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"Children of the fence": the maintenance of extra-marital children under law and practice in Botswana

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Athaliah Molokomme

"Children of the fence"

The Maintenance of
extra-marital children
under law and
practice in
Botswana



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'CHILDREN OF THE FENCE'
THE MAINTENANCE OF EXTRA-MARITAL CHILDREN
UNDER LAW AND PRACTICE IN BOTSWANA

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LIST OF ABBREVIATIONS

AD	Appellate Division of the Supreme Court of South Africa
BLR	Botswana Law Reports
BNR	Botswana Notes and Records
CAP.	Chapter
CILSA	Comparative and International Law Journal of Southern Africa
CLA	Customary Law Act
CSO	Central Statistics Office
Ct	Court
DC	District Commissioner
DO	District Officer
Def	Defendant
JAL	Journal of African Law
JC	Junior Certificate of Education
JLP	Journal of Legal Pluralism
KCC	Kanye Chief's Court
KMC	Kanye Magistrate's Court
LLJ	Lesotho Law Journal
LOB	Laws of Botswana
MP	Member of Parliament
NMS	National Migration Study
P	Pula, Botswana currency= approx. 50 UScents, 1989; divided into 100 thebes (t)
P.C.	Per Capita
PO	Presiding Officer
Ptf	Plaintiff
R	Rand, South-African currency, legal tender in Botswana before 1976
SASF	Semi-Autonomous Social Field
SA/SALR	South-African Law Reports
SOAS	School of Oriental and African Studies
WLD	Witwatersrand Local Division Law Reports, South Africa
WLSA	Women and Law in Southern Africa Project
ZLR	Zimbabwe Law Review

Note: One citizen of Botswana is a Motswana, more than one are Batswa na, and the language most commonly spoken is Setswana.

LIST OF LAWS OF BOTSWANA (STATUTES)

Title	Volume	Chapter
Affiliation Proceedings Act	III	28:02
Chieftainship Act	IV	41:01
Constitution	I	-
Court of Appeal Act	I	04:01
Customary Courts Act	I	04:05
Customary Law (Application and Ascertainment) Act	I	16:01
Deserted Wives and Children Protection Act	III	28:03
High Court Act	I	04:02
Magistrates Courts Act	I	04:04
Maintenance Orders Enforcement Act	III	29:04
Married Persons Property Act	III	29:03
Penal Code	I	08:01
Tribal Land Act	III	32:02

GLOSSARY OF SETSWANA TERMS AND PHRASES

bana ba dikgora: children born outside marriage
Bangwaketse: members of the group in Southern Botswana among whom the research was conducted; singular: **Mongwaketse**
bogadi: cattle delivered by man's family to woman's family after agreement to marry
botsetse: period during which a woman is confined indoors following the birth of a child
dikotla: literally nourishment; refers to contribution in cattle, food or money for the upbringing of a child
go kopanya: to bring people together with the aim of resolving a dispute
go kibilitla: to struggle, usually to pay a debt
go ralala: practice where a man may visit a woman at her parents' home following agreement between their families to marry, before **bogadi** is delivered
go tshwaela: to earmark livestock (usually cattle) for the benefit of someone else for their enjoyment in the future
kadimo: practice where a woman moves to the home of a man following an agreement to marry, before **bogadi** has been delivered
kgosi: chief
kgotla: 1. central place in ward or village where public assemblies take place, and disputes settled
kgotla: 2. a ward where several family groups live; plural: **dikgotla** or **makgotla**
kgotlana: small ward or sub-ward in a village, or a meeting place in such a ward;
lokwallo lwa matsalo: birth certificate or other document showing date of birth
mekgwa le melao: usages and laws
moithwadiso: capacity to make a woman pregnant
molato ga o bole: a debt never rots
morafe: general body of inhabitants or members of a defined ethnic group, used instead of the label 'tribe'; plural: **merafe**
mosadi ga a ikgweetse: a woman has no capacity to enter negotiations or litigation without male assistance
Sengwaketse: 1. the traditions or culture of Bangwaketse
 2. the special Setswana dialect spoken by Bangwaketse
serotwana: gift of cattle or other property to a daughter on marriage, associated mainly with Bakgatla
thagela: fine of a cow paid by a man who makes a woman pregnant before marriage is agreed upon, associated with Bangwato
tshenyo: the impregnation of an unmarried woman
patlo: procedure whereby the parents of a man ask for a wife from the parents of a woman

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PREFACE

'Children of the fence' is a literal translation of the Setswana phrase *bana ba dikgora*, which is sometimes used to describe children whose parents are not married to one another. The fathers of such children are said to have 'broken through the fence', instead of walking in openly through the normal entrance to the woman's parents' compound. Although often used in a derogatory sense to denote illegitimacy, the term is employed in a positive and affectionate sense in this study; in fact I am expecting such a child myself.

My interest in this subject was sharpened sometime between 1983 and 1987, when I taught customary law and family law at the University of Botswana. Struck by the limited literature by Batswana researchers in both fields, I began to do research which led me to concentrate on the legal status of women in the family. I then became involved in a legal literacy project, disseminating the law to women's groups in both rural and urban areas in Botswana. While most of the material in this project concentrated on the status of married women, in practice, the majority of problems we came across concerned unmarried women and the welfare of their children. This made me realise that in the preparation of materials and teaching of family law, there was an over-emphasis on marriage as constituting the basis of the family. This does not fit with the contemporary social reality in Botswana, where extra-marital parenthood has become more common and generally accepted. It is my hope that this study will contribute to redressing that omission.

Many people and institutions assisted me in carrying out this study; I hope that those I fail to mention by name will forgive me in the knowledge that I am nonetheless grateful to them. I would like to express my gratitude to the Netherlands Minister for Development Cooperation for financing the Roman-Dutch Law Project of which this study is a result. I wish to thank the University of Botswana for granting me study leave from my teaching to carry out this study, and for providing institutional and financial support during periods of fieldwork.

Among the many friendly people in Kanye, I wish to acknowledge the assistance of Kgosi Seepapitso IV, Deputy Chiefs Makaba and Gaseitsiwe, and the staff of the Bangwaketse tribal administration. The heads of various wards in Kanye, especially Mme K. Gaseitsiwe, Borre M. Bome, K. Dikgageng, B. Mosielele, M. Motswapswe and S. Tshosa who kindly

arranged discussion panels for me at their dikgotla. Many other elders, especially Borre K. Morekisi, M. Solomon and B. Dikole gave patiently of their time in my repeated enquiries about Ngwaketse law. Le kamoso bagolo bame. I would also like to thank Mr L.T.S. Matlhabaphiri, DC for Kanye in 1989, and his staff for providing me with an office and other facilities; Senior Magistrate N. Bopa and his staff for putting up with my constant intrusion into their records and court proceedings. Leach and Mpale Tlhomelang welcomed me into their home, and gave generously of their company, as did Vivian Joseph and Dintle and Piet van Zeijl. David Reetsang and Kabo Leinaeng provided excellent research assistance and humour. A very special thank you to all the men and women who patiently answered our sometimes insensitive enquiries into their private lives. I am very grateful to Keeme Mosinyi for allowing me to use his drawing on the front cover.

In the Netherlands, I would like to thank Chris van Nispen, who first facilitated contact between myself and the Roman-Dutch law project at Leiden university, and thereafter provided much personal support. Leiden university regulations prohibit me from thanking my supervisors, Professors J.Th. de Smidt and E.A.B. van Rouveroy van Nieuwaal, who provided academic guidance during this study. Peter Geschiere adopted me into the 'PDO family'; David Stelpstra, Jaap Timmer and Willem Veerman kindly assisted me with word processing and printing. I wish to thank the African Studies Center at the university of Leiden for agreeing to publish this study in their series of research reports. My gratitude also goes to K. von Benda-Beckmann for her comments on an earlier draft of chapter ten. Any mistakes in the content, or flaws in the arguments, of course remain entirely mine.

I was privileged to have two wonderful extended families in both Botswana and the Netherlands, and would like to thank you all very much. I want to particularly acknowledge my parents, I.M. and R.K. Molokomme, who have always encouraged me to study; sadly, my father passed away last year before he could see this work. To Jaap Arntzen, thank you for consistent professional and emotional support.

Athaliah L. Molokomme

Leiden, August, 1991

INTRODUCTION

1

1.1

Statement of the problem

This study is concerned with the laws regulating compensation for extra-marital pregnancy and maintenance of extra-marital children in Botswana. Focus on extra-marital pregnancy is justified by the national increase in the number of unmarried mothers, which rose from 48% of all mothers in 1971 to 57% in 1981 (Botswana Government 1981a). As reproduction in pre-colonial Tswana society was apparently based upon marriage, this trend has invited much public debate. These debates intensified from the 1970's onwards when statistics further revealed that births to girls between the ages of 15 and 19 years went up by 43% between 1971 and 1981 (Botswana Government 1985:18). More recently, it has been estimated that teenagers who are mothers have risen from 10% in 1981 to 24% in 1988 (Alexander 1991:12).

Various public meetings and workshops have been held by village communities, traditional and district authorities, educational and government institutions to discuss the issue. The following remarks made in the report of one such meeting reflect this concern:

The present situation is such that the number of children born outside marriage is alarmingly high and generally the number of children born by single mothers and often fathered by different men is very high. Fathers often disappear from the scene altogether due to various reasons. This means that the strains and stresses of bringing up children single handedly is left with the mother (or her parents). She is faced with psychological, emotional and financial problems¹.

Much of the public debate has been centered around understanding the causes of this development, and finding ways of arresting it, especially among teenage girls who have to drop out of school as a result. At another level, the debate has been focussed upon the material aspects, especially the role of the law in ensuring that the fathers of these children make a contribution to their maintenance.

Most communities in Botswana possess traditionally-based remedies for extra-marital pregnancy, which generally entail compensation in cattle paid to the woman's father. Such compensation may be obtained through

1 Botswana Council for Social Services (1983:1). For similar discussions, see reports of the Women's Affairs Unit, Ministry of Home Affairs, Gaborone (1983-1985).

family negotiations, or where these fail, mediation and adjudication by headmen and chiefs in the courts. A child borne by an unmarried woman became a member of its mother's descent group; her father became its legal guardian and was responsible for its maintenance. He in turn was entitled to compensation from the child's natural father. A woman's capacity to obtain customary remedies is therefore dependent upon the availability and cooperation of her senior male relatives. As we shall find out in subsequent chapters, socio-economic changes have undermined these traditional remedies:

Today, the security offered by the child's membership of the mother's descent group may no longer be available. Many women break away from their kin in search for employment, and even where they do not do so, the traditional willingness of their families to assume responsibility for any children born can no longer be taken for granted (Roberts 1972a:322).

It was in recognition of this changed reality that the Botswana Parliament intervened by passing the Affiliation Proceedings Act of 1970. This legislation is a transplant from English law that sought to enable unmarried women to sue the fathers of their children independently without the assistance of male relatives. Although the attorney general described it as 'a major exercise in law reform which to a large extent cuts through the whole of customary law' it was not intended to replace customary remedies. Rather, it was meant to supplement them by providing women with an easier alternative (Botswana Government 1970:68). The Act is discussed in detail in chapter four, but it is brought up here because its operation forms one of the main concerns of this study.

The legislation was not introduced into a legal vacuum: we earlier noted that although being undermined, a system of customary remedies for extra-marital pregnancy was already in place. In addition to these, we shall find out in chapter four that a third set of remedies had been introduced during the colonial period, those of the Roman-Dutch law. These remedies co-exist in a situation of 'legal pluralism', a concept which we discuss in more detail later in this chapter.

It is the primary objective of this study to understand how these various remedies operate in practice, and their impact upon their users. In so far as it seeks to understand the operation of legal pluralism, this is by no means the first study of its kind. Similar studies of legal pluralism by lawyers and anthropologists abound in

various parts of the world, especially in non-western societies². In the case of Botswana however, only a few studies of this kind have been made, and even fewer have focussed exclusively upon the issue of extra-marital pregnancy and the law. The following section is devoted to a brief discussion of the most significant of these studies.

1.2 Previous studies on extra-marital pregnancy in Botswana

Although not primarily a legal study, Syson's (1972:41) pioneering work on unmarried mothers in Botswana deserves a brief mention. It is a socio-economic study which sought, among other things, to find out how unmarried mothers obtained their financial support. The results of her survey, which included 451 unmarried mothers, revealed that 40% of these women received any support, whether in cash or in kind, from the fathers of their children. Not surprisingly therefore, very few relied on these men for their main or subsidiary sources of support (19% and 16% respectively). A finding that further reflects the marginal status of unmarried mothers is that three times as many of them relied on their own personal efforts for their main support as married women.

As far as litigation was concerned, 12% of the unmarried mothers had been involved in a court case; of these, 61.8% had received the cattle or money set out in the court order. Although Syson considered this a 'small proportion' at the time, the findings of our study will reveal much lower compliance rates twenty years later. Not having a primarily legal focus, Syson's study did not discuss the laws in this respect, nor did it go into the details of women's use of, and experiences with the legal system.

The next published work to touch upon the issue was by Comaroff and Roberts (1977:97), which is a legal-anthropological study dealing with changes in the laws and attitudes towards extra-marital sexuality among the Bakgatla. Like Schapera (1933:59), they noted that extra-marital pregnancy was more common, attitudes towards it more tolerant, and that there was a corresponding change in the law regulating compensation for impregnation. The two major changes were, firstly, that by the 1960's, the Bakgatla chief's court was permitting women to bring claims for compensation without the assistance of male relatives. Secondly, the

² See Snyder (1981:164-178) and J. Griffiths (1986:51-55) for a comprehensive review of such studies.

court was willing to award compensation in cases of second and subsequent pregnancies, a situation which was apparently not permissible under Bakgatla rules before the turn of the nineteenth century. These changes are very well illustrated through an extended discussion of disputes demonstrating the dynamism of Bakgatla customary law.

What is lacking from this work is any discussion of how these changes in customary rules interacted with the rules of the state legal system. This omission is particularly significant because at the time of their publication, the Affiliation Proceedings Act was in the process of amendment. As we shall find out in chapter four, heated debates were taking place countrywide about the role of the Act in matters of extra-marital pregnancy, especially its relationship with customary remedies (see Botswana Government 1976a:37).

Comaroff and Roberts' (1981) subsequent work on the broader theme of the nature of Tswana law and its relationship with social processes produced some interesting findings, some of which we will discuss in chapter two. Although it was not especially concerned with the issue of extra-marital sexuality and the law, it contains an interesting chapter on the transformations taking place in Tswana marriage processes. Some of their ideas are discussed in chapter three. Like their 1977 work, these authors paid little if any attention to the national framework in which these rules and processes operated, concentrating as they did on the customary laws of two groups, the Bakgatla and Barolong Boora-Tshidi³. This is in spite of Roberts' (1977:2) criticism elsewhere of previous anthropological work for focussing upon:

the relationship of different dispute settlement agencies within a single society, rather than relationships between these and adjacent agencies of the national legal system.

His work may therefore equally be charged with the same bias.

A study conducted by A. Griffiths in 1982 and 1983 in the village of Molepolole for the first time addressed the question of the operation of the Botswana plural legal system with particular emphasis upon family law. Before the completion of her doctoral thesis in 1988, she published some of the results of this research which concerned the use of the plural laws by unmarried women to obtain compensation for pregnancy and support for their children (A. Griffiths 1983:1). She found that women in Molepolole used both the customary and common law sys-

tems, starting with the former for the first child and moving on to the magistrate's court for subsequent children. The officials administering the two systems in Molepolole worked together by referring women to each other, depending on whether they sought compensation for first or subsequent pregnancies. She observed that magistrates and chiefs courts were careful not to usurp the other's jurisdiction in this respect. Thus she presents a harmonious model of the institutional operation of the two systems in Molepolole, which as we shall find out is not usually the case in Kanye where our study was carried out. The article acknowledges in conclusion however that the customary system is being eroded, and is failing to meet the needs of women: thus half of the women in her sample had been to the magistrate's court. Unfortunately, the article contains few detailed case studies showing unmarried women's experiences with obtaining compensation and support under the plural legal system.

This omission was mitigated four years later by A. Griffiths' doctoral thesis (1988), which presented more detailed data of the operation of the plural legal system in the settlement of family disputes in Molepolole. The thesis looked at a much broader field than that of unmarried women seeking support: materials on breakdown, neglect, support and property disputes between married persons are also presented. These disputes are very well grounded in the socio-cultural milieu from which they originate, with the first part of the thesis presenting a detailed profile of households in one of the village wards. This is a particularly useful approach because it brings out the details of social life in both trouble and trouble-less situations (Holleman 1973:585). Due to A. Griffiths' broader focus on family disputes in general, only a few of those concerning extra-marital pregnancy which ended up in the courts are discussed. One chapter is devoted to three such disputes, two of which ended up at the chief's court and one at both the chief's and magistrate's court. Although these are discussed in some detail, the background discussion of the operation of the state law system in extra-marital pregnancy matters is very brief, especially concerning the Affiliation Proceedings Act. The chapter does not therefore provide the reader with a clear idea of the state law maintenance rules and their operation at the Molepolole magistrate's court.

This in our view is an unfortunate omission because it is important to appreciate the substantive and procedural content of state law in order

3 For a review of this work, see Snyder (1983:527-132).

to understand its impact upon the consumers of the law at the local level. This is particularly important in view of A. Griffiths' own finding that the customary system is being eroded, and that a significant number of women are resorting to the magistrate's court. The content of state law, its application by magistrates at the local level and the consequences of this for women and children therefore becomes a relevant question.

The author's superficial treatment of the operation of state law in extra-marital pregnancy disputes is implicitly justified by her observation that there is a long backlog of cases at the magistrate's court. We shall find out that this is also the situation in Kanye, although unlike Molepolole, the latter has had the benefit of a fulltime magistrate for nearly ten years. These problems of access notwithstanding, they do not provide sufficient justification for the researcher to pay less attention to the operation of state law at the local court level⁴. The question of the impact of the state laws of maintenance on women and children was first addressed by Brown (1984). The study was focused upon the operation of two statutes, the Affiliation Proceedings Act and the Deserted Wives and Children Protection Act⁵. She identified certain problems with the administration of these statutes, especially the institutional hurdles limiting their effectiveness. These included the shortage of magistrates to hear cases and the absence of an effective machinery to enforce court orders. Based upon data from ten courts nationwide, the study concludes with some practical recommendations to alleviate the situation. The study thus provided for the first time a useful starting point for an understanding of the operation of the two maintenance statutes. But it has shortcomings relating to its scope. First, its exclusive focus on statute law at the expense of customary and Roman-Dutch law means that only a part of the picture was presented. Secondly, because it covered such a wide geographical area, it ended up missing the depth required to fully understand the operation of the system as a whole. Thus the focus had to be limited to procedu-

4 This underestimation of state law is a common practice among legal anthropologists studying non-western societies, who tend to concentrate upon customary or 'folk law' instead. It appears to be a consequence of their rejection of the 'legal centralist' approach to the study of law in favour of a 'legal pluralist' perspective. We deal briefly with these approaches later in this chapter.

5 Caps. 28:02 and 28:03, Laws of Botswana.

ral and institutional questions at the expense of other equally important substantive socio-legal issues which have a bearing upon the impact of the law.

Other work includes that by this writer (Molokomme 1985; 1987 and 1989), dealing mostly with the general legal status of women in Botswana. The shortcomings of this work have been that it dealt mainly with the formal rules applying to the position of women. Thus insufficient attention was paid to the actual operation of the law at the grassroots level, and the consequences of this for unmarried women in particular.

1.3 Aims and objectives of the study

My study is intended to complement previous work by filling in some of the gaps that were identified, and has the following specific aims and objectives:

- a. to comprehend the reasons for the increase in extra-marital reproduction and its seeming tolerance by the society;
- b. to make an in-depth review of the customary, Roman-Dutch and statutory laws relating to extra-marital pregnancy and their relationship to each other;
- c. to find out the extent and manner in which these laws are used in practice, and their effectiveness;
- d. to comprehend the interaction between these plural sources of law, both at the institutional and grassroots level;
- e. to make theoretical and practical conclusions on the above, with a view to recommending changes in the law which are relevant to its consumers' social reality, and meaningful to their day to day lives.

The relative novelty of this study therefore lies in four aspects. First of all, it is the first to focus exclusively upon the area of extra-marital pregnancy and the law in Botswana. Unlike previous legal-anthropological studies on Botswana which have concentrated heavily upon customary law, we seek to pay equal attention to the development and operation of the substantive and procedural rules of both customary and state law. The relationship between these plural sources of law is examined at both the national and local level. Secondly, we go beyond the scope of previous dispute settlement studies, which often stop at the stage of the court's decision. Here, we are concerned with the

effectiveness of the decisions of the courts, and the factors which influence this. Only in this way is it possible to assess the relevance and impact of the law upon unmarried women and their children. Thirdly, by paying attention to the careers and realities of both men and women, the methodology of this study seeks to be more gender-sensitive than previous ones. Finally, based upon the foregoing, the study addresses the practical question of law reform, which previous studies have tended to avoid (cf. Roberts 1977:3). In our view, recommendations for law reform based upon scientific research findings are more likely to be relevant to the social realities of people, rather than lofty state programs of social engineering through law.

1.4 Methodologies for collection and analysis of data

A variety of methods were utilised in carrying out the study, because no method on its own was considered sufficient to fully address the research questions posed above. These included a combination of what may be termed traditional legal methods and social science methods of data collection. This section is devoted to a discussion of these methods, as well as the theoretical perspectives which inspired them.

1.4.1 Traditional legal methods: the legal centralist perspective

The material contained in chapters one to four of this study was collected between the years 1983 and 1987 when I taught the courses family law and customary law at the university of Botswana. Traditional legal methods were mainly used to collect this data: statutes, authoritative texts, restatements of the law and the decisions of the superior courts. Because these sources are limited to those laws which are written and recognised by the state, this methodology on its own seemed to be insufficient. Such an approach has been labelled 'legal centralism' and has been criticised for several reasons, some of which are discussed below.

According to the ideology of legal centralism:

Law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions (J. Griffiths 1986:3).

Comaroff and Roberts (1981:5) identify a similar approach to the study of law, and label it the 'rule centered paradigm'. According to this

approach, social life is governed by rules, and normal behaviour is explained in terms of compliance with these rules. Any departure from the norm such as the occurrence of a dispute is seen in this view as dysfunctional, and rules are a mechanism of correcting this. They point out that this approach, which has its origins in western legal theory, has several weaknesses especially when applied to the study of non western legal systems.

The main weakness is that it looks at non-western law with western eyes when in some cases analogies do not exist, or may exist though in a different context. Thus false comparisons are often made by scholars working within this paradigm, sometimes even based upon an imperfect understanding of their own legal systems (van Velsen 1967). Secondly, they have been criticised for regarding rules of law as homogeneous, and as existing separately from other social norms. Like the legal centralist approach to the study of law, the rule-centered paradigm wrongly assumes that dispute settlement is the exclusive preserve of judicial institutions such as courts.

Despite all these criticisms, we used methodologies associated with the legal centralist perspective because our research questions required an understanding of the rules applicable to compensation for extra-marital pregnancy and maintenance of children. In order to mitigate the weaknesses of this methodology and the approach it implies, other methods were used in the collection and analysis of data. These were inspired by an approach to the study of law that is the opposite of the legal centralist paradigm. This approach, now commonly known as legal pluralism, is discussed in the next section.

1.4.2 The paradigm of legal pluralism

The starting point of this approach is a recognition of the plural nature of law and legal systems, a position that is the antithesis of the legal centralist one. Although only explicitly labelled as such in the 1970's, this perspective had been utilised much earlier by scholars of the sociology and anthropology of law (J. Griffiths 1986:1 and 1990:9). Thus it has been expressed (explicitly or implicitly) differently by different writers (e.g. Hoebel and Lywellyn 1941; Pospisil 1971; Moore 1973; Gallanter 1981). At the basis of the various approaches is the idea that the state does not have a monopoly on legal

regulation. There are multiple sources and types of regulation that operate outside state structures and that are recognised by their members as binding.

Moore's idea of the 'semi-autonomous social field' is perhaps the most useful method of describing a situation of legal pluralism. Moore conceives of society as being occupied by various semi-autonomous social fields (SASFs). These are indigenous social organisations which generate their own norms and possess their own structures. Moore's SASFs therefore have a regulatory capacity, but they are not entirely autonomous, because their members are also members of other SASFs. SASFs vary in their size and degree to which they can regulate the behaviour of their members, and to some extent compete with each other. The state, various levels of the bureaucracy, village communities, age sets or regiments, trade unions, civil and professional associations, are all examples of SASFs. Each of these SASFs produces its own internal norms or 'indigenous law' (Gallanter 1981:1), which compete with state laws for application to its members.

It is this plurality of regulation which is seen as a situation of legal pluralism. Legal pluralism is therefore a state of affairs, a reality or a fact, but it is not a theory of law. Thus Snyder (1981:156) asserted that there was at that time no satisfactory theory of legal pluralism. Since that time, J. Griffiths (1986:1) has sought to formulate a descriptive theory of legal pluralism. He distinguishes two types of legal pluralism: that in the strong sense and that in the weak sense. He defines strong legal pluralism as follows:

It is when in a social field more than one source of 'law', more than one 'legal order' is observable, that the social order of that field can be said to exhibit legal pluralism.

Thus strong legal pluralism corresponds with social pluralism, and recognises the existence of numerous SASFs, each with its own norms and institutions. The weak sense in which the term is used is associated with scholars who espouse the ideology of legal centralism. Here, legal pluralism is used to describe a situation where the state allows different systems of law applicable to different groups to co-exist within the official legal system. This second sense in which the term is used is rather narrow; some may not label it legal pluralism at all because it does not sufficiently describe what actually happens at the grassroot level. This descriptive elaboration of legal pluralism is still not an analytical theory of legal pluralism, and Griffiths has

continued the search for one. He has recently proposed a sociological theory of legislation based upon legal pluralism, which we discuss in section 1.4.4. Before that is done, the next part presents an approach by various scholars which laid the ground for this recent theoretical development, and which was utilised in this study.

1.4.3 Studies on dispute processing: the processual approach

There has been various studies by scholars working in dispute processing, and who have dealt implicitly with the idea of legal pluralism for some time. These studies took dispute processing as their central theme, with rules occupying a secondary position (Snyder 1981:145). Comaroff and Roberts (1981:5) have collectively labelled this the 'processual paradigm', which is they consider the opposite of the rule-centered one. The processual paradigm sees conflict or dispute as normal, and seeks to understand its meaning as part of daily life. Scholars working within this paradigm seek to understand disputes in their total social context, that is within Moore's SASFs. Their methodology looks for example at the history of the dispute, at attempts to resolve it outside and inside court, at the decision of the court as well as at the post-judgement situation.

Thus unlike the rule-centered approach which concentrates on rules and their operation in the courts, the processual approach sees this as only one stage in a larger process. The cultural origins and logic of rules is stressed, and the role of third parties during negotiations and mediation is given as much attention as the role of the formal courts (see Gulliver 1969:24). Rules are seen by this approach as negotiable and manipulable, and as performing functions other than the mechanical application to disputes, leading to a predictable outcome. Similarly, courts are not seen simply as institutions where disputes enter, are adjudicated and resolved:

The principal contribution of courts to dispute resolution is providing a background of norms and procedures against which negotiations and regulation in both private and governmental settings take place (Gallanter 1981:6).

This approach thus emphasises what has been labelled the 'litigant's perspective', which looks at the social milieu in which disputes arise, at the goals of the litigants and the strategies they employ to achieve them. It recognises that litigants may engage in forum shopping; where

they resort to different courts and systems depending on which one benefits them.

The processual paradigm has however not escaped criticism, as Comaroff and Roberts (1981:15) point out. One of these has been that it opens up the field of study too wide, leading to an absence of focus and specificity. Secondly, its emphasis on the negotiability and manipulability of rules has been criticised for leading to a simplistic conception of human behaviour. Human beings, the critics point out, do not always act strategically, and social control cannot be reduced to strategic interaction.

In our view, the legal centralist paradigm has obvious inadequacies because its focus is too narrow, but it need not be seen as necessarily opposed to legal pluralism. Legal pluralism encompasses elements of the legal centralist approach, but is broader and recognises the importance of other social processes apart from legal rules. Although this applies to other societies as well, the nature of the legal systems of former colonies in particular necessarily reject the notion of legal centralism. The idea of legal pluralism in the strong sense, on the other hand, is better suited to a study such as this one, where legal remedies for extra-marital pregnancy are as multiple as they are complex. It is here that the strengths of the processual paradigm emerge: it recognises the plurality of law and legal systems. It also recognises that rules and disputes are part of a broader social context, and not abstracted from it.

This study therefore uses legal pluralism as its starting point, and in the analysis of disputes, the processual approach is adopted. The history, attempts at negotiation, mediation, adjudication and the post-judgement situation of disputes are considered. In addition to analysing the handling of disputes by the courts, we pay attention to the litigant's perspective. The parties' relations, their goals and the strategies they employ to achieve them will be discussed.

In further pursuance of a framework which takes sufficient account of all aspects of legal pluralism, this study will use ideas from J. Griffiths' (1990) proposed new theory of legislation, a summary of which is presented in the next section.

1.4.4 Recent theoretical developments: legal pluralism and the social working of law

J. Griffiths (1990) seeks to elaborate a sociological theory of legislation which takes legal pluralism as a starting point. He begins by criticising what he calls the instrumentalist perspective to legislation, where governments for example try to use law as an instrument for social change. The instrumentalist approach therefore presupposes that legal rules are capable of influencing peoples' behaviour towards desired social objectives (cf. also F. von Benda-Beckmann 1989:131). It is associated with policy-makers, who are interested in whether the objectives of the legislation have been fulfilled or not, and the reasons for their success or failure.

Griffiths dismisses this perspective as theoretically sterile, and as having hindered the development of a sociological theory of legislation. Instrumentalism makes untenable assumptions about social life and the place of legal rules within it; it is based upon the legal centralist notion that wrongly assumes that the state has a monopoly on legal regulation.

In the place of the instrumentalist perspective, Griffiths (1990:8) proposes an alternative approach which poses the following questions:

What difference does the law in question make in a concrete situation of (inter)action, of behavioural choice? Not: did individuals obey? but: what did people do? Not: did this law steer social development in the desired direction? but: What exactly happened in the society in question when the new legal factor was added? Attention is directed, in other words, not (exclusively) to the instrumental effectiveness but to the social working of law.

Griffiths uses Moore's (1973) concept of the SASFs to elaborate his theory of legislation. He however defines SASFs slightly differently to include 'every collection of persons which exercises control over its members... a SASF is a group, the fundamental unit of social control' (p.10). External law such as legislation is released not into a normative vacuum, but into a complex network of these SASFs. It will be remembered that not only do Moore's SASFs generate their own norms, they also resist the penetration of external norms. This is because although they are only partly autonomous, SASFs do strive for maximum autonomy. According to Griffiths, the extent to which such autonomy can be achieved depends on two important factors. First, the internal organisation of the SASF, especially the degree to which its members are dependant on the relationships it regulates, for access to resour-

ces for which they have no alternative source. Secondly, it depends upon the investment which the external element or SASF (such as the state in the case of legislation) is prepared to make in the 'penetration' of its own rules.

As far as the investment factor is concerned, the external SASF can do this either by providing the energy itself (proactive mobilisation) or it can rely on the cooperation of the members of the local SASF (reactive mobilisation). Griffiths observes that the latter type of mobilisation is rare, while reactive mobilisation is more common. In this scenario, the external SASF such as the state does not invest in understanding local structures or relationships. Rather, it relies upon members of the local SASF to invoke its rules in both trouble and troubleless cases. In addition, it often depends upon local SASFs to implement and apply them in trouble cases. These external rules must however compete with those of the local SASF, as members have a choice between the two. Thus the mobilisation of external law occurs within the context of, and subject to the regulatory supervision of the local SASFs directly concerned with the interaction in question. Griffiths concludes therefore that reactively mobilised external law respects the internal order of SASFs, and has a limited capacity to effect change there. In certain cases, SASFs may adopt external law or become agents for its implementation. In other words, especially where they are well organised, local SASFs are 'in charge' because they control local relationships. Because legislation does not alter these relationships, it can only have a limited effect on the conduct of its members. Griffiths demonstrates the dependence of external SASFs on local ones by discussing two important pre-requisites to reactive mobilisation of external law. First of all, the new law must be communicated to the members of the SASF, but the external SASF does not usually do this itself. It depends upon various intermediaries (such as its local branches) to communicate and apply the law, which in turn depends upon their internal order. In the process, the external law is invariably transformed by the time it reaches the people; thus most people either do not know the law, or receive transformed versions of that law (cf. Molokomme 1987c).

The second pre-requisite to reactive mobilisation of external law is to activate the relevant actors, who must decide what to do with the information in their possession. Numerous studies have shown that

responses to this are varied: some actors may do nothing while others may use the law to achieve certain goals. Their responses are determined not only by individual personal characteristics, but mainly by the social context in which they operate, that of SASFs. This leads J. Griffiths (1990:18) to conclude as follows:

Thus the social working of law, even in the case of some degree of penetration, is more dependent upon the circumstances and motives of the actors than the intentions of the legislator. And their circumstances and motives are to a large extent determined by the SASFs to which they find themselves.

It is plain to see that J. Griffiths' theory of the social working of law has a direct relevance to this study. Although we are concerned with the regulation of extra-marital pregnancy and maintenance by all aspects of the plural legal system, legislation in the form of the Affiliation Proceedings Act forms a major part of this study. This Act may be seen as an instrumentalist attempt by an external SASF, the state, to induce social change in the area of extra-marital pregnancy and maintenance. As we earlier noted, this Act was released not into a normative vacuum, but into societies which had their own institutions and norms in this respect. These societies may be seen as constituting SASFs themselves, as well as possessing other SASFs including those based upon co-residence, kinship, age, religion, economic cooperation and all manner of other local groups that have a regulatory capacity (cf. chapters three and five). These SASFs have been subjected to external influence through many centuries, one of which has been external law. Since this work is partly concerned with the functioning of (external) state law in a situation of legal pluralism, it provides an opportunity to test the theory of the social working of law. Thus we apply this framework to the analysis of the functioning of state law, especially the statutory laws regarding the maintenance of extra-marital children.

In order to operationalise the theoretical approaches discussed above, this study employed a combination of non-legal methods in the collection of data, which are discussed in the following section.

1.4.5 Sociological and anthropological methods of data collection

In order to obtain a comprehensive picture of the operation of legal pluralism at the local level, it was necessary to select a unit of analysis, or SASF (Moore 1973). The village of Kanye, just over 100 km.

south of the capital Gaborone, was selected where the months of June to October 1989 were spent doing research (see chapter five). Kanye was chosen first of all because it is fairly representative of a large, centralised Tswana village which is the capital of one of the major *merafe* (Botswana Government 1981b). Secondly, being the capital of Southern District, institutions administering both state and customary law are located there, which made access to documents and officials easier. Moreover, the chief's court at Kanye has the earliest case records nationally (from 1910), and unlike other rural centers, Kanye has had the benefit of a fulltime magistrate since 1980. Finally, its location between two urban centers, and near the border with South Africa made it suitable for a study which sought to understand the working of legal pluralism in a situation of social change (map 1).

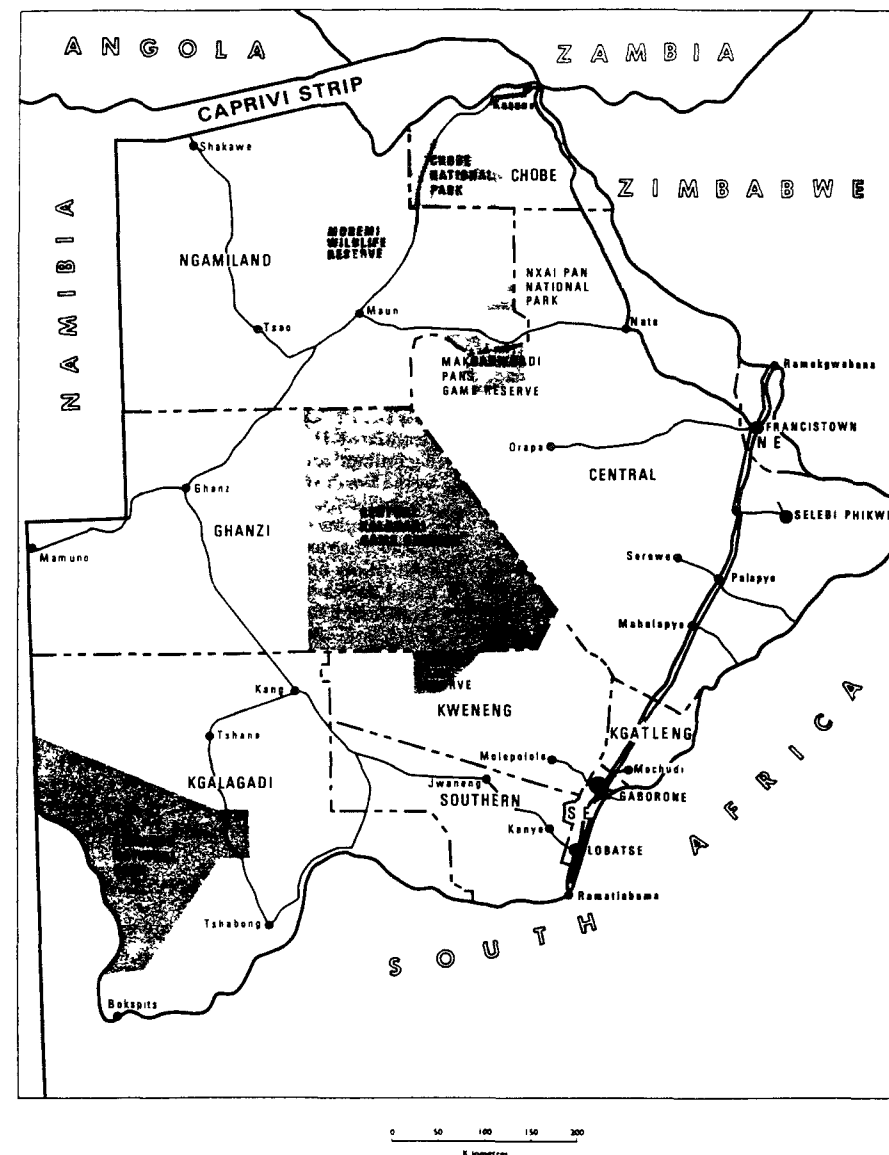
1.4.6

The survey

To begin with, a survey was carried out among 178 unmarried mothers in Kanye, between the months of June and August 1989. Although sample surveys have been correctly criticised for their superficiality and the risk of smoothing over specific features of individual cases, the decision to carry out a survey was influenced by several considerations. First of all, it was considered to be one way, in addition to participant observation, of obtaining an idea of the nature of male-female relationships in the local context. The specific figures generated by a survey can provide some basis on which to generalise about such trends as extra-marital fertility and its socio-economic implications.

Secondly, a survey provides another way of finding out how pregnancy and child maintenance matters are handled outside the formal dispute settlement agencies (cf. Holleman's 'troubleless cases' 1973:110). Thirdly, it was hoped that a survey would help raise questions and issues for further investigation with other methods such as case studies. Finally, as the research utilised a combination of methods, a survey was seen as one of the ways of testing the reliability of the survey method itself against the more focussed case study method.

Map 1: Botswana and its administrative districts



Source: National Development Plan 1985-1991.

A questionnaire containing mainly close-ended questions was prepared with the assistance of colleagues in the social sciences at the university of Botswana. It was then tested in a pilot study in Kanye, with the assistance of two university of Botswana students, who were briefed about the aims of the survey, and the manner in which questions should be posed. Following the pilot, we discussed each question in detail, especially some of the problems experienced in the process, which led to some questions being re-phrased or deleted.

The revised questionnaire was finalised and administered at the only two health clinics in Kanye, and at the magistrate's court in the same village. Thus we went for a purposive sample, to places where we were likely to meet women who had children, instead of going to their individual households. The vast majority, 142, were carried out at the health clinics, while the remaining 36 were conducted at the magistrate's court.

The list of questions put to the women sought primarily demographic socio-economic data, and secondarily data on the extent to which they mobilised the law to obtain support for their children. The answers obtained from the survey were analysed by preparing a codebook in which the various questions were given variable names, numbers and categories. The answers were subsequently coded by questionnaire, and analysed using a statistical computer program (statgraf). The results of this survey are presented in chapter four.

A question that necessarily arises is the extent to which our sample is representative of women in the village generally, and unmarried women in particular. No particular percentage of the population was targeted, so the figure of 178 interviews was not planned. In addition, our sampling technique may have the effect of introducing some bias in favour of women who were likely to visit a clinic or a court. Unfortunately, statistics relating to the marital status and socio-economic characteristics aggregated according to sex are not available at the regional level. It cannot be said with accuracy therefore how representative of women in the village, or of unmarried women, our sample is. There is, however, evidence from previous national studies and a number of regional studies which strongly suggests that the sample is fairly representative.

First, as was earlier noted, ten years ago, unmarried mothers constituted 57% of all mothers at the national level, and all indications are

that this is likely to have increased rather than decreased (Botswana Government 1981a). That this increasing separation of reproduction from marriage is duplicated at the regional level is confirmed by three studies done in Southern District, two of these in Kanye. Gulbrandsen's (1980:29) socio-economic study in Mmathethe, a small village near Kanye found that the number of unmarried mothers remaining in their natal households was on the increase. Out of forty six women between thirty one and forty of age, only half were married, but all except two of them had children.

Molenaar's (1980:11) restudy of Tsopye ward in Kanye revealed similar trends. Out of a total of 173 adult women, 60% had never been married, and 76% of these unmarried women had children. The number of unmarried women had increased by 72% since Schapera's research forty years previously, while that of children borne by these women had gone up by 52%. A more recent study of the same ward in Kanye confirms similar trends in this respect (Windhorst 1989:30). She found that the percentage of unmarried mothers had increased by 15% in the nine year period since Molenaar's research.

Although not based upon a total or majority sample of women in Kanye, the studies summarised above strongly support the view that unmarried mothers have come to constitute a significant percentage of women in the village. On that basis, it may safely be said that our sample is fairly representative of women in Kanye generally. Whether it is representative of unmarried women in particular will emerge when the findings of our survey are presented, and compared with previous ones.

1.4.7 Analysis of court records and extended case study

The records of the courts hearing extra-marital pregnancy disputes form the major source of data for this study. Although the analysis of court records is an established method of research in legal studies, it is the records of the superior courts which normally receive the most attention. This is done in spite of the reality that most cases begin and end at the level of the lower courts (van Velsen 1967). In order to avoid this pitfall, the records of two local courts in Kanye were used in the manner discussed below.

1.4.7.1 The records of the Kanye chief's court

The records of disputes concerning extra-marital pregnancy and related matters heard by the chief's court between 1978 and 1988 were located through the court registers. The registers at this court were not very well kept, and those from 1981 and 1982 could not be located. It therefore became necessary to go through the piles of individual case files from this period. Although this was more time consuming, it was still possible to locate some relevant cases in this way. Altogether, a total of fifty two entries and case files were identified, mainly under the heading of seduction, but also breach of promise and family disputes. Only thirty one of these contained a complete record of the proceedings, the judgement and its execution. It proved difficult to trace the participants in most of these disputes for extended case study, but some of them were discussed with members of the court. It is the records of these thirty one cases which form the basis of chapters six and seven (appendix B for a list of these cases).

1.4.7.2 The records of the magistrate's court

At the magistrate's court, the state of the records was quite good, and a special register was kept for maintenance cases, which made work there easier. There were many more maintenance cases registered at the magistrate's court than seduction cases at the chief's court, so a sample had to be made. Like the chief's court, cases heard between 1978 and 1988 were selected, and the sample consisted of two lots of cases. The first lot was obtained through the survey described in 1.4.6: the records of cases involving twenty five of the women from the survey were located and read. Ten of these were subsequently selected for extended case study, mainly through in-depth discussions with their participants. No special criteria were employed in this selection; those cases in which the participants could be found ended up constituting this sample. The second lot of the magistrate's court cases was obtained by selecting some maintenance cases from the court register. The criterion for selection was to find some odd cases, such as those in which no orders were made, or where orders different from those prescribed by statute were made. This was done in order to eliminate the bias introduced by the cases identified through the survey, most of

which were 'success stories' in the sense that regular orders had been made, and the women came to court to collect maintenance payments. The records of thirty eight cases in the second lot were then read and analysed. It was possible to follow up four of these for extended case study through in-depth discussions with their participants. The numbers involved in sampling the cases for follow up were not consciously planned; they were simply determined by the number of participants who could be located. In other words like the survey, we went for a purposive sample, and did not target a particular number or percentage of the total cases coming before the court. There are therefore altogether sixty three case records which were read and analysed at the magistrate's court; in the case of fourteen of these, in-depth interviews were conducted (appendix B for a list of these cases). It is on these sixty three cases that the discussion in chapters eight, nine and ten is mainly based.

1.4.8 Interviews and court observations

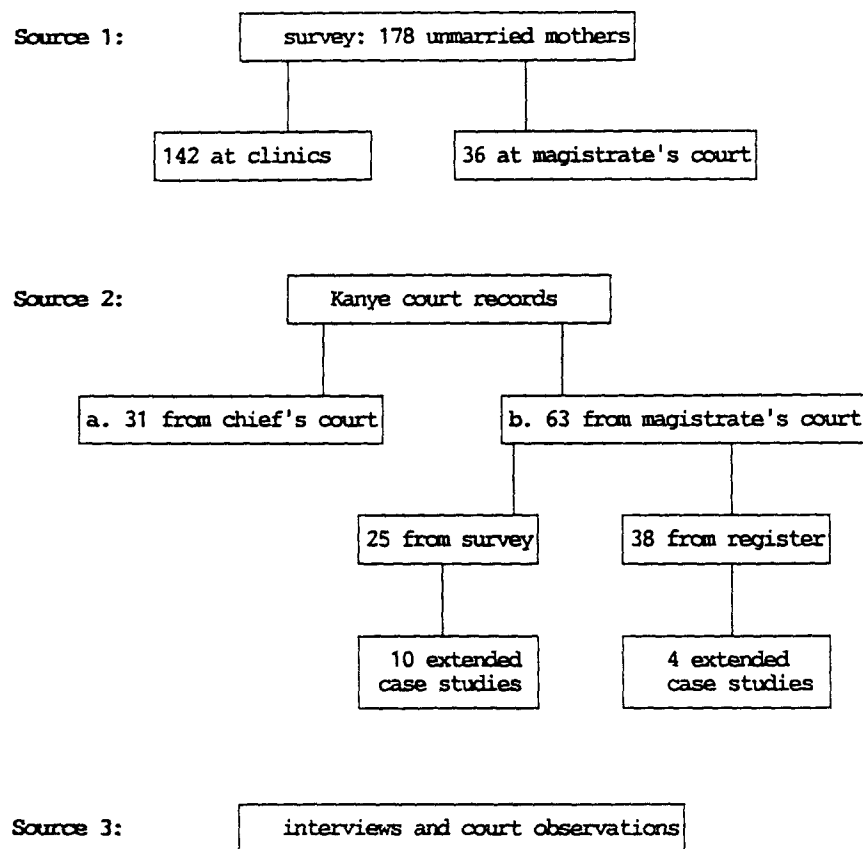
Other methods of data collection included interviews with several persons such as headmen, chiefs, social workers, magistrates, court clerks, police and other government officers in and outside Kanye. These were normally based upon a list of questions prepared beforehand, administered in a rather formal atmosphere, and the answers written down in a research notebook. No tape recorder was used for most of these interviews, as this appeared inhibiting.

At the chief's and headmen's dikgotla, I often held an open discussion with a panel of court elders specially invited for the occasion. Although most of these were elderly males, my request for more female participants was usually welcomed and granted, especially at the smaller dikgotla. These discussions were also written down in my notebooks, and no tape recorder was used. Informal discussions were also held regularly with ordinary residents of Kanye at their homes and during social functions, which were not always written down until later that day.

Finally, a number of maintenance and related proceedings that came before the courts at Kanye were attended throughout the research period. I sat mainly at the magistrate's court during a total of at least six maintenance proceedings, ordinary criminal prosecutions, and prose-

cutions for failure to comply with maintenance orders. I wrote down the proceedings verbatim, my impressions of the atmosphere in the courtroom, and in some cases tape recorded the proceedings (see for example case one). Unfortunately, not a single case involving extra-marital pregnancy was heard at the chief's kgotla during my entire four months stay there. Thus I was unable to observe these disputes first hand, although I attended a couple of related family disputes. This was however mitigated by the availability of the seduction case files discussed earlier. Figure one summarises the sources of data for this study (excluding the traditional methods).

Figure 1: Sources of data



1.5 Structure of the study

This study contains a total of eleven chapters, and is organised as follows:

Chapter one is this introductory chapter, which mainly described the background, justification and methodologies of the study.

Chapter two presents an overview of Botswana's legal system from what we earlier referred to as the legal centralist perspective. Thus it describes the sources of law, the courts which administer them and their relationship with one another. This chapter is meant to introduce the reader to the nature of the administration of justice in Botswana, and some of the problems posed by legal pluralism.

Chapter three describes the socio-political organisation of the family and society in Botswana, which is based upon a review of the literature. It focusses upon the socio-economic changes that have taken place since foreign intervention, especially the values and norms relating to marriage and reproduction. This chapter is intended to provide the socio-cultural background against which the national laws regulating extra-marital pregnancy to be discussed in the next chapter should be understood.

Chapter four presents the customary, Roman-Dutch and statutory rules regulating extra-marital pregnancy at the level of the national legal system. Particular attention is paid to the origins and development of these rules, and the relationship between them.

Chapter five provides a brief description of the social, economic and political organisation of Kanye village, especially its administrative institutions. It also presents the results of a survey carried out among unmarried mothers in the village, in order to provide the socio-economic background against which the discussion in subsequent chapters should be understood.

Chapter six discusses the ideal norms and procedures regulating extra-marital pregnancy among the Bangwaketse morafe. It is based mainly upon seduction and related records from the chief's court at Kanye, and interviews with Bangwaketse informants.

Chapter seven assesses the effectiveness of the decisions of the Kanye chief's court in seduction cases. This is done through an analysis of the compliance record with the orders of the court, and its demonstrated capacity to enforce its decisions. Attention is also paid to the

factors which influence compliance, which are based upon interviews with litigants and members of the court.

Chapter eight shifts the emphasis away from the Bangwaketse customary method of dealing with extra-marital pregnancy and looks at the operation of state law procedures discussed in chapter four in the specific context of Kanye. It is based mainly upon attendance of maintenance and related proceedings, analysis of case records and interviews with litigants and court officials at Kanye magistrate's court.

Chapter nine like chapter seven, assesses the effectiveness of the decisions of the Kanye magistrate's court, using the same test of effectiveness as in chapter seven.

Chapter ten discusses the interaction between the method of dealing with extra-marital disputes under the Bangwaketse customary system and that under the state law. This interaction will be based upon case studies of the manner in which the residents of Kanye have sometimes used the two systems of law strategically to suit their own purposes. The response of both the chief's and magistrate's courts to this strategic use of the law are also considered.

Chapter eleven will conclude the study by bringing the discussion in the preceding chapters together, summarising the main findings of the study, as well as their methodological and policy implications.

2 THE JUDICIAL AND LEGAL SYSTEM OF BOTSWANA

This chapter provides a general outline of Botswana's judicial and legal system, and should be read subject to the comments made in the introductory chapter about the nature of law and legal systems. This means that the picture to be presented here is one of juristic pluralism, as contrasted with pluralism in the strong sense.

The first section outlines the sources of the law of Botswana. The second section presents the institutional framework within which these sources operate, that is the courts, their composition and jurisdiction. The third section explains the circumstances in which customary law and common law apply, while the fourth and final section makes some brief remarks about the status of these two systems in relation to one another.

2.1

The sources of law

The state legal system of Botswana is based upon a republican constitution which was adopted at independence from the United Kingdom in 1966 (volume I, Laws of Botswana or LOB). This constitution contains a bill of rights modelled along the lines of the Universal Declaration of Human Rights, and provides for three arms of government: the legislature, the executive and the judiciary. The legislature consists of two houses, the national assembly and the house of chiefs. The house of chiefs is the lower house, and is constituted by the chiefs of the eight principal Tswana *merafe*¹. They have no law-making power at the national level, but are very influential at the local level where they administer customary law (see also Chieftainship Act, volume IV, LOB). National law-making power is vested in the national assembly, but the latter are required by the constitution to send bills concerning 'tribal' administration or customary law to the house of chiefs for advice. The national assembly is however not obliged to follow the advice of the house of chiefs, although in practice they give it serious consider-

¹ This term will be used throughout this work instead of the colonial label 'tribe', as it is both indigenous and sociologically more acceptable. In dealing with statutes which retain the 'tribe' terminology however, the latter term will be retained. As it is still used in most legislation, the term 'tribe' will be retained in quotations.

ration, especially in sensitive matters.

A scholar unfamiliar with the Botswana situation might conclude from a first glance at the constitution that most laws in Botswana are made by the national assembly, that they are written and apply generally to all persons in the country. Such a conclusion would be far from true, because the Botswana legal system in fact recognises three sources of law: customary law, Roman-Dutch law and statute law. These three sources co-exist in a situation of juristic pluralism within the national legal framework, and we now turn to describe them.

The customary law

2.1.1

Customary law is a rather imprecise term used to describe a body of rules, principles, usages and expectations that have their roots in the cultures of pre-colonial Tswana societies. This term replaces the colonial label 'native law and custom', and has been criticised for suggesting a lesser form of law. Legal anthropologists sometimes use the term 'folk law' instead, but this term is equally controversial. The term customary law will therefore be retained in this study for purposes of consistency with judicial usage in Botswana. Customary law is recognised by the state as an independent source of law, and is accorded the following definition:

Customary law means, in relation to any tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity and natural justice².

This rather vague definition of customary law effectively leaves the content of customary law to the local level, where once again there is a plurality of customary laws, most of which are not codified. Thus the term customary law covers a variety of rules, principles and usages of the different *merafe*, which may differ from each other, as well as vary from within. Comaroff and Roberts (1981:70) have aptly described it as follows:

2 This definition is contained in the Customary Law (Application and Ascertainment) Act of 1969, Cap. 14:03, and the Customary Courts Act, Cap. 04:05, Laws of Botswana. The Botswana parliament provides no guidelines for the standards of morality, humanity and natural justice to be used in the applicability of customary law. The retention of this 'repugnancy clause' by an independent African country which officially claims to recognise its own customary law also leaves much to be desired (e.g. Himsworth 1972:5 and Sanders 1985b:78).

Rather than constituting a coherent and internally consistent set, *mekgwa le melao*³ comprise a loosely ordered and undifferentiated repertoire of norms, the substantive content of which varies widely in its nature, value and specificity.

As shall be demonstrated in subsequent chapters, customary law is in a continuous process of change, and it is often difficult to say with certainty what the applicable rules are. Moreover, most customary systems allow for a large degree of flexibility, and the application of rules is not always of overriding importance.

While the nature of customary law poses no special problem for customary courts, this is not the case with non-customary courts. The latter have since the colonial period had power to review or hear appeals from the former, and must apply customary law in such cases. The Customary Law Act thus lays down certain provisions for its ascertainment by the courts. A court which entertains any doubt as to the existence or content of a rule of customary law may consult reported cases, textbooks and other sources, and may receive oral or in written opinions in that respect (section eleven Customary Law Act). Although the provisions refer generally to 'the courts of Botswana', these rules appear to have been especially enacted for the non-customary courts, which are not well versed in the customary law. In the customary courts, customary law is (presumed to be) generally known by court members and the community.

Thus in practice the customary courts do not need to and rarely use the ascertainment provisions of the Act. It is only in the rare instances where questions of customary law come up in the courts of general jurisdiction that the issue of ascertainment arises. In such cases, the high court in particular has normally resorted to various texts, mainly Schapera's handbook (1938), and various restatements of the law undertaken by the School of Oriental and African Studies in London and others done at the request of the Government of Botswana in the 1970's (see Campbell et al. 1971; Roberts 1970 and 1972a). Persons knowledgeable in customary law such as chiefs are often called as expert witnesses in particular cases.

Although documentary sources of customary law are particularly convenient for the non-customary courts faced with applying customary law on appeal, the courts have not used them with sufficient caution. The high

3 This is the indigenous description of Tswana customary law and literally means usages and laws.

court in particular tends to treat Schapera's handbook and Roberts' restatement of Tswana family law (1972a) not as guides to general principles, but rather as codifications of Tswana customary family law⁴. This is unfortunate because these sources are now dated, and the methodologies they employed rather too rule-oriented, presenting Tswana customary law outside its social context⁵. It is therefore at best doubtful whether the law applied by these courts is in any way related to the social reality according to which most Batswana conduct their lives today.

2.1.2

The common law

What is described as the common law in the Botswana legal system is a rather misleading term for two reasons. First of all, it does not have the meaning which it generally has in comparative law, that is as based on the English legal tradition. In the Botswana context, the term is used to describe the combination of 1) Roman-Dutch law received during the period of British protection, and 2) legislation emanating from the national assembly. Secondly, the term common law is misleading because it suggests that these laws apply generally, or are common to the majority of the population. The fact of the matter is that the common law is applicable only to certain areas of the legal system, and is often restricted to certain categories of persons. We shall return to this issue in section 1.3.

Roman-Dutch law was first received into the Bechuanaland Protectorate⁶ in 1885 by proclamation via the Cape, then a British colony. The choice of Roman-Dutch law over English law was influenced by British plans at the time to have Bechuanaland, along with the other high commission

4 See among others: *Nthebolang vs Mphetlhe and another* (Civil Trial 278/1982, unreported) high court; *Ontebile Lekoko vs Kgomoiso Lekuka* (Civil Trial 167/1987, unreported) high court; discussed in Otlhogile (1989:63).

5 The authors of the Restatement of African Law Series accepted the limitations of their approach earlier during their work (see Allot 1970a and Roberts 1971).

6 This name was given to the territory today known as Botswana by the British colonial government. The term Bechuanaland appears to come from 'Bechuana', a colonial adulteration of the indigenous label 'Batswana'.

territories of Basutoland and Swaziland incorporated into the planned Union of South Africa (Aguda 1973:52). Although Bechuanaland and the other High Commission territories were eventually never incorporated into South Africa, they did not escape becoming what a South-African judge once called the 'South-African Law Association' (see Sanders 1985a:47). The Roman-Dutch law became entrenched during the colonial period as the 'official law' of Bechuanaland, although in practice it applied only to selected areas, especially public law, and mainly to the non-African population of missionaries, traders and colonial officials.

Initially, political independence in 1966 brought few changes in the legal sphere, apart from the adoption of the constitution, which made provision for the continuation of 'existing laws', which included the received Roman-Dutch law and some colonial proclamations. Today, Roman-Dutch law survives and is recognised as an independent source of law, and together with statute law is labelled the common law. Although regularly employed by judges of the superior courts, the term Roman-Dutch law is something of a misnomer⁷. This is because in practice, the principles applied by the courts are mostly derived from South-African authorities and judicial precedents. These sources are not always consistent, and sometimes the interpretations of the South-African courts are influenced by legislation peculiar to South Africa. As we shall find out in chapter three, this has caused often uncertainty in the Botswana courts as to the exact state of the Roman-Dutch law in certain areas.

This uncertainty has been worsened by the emergence of a large body of statute law as a major source since independence. In some areas such as criminal law, legislation has replaced the Roman-Dutch law⁸. The 1970's also saw the introduction of English law-inspired legislation in the area of family law, which to varying degrees altered or replaced Roman-

7 See Brewer (1974:24) who suggests that because of the influence of English law principles in the 1800's, the term 'Cape colonial law' may be more appropriate to describe this body of law.

8 The criminal law is now based upon an English law-inspired Penal Code, Cap. 08:01, Laws of Botswana.

Dutch law principles⁹. These developments have been problematic because the statutory enactments are not always clear on their effect upon Roman-Dutch and customary laws. This has created further uncertainty in areas such as the law of maintenance, which forms the subject of this study. When the third source, customary law (itself far from homogeneous) is added, the resultant situation of legal pluralism can be rather confusing. We shall find out in subsequent chapters that this situation encourages people to manipulate the various options to satisfy their own goals.

The next section discusses the courts, their composition and jurisdiction to apply the sources of law described above.

2.2 The courts: their composition and jurisdiction

The parallel system of courts which resulted from the introduction of colonial courts to co-exist with the Tswana courts has been retained to this day. These courts however exist in a single hierarchy, with the various grades of customary courts at the bottom, followed by various grades of magistrates' courts. The latter are together labelled the subordinate courts, while the high court and the court of appeal are superior courts of record. These non-customary courts are often referred to together as courts of general jurisdiction. Below we briefly discuss the composition, jurisdiction, and the laws applicable in these different courts.

2.2.1 The customary courts

The customary courts in present-day Botswana are successors to an elaborate system of courts which existed prior to the colonial period, and which have survived in a different form since then (see Roberts 1972b). These courts were tied to the socio-political organisation of pre-colonial Tswana societies, which will be discussed in more detail in the next chapter. The officially recognised customary courts are today regulated by the Customary Courts Act. Unlike the other courts which fall under the administration of justice, the customary courts

9 See for example the following: Affiliation Proceedings Act of 1970; Matrimonial Causes Act of 1973 and Married Persons Property Act of 1970.

are classified under local government. The minister of Local Government and Lands may, on behalf of the president, establish or recognise an already existing customary court by warrant. In practice official court warrants are granted mainly to chiefs' courts in the various districts, traditionally the highest courts of appeal. At the lower level, courts administered by headmen and chiefs representatives' courts in outlying villages are also sometimes granted official recognition.

It is difficult to say with certainty how many customary courts exist countrywide, because not all operating customary courts are recognised by the state. Apparently, there were approximately 203 registered customary courts in 1979, 158 of which were presided over by warranted chiefs or headmen (Odell 1985:71). The remainder were presided over by unwarranted but paid headmen, which shows a recognition by the state of the vital role of these courts¹⁰.

In addition to these are an unknown number of other courts, unwarranted by the state but which dispense justice on a daily basis to Botswana's rural majority. The colonial and post-independent state's failure to warrant these courts is explained by Roberts (1972b). He observed that this would have imposed intolerable burdens on the colonial administration, in view of the requirement that all warranted courts had to maintain a written record of their proceedings since 1934. In addition he points out that the traditional ward system of organisation was already breaking down in 1934, and some wards could no longer be defined on a geographical basis.

This observation is even more applicable today when settlement patterns have been drastically changed by urbanisation and migration. In some villages, customary courts administered by headmen still exist in every ward, the basic administrative unit in Tswana societies. In others the picture may be different, depending upon the effects of socio-economic change upon ward cohesion. The official list of customary courts therefore reflects only a part of the picture, and it is with that caveat in mind that we should read the following section which deals with these courts.

The Customary Courts Act recognises three categories of customary court: first, lower customary courts, which roughly correspond with the traditional ward courts under a headman, but which may also be court

10 In 1978, the officially recognised customary courts heard 8,75 cases (Odell 1985:71).

held by a headman in a small outlying village. Next in the official hierarchy come the higher customary courts, normally the chiefs courts, which serve as courts of appeal from lower customary courts, and in some cases as courts of first instance.

As far as their civil jurisdiction is concerned, these two categories of courts may entertain matters justiciable under any law administered by them, which laws are primarily customary law and any other written law they may be authorised to administer. Their jurisdiction over persons includes where both parties are 'tribesmen', or the defendant consents in writing to their jurisdiction, or the defendant is ordinarily resident within the area of the court. In addition, these courts may entertain cases where the cause of action arose wholly within the area of their jurisdiction. They are prohibited from hearing certain specified cases, such as those relating to the dissolution of marriages by civil rites, testate succession, insolvency or any other matter to which the common law applies.

In criminal matters, these courts may hear cases in which the accused is a 'tribesman', or consents in writing to their jurisdiction, and the offence is alleged to have been committed in their area of jurisdiction. It is in the area of criminal law that the customary courts are subjected to severe jurisdictional limitations. They are prohibited from hearing cases including treason, bigamy, corruption and abuse of office, robbery, rape, and other serious offences. It seems that the ultimate aim is to have the penal code regulate all criminal matters: customary courts are required to be guided by the provisions of the penal code in such cases. More specifically, they must follow the Customary Court Procedure Rules which lay down pleading and other procedures along the lines of the common law.

Appeal lies from lower to higher customary courts, and provision is also made under the Customary Courts Act for cases to be reviewed by the customary courts commissioner, an official who plays a supervisory function, but who also has authority to make orders and pass sentences in the same manner as a subordinate court.

There are situations in which cases may be transferred from one customary court to another, or to a subordinate court of competent jurisdiction. These include cases where a party to a dispute feels that the customary court is unreasonably delaying its adjudication, or has unreasonably refused to hear it. In such cases, the party concerned

reports the matter to the customary courts commissioner, who will transfer the case accordingly, should he consider this to be in the interests of justice. In practice therefore, these customary courts deal mainly with minor criminal offences, but they settle the vast majority of the civil disputes arising between rural dwellers. More recently, the ministry of Local Government and Lands has set up urban customary courts in some major towns. These courts are usually headed not by chiefs but by former civil servants, and they appear to handle a large volume of minor civil and criminal cases.

The third category of customary courts are the customary courts of appeal, which although they have been provided for since 1968, the first was constituted in 1986. It was initially provided that the president could establish any single chief, tribal authority, any other tribesman or group of these to be a customary court of appeal. The customary court of appeal that has been constituted so far is composed of a number of persons who are well versed in tradition and have had previous experience either in local government or administration of justice.

This court is based mainly in the capital Gaborone, but also sits in circuit in other parts of the country. The court has original jurisdiction in certain cases which are beyond the jurisdiction of the lower and higher customary courts. This court also possesses appellate jurisdiction in matters on appeal from the customary courts below. Originally, the Customary Courts Act provided for appeals to normally proceed from a customary court of appeal to a magistrates court, but an amendment in 1986 altered this. Under this amendment, appeals may proceed directly from a customary court of appeal to the high court if a person's status is at issue, the amount of the judgement exceeds 200 pula, or where a sentence exceeds six months imprisonment or corporal punishment of eight strokes¹¹.

2.2.2

The magistrates courts

These courts are the successors to the first colonial courts that were set up in the Bechuanaland Protectorate, and were at the time referred to as the subordinate courts, a term today used to describe both the

11 See Customary Courts (Amendment) Act of 1986.

magistrates and customary courts. During the colonial period, members of these courts were usually not formally trained in law, and performed their judicial functions alongside their normal administrative duties. Thus senior district officers and district commissioners could hold a subordinate court of the first class; district officers a subordinate court of the second class and cadets and district assistants courts of the third class.

Today, the magistrates courts are constituted and governed by the Magistrates Courts Act, which makes provision for four grades of magistrates' court. The highest magistrates courts are those of the chief magistrates, followed by senior magistrates, magistrates grade one and magistrates grade two. These courts administer mainly the common law, although they potentially have jurisdiction to apply the customary law as well. The extent of their jurisdiction to apply customary law is not entirely clear, the Act merely providing that they shall apply it in cases where it is properly applied. This matter has been discussed comprehensively by other writers, and the technicalities involved will not be repeated here (Himsworth, 1972; Bennett, 1985). Suffice it to say that in practice, these courts mainly apply the common law, and apply the customary law in the rare situations where they hear cases on appeal from customary courts.

These magistrates courts exercise jurisdiction within the district in which they are situated, and like the customary courts, they are subjected to restrictions in certain criminal and civil matters. Cases between tribesmen may be transferred from a magistrates court to a customary court should the clerk of the former court consider it suitable.

Likewise, such transfer may take place to any other court of competent jurisdiction for reasons of financial convenience or because the value of the action exceeds the jurisdiction of the court in which it was initially brought. Appeal normally lies to the high court, which has power to review the proceedings of magistrates courts, and set them aside or make any other orders it considers suitable.

2.2.3

The high court

The high court of Botswana is provided for in the national constitution, and the High Court Act makes further provision for its composition,

jurisdiction and other matters. It consists of the chief justice and such number of judges that the president may appoint, and proceedings may be disposed of by a single judge. Provision is also made for the court to secure the assistance of assessors, who perform an advisory, but not decision-making role, although their agreement or disagreement with the judge must be noted on the court's record. Assessors are normally called to advise the court on questions of customary law, should these arise during appellate proceedings.

The high court is a court of record, and has unlimited original jurisdiction in civil and criminal matters, under any law and in all cases arising within the country. Most cases in which the court exercises such original jurisdiction are those which fall outside the jurisdiction of the subordinate courts, such as homicide and dissolution of civil marriages. It also has appellate jurisdiction in cases from all subordinate courts, and exercises review functions. The high court applies mainly the common law, although it also applies customary law in the rare situations where it hears an appeal on a point of customary law. The court has a permanent presence in two places, Lobatse in the south, and Francistown in the north, although a judge may often conduct sessions of the court in other places.

2.2.4

The court of appeal

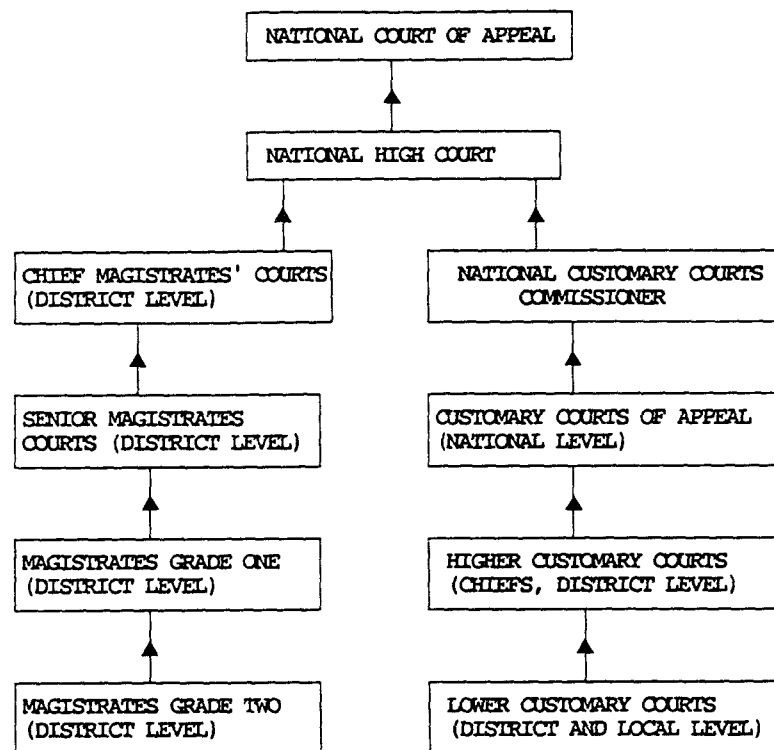
This court is the successor to the combined colonial court of appeal of Basutoland, Bechuanaland and Swaziland, which came to an end with the independence of Botswana and Lesotho in 1966. In the case of Botswana, a separate court of appeal was provided for in the Independence Constitution, and further provision was made by the Court of Appeal Act. The court is composed of a president, the chief justice, any number of justices of appeal as the national president may prescribe, and the judges of the high court. Like the high court, the court of appeal is a superior court of record with appellate jurisdiction over all decisions of the high court in civil and criminal matters.

Unlike the high court however, the court has no original jurisdiction, although certain questions of law may be reserved for it, and its decisions are binding on all other courts in the country.

Any one or three members may normally sit as a court of appeal, except in certain important cases, where a quorum of five is required. High

court judges may not sit on appeals from their own decisions, and the final decision of the court is that of the majority. Presently, the court of appeal is not a permanent one, it sits in sessions at certain times of the year in Lobatse, and is composed totally of non-resident justices. The court administers both customary and common law, although in practice the latter is primarily applied. From the foregoing discussion of the courts figure 2 summarises the hierarchy.

Figure 2: Hierarchy of courts



A question that arises logically from figure 2 and the foregoing sections is how the decision as to which law applies to which persons and in which courts is made. This is analogous to the problem known in international private law as choice of law and forum. The next section is devoted to providing some general answers to these questions.

2.3

The application of the two systems

The question presented by the situation of legal pluralism described above has preoccupied administrators of the legal system since the colonial period. At that time, the answer adopted was simple: customary law for the Africans, and common law for the non-African population. Due to political expediency and socio-economic change, operating the legal system along these racial lines did not work out according to colonial expectations. By the mid 1930's, most areas of public law had been removed from the jurisdiction of traditional authorities and brought within the sphere of the colonial law. This is how today many areas of public law such as constitutional, criminal and labour law remain the preserve of the common law.

What about customary law? This question was considered so important that the parliament of the newly independent Botswana enacted a special statute to deal with it. This is the Customary Law (Application and Ascertainment) Act, which was passed in 1969, and lays down general principles for the application and ascertainment of customary law¹². Drafted with the assistance of the School of Oriental and African Studies Project, this statute lays down 'choice of law' rules to be used by courts in deciding which law applies.

The Customary Law Act lays down the general rule that customary law is the system primarily applicable between 'tribesmen' in civil matters (section four; see also Himsworth 1972:4). There are however three exceptions to this general rule: first, customary law will not apply if the parties to the dispute expressly or impliedly intended the matter to be regulated by common law. Secondly, customary law will not apply where the transaction out of which the case arose is one unknown to customary law. Finally, parties may themselves exclude the application of customary law in a specific case by executing a written document to

¹² See Cap. 16:01, Laws of Botswana. The provisions of this Act relating to the ascertainment of customary law were discussed in section 2.2. For a detailed discussion of its provisions and their implications, see Himsworth (1972:4).

the effect that they wish the common law to apply instead¹³. Unlike under the colonial law where customary law could not be applied to non-Africans, today it is possible, and the latter may expressly or impliedly bring it into operation in cases where they are involved with 'tribesmen' (section five, CLA).

The Customary Law Act further makes provision for certain specific cases in which customary law will apply. Where a tribesman dies intestate for example, his heirs will be determined according to customary law (section seven). In recognition of the plurality of customary laws, provision is made for situations in which there is a conflict of customary laws. These conflict rules are modelled very much along international private law lines: the *lex situs* applies in land matters, while the personal law of the deceased applies in inheritance matters (section ten). In all other cases, a court confronted with a conflict of customary laws may apply that law which the parties expressly or impliedly intended to regulate their obligations in the matter, or the customary law of the place where the action arose.

Where the system of customary law cannot be ascertained according to the above rules, the court is required to decide the matter 'in accordance with the principles of justice, equity and good conscience' (section twelve). This begs the question of the standards of justice, equity and good conscience to be applied in such cases: are these to be those of the customary law or those of the common law? What if these are in conflict? These questions are left unanswered by the Act, as are many others which have been sufficiently dealt with elsewhere (see Himsworth 1972 and Sanders 1985b). Suffice it to say that the general 'choice of law' approach it adopts has proved to be much too simplistic and unsatisfactory. Roberts (1977:3), himself a former advisor to the Botswana government on customary law, put it succinctly as follows:

A solution of this kind, under which a straight choice between different systems is made by referring to a further set of rules provided by statute, has obvious advantages from the point of view of a high court judge; but it was typically formulated and discussed without reference to the situation on the ground, ignoring that in practice litigants saw themselves free to make their own choices between two systems, and to manipulate different elements of each system as best they could. Because legal draftsmen were remote from the lower levels of the system, where conflicts actually originated,

13 A common example of this is the second schedule of the Married Persons Property Act, where prospective spouses may execute various forms excluding the application of customary law to their property.

the abstract choice of law rules formulated for inclusion in legislation generally had an air of unreality.

This view is certainly confirmed by the findings of this study, which are amply demonstrated by in subsequent chapters. The next and final section briefly examines a related question, that of the relationship between customary and common law in the Botswana legal system.

2.4 The relationship between the sources of law

The question of the general relationship between customary law and received externally-based laws has been the subject of a number of writings (see among others Allot:1970a and b; Bennet 1985). The question has sometimes been posed in terms of conflict or harmony, with those working from a 'choice of law' perspective assuming conflict (cf. Sanders 1985:77). Others approach it from the point of view of dominance or subservience (see Hooker 1975).

In the case of Botswana for example, superficially, the common law appears dominant over the customary law. This conclusion may be encouraged by the fact that customary law is mostly unwritten, and defined subject to the written law which is mostly statutory and Roman-Dutch law. Furthermore, customary law is in practice still administered by the chiefs of the various *merafe*, who, as we earlier observed have lost their traditional law-making powers to the national assembly. Finally, the customary courts have since the colonial period lost their jurisdiction over serious crimes, and the criminal law has since 1964 been codified by the Botswana Penal Code. The requirement that customary courts should follow statutory guidelines in criminal proceedings has led to the erosion of customary criminal law.

A closer look at the situation however reveals that customary law is not as downtrodden as it appears. First of all, the constitution protects some aspects of customary law which would otherwise be made ineffective by other constitutional provisions. Section 15(4)(d) of the constitution provides for example that a seemingly discriminatory law which makes provision for the application of customary law shall not be discriminatory for constitutional purposes. Yet another example is the constitutional provision which makes an exception to the rule that every person accused of a crime is entitled to legal representation. This provision, section 10(12)(b), permits a subordinate court to exclude lawyers in proceedings for an offence under African customary

law.

Moreover, as we earlier pointed out, customary law possesses an inherent strength in the number of people to whom it applies in practice, especially in the area of private law. For the vast majority of Botswana citizens live their lives and settle their disputes largely according to customary law. It is in recognition of this reality that the Customary Law Act lays down the general rule that customary law is the system primarily applicable to 'tribesmen' in civil matters. Thus while customary law may appear subordinate on the formal institutional level, it is not so to those who live in accordance with it. This does not mean that there will be no situations in which common law overrules customary law; on the contrary, these do exist. It also does not mean that the two systems or their administering institutions are never in conflict; indeed they sometimes are. What is meant is that it is not always useful to talk about relationships of conflict or harmony, dominance or subservience, at a very generalised level. The findings of this study show that the situation is more complicated than that; it depends on the area of the law, its effectiveness, the persons or institutions involved, and other factors which lie outside the legal domain. Before these findings are presented, the next chapter provides the general social, economic and political background against which the national legal system described in this chapter operates.

This chapter provides a brief description of the changing socio-political and family structure among the Tswana. The term 'the Tswana' may be misleading, as it can be understood in two senses. First, it is an ethnological and linguistic description of one of the three main groups which constitute the larger Sotho group of Bantu speaking peoples of southern Africa (Schapera 1953:9). In this sense, people of Tswana stock are to be found in other parts of southern Africa other than the present nation state of Botswana, notably in South Africa. Although Tswana people remain the most numerous, other non-Tswana groups have always lived and continue to live in Botswana. The second sense in which the term 'the Tswana' is used encompasses all these groups, that is, to describe the citizens of the state of Botswana. Because of socio-cultural differences between these groups, the historical description in the first part of this chapter will be restricted to the Tswana in the first sense. The discussion in the second and third sections applies generally to all groups, that is to the Tswana in the second sense of the term.

An attempt to describe and analyse the structure and organisation of any society is difficult because one can only describe ideal patterns, and there may be local and regional variations. Moreover, no society is static, and change may affect different families and communities differently. Generalisations therefore become risky, especially in societies where changes are rapid and uneven. Botswana society has certainly undergone such changes, especially in the last century. Our description will therefore endeavour to be historically sensitive, as well as be up to date with contemporary events.

The first section begins with a brief description of the social, political and economic organisation of Tswana societies before foreign intervention, especially colonialism. The second section deals with the socio-economic changes which took place in the fabric of Tswana society since the turn of the century, and the pressures that led to these changes. The third section considers the effect of these changes on family life, and the new issues presented by this changed situation.

3.1 The socio-political organisation of pre-colonial Tswana societies

Because so little is documented about the organisation of the Tswana prior to their contact with foreigners in the 1800's, we must rely upon later studies for what may be said to have been the traditional situation. Schapera (1935 and 1938) was the first to document the socio-political organisation of the Tswana as close to the traditional period as we may get. Before the declaration of the Bechuanaland Protectorate by the British in 1885, the area today known as Botswana comprised several independent states or chiefdoms, which were mainly inhabited by people of Tswana stock. Five major groups are generally considered to be the most senior of these *merafe*: the Bangwaketse in the south, who form the subject of this study; the Bakwena and Bakgatla in the center; the Bangwato in the north and the Batawana in the north west.

Except for the Bakgatla, who arrived last from the Transvaal, all these groups initially settled as one under the leadership of a Mokwena chief. Between 1760 and 1780, the Bangwaketse and Bangwato were formed from a split in this main group, and around 1795 the Batawana broke away from the Bangwato (map 1).

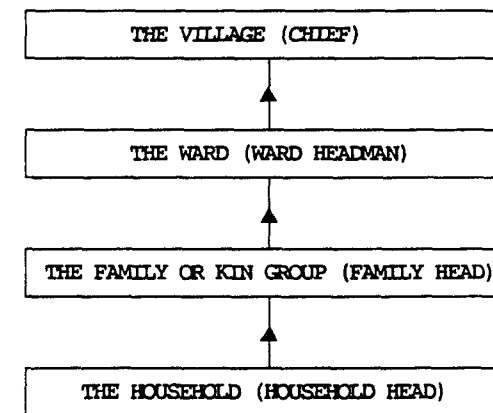
Thus although these groups came to vary in size and composition, the politically dominant Tswana communities shared broadly similar characteristics. These include a similar socio-political and economic structures, and a common language with local differences in dialect (Schapera 1953:9). Below we consider some of the features which characterise their socio-political organisation.

3.1.1 Co-residential administrative units

The most distinguishing feature of the Tswana societies was their organisation into units of co-residence arranged in a hierarchical manner. These ranged from the household at the bottom, to the kin group, the ward, and finally the village at the top (Schapera 1938:12). The household consisted of a man, his wife or wives and their unmarried children, and in some cases married sons who continued to live with their wives and children in the same compound as their parents. The structure of households however varied considerably, as Schapera (1935:213) has observed, and should not be assumed to take this form alone.

A group of genealogically related households lived close to one another, and formed the *family or kin group*, which includes a large group of people. Kinship is a very important concept in Tswana societies, as it has political and economic implications. It also plays a cohesive function, as kin members owe one another clearly defined reciprocal obligations, depending on the closeness of their relationship. A number of family groups formed the *ward*, which represents a distinct social unit for administrative purposes. Wards varied in size, some could be rather large and form a separate village by themselves, while a group of smaller or medium-sized wards together made up a village. The picture of the ideal typical Tswana society of the pre-colonial period may therefore be presented as in figure 3.

Figure 3: Hierarchy of co-residential units



As we shall find out subsequently, this ideal organisational hierarchy has been altered to varying degrees by social, political and economic changes. Some elements of it however continue to survive to this day.

3.1.2 Male Leadership in public politics

Each of the above mentioned units was headed by the most senior male member, who played a leadership role in the group's administrative, political, judicial and spiritual affairs. These leadership positions were hereditary along the male blood line, and except for instances of regency, women could not succeed to them. Their incumbents were charged

with administrative responsibilities such as the allocation of land and organisation of labour. Their powers included law enforcement, dispute settlement and punishment of those who violated the law. Thus these units may be seen in Moore's terms as semi-autonomous social fields (SASFs).

The political system operated through a system of delegation of power and responsibility from the head of one unit to the next in the hierarchy. Thus the head of the household was responsible to the head of the family group, who was in turn responsible to the headman of the ward, with the kgosi or chief of the village as general overseer. The kgosi was a central figure in Tswana societies, and is portrayed at once as a mythical, powerful, and often autocratic overlord, and at the same time as a protective, sympathetic 'father of the nation':

He controlled many aspects of public life. He was both lawgiver and judge; he regulated the allocation of land, the annual cycle of agricultural tasks and several other economic activities, including external trade; he often led the army in war, and supervised or personally conducted various religious and magical rites (especially rainmaking) on behalf of his subjects collectively (Schapera 1943:4).

The headmen of smaller outlying villages and wards carried out similar tasks in their respective units, but enjoyed markedly less powers than the chief. Although he enjoyed these wide powers, the chief had to be careful not to exceed them, otherwise he risked unpopularity and possible impeachment. In his administration of the morafe therefore, he was expected to consult with others on major issues affecting the community. These usually included his brothers, paternal uncles, the headmen of large wards, and economically powerful commoners who had a lot of influence among the people. Thus the system had something akin to the concept of checks and balances, with the chief having to play an intricate balancing game between various groups in the community (SASFs).

The power politics of the Tswana morafe were thus teeming with activity and often intrigue, as the literature reveals (Comaroff 1973 and 1978). The Tswana chief is often portrayed as a powerful, legitimate overlord, ruling peacefully over his willing subjects. This picture is however easily exaggerated, as oral and written history reveals a picture of chiefs, royals and commoners locked in attempts to consolidate the power and influence of themselves and their families.

Apart from the closed private consultations between the chief and his advisors, public issues were discussed at the kgotla, the open public

space to be found at the center of every Tswana village, near the chief's residence. This forum is a simple clearing which is marked by a semi-circle of poles, and is also to be found in every ward. The heart center of Tswana government and politics, it is treated with great respect and awe: a fire is kept burning there all the time. It is from there that the chief conducts affairs of state, including the reception of visitors and the adjudication of disputes.

One of the major public functions of the kgotla is the holding of popular assemblies for discussion of general or specific issues affecting the morafe. In these assemblies, all adult men were apparently entitled to attend and air their views freely. Rank and social status were however important, and royals, the chief's inner circle of advisors, and those from powerful family groups could dominate the discussion and often influenced decisions. On the other hand the views of commoners, younger men, those with limited resources and members of smaller subject communities carried less weight. The latter were often not allowed to speak at all (Murray and Datta, 1989). Similarly, women were not entitled to attend these public meetings, in keeping with the sexual division of labour which excluded them from the sphere of public politics. Today, when the kgotla is used for other meetings such to explain government policy, women commonly attend.

Another major function of the kgotla was its role as a court. There existed an elaborate system of courts which was modelled along the lines of the co-residence system described above. Thus courts were to be found at every level of the hierarchy; that is at family group, ward and village levels. Disputes had to be heard by the courts at the lowest level before resort was made to the higher courts of the headman and chief. In serious cases, such as those which the chief considered too significant politically to be heard by a headman, these could proceed directly to the chief's court; in certain cases he intervened and called for them personally. Dispute settlement was thus an important source of exercising power which has become even more so since the chiefs have been deprived of their constitutional powers.

3.1.3

Subsistence agricultural economy

Most Tswana societies mainly depended upon raising cattle and other small stock, as well as crop farming for their sustenance. Most of the

soils in the country are however poor and not well suited to crop production, and rainfall is very erratic and unreliable. In those areas where arable farming was relatively rewarding, the settlement pattern was characterised by seasonal movements of the productive population from the villages to the lands at the beginning of the rainy season, and after ploughing and harvesting, people would return to the village. Thus the Tswana often describe themselves as having three homes: the village, where their permanent residences are built; the lands, where they plough and which are located some distance away from the village; and the cattle post where they keep their cattle, located even further away from the village.

Cattle were (as they remain today) an important source of wealth and status, and performed various functions such as the payment of bridewealth, fines, and were also a medium of exchange. The more cattle one had therefore, the greater his economic and political power. Households constituted economic units, and production was organised according to a sexually ascribed division of labour, with women in charge of raising children, working in the fields to produce food, preparing meals and generally managing the household. Men's work was to manage the cattle-posts, hunt and participate in the public affairs of the morafe. They were however expected to assist women with clearing and ploughing the fields as well, but women were mostly in charge of food production. Thus there was a lot of interdependence between men and women as well as within and between households and family groups, and close interconnections between the public and private spheres.

The economy was a subsistence one, and every family received land on which to build their homesteads and cultivate their food. Land was thus an important resource, and was allocated in the first instance by the chief to the headmen of smaller villages and wards. These would in turn allocate portions to the heads of family groups, who then demarcated portions to households under their charge according to need. Every married man was entitled to land for himself and his family to build their home and on which to plough. According to traditional Tswana principles, the land belonged to everyone, and the chief only held it on behalf of the community. It could not be bought or sold, and speculation with it for material returns was not permitted, although fields could be lent in return for a share in the harvest.

The use of especially residential land was however relatively private,

and once allocated to a family, it was passed from one generation to another within that family, and no one could deprive them of its use unless they were banished by the chief from the village, or themselves abandoned it. Arable land was likewise allocated to married men on behalf of their families according to need and their capacity to work on it. As a result polygamous and wealthy households received larger portions, as they could mobilise more labour for production.

A married man had to set aside a field for the special use of his wife, and in a polygamous household each wife must have her own field, which was inherited by her children. The wife plants and harvests crops on this field, which is under her control, and may not be used by someone else without her permission (Schapera 1938:202). Thus while women were not generally entitled to land in their own right, they did acquire control of fields in this way through marriage. Unmarried women could also acquire residential and arable land from their fathers when they were past marriageable age, and their male relatives would assist them to plough it. A common practice among the Bakgatla was for a man to give his daughter a plot on marriage, known as *serotwana* on which she and her husband would plough, but which remained under her control. This was meant to provide some security for the woman should there be a crisis in the marriage, and the husband could not deal with it without her consent.

A piece of virgin land could in the same way be allocated by a father to his unmarried son if he is old enough to plough it, under the system known as *go tshwaela*, or to earmark. This practice is used to allocate other forms of property such as cattle during the lifetime of a man, so as to minimise inheritance disputes following his death.

The foregoing discussion shows that kinship was an important concept in Tswana societies, and that individuals were regarded very much as part of a family group. The interdependence among family members in activities such as ploughing meant that it was important for individuals to identify and cooperate with their relatives at all times for their own survival. As we have seen, the household and family group were the basic social units from which the larger units developed. Marriage was seen as the foundation of the family, and the institution within which socio-economic activities took place, and the society was reproduced. As our description of rights to land makes clear, marriage is a fundamental rite of passage, some kind of a passport which opens the door

for men to attain adulthood, and acquire the means of production and labour, and with it independence to run their own households. We therefore now turn to briefly discuss the Tswana marriage.

3.1.4

The Tswana marriage

Traditionally, marriage was ideally arranged by the parents and families of young people who had been through the traditional rites of passage such as initiation ceremonies. Young people apparently had little say in their choice of partner, the boy's parents initiated the process by identifying a suitable girl from a good family. Such qualities as ability to work hard, good manners and modesty were highly emphasised, and the girl's family should not have a record of witchcraft or other undesirable characteristics. Thus the daughter of a relative or neighbour whom the family was likely to know well was usually preferred. Although there were prohibitions based on relationship, most Tswana societies encouraged marriages between cousins, especially cross-cousin marriages. The dominance of parental control in their children's choice of partner can be explained by a fact common on other societies: that marriage was used to create new or strengthen existing economic and political alliances between families. As for the procedural aspects of marriage, having so chosen a suitable girl, the boy's parents would then proceed to 'ask for her' from her people, this procedure being known as *patlo*. The exact form of *patlo* varies from one group to another, but these discussions are common to all Tswana groups, and are regarded as one of the most important elements of the Tswana marriage. A second essential ingredient was the delivery of an agreed number of cattle as bridewealth or *bogadi* by the wife-askers to the wife-givers.

The Tswana marriage has been a subject of research and writing for some time (Schapera 1938 and 1939; Roberts 1970 and 1972; Comaroff and Roberts 1981). Much of the debate has centered around the essential requirements of a valid Tswana marriage. Schapera (1938:138) had earlier identified the most important requirements to be *patlo* and *bogadi*, and had gone as far as to state that no marriage is regarded as complete without *bogadi*. Roberts (1972:241) reconsiders this legalistic interpretation, and based upon research findings among the Bakgatla, observes that:

Any attempt to isolate essential formalities associated with formation conflicts with the way in which Kgatla see marriage and its formation and leads to a misunderstanding of the way in which norms related to the process of formation operate in the context of a dispute.

Roberts makes the important point that western legal concepts are unhelpful to understand Tswana marriage. One of the features which distinguishes Tswana marriage from western concepts of marriage, he points out, is that as opposed to being a single event, it is a process. It is a chain of various events which may stretch over a long period of time, from the families' agreement that the couple will marry, to the exchange of gifts and other rituals and ceremonies, to the delivery of *bogadi*, the celebration of the marriage and the removal of the woman to the man's home. Also, *bogadi* did not have to be paid immediately, it may be delayed for years, and still the couple be considered by their families to be married. Its non-delivery however affects the status of any children who may be born to the couple in the meantime, who will not be regarded as the legal offspring of the man. This is because *bogadi* transfers the woman's reproductive capacities from her own family to that of the husband (Schapera 1938:138).

The likelihood that children may be born before *bogadi* has been transferred, is increased by the *go ralala* custom, where the couple may once *patlo* has been completed, cohabit at the woman's parents' home before she is finally removed to the man's home. This has also complicated the debate about when exactly a Tswana marriage comes into existence.

Comaroff and Roberts (1977:112) noted a tendency to delay delivery of *bogadi* among the Bakgatla, although some couples were still treated by their families as husband and wife. This led them to conclude that public recognition of the couple as married is a very important element in the validity of a marriage, and combined with the other elements, is used as means of assessing the validity of a relationship should there be a dispute. At the same time, they insist that:

Despite the clarity with which they are perceived, the Kgatla do not treat these formal incidents as prescriptive necessities in the constitution of a marriage.

They observed an ambiguity which seems to characterise heterosexual relationships among the Bakgatla, and how their validity as marriages were negotiated during disputes. They do not say however whether this was the traditional situation among the Bakgatla, or whether it may be the result of changes which have taken place. It is our view that *patlo*

or parental agreement must be taken as the most important essential in the Tswana marriage process, because it is from there that the other processes such as *bogadi* and public recognition may follow. This is a logical fact and should be accepted without the fear that western concepts of marriage are being used to analyse Tswana marriage. This is not to deny the fluidity which characterises heterosexual relationships in Botswana today, which will become quite clear when we discuss the study findings.

The next section discusses the changes which have taken place in the fabric of the societies described above, and their impact on the socio-political and family structure.

3.2 Socio-economic change and its impact on the family and society

The social organisation of Tswana societies as described above underwent tremendous changes from the 1800's with the arrival of European traders, hunters, missionaries and the subsequent establishment of British colonial administration. This should not be taken to suggest that before this period the Tswana societies were static and unchanging; the paucity of literature from the early period makes it difficult for us to pinpoint internal agents of change. There is some evidence however to suggest that the various *merafe* borrowed traditions and practices from one another, such as magical rites and medical treatments (Schapera 1943:229). Neither does it mean that the entire 19th century was characterised by European influence alone, because many internal changes were taking place during this century. It is true to say however that European contact had the most disruptive impact on the Tswana family and society.

The foreign arrivals brought different styles of life, beliefs and values, especially the missionaries who set up their missions and schools around the country. The traders brought with them new types of goods and introduced money as a medium of exchange, provided new ways of earning a living such as wage employment, while the colonial administration introduced an alien system of government and laws. Pressure for change thus came from a variety of sources, some of which are discussed in the following pages.

3.2.1 Christianity, western education and colonial rule

The role played by the introduction of christianity in African history is well documented and will not be repeated here. It appears that by 1940 christianity had spread to a 'fair proportion' of the Tswana population (Schapera 1943:230). Christianity introduced a completely new code of conduct, which was often in conflict with established norms such as polygamous marriage, initiation ceremonies, transfer of *bogadi* and customs relating to death. The churches had a particularly strong influence on Tswana norms and practices relating to the family, especially the institution of marriage. The influence of the church upon Tswana polygamous marriage in particular was significant, and there is evidence to suggest a link between the conversion of some Batswana to christianity and a decline in polygamous marriages (Schapera 1933:87; Comaroff and Roberts 1977:122). We shall return to this later when we discuss the effects of these changes.

The introduction of British administration in 1885 caused significant political changes. Initially, the British colonial government was hesitant to interfere with the administration of the various *merafe*, especially because the territory had no economic attraction for them, being seen only as a route to the north. The colonial policy of non intervention was however not to last, and the inevitable struggles for power between the administration and the chiefs eventually surfaced. The response of the colonial government was similar to that adopted in other colonies. Direct intervention in the affairs of the population began to take place, and the Chiefs were brought under the control of the administration. As early as 1919, appeals could proceed from the court of the chief to a colonial magistrate, and by 1934 chiefs could only be legitimate if they were recognised by the colonial administration. An attempt to reorganise the traditional court system in 1934 however failed, but the subsequent period saw the colonial administration usurping for itself jurisdiction over significant local matters¹. Without underestimating the importance of these changes, it is true to say that they did not significantly affect the social structure and organisation of the local population, and that stronger agents of

1 See the following legislation: Native Appeals Proclamation 1/1919; Native Administration Proclamation 74/1934 and Native Tribunals Proclamation 75/1934.

change came from other sources.

One of these agents of change was the availability of schools providing western-style education for the youth, which had various consequences for the whole society. First of all, these schools provided young people with an alternative to the traditional initiation schools, which meant that they were missing out on some of the traditional methods of learning and socialisation into their roles in society. Secondly, schools away from home gave young people freedom from social control by their elders, a strong feature of traditional Tswana society. Thirdly, and related to the second is the new ways of earning a living which education enabled the young to pursue outside the agricultural subsistence economy, and with these the possibility of becoming economically independent from their elders. This is linked with the most important agent of change: the introduction of a cash economy, and the transformation of the rural subsistence economy, to which we now turn.

3.2.2 The cash economy and labour migration

It is generally agreed that one of the most important agents of change was the introduction of a cash economy, and the demand for labour in the South-African gold mines. The need for cash was created in the first instance by the introduction of money as a medium of exchange which largely replaced the traditional barter system. The new goods brought in by the traders required payment in cash, and this was further reinforced by the introduction of taxes fairly early in the colonial period. Thus many young Batswana men had to engage in formal employment. For these young men, a regular wage in the mines provided greater security than agricultural production, especially in view of the latter's vulnerability to ecological conditions. As early as 1943 therefore, almost half of the young Batswana men between the ages of 15 and 44 years were employed away from their homes, and 28% of all adult Batswana males were absent working in South Africa. The migration of women came later and was low compared to that of men (Schapera 1947:196).

Migration for employment purposes thus became a feature of Tswana life

since the 1800's, and continues to be so today². In the 1970's migration for employment purposes within the country appears to have increased, mainly resulting from the discovery of diamonds, and a growth in the cattle industry. The National Migration Study (NMS) of 1982 noted that national migration took three directions: within rural areas, from rural areas to towns and from rural lands to freehold farm areas. The general result of such migration is an alteration in peoples' settlement patterns within the rural areas, and larger central villages gained population at the expense of smaller ones. Also within the rural areas the NMS noted a tendency for people to reside more or less permanently at the lands and cattlepost, which in the past was only seasonal.

As for rural-urban migration, the rural areas are losing population to the urban areas, although the rate is not uniform. The quest for employment was identified as one of the major causes of migration from rural to urban areas, and over one third of the total labour force were found to be absentees from other permanent homes (Botswana Government 1982:26).

Some commentators have warned against assuming that migrant labour was the only cause of changes that took place in Tswana society (Molenaar 1980:23). There is no doubt that a combination of factors played a part in this respect; we earlier identified education, christianity and colonial intervention. At the same time, there is no denying the dominance of the economic factor, and if one must be singled out as the most influential, it is the transformation of the Tswana economy from an agricultural subsistence one to an economy where money was assuming greater importance. The more this happened, the more it became important for some members of the family to become engaged in wage employment, most of which was only to be found outside their villages. This has had far reaching and lasting effects upon the social organisation of Tswana society, which we discuss in the following pages.

Although we are more concerned with the impact at the micro level of the family and household, a brief word must be said about the national

² International migration constituted 4% of Botswana's de facto population (1981), and 8% of the labour force aged over fifteen years (1979); 82% of these migrants being in South Africa (Botswana Government 1985a). Changes in the recruitment patterns of the South-African mines resulted in a reduction of Batswana mineworkers from an average of 28,600 between 1965 and 1978 to 16,470 in 1988.

level, as this directly influences the former.

3.2.3 Impact on the rural economy

At the national level of the economy, the movement of the productive section of the population from rural areas to larger centers in search of work has led to a decline in the rural agricultural sector. Young people on whom the rural economy was previously dependent for food production are now absent, leaving behind only the unproductive population of the very young and the elderly. It is clear that wage employment has over the years overtaken crop and livestock production as major sources of income, and the NMS findings cast doubt upon the previous assumption that the majority of Botswana's population is engaged in, and primarily dependent upon these. The study concluded that (Botswana Government 1982, vol. 1:38):

Few families (10%) are able to subsist on agriculture alone, and secondly, low agricultural returns for many farmers make it an unattractive activity in competition with other potential income sources - in particular wage income.

Brown (1980:4) confirms this trend for the Kgatleng district, where she found that people were more willing to neglect arable agriculture as soon as employment opportunities came along. Ownership of cattle remains an important source of wealth, but this reflects a highly skewed picture: 45% of rural households do not own cattle, and 5% of the wealthiest owned 50% of the cattle (Botswana Government 1974). The NMS found that 12% of rural cattle owners owned 50% of the cattle, and that only 9% of all cattle-owning households would be able to live off their income from cattle alone (Botswana Government 1982:38).

In view of the 1980's drought, these figures are likely to be even worse, and the rural economy has probably undergone a further decline. Although no recent statistics on poverty are available, it is doubtful that the situation of most households improved during the 1980's 'economic boom'. The Household Income and Expenditure survey conducted in 1985/86 shows that rural households were dependent for 50% on cash earnings and cash gifts, as compared with 23% from their own produce (Botswana Government 1988c). At the same time, the employment market has not grown proportionately with the demand for jobs, and income inequalities have certainly increased. Arntzen (1989:67) estimated that the majority of rural households still lived in absolute poverty in

1985.

In addition to the economic impoverishment of the rural economy, socio-cultural changes have also been taking place over time. These have been felt mainly in the area of the institution of marriage, household composition and organisation. A major development in this respect has been an increase in the number of unmarried mothers, changes in the form and viability of households, notably the emergence of what has been called 'female-headed households'. These changes are discussed in the following pages.

3.2.4 Impact on the institution of marriage

Various changes took place in the institution of marriage. First of all, socio-economic changes lessened the social and economic control of young people by their elders. This meant that the latter could no longer always control matters of production, marriage and reproduction as they did before. Elders could no longer always choose marriage partners for their children, and enjoy the benefits of their labour and cooperation. The possibility of marrying by Christian or civil rites, where the consent of the prospective spouses themselves was sufficient if they were over twenty one years provided some young people with a way out of parental control. This was made all the easier by the newly acquired economic independence on the part of the young; a young man was no longer totally dependent on his father to produce bogadi cattle, as he could now either pay in cash or purchase his own livestock with earnings from wage employment.

Secondly, labour migration in particular disrupted existing marriages and families because of the long absence of married men from their wives and families. Marital infidelity is said to have increased, leading to unstable marriages, deserted families and divorce. Thirdly, these changes appear to have led to a decline in the number of marriages. The migrant labour system in particular produced a trend towards late marriage on the part of young men, and the consequent creation of a large pool of unmarried women of marriageable age (Schapera 1933:86). Writing about the Bakgatla, Schapera observes that before the turn of the century the practice was for girls to be married soon after initiation, while boys had to wait between four and seven years after initiation because the latter were expected to marry girls in the regiment or

age set formed after their own. With many young men migrating to the towns to work or attending school, girls had to wait longer after puberty and initiation before marriage. According to Schapera (1933:86), the average age of marriage for men had become 25-30 years and 19-26 years for women, whereas it was previously 18-20 years for men, and even younger for girls (Schapera 1933:86). As a result, some women ended up not marrying at all.

Similar changes were observed by Roberts and Schapera (1975:26) in a re-study of a Mochudi ward forty years later. They found that the number of unmarried women of marriageable age had increased from 23% to 55%, while the corresponding figures for men were 27% to 67%. Labour migration from the ward had increased from 66% in 1934 to 78% in 1973, and was seen as a plausible explanation for this. Similarly, Kocken and Uhlenbeck (1980:53) observed these trends among the Batlokwa, where they found that there had been a decrease in the incidence of marriages. While in 1943 the ratio of married to unmarried women above eighteen years was 2.7, by 1980 this had altered to 0.5. Among the unmarried women, 45% had at least one child (see also Molenaar 1980:26).

Kocken and Uhlenbeck suggest two reasons for the trend towards late marriage. First of all, marital status is no longer essential for the attainment of adulthood, and both married and unmarried men may participate in kgotla discussions under the new rules (cf. Kuper 1970). Secondly, the acquisition of property is no longer dependent upon marriage; as we earlier observed, education and wage employment provide alternative ways to become financially independent. They observed that many single men in Tlokweng had already built their own homes, had girlfriends and sometimes children, and saw no reason to commit themselves to marriage.

Comaroff and Roberts (1977:118) make similar observations about the Bakgatla, where they did research forty years later than Schapera. They emphasise that the transformation from polygamous to monogamous marriage has had complex implications for the society. One of these has been the emergence of what they label 'serial monogamy', where instead of getting married to one woman once and for all, men establish 'a plurality of (single) unions in sequential order' (Comaroff and Roberts 1977:118). In this way, young Bakgatla men postpone marital commitment until it is convenient for them to marry. This trend is encouraged by

the ambiguity which characterises heterosexual relationships among the Bakgatla. Young men may pursue several marriage-type relationships, promise marriage if they must, but desist from formal marriage, and then refuse to construe the relationship as a marriage should a dispute ensue.

Gulbrandsen (1986:1) likewise observed changed marital strategies among the Bangwaketse, which we shall discuss in more detail in the second part of this study. According to Gulbrandsen, the young Mongwaketse migrant male is encouraged to postpone marriage and the establishment of his own household by, among other things, a favourable supply of marriageable women. Bangwaketse women, he observes, are ambivalent towards marriage, and tend to marry late or not to marry at all.

3.2.5 Increase in pre-marital pregnancy and birth

The changes observed in relation to the institution of marriage discussed above appear to have been accompanied by a concomitant increase in pre-marital sexuality and birth. Schapera had observed this as early as 1933, and in his 1934 study of Rampedi ward in Mochudi, he found that of 26 adult females in the ward, four of the six unmarried women had at least one child. Roberts and Schapera's (1975) re-study of the same ward forty years later revealed that children borne by unmarried women had increased from 12% in 1934 to 40% in 1973. The frequency of unmarried women with children had hardly increased, implying that more unmarried women had more than one child by 1973.

The increasing separation of reproduction from marriage has been attributed to several of the factors earlier discussed which we shall only summarise here. First of all, the loosening of traditional practices such as initiation, and the weakening of the traditional control formerly exercised by elders over younger people due to their absence at school or work. These young people, according to elderly informants, are more free in the towns and become accustomed to viewing pre-marital sex lightly. Secondly, the surplus of unmarried women of marriageable age created by male absenteeism, who sooner or later succumb to the advances of young men on leave from the mines, or become the concubines

of older married men who are no longer marrying polygamously³. Thirdly, the changes in the marital strategies pursued by young men and women may be seen as encouraging pre-marital pregnancy and therefore as partly responsible for the increase in unmarried mothers. The literature goes so far as to suggest that attitudes towards this development are quite lax, and sometimes even encouraging (see for example Gulbrandsen 1986:1; Ingstad and Saugestad 1987:11).

3.2.6 Changes in household composition and organisation

The changes described in the preceding pages, particularly the migration of the most productive members of rural households, have affected the composition and organisation of those households. As far as their composition is concerned, previous studies and casual observation of rural households show that their permanent residents have become the elderly and the very young, usually grandparents and young grandchildren. Although female out-migration is not as high as that of men, it is increasing, and women no longer necessarily form a large percentage of those 'left behind' (Botswana Government 1982:3).

The implications of this for the rural economy are obvious, and were earlier discussed. These household members left behind depend increasingly on remittances from those who absent earning a living from wage employment. At the same time, these households have experienced an increase in numbers due partly to the presence of the children of unmarried daughters. Kocken and Uhlenbeck (1980: 54) observe that there has been a shift from the traditional two-generation nuclear household to a three-generation household: their sample contained 36% of the latter. This increases the burden on these households, whose members as we have seen are unproductive, and depend on remittances from wage-earning members for their subsistence.

Another agent of change that has affected the structure and cohesion of rural households came from legislation passed in 1970 which introduced

3 As recently as 1986, the argument that the abandonment of polygamy 'produces illegitimate children' was used in parliament in an attempt to introduce polygamy into civil marriage (see law reform committee reports 1980 and 1986).

changes in the traditional land tenure system⁴. The Tribal Land Act removed the allocation and control of land from traditional authorities to land boards comprising a combination of local and central government authorities. This law permits people to build their homes wherever they wish, and has affected the traditional settlement pattern described earlier. Kin members no longer necessarily have their homesteads in the same part of the village: due to land pressure in their natal environment, some build their homesteads in other wards. Yet others may do so in different villages, located some distance away from their original homes. This adversely affects the close kin cooperation that lay at the basis of the traditional socio-cultural system. There is concrete evidence that the willingness and ability of kin to assist one another in socio-economic activities especially in times of crisis has been grossly eroded. Molenaar (1980:31) makes the following comments about Tsoppye ward in Kanye:

The introduction of a cash economy and wage labour has led to a partial breakdown of kinship cooperation and the fulfillment of kinship obligations. Earning a living has become more and more an individual or individual household affair. The system of mutual benefit oriented towards the group had been replaced to some degree by a more individualistic attitude.

Perhaps the most dramatic phenomenon has been the development of what has come to dominate literature on women in Botswana: the emergence of 'female-headed' households (see Botswana Government 1982; Peters 1983 and Kerven 1984). This label has been rather controversial for the main reason that the concept of a female-headed household is said to have no place in Tswana culture: traditionally, households were always headed by men. A household may appear *de facto* to be headed by an unmarried adult woman in the sense that there is no adult male who resides in it and exercises decision-making functions on a daily basis. At the same time, some man somewhere such as a father, brother or uncle may *de jure* head it, in the sense that only he may legally make certain important decisions, such as the capacity to litigate or represent the household in other traditional activities reserved for men. The objection to such a household being labelled female-headed is therefore that headship of a household implies power, which these women do not wield entirely. Secondly, if economic viability is employed as a yardstick for the

4 For a theoretical discussion of the unintended consequences of new laws, see Moore (1973) and J. Griffiths (1986).

existence of an independent household, many of the female-headed households would not qualify. Kocken and Uhlenbeck (1980:58) note that a household requires sufficient agricultural and domestic labour, as well as a cash income in order to be viable. These are resources an unmarried woman will not possess until she had reached an advanced age, and even then domestic labour and access to cattle will often still be limited. At this point, the role of children as a source of future labour becomes important, and may be linked to the increased separation between marriage and reproduction.

Another point we must keep in mind is that although the development of female-headed households is historically related to the increase in the number of unmarried mothers, these two categories do not always overlap, and should be treated as analytically separate from one another. The concept of a female-headed household should therefore be used with caution, and it is with this caveat in mind that we proceed to discuss the characteristics of these households.

The emergence of households apparently headed by unmarried adult women was first documented by Schapera (1935:213). At this time, it appears that these were households in which adult spinsters and their children lived separately from their natal families, with no fully resident adult male. Roberts (1975:263) found that since Schapera's study of the same ward nearly forty years later, two such households had emerged in Rampedi, and were headed by female members of the lineage. This is not such a dramatic increase, and Roberts does not explain what definition he used to label these households 'female headed'.

Studies conducted in the 1970's raised policy and research interest in these households, and Bond (1974) found that 8% of her sample of 204 households were headed by women. In 1978, Brown (1980:6) conducted a study among 210 Bakgatla households, and found that 35% of these were headed by women in their own right, as opposed to those headed by women on behalf of a male who is temporarily absent. These studies did not however further elaborate upon their conceptual definition of a female-headed household.

Policy interest in these households appears to have gained momentum in the late 1970's especially following the finding that 29% of all rural households were headed by women with no adult male (Botswana Government 1976b). The national census further revealed that the number of unmarried mothers had increased from 48% in 1971 to 57% in 1981. The nation-

nal migration study published the following year sharpened the focus upon these households (Botswana Government 1982). These and other studies used different typologies of female-headed households which will not be repeated here (cf. Gulbrandsen 1980; Ingstad and Saugestad 1987). The characteristics of these households emerging from the literature will now be briefly summarised.

First of all, the majority of *de jure* female-headed households tend to be over 45 years of age, and to have been married before (Izzard 1982). Most in Izzard's sample had between four and nine children, had at least one grandchild, and almost half had never been to school. In the NMS sample, the majority of female heads who did not have an adult resident male had never married, in marked contrast to those in which an adult male was present. A factor which further complicates the definition of these households is the fact that some of these women may later marry. This does not however mean that they necessarily cease to be household heads, as they may then become *de facto* heads should their husbands go away to work. Thus Izzard (1982:681) properly observes that what may first seem to be different household types may be different stages of the same household type. Furthermore, she warns against the dangers of assuming homogeneity among female-headed households, because there is a lot of variation within different categories of households in terms of access to resources and the problems they experience.

A fairly safe generalisation that is supported by the literature can however be made about the second distinctive feature of these households. This is that they are generally at the lowest end of the economic ladder: cattle ownership is lowest among female-headed households, and their ownership of land less frequent. According to the NMS, only 22% of the female-headed households own cattle, thus they are clearly over-represented in the 44 to 54% of rural households who countryside claimed not to own cattle (Botswana Government 1982:38). The low levels of land and cattle ownership among women should not be surprising because traditionally, women gained access to these through males, and not in their own right.

Similarly, their ownership of land is less frequent than that of male headed households, and even where they have land, their units are relatively small (Bettles 1980:7). The reason most women gave for not owning land was that they had not applied, followed by the answer that they were not yet married and finally that they lacked the resources to

utilise the land. The latter is confirmed by the finding that the lowest proportion of female-headed households who ploughed were those in which there was no resident adult male. This is because ability to engage in agriculture is heavily dependent upon the availability of draught power and labour, to which men have better access.

How then do these households survive, if they are engaged in the least rewarding sector of the economy, and even then their access to the means of production is limited? Brown's 1980 study found that many of these households depended solely on remittances from their wage-earning children for a living. Other studies show that these women are also engaged in all manner of income-generating activities in the informal sector such as beer brewing, where returns are low and unreliable. Izzard summarises the socio-economic position of these households as follows:

The picture which emerges is one of a highly dependent and vulnerable social group, headed by women and lacking adult males. Their low degree of participation in the rural mode of production involving land and cattle, can be contrasted with their reliance on cash (Botswana Government 1982:694).

The most recent official statistics show that 54.6% of the rural households were headed by women. These households earned an average of 130 pula (approximately US\$65) per month, as compared to the monthly average of 198 pula earned by male-headed households (Botswana Government 1988c:14). At 34% below the average, the marginal position of female-headed households can therefore hardly be over-emphasised.

The next chapter looks at the development of state law provisions intended to partly address the support problems of unmarried mothers, irrespective of whether or not they are the heads of their households.

THE NATIONAL LAWS REGARDING COMPENSATION FOR EXTRA-MARITAL PREGNANCY AND MAINTENANCE

The primary purpose of this chapter is to describe the rules of the national legal system relating to compensation for extra-marital pregnancy and the maintenance children born to unmarried women. As we saw in chapter two, these are derived from a variety of sources: customary law, Roman-Dutch law and statutory law. The first three sections of this chapter are devoted to a discussion of these rules and principles within each of these legal regimes. Attention is paid to their origins, development and the changes they have undergone.

It will be shown that contrary to the commonly held belief that uncertainty is a feature of customary law alone, the Roman-Dutch and statutory laws in this area are equally uncertain. Another area of uncertainty is that of the relationship between these three sources of regulation. It is this relationship that the fourth and final section of the chapter addresses, using some leading decisions of the high court of Botswana to illustrate this.

Like chapter two therefore, the discussion in this chapter presents these rules from the perspective of juristic pluralism, and is meant to provide the national legal background against which the subsequent chapters should be understood.

4.1 Tswana customary remedies for extra-marital pregnancy

Although the social reality has changed dramatically, the law of most Tswana communities remains to some extent based upon the ideal which links reproduction with marriage. An unmarried woman generally remains under the guardianship of her father, or some other senior male relative until her marriage, at which point she passes into the guardianship of her husband. These rules reflect the patriarchal nature of society, and ensure the control of women's productive and reproductive capacities by men. Thus the impregnation of an unmarried woman was regarded by traditional Tswana law as a wrong against her father. The term used was *tshenyo*, which literally means 'spoiling', an apparent reference to the spoiling of the woman's marriage prospects by pregnancy. The most commonly employed English translation for *tshenyo* is seduction. Although this term will be used throughout this study, it is a rather poor translation. Seduction in English is associated with the loss of

virginity, while in Tswana customary law it is based upon pregnancy. The usual procedure where an unmarried woman was impregnated was for her senior male relatives to report the matter to the family of the man alleged to be responsible. The two families would then seek to reach an arrangement suitable to both of them, in keeping with the traditional practice of exhausting domestic remedies. Should agreement be reached during these negotiations, the matter will normally be settled between the respective families. Where they cannot agree, or where the man alleged to be the father denies responsibility, the girl's family may bring an action for seduction before the headman of the seducer's ward. At the court of the headman, the matter will be heard in the customary manner, in the presence of members of the respective families, their witnesses and any adult men who wish to attend. Everyone may participate in the discussion, and the headman renders the final decision on whether the defendant is found to be the father of the child, and if so the amount of compensation he should pay to the girl's father.

In some cases, it may be agreed that the defendant marry the woman, instead of paying seduction damages. Among the Bangwato however, he was still sometimes required to give her father a beast known as *thagela*, for having 'broken through his fence'. Where he was unwilling to marry the girl, he had to deliver to her father the number of cattle specified by the *kgotla*, which varied from one group to another. Even within groups, the number of seduction cattle varied depending on the circumstances of the case. Except among the Bangwato, the action is generally not available if sexual relations with an unmarried woman do not result in pregnancy (Roberts 1970). Furthermore, the action was generally available only in the case of a woman's first pregnancy, unless the same man was responsible for the second pregnancy as well.

The basis for the action and the purpose of the cattle damages that may result from it have been the subject of conflicting interpretations by writers and informants alike. Some are of the view that these cattle were meant to compensate the girl's father for the reduction in the number of *bogadi* cattle he would have received had his daughter not been seduced. Others view the damages as primarily meant for the child's maintenance. Schapera (1938:266) says that the cattle paid to the girl's father must be used for the support of the child: they are held in trust for the girl and her child, and do not form part of the father's estate on his death. In some cases, he observes, she may take

them with her on marriage to someone else, although this appears to vary depending on the circumstances.

What appears likely is that the remedy serves both purposes, that is as a punitive measure, as well as to establish the child's right to maintenance at its mother's home. This conclusion is in our view strengthened by the broader social function of cattle in relation to marriage, reproduction and support. Where a woman is married under Tswana custom, *bogadi* cattle are produced by the husband's family to the family of the wife. The purpose of *bogadi* was both to legitimise the children in their paternal descent group, and to secure their rights to support at their mother's descent group. The latter function became important in times of marital crisis, when the woman and her children could return to her descent group and expect their support, as they had received her *bogadi*. Seduction cattle may likewise play a similar role in entrenching the extra-marital child's right to support from its paternal grandfather's descent group.

Even without the delivery of *tshenyo* cattle however, a child born to an unmarried woman is still regarded as a child of its mother's descent group, with the attendant rights and obligations flowing from such affiliation. He uses their family name and adopts their totem; they must raise him and ensure that he goes through the normal rites of passage in life. Should his mother remain unmarried, he remains in her descent group throughout life. If she marries, he may become a member of his stepfather's descent group should he adopt the child. Otherwise the general rule is that a child borne to an unmarried woman is the primary responsibility of the mother's descent group. Thus any subsequent children she may have, and for whom no action for seduction lies, are still entitled to support from their mother's family. Maintenance in the Tswana ideal was thus not a distinct legal right available to an unmarried woman against the father of her child; this was the responsibility of her descent group, whose head could obtain seduction damages as earlier pointed out.

These general principles of Tswana law on remedies for extra-marital pregnancy have come under pressure from the socio-economic changes described in chapter three for some time now. Many Tswana communities have therefore adjusted their laws and practices in response. This has led to even more pluralism within communities as people seek ways of negotiating appropriate solutions to increasing extra-marital pregnan-

cy.

On the institutional side, previous research shows that while customary courts around the country have responded differently to these changes, most have made some alterations in the traditional requirements. Roberts (1972a) observes for example that all ward courts in the principal *merafe* he investigated in the late 1960's were willing to hear cases without insisting on the traditional participation of senior members of both families, should this not be possible. In the case of the impregnation of an unmarried woman, he observes that most customary courts by then permitted the woman herself to bring an action against the man she alleges to be the father of her child.

Yet another development is for some customary courts to award compensation with respect to second and subsequent children, notably at the Bakgatla chief's court (Comaroff and Roberts 1977; personal communication with Chief Linchwe, 1986). This suggests that some customary courts now see the remedy more as providing for the support of the child than as compensating the girl's father. We shall find out in subsequent chapters that the chief's court at Kanye has not been as innovative in adopting both these rules.

The next section presents the rules and principles of the Roman-Dutch law regarding the impregnation of an unmarried woman and the maintenance of her child.

4.2 The Roman-Dutch law approach to extra-marital pregnancy

Like customary law, Roman-Dutch law regarded extra-marital pregnancy and birth as an irregularity, and provided nearly similar remedies. Thus Roman-Dutch law provided the man with a choice either to marry the woman or pay damages for seduction (van der Linden, Inst. 1.16.4). According to Huber (II.10.2), the punishment under Imperial law was very harsh indeed: *stuprum*, which included both seduction of a virgin and that of a widow, could earn a man of stature the confiscation of half his property, and a man of straw public corporal punishment with banishment. He laments the demise of this harsh punishment in the following words:

But at the present day, to the shame of this century, unchastity is more mildly treated. In our Ordinance we have no penalty for it, other than the fine for mere fornication, which is estimated at 50 guildens of Carolus in the second article of the tenth title to the second book, to which we may add that the seducer, if he has slept

with a decent spinster, is obliged either to marry or to dower her; that is provide her with a suitable marriage portion, according to her quality (p.423).

Children borne to unmarried women were labelled bastards who were in the old law not only excluded from honourable offices, but also could not testify against the legitimate (Grotius 1.12.7). Although these disabilities were removed with the passage of time, extra-marital children were still considered as having no legal fathers; thus they had no rights to succeed to the latter's property after his death. They had rights only to succeed to their mother and her blood relatives, because '*eene moeder maakt geen bastaard*' or 'from the mother's perspective, the child is not illegitimate' (Grotius 2.7.8). Thus like Tswana customary law, illegitimate children were effectively their mothers' families' responsibility.

The Roman-Dutch law approach was however different from that of the Tswana customary law in at least three respects. First of all, the right to proceed against the seducer and any damages awarded in Roman-Dutch law belonged to the woman herself, unless she was a minor. Secondly, the action for seduction was available even if pregnancy did not result, as long as the woman could prove that she had been a virgin before the seduction (Morice 1905:248). Thirdly, the action for seduction in Roman-Dutch law was separate from that for the recovery of maintenance and other financial claims relating to a child who may result from the seduction. A woman who bore a child as a result of the seduction could sue the man for the expenses she incurred during confinement, as well as for maintenance of the child. The procedure for obtaining maintenance under the Roman-Dutch law was:

made by an extraordinary method of pursuit and one to be summarily conducted that the magistrate shall give a hearing, shall fix maintenance in accord with the extent of the resources and class of those who are to be maintained and of those who ought to maintain them, and unless it is provided, shall afford it by seizure and selling up of pledges to those who have to be maintained (Voet 48.5.6).

In cases where the alleged father of the child denies responsibility for the pregnancy, certain rules of evidence come into operation. If the man denied sexual intercourse, the burden was on the woman to prove the seduction. If he admits sexual intercourse but denies paternity, the woman's credibility is strengthened, and it is no defence for him to bring proof that the woman was intimate with other men, or that his association with her was short-lived (Grotius 1.12.7).

These strict principles of the Roman-Dutch law on the establishment of paternity appear to have led to conflicts of opinion among Roman-Dutch authorities (Davids 1965:448). This conflict is reflected in the decisions of the South-African courts and academic writing on the matter of proof of paternity. The dominant South-African legal position is summarised by Boberg (1977:327) as follows:

Central to the proof of paternity in civil or criminal proceedings is the woman's evidence. Here the law's attitude is best understood by viewing the proceedings in two stages: before and after the proof (or admission) of intercourse. Recognising that the acceptance of the woman's unsupported accusation could expose many eligible but innocent males to paternity suits which they might find it difficult to defend, the law requires corroboration of the woman's story. Once it is proved (or admitted) however, that the man she accuses had intercourse with her at any time - even a time when, having regard to the period of human gestation, such intercourse could not possibly have produced the child in question - the law immediately loses sympathy with him. Branded as a fornicator, he is presumed to be the child's father unless he proves that he cannot be.

This approach was established by the South-African appellate division in the leading case of *S v Swart*¹. It has however been criticised as too strict and unfair some courts going so far as deciding against it (Davids 1965:448). The opposite approach has been that the onus of proving that he is not the father only shifts to the man after an admission or proof that he had intercourse with the woman at a time when it could have led to the birth of the child². Since *S v Swart* (supra) was decided by the highest court in South Africa, the strict position regarding the presumption of paternity prevails as the law in that country.

In view of the date of these laws, their origins in a different society, and the fact that they passed through another medium before their reception, the question arises as to the extent to which they actually apply in Botswana. Because Roman-Dutch law during the colonial period applied mainly to non-Africans, these laws did not affect the majority of the local population, who continued to live according to their own laws. Although this is still largely the case today, a combination of socio-economic change and post-independence legislation has brought

1 1965 (3) SA 454 (AD). For another case applying this rule, see *Holloway v Stander* 1969(3) SA 291 (AD). A staunch supporter of this approach is van den Heever (1954:63).

2 See *R v Swanepol* 1954 (4) SA 31 (O) and other cases cited by Boberg (1977:328).

some local people within the sphere of Roman-Dutch law. This process took place in a rather curious manner because it came via the medium of a statute transplanted from English law. This statute, which now forms an important source of the law of maintenance is discussed in the next section.

4.3 The statutory approach to extra-marital pregnancy

4.3.1 Background to statutory intervention

Statutory intervention in the area of extra-marital pregnancy and maintenance was justified by reference to two related factors. First, the socio-economic changes discussed in chapter three, and secondly the resultant inadequacy of existing legal remedies. Presenting the Affiliation Proceedings Bill to parliament, the attorney general indicated that it was 'a major exercise in law reform, which to a large extent cuts through the whole of customary law' (Botswana Government 1970:68). The main aim of the bill was to provide a more appropriate machinery for unmarried women all over the country to themselves sue the fathers of their children for maintenance. He explained that the customary law approach had become more and more difficult to enforce because of the mobility of people in search of jobs. The Roman-Dutch remedies, on the other hand were unknown to most people, as they had only recently been made available to Africans. The bill was however not intended to replace these two sources of law, but rather to provide a more straightforward machinery for the making of orders relating to 'illegitimate' children.

The parliamentary debates during the bill's second reading were rather superficial and cynical, although the majority of members supported the bill. The few who opposed it did so mainly on the grounds that it would encourage women to be immoral, 'prostituting themselves' so they could obtain maintenance payments from men. Others felt that most Batswana men did not earn enough to be able to afford the R25 monthly payment proposed as a maximum by the bill³. With the assistance of several government ministers and MPs, notably Chief Bathoen Gaseitsiwe, then MF for Kanye, the attorney general defended the bill before parliament

3 R stands for the South-African Rand, which was legal tender in Botswana before 1976. In 1989 it was worth approximately 50 UScents.

with the following remarks:

It is considered Mr Speaker that this is a major law reform to protect the womenfolk of this country and also protect or discourage the menfolk of the country because you will appreciate that no man in his right senses will wish to take the risk of having to pay R25 out of his meagre earnings for a child outside his own family. It is therefore a general improvement on parties concerned, woman and man that it is in their interest that if they wish to have children they only have to proceed and go to the magistrate or to the church and marry and have children of their own without attracting the provisions of the Affiliation Bill (Botswana Government 1970:69)

The bill thus appears to have had a double purpose: first to protect women and children, and second to discourage illegitimacy. The explanation appears to have pacified the few MPs who opposed the bill, and the Affiliation Proceedings Bill became an Act of Parliament a month later on 25th of November 1970. Like other family law statutes of its time it was based upon the English Affiliation Proceedings Act of 1957, with only a few alterations. This Act was therefore an attempt at bringing about social change through law reform, a common policy perspective which J. Griffiths (1990:4) criticises and labels 'instrumentalism'. The success or failures of this attempt are dealt with in subsequent chapters; the following sections discuss some of the Act's major provisions.

4.3.2 Initiation of proceedings

Process under the Act may be initiated by a single woman (who is defined to include a widow and a married woman who is separated or living apart from her husband) who is pregnant, or who has delivered a child. Such a woman may make a written complaint on oath to a magistrate grade one for a summons to be served on the man she alleges to be the father of her child (section three). The Act makes itself financially accessible to its beneficiaries by providing that no court fees are payable for anything done under it, process being served free of charge by a member of the Botswana police, who is vested with the powers of a court messenger.

Section four requires that such a complaint generally be made within twelve months of the child's birth, although it may be brought at any subsequent time if the alleged father has within twelve months after the birth maintained the child. Although the parliamentary committee appointed to consider amendments to the Act in 1976 recommended the

extension of this twelve months period, this was not adopted in the 1977 amendment (Botswana Government 1976a). Instead, the amendment left the general twelve months limitation intact, but provided two new situations in which a complaint could be brought later than twelve months after the child's birth. First, the man alleged to be the father must have done or said something with the dishonest intention of inducing the woman from not making a complaint during the twelve months following the child's birth (section 4(1)(b)). As we shall find out later in this chapter, this provision has led to conflicting interpretations in the courts, with adverse consequences for unmarried women and their children.

The second situation where an action may be brought later than twelve months is where the father was absent from Botswana during the first twelve months following the child's birth (section 4(1)(c)). In such cases, the woman may make a complaint within twelve months of his return.

4.3.3 Powers and procedures of the court

Only courts presided over by a magistrate grade one or above may hear affiliation cases (section 6(1)), an unrealistic provision in view of the shortage of magistrates. Whether the defendant consents or admits to being the child's father or not, the court is required to hear the evidence of the mother and any other evidence that may be produced, including that tendered by, or on behalf of the defendant⁴. The mother's evidence must be corroborated in 'some material particular' by other evidence to the court's satisfaction, before the defendant is adjudged the putative father of the child (section 6(2)).

Should the court consider it suitable, it may make an affiliation order against him, for the payment of a sum of money weekly or monthly not exceeding P5 a week or P25 a month for the maintenance and education of the child⁵. This was raised to P10 and P40 respectively by the 1977 amendment, and provisions were made for the award of lump sums instead of weekly or monthly installments.

4 Section 6(1). This jurisdictional limitation is not reasonable, in view of the shortage of magistrates countrywide.

5 P stands for 'pula', the name of the currency in Botswana, which was roughly equivalent to 50 UScents in January 1990.

The introduction of lump sum payments instead of monthly installments was inspired by the recommendations of members of the public to the parliamentary select committee (Botswana Government 1976a). Many members of the public who were consulted or made written submissions to the committee, were opposed to periodic payments for several reasons, some less convincing than others. First, many people were of the impression that these amounts were very large, which was actually not the case. Secondly, it was argued that periodic payments might break the families of married men, as they are not secret, and may encourage them to maintain contact with their girlfriends. These two reasons reflect male attitudes towards their extra-marital children, whom they do not consider really as their own. The vast majority of those who gave evidence were male (60 males to 24 females made oral submissions), and their views were very dominant.

The third and most valid argument in favour of lump sums was that they were better suited than periodic payments to men who were not in regular employment. Finally, many were of the view that lump sum orders were less problematic to enforce than monthly installments, a view we shall test in the analysis of the Kanye material.

The duration of orders is restricted to the child's thirteenth birthday, but may be extended to sixteen years (but not longer) if the child is still attending school. Before the 1977 amendment, the general period was sixteen years, while the maximum age beyond which orders could not go was 21 years (see section ten). The reasons for the change are not apparent from the debates on the bill.

4.3.4 Enforcement provisions

In an attempt to provide orders made under the Act with an enforcement mechanism, section eleven gives such orders the force of a civil judgment, enforceable under the rules of court. It further provides that a garnishee order may be issued against future earnings in respect of installments of maintenance not yet due under a maintenance order. As we shall find out later, magistrates hardly issue such garnishee orders. Further enforcement provisions are contained in a separate statu-

te, the Maintenance Orders Enforcement Act⁶. This statute makes failure to comply with a maintenance order a criminal offence punishable by up to one year's imprisonment. The only defence to such a charge is that the defendant lacked the means to pay. Failure to notify the beneficiary of an order or the clerk of the court is also an offence similarly punishable by up to one year's imprisonment. A perusal of high court records shows that imprisonment is generally avoided as a method of enforcement. It is more common for custodial sentences wholly suspended for some months to be issued, on condition that the defendant pays the arrears within that period of time⁷. This practice, which is also common at the magistrate's court in Kanye, is based on the reasoning that sending the defaulter to prison would be tantamount to 'killing the goose that lays the golden egg'⁸. We shall find out in subsequent chapters that men prosecuted for failure to comply with maintenance orders in Kanye have taken advantage of this and devised further delatory strategies.

The next section address the question of how the various sources of law discussed above fit together in the national legal landscape.

4.4 The relationship between the plural provisions for extra-marital pregnancy

The preceding sections have presented a picture of several remedies which co-exist within the Botswana legal system for extra-marital pregnancy and maintenance. A pertinent question becomes how these fit in together; in other words which applies when, and can they be applied to the same case? This question, which forms one of the cornerstones of this study, is a problematic one and will be addressed only superficially at this stage. It will be answered mainly by reference to the

6 Cap. 29:04, Laws of Botswana. The Act also covers maintenance orders made under the Deserted Wives and Children (Protection) Act, all maintenance orders made by the high court, as well as foreign orders confirmed under the Maintenance Orders Act.

7 See for example *Kalaben vs The State*, Criminal Appeal 138 of 1983 and *Edward Molefi vs The State*, Criminal Appeal 137 of 1983; both unreported.

8 Interview with J.M.Seema, former Kanye magistrate, in Serowe, Central District, 14.9.89.

Affiliation Proceedings Act, as it introduced the most recent changes in the law. Thus the following sections examine the relationship between the Act and the customary law on the one hand, and that between the Act and the Roman-Dutch law on the other.

4.4.1 The relationship between the Act and customary law

This issue appears to have occupied the minds of the legislators passing the Affiliation Proceedings Act from the very beginning (see Botswana Government 1970:68). The initial concern was to clarify the relationship between awards made under the Act with those made under the customary law. Thus the original section 6(3) required the court, in deciding the amount of money to be awarded as maintenance, to take account of any award of money or property of any kind made by a customary court in respect of the birth of the child. This proved difficult to put into practice, and in any event did not sufficiently address the question of the effect of the Act on customary law actions for seduction.

Questions arising in practice included whether a magistrate's court could entertain the complaint of a woman whose father had obtained (or was in the process of seeking) damages for her seduction in a customary court. This question was addressed by the select committee in 1976, and in their report they indicate the concern among members of the public about 'trial in two courts'. The public did not wish the customary action for damages done away with; in fact, many were of the view that only customary law should apply to such cases. They felt that it was not fair for a man to be 'tried twice for the same case', that is being brought before a customary court for seduction and a magistrate's court for maintenance. The assumption behind this complaint is that the two remedies are the same, or that they address the same needs. Only one written submission to the committee addressed itself critically to this issue:

It is important to appreciate from the onset that we are in fact dealing with two different problems, i.e. discrepancies in the customary courts fines in livestock for damages and the installments for maintenance (Affiliation Proceedings 1970). It is also equally important to appreciate the fact that although we are trying to cater for the child's welfare, the reasoning behind the two approaches

is different and parallel⁹.

While conceding that 'in reality the question is slightly (more) complex than just an issue of trial twice on the same matter', the committee's final recommendation was quite unhelpful. They merely suggested that an amendment should 'provide for exhaustible remedies in or forum only' (p.3). The legislators' response was equally unhelpful: section 6(3) of the Affiliation Proceedings Act was repealed, and was replaced by the following new section thirteen:

No court shall have jurisdiction in respect of a complaint under section three where proceedings by the complainant for substantially the same relief as provided by this Act had been instituted in relation to the same child in a customary court, and the final determination of those proceedings is still pending or has been made upon the merits.

This provision was clearly intended to prevent a situation in which a man was brought before two courts for the same child, or in legal parlance *res judicata*. It also appears that the legislators were keen to prevent 'forum shopping', where parties would move from one court to another in search for the remedy that gives them maximum gain, or obtain double remedies¹⁰.

But that is all that can be said with any certainty about the provision and its legislative background. The terminology employed by section thirteen is vague and unnecessarily legalistic, especially in its failure to define precisely what is meant by 'substantially the same relief'. It will be remembered that customary law awards in respect of children borne by unmarried women are essentially based upon the wrong of seduction, and that it is her guardian who may claim damages. This begs the question whether seduction damages, which not go to the child's mother but to her father, are substantially the same as the relief provided by the Act: maintenance. We also earlier noted the changes in this traditional approach were taking place unevenly around the country, so that some customary courts have retained the traditional seduction-based approach, while others have altered it into or

9 Memorandum to the select committee from B.K. Temane, the district commissioner, 25.5.1976 (Botswana Government 1976b:66).

10 See the report of the select committee on the Act (p.10). We shall find out later that this has not prevented some litigants from doing this. Moreover, they engage in other forms of strategic manipulation of the two systems beyond the imagination of the committee.

closely resembling a maintenance action. In the latter case, one could reasonably argue that the two actions were substantially the same, while the former would appear to be a rather different remedy. In view of these observations, the term 'substantially the same relief' which the Act employs takes us no further in clarifying the relationship between itself and claims made under the customary law. Although the question came before the high court in *Makwati vs Ramohago*¹¹, it was unfortunately not decided. In this case, the parents of a woman had obtained four head of cattle for her seduction in a customary court. When she subsequently brought an affiliation complaint against the same man before a magistrate, the latter dismissed her claim on the basis of section thirteen. The man appealed to the high court, which sent the case back to the magistrate for retrial, directing the magistrate to call for the record of the magistrate's court in order to determine whether the claim was for 'substantially the same relief'. The judge did not however venture any opinion on the meaning of the phrase, and thus deprived us of the opportunity to have the matter discussed at a superior court level¹².

As we shall find out when we discuss the Kanye case materials, this question is crucial, and the resulting uncertainty has had adverse consequences for single women and their families. Because it has thrown the law into such a confused state, it results in those who are ignorant of it losing rights of action, while it encourages those who are aware of it to select the forum which best suits them. It has also caused jurisdictional conflicts between customary and magistrates' courts (case twenty one).

4.4.2 Relationship between the Act and Roman-Dutch law

Although they have more in common with one another than with customary law, the relationship between the Affiliation Proceedings Act and the Roman-Dutch law in the area of extra-marital pregnancy is equally uncertain. One of the reasons for this uncertainty is that the Act is based upon English law, which is often quite different from Roman-Dutch

¹¹ Civil appeal 10/1983 (unreported).

¹² For a fuller discussion and recommendations on the interpretation of this provision, see Molokomme (1987c:133).

law (cf. Morice 1905:247). Secondly, the Act makes no mention of the precise effect of its provisions on the Roman-Dutch law. Because of the rule of construction that a statute alters the common law only when it uses specific language to that effect, it may be said that those provisions of Roman-Dutch law not specifically repealed continue to apply. But this is not very helpful in this case because nowhere does the statute refer to Roman-Dutch law. Instead, it introduces concepts and procedures which are different from, or non-existent in Roman-Dutch law, without saying what their effect is.

Two issues which have regularly come up in the high court may be selected to demonstrate the problems brought about by the coexistence of Roman-Dutch and statutory remedies in this area. These are the rules and principles relating to the establishment of paternity and the period within which maintenance actions may be brought. These two categories of rules and their interpretation by the high court in Botswana are discussed below.

4.4.2.1 The establishment of paternity

In section 4.2, we discussed the Roman-Dutch principles for the establishment of paternity, and the conflicting interpretations of these in the South-African courts. What then is the situation in Botswana law and which line have the courts of Botswana followed? Although it was passed at a time when the South-African controversy had been ongoing for some years, the Affiliation Proceedings Act did not address itself squarely to the issue. This is the unsatisfactory result of the style of law reform in Botswana, which involves little if any research on the legal position and lessons learnt in related jurisdictions¹³. The Act simply copied the English provision, which contained only the following superficial references to the procedure for proof of paternity:

On the hearing of a complaint under section three the court shall hear the evidence of the mother (notwithstanding any consent or admission on the part of the defendant) and such other evidence as may be produced and shall also hear any evidence tendered by or on behalf of the defendant.

If the evidence of the mother is corroborated in some material particular by other evidence to the court's satisfaction, the court

¹³ An appreciation of the South-African controversy might for example have led to the enactment of a definite provision in the Affiliation Proceedings Act on the position in Botswana.

may adjudge the defendant to be the putative father of the child and may also, if it thinks fit in all the circumstances of the case, proceed to make against him an affiliation order (section 6(1) and (2) of the Act).

It is noteworthy that the Act makes no mention at all of the controversial presumption of paternity which arises on an admission of intercourse by the man; the above provisions only refer to corroboration. How then have the Botswana courts reconciled the provisions of the Act with the uncertain Roman-Dutch law position? In the following pages, we discuss a number of leading high court decisions which deal with this issue.

The link between the Roman-Dutch law presumption of paternity and the Act's requirement for corroboration was elucidated by Judge Edwards in *Moathodi v Oduetse* as follows (1978 BLR 33:35):

Mr Mbeki, for the Appellant, sought to argue that section 6(2) of the (Affiliation) Act excluded the operation of the presumption. I cannot follow the argument. The admission of intercourse, bringing with it the presumption of paternity is a most effective form of corroboration.

A closer examination of the legal situation in Botswana on the paternity issue shows that the same controversy to be found in South-African law has dodged the high court of Botswana. Initially, the strict approach laid down in the South-African case of *Swart* (supra) was favoured, as the following excerpt from Judge Edwards' judgement in *Moathodi v Oduetse* (supra) shows:

...an admission by the man indicated as the father of her child by the mother (the respondent was found to be a credible witness) that he had intercourse - no matter when - with the mother creates a presumption that he is the father and casts upon him the burden of proving that it is impossible for him to be the father. This was recognised in *S v Swart* 1965 (3) SA 454 (AD), a decision with which, with respect, I agree.

The following passage from the South-African case of *S v Jeggels*¹⁴, is however the most often cited by Botswana high court judges as the correct Roman-Dutch law position (1962 S.A. 704:706):

The common law is very clear on this point. *Grotius* stated that, if a man admits intercourse, the woman is to be believed in her identification of the father, even though she had intercourse with others. Moreover, even if the man protested that the date of intercourse was only a month before the confinement, or as much as a year before the confinement, this could not avail him, as he was not to be believed as to the time which he might fix upon in order to free himself. (*Grotius* S.36.3; *van Leeuwen*, 4.37.6; *Voet* (48.5.6)... In *Rex v Pie*,

¹⁴ 1962 SA 704, by Judge Rosenow, at p.706.

1948 (3) SA 1117 (O), *van den Heever J.P.*, (as he then was) refers *inter alia* to the authorities quoted above and states that the effect is to create a presumption that the man pointed out as the father by the mother is in fact the father, and that such a presumption can only be rebutted by clear proof (e.g. that the accused was outside the country during the period of gestation; or that he was, and is, impotent; or by means of a blood test, etc.)

This was held to be a correct statement of the Roman-Dutch law by the Botswana high court in the case of *Lardener v Mosege*¹⁵. Although the appellant admitted that he had sexual intercourse with the respondent, he countered that he had had a vasectomy, and was as a result infertile at the time of the intercourse. He tendered as proof of his infertility the evidence of a medical doctor who had performed a sperm test on him as well as the fact that his wife had not conceived ever since the operation, although she had used no contraceptives. A magistrate had nevertheless adjudged him the father of the respondent's child, a decision against which he appealed to the high court.

Dismissing the appellant's claim, the high court stated that under the common law of Botswana an admission of intercourse by a man pointed to by a woman as the father of her child raised a presumption that he was in fact the father. Using *The State v Jeggels* (supra) as authority, and citing the above quoted passage in full, the judge indicated that the presumption may further be rebutted if it can be shown that the woman is not worthy of belief. Despite the fact that the respondent was what the judge called 'a woman of easy virtue', the court confirmed the decision of the magistrate, reasoning that appellant had not produced sufficient proof of his infertility to rebut the presumption of paternity. According to the high court, the appellant should have produced proof of the success of the vasectomy operation in order to displace the presumption.

The decisions in *Lardener's* case and *S v Jeggels* were followed by the high court in a number of subsequent paternity cases¹⁶. In *Gomotho v Selelo* (supra), the Roman-Dutch law presumption of paternity was held to have arisen following an admission of intercourse by the appellant. He however sought to rebut the presumption by alleging that he had used a preventative during such intercourse, to which the court responded:

¹⁵ Civil appeal 1 of 1974 (unreported).

¹⁶ See among others *Kalyvas v Dire* 1975 (1) BLR 51 and *Gomotho v Selelo* 1977 BLR 86.

The Senior Magistrate referred to *The State v Jeggels* (supra), which is relevant to this appeal. It was there noted that the fact that some form of preventative was said to have been used was not sufficient to rebut the presumption referred to above. The appeal is accordingly dismissed.

The above cited decision, along with *S v Jeggels* (supra), was followed in *Mampane v Mashiakgomo*¹⁷ to dismiss an appeal by a man who admitted sexual intercourse but insisted that he was not the child's father. Similarly, a man who put the date of intercourse outside the gestation period was nonetheless held to be father of the respondent's child, because this was insufficient to rebut the presumption of paternity¹⁸. Once again, the decisions citing the Roman-Dutch authorities referred to above, especially *S v Jeggels* (supra) were used as a basis for these decisions.

The strict application of the Roman-Dutch law presumption of paternity was first criticised in *Matenge v Ramadi*¹⁹ in the following terms:

The rule of evidence, admittedly a somewhat controversial one, enunciated in *Jeggel's* case does not, in my view, establish a presumption of paternity contrary to the course of nature. What it does is to make an admission by the defendant that he had sexual intercourse with the complainant at a time which could not possibly have resulted in pregnancy corroborated by the complainant's evidence that the parties had intercourse at a time which could reasonably have led to that pregnancy.

Chief Justice O'Brien Quinn (as he then was) took this change of approach on the part of the high court further in the case of *Otshabeng v Gopolang*²⁰. In that case, the appellant had been adjudged by a magistrate to be the putative father of respondent's twins. Whilst appellant admitted intercourse, he alleged that this had happened four months before the respondent conceived, and that in any event the respondent had affairs with other men. On appeal to the high court, the chief justice reviewed previous decisions in both South Africa and Botswana applying Roman-Dutch law on the establishment of paternity. He noted that the decision in *S v Jeggels* (supra) had been followed in

17 Civil appeal 51/1982.

18 *Mosarwe v Maseba* 1982 (2) BLR 70. See also *Maurice v Ralefala* unreported civil appeal of 1982, high court, where the defence that different men had also had sexual relations with the respondent was held to be insufficient to displace the presumption.

19 Civil appeal 9/1982 (unreported), Botswana high court.

20 Civil appeal 11/1984 (unreported).

Botswana in various cases, but that it had been questioned in *Matenge v Ramadi* (supra).

In the chief justice's view, *Jeggel's* case places the matter too highly; the presumption of paternity is a rebuttable one, and can be rebutted by the defendant's evidence that intercourse with the plaintiff had not taken place at the time of conception. In support of this, the chief justice cited older South-African cases applying the Roman-Dutch law²¹. Although he did not wish to depart from established authority, the chief justice indicated that he preferred the approach of these older authorities to that used in *Jeggel's* case and the Botswana cases following it.

The exact state of the law in this respect will remain undecided until it is resolved by the Botswana court of appeal, which has not happened so far. However, it appears from the foregoing discussion that recent opinion at the high court favours a less strict approach to paternity cases. This is a departure from the position set out by the South-African appellate division in *Swart's* case. Although there have been no decisions at the high court since *Gopolang* (supra) addressed to this issue, the criticism of the strict application of the presumption of paternity by the former chief justice in *Gopolang's* case might indeed be a sign that the Botswana high court will in the future pursue a different interpretation of the Roman-Dutch law than the South-African courts.

It is also noteworthy that although all these cases were originally brought under the Affiliation Proceedings Act, its provisions have not been very helpful in deciding issues of paternity. This is because these provisions are superficial, so the high court has used Roman-Dutch principles to elaborate upon them. In issues of paternity therefore, the high court has attempted to forge a relationship between Roman-Dutch and statute law which is complementary. There are other aspects however in which the statute has come to enjoy a monopoly of application, such as the time limitation within which complaints may be brought, which we discuss briefly below.

21 These were *R v Swanepol* 1954 (4) SA 31; *R v Hoffland* 1928 CPD 81; *de Wit v Uys* 1913 CPD 653; *Nelson v Schneider* 1930 (2) WLD 177 and *E v E* 1940 TPD 333.

4.4.2.2 Time limitation for affiliation complaints

While the Roman-Dutch law does not lay down a time limit within which maintenance cases may be brought, we already found out that the Affiliation Proceedings Act does. How then have the courts reconciled these different positions? The answer to this question is important because as shall become clear, it has serious implications for the rights of women to bring maintenance claims on behalf of their children. This is another area in which controversy and uncertainty have reigned, at the level of both the magistrates' and high court. In this final section, we discuss the manner in which the high court has handled the issue. The first case in which this issue arose at the high court was *Moatlhodi v Oduetse* (supra). The appellant had been found by a magistrate to be the putative father of the respondent's child, even though she had brought the complaint twelve months and three days after the birth of the child. Appellant used this three day delay as one of the grounds of appeal to the high court. Judge Edwards decided that the question before him was whether the section laying down a twelve months limitation should be regarded as peremptory or directory. If it were held to be peremptory, he reasoned, strict compliance with it was essential, whilst if it were held to be merely directory, substantial compliance would suffice. After reviewing various authorities dealing with the interpretation of statutes, the court decided that the section should be interpreted in such a way as to best ensure the attainment of the objectives of the Act. According to Judge Edwards:

If section 4(1)(a) is to be regarded as peremptory - if substantial compliance is not to suffice - the consequences of that view are likely to be needlessly frustrative. A complainant who has unassailable grounds for an order will be disentitled to obtain one if, through ignorance or over sight, she is only one day late in making her complaint; and in such a case the illegitimate child, for whose purpose the Act was enacted, will stand to lose. At common law both parents are responsible for the support and education of illegitimate children. The Act does not extinguish or supersede the child's right to maintenance. (emphasis added)

The court thus decided that the time limit fixed by the legislature was directory and not peremptory; that therefore substantial compliance with it was sufficient. The magistrates order was confirmed, and the appellant lost his appeal.

This liberal interpretation of the time limitation laid down by section four of the Affiliation Proceedings Act was however rejected four years

later by Corduff, J. in *Sichinga v Phumetse*²², where the complaint was made five weeks after the child's first birthday. A magistrate had nonetheless awarded an affiliation order in favour of the respondent, on the basis that the father had been maintaining the child until it was ten months old. The magistrate had also relied on *Moathodi v Oduetse* (supra) which held that the limitation was directory and not peremptory, and therefore that substantial compliance with it was sufficient. Judge Corduff reasoned that if the father had supported the child until it was ten months old, this was not consistent with the inference of a dishonest intention which is required by section 4(1)(b). The mother, according to the judge, had ample time between the time when the father stopped to maintain it at ten months of age, and when it reached twelve months. Rejecting the approach of *Moatlhodi's* case, the judge said that while he felt the greatest sympathy for it, it could not be justified. He indicated that in England, from where the Botswana Act was copied, a similar limitation of time had been strictly interpreted, and he saw nothing which dictated a contrary interpretation in Botswana.

I must respectfully disagree with Judge Corduff's approach to this matter: first of all, it is insensitive to the social reality in Botswana to adopt the interpretation of the English courts. In Botswana, it is normal and common practice in family matters to attempt to resolve disputes within the family. Customary courts actually require this before disputes can be brought before them. As the Kanye case studies will show, the process of negotiating compensation for pregnancy and maintenance may take many months and even years. Previous research has shown that most women first seek relief from the customary system through their families, and only when this fails do they resort to the magistrate's court (A. Griffiths 1984; Brown 1985). By that time the twelve months limitation will usually have run its course.

The second reason why the strict approach is inappropriate is because in England, the initial time limitation in England was in 1971 lengthened from one to three years, so that the two sections were no longer exactly comparable. In 1987 the English limitation was totally removed by the Family Law Reform Act. In view of these legislative developments in England, it is surprising that judges in Botswana should continue to apply standards that have, for good reasons, been abandoned by the

originators of the legislation. It also illustrates the weakness of the Botswana law reform machineries, and judicial ignorance of current legal developments elsewhere.

As Judge Edwards in Moatlhodi's case correctly pointed out, such a strict interpretation is also counterproductive and prevents children from benefitting from the Act for technical reasons. Thus some magistrates who deal with affiliation cases on a day to day basis are more sympathetic and often allow late cases to proceed as long as the man does not object. Men who wish to avoid liability and have legal advice have however continued to succeed by appealing to the high court. The strict legalistic approach to interpreting the time limitation has unfortunately been consistently applied at the high court since Sichinga's case.

Judge Hannah agreed with it in *Makwati v Ramohago* (supra), where the woman's application was four months late. Citing Sichinga's case with approval, the judge dismissed appellant's claim on the basis that the twelve months limitation was peremptory and not merely directory. This strict approach appears to have become firmly established, as it has since been followed in two other cases, *Tom v Kealotswe* and *Kgamane v Diteko*²³, where complaints were brought out of time because the fathers had supported the children for long periods of time. In both cases, the judges dismissed the claims, reasoning that the relevant section of the Act required the fathers to have been acting dishonestly, a conclusion which was impossible to reach on the basis of their long record of supporting the children. That section 4(1)(b) of the Affiliation Proceedings Act as amended in 1977 is more of a hindrance than a help to single mothers and their children is resignedly accepted by Hannah, J. in *Kgamane v Diteko* (supra):

While I have very great sympathy for the plight of any young mother who, through no real fault of her own, finds herself having to bring up a child without assistance from the father, so long as the provisions of section four remain as they are there will be many cases where the court can do nothing (p.15).

The hard legalism of high court judges in late cases is however most clearly expressed by the following passage from Judge Corduff in *Sichinga v Phumetse* (supra at p.163):

I appreciate the predicament of Magistrates in cases such as these but, to quote Dicey's repeated dictum, hard cases make bad law.

23 Civil appeals 5/1983 and 13/1983, high court, unreported.

It is worthy of note that except for Judge Edwards in Moatlhodi's case, nowhere do the judges in such cases consider the Roman-Dutch law, which imposes no time limitation, as a basis for allowing late applications. Furthermore, because the vast majority of women seeking maintenance do not have legal representation, the opportunity for late cases to be argued under the Roman-Dutch law has not yet been taken up²⁴.

With the judges passing the buck as Judge Hannah seems to be suggesting in *Diteko v Kgamane* (supra), it may be time for the legislature to respond. Such a response should either address the question whether a maintenance action may still be brought under Roman-Dutch law, or remove the twelve months requirement entirely. The parliamentary select committee appointed to consider amendments to the Affiliation Proceedings Act in 1976 did however recommend the total removal of the twelve months requirement. This recommendation was not taken up by parliament, and appeared neither in the bill nor in the final Act. This has adverse consequences on unmarried mothers and their children, as the Kanye case study discussed in the following chapters will show.

24 This may happen in the near future. The Botswana chapter of the Women and Law in Southern Africa (WLSA) research project is considering a test case in this regard (WLSA Newsletter 4 1990:4).

5 THE VILLAGE OF STUDY AND THE SURVEY OF UNMARRIED MOTHERS

5.1 Kanye village

5.1.1 The physical characteristics

Kanye is located in the south eastern part of Botswana, bordering South Africa (map 1). It is the traditional capital of the Bangwaketse morafe, whose presence in the area dates as far back as the 1700's. It was in 1798 that the Bangwaketse first settled on Kanye hill under the leadership of Makaba II, their fourth and most powerful pre-colonial chief. The initial location of the village at the top of a hill served as a defence from enemy attacks, and it appears that many of these were indeed successfully resisted from that stronghold (Schapera 1940:1). Despite two hundred odd years of political, social and economic change, Kanye has retained its identity primarily as the center of Bangwaketse affairs.

Kanye has however grown tremendously from the original hill-top settlement into one of the largest villages in the whole country. Today, the village covers about thirty square km., and plays the important role of administrative headquarters of the Southern District. It is there that the main offices of the central and local government for the Southern District are located, as well as those of certain important parastatal and private organisations. The village is divided into eight main administrative sections or wards, known as village development committee areas. These eight wards are however an administrative convenience employed by the state; in reality there are at least seventy traditionally based wards (*dikgotla*) in the village, each with its own head (cf. chapter three).

Kanye hill (Ntsweng) remains the heart center of the village as the chief's *kgotla* is located there. Three of the eight main administrative wards (Kgosing, Ntlhayatlase and Bagami) are located on Ntsweng hill. The village has over the years spread downhill to Dilolwe Mafhikana, Sebege, Tsopye and Taukobong wards, where most of the population is now concentrated. In the older wards, the settlement pattern generally follows the traditional ideal, with members of the same family group

occupying the same part of the ward. Sometimes members of the same kin-group form a whole ward by themselves, this also being referred to as a *kgotla*. Some of these have a small clearing, also called a *kgotla*, which is located at the center of their ward, where they hold meetings and settle disputes. In the newer wards, the settlement pattern varies; in some cases it is based on family relationships while in others it is not. In some cases, members of a ward that has become crowded apply for part of a new ward and settle there as a family group, thus establishing their own *kgotlana*. Younger members often apply for land and build their houses in new areas outside their original wards, this resulting in a scattering of family members which can have adverse consequences for kin-group cohesion (cf. chapter three; Molenaar 1980 and Windhorst 1989).

5.1.2 The population and household structure

The total population of Kanye was 20,215 people in 1981, which makes it a rather large village¹. As is the case nationally, this population is made up mostly of young people: 46.5% of the total population are under fifteen years, with under fives constituting 19.5% of the total population (Botswana Government 1981a). The male-female ratio is 4:6, thus highly in favour of females, which is most predominant in the 5-29 year age group, and the age group over the age of seventy years. The absence of young males who may be at the cattlepost or working abroad may partly explain the female dominance in the working age groups, while the predominance of females in the over seventy age group is explained by higher mortality rates among men (Botswana Government 1986b:53).

Information relating to household structure at the village level is unfortunately not available, except for the findings of two studies conducted in one Kanye ward, Tsopye (Molenaar 1980 and Windhorst 1989). Molenaar (1980:21) observed little change in the social structure of

¹ The classification of places into towns and villages in Botswana is not based upon population size alone, but also upon socio-economic characteristics (see Botswana Government 1981b).

the ward in the forty years since Schapera had done research there. According to her, the basic agnatic character of the ward had been retained, and fifty seven out of the sixty one households were headed by genealogically-related males (cf. chapter three). In only four cases were the households headed by unmarried mothers, which Molenaar does not regard as a significant structural change.

She however observed significant changes in the organisation of households within the wards, especially their composition. Most striking was first the decrease in the number of marriages, and a tendency toward late marriage. Secondly, she observed a dramatic increase in the number of unmarried mothers and children. Third, she observed that very few new households had been created in the past twenty five years, which she attributed to economic constraints.

Windhorst (1989), who did a re-study of the same ward nearly ten years later however came to a rather different conclusion from Molenaar's. She asserts that structural changes had taken place in the ward, which were mainly the creation of new settlement sites not based on patrilineality, and the establishment by sixteen unmarried women of their own autonomous households. As we shall find out in section 5.2, very few of the women in our survey had established their own independent households.

5.1.3 The village economy

Although agro-pastoralists by tradition, the people of Kanye have, like those in other rural areas in Botswana, adapted to the socio-economic changes earlier described in various ways. Household members are engaged in various income-generating activities, which include crop and livestock production, as well as wage employment. The extent to which people rely on these sources of income varies from one household to another, but the most important determinant of income is cattle ownership. In 1981, more than 70% of all households in Kanye owned some cattle and/or small stock (Botswana Government 1986a:61). As is the case nationally however, the distribution of cattle is highly skewed (Botswana Government 1974).

The majority of households are also involved in arable agriculture, and

in 1981, 64% had planted crops in at least the previous five years. As we earlier noted however, arable agriculture in Botswana is an unreliable source of income, dependent as it is upon unpredictable rains. The capacity of households to earn an income from farming is also dependent upon cattle ownership, and their capacity to mobilise labour for this purpose. As a result, poorer households with few or no cattle are less able to derive a sufficient income from farming alone, and some of their members must go away to find work in the wage sector. Female-headed households constitute a significant percentage of these, in view of their limited access to land and cattle (cf. chapter three). Cash employment has therefore become a major source of income for most rural households. Thus 41.1% of Kanye's economically active population was engaged in regular cash work for others in 1981, as compared with 33% who were employed in the traditional agricultural sector. More recent research reveals that wage employment became the major source of income in the district in the 1980's, accounting for 80% of household income in 1982/83 (Abel et al. 1987:6). While this was partly due to the 1980's drought, it was especially the case for households with fewer cattle, this showing once again the importance of cattle ownership for the economic survival of households.

Prospects for wage employment in the village are generally very low, despite modest growth in the government and business sectors during the 1980's. Most individuals are involved in so-called 'informal sector' activities such as brick moulding, street vending, handicrafts, beer brewing and sale, carpentry and irregular repair work. Most of these are women, and returns from the informal sector are both lower and less reliable than those from formal employment. During the 1980's, many poor household members were involved in government drought relief projects, which also provide very low returns.

The most viable option for most individuals is therefore migration to other parts of Botswana or outside to find work. In 1981, 21% of the economically active population was absent at work away from the village, and it was estimated that almost every second household had a family member working abroad; 76% of these worked in the South-African mines, which is understandable in view of Kanye's close proximity to the Republic. Some of the residents of Kanye work in the town of Lobat-

se, the center of Botswana's beef industry, located only 45 km. away. The development of Jwaneng, a major diamond mining town 80 km. away in the 1980's also increased employment opportunities for the people of Kanye (see map 1).

Employment opportunities nonetheless remain limited and are dependent upon sex, age, and education. The national job market is generally more favourable to males, and Kanye is no exception to this trend. In Kanye itself, 54% of the jobs are held by men, and they constituted 90% of those absent from the village for employment purposes in 1981. Further evidence of limited job opportunities for females is the finding that 25.3% of Kanye's economically active population seeking work in 1981 were women, as compared with 13.4% of men (Botswana Government 1986a:65). While the percentage of women of working age in Kanye is higher than that of men, the latter are more involved in formal employment.

This may be partly explained by the fact that women are involved in housework and other activities which are not defined as 'economic activities'. We also noted earlier that more women than men are involved in what are known as informal sector activities, which often escape the attention of statistics and research. As a result, many more women than men may be formally registered as being economically inactive, the figure for Kanye in 1981 showing that women constituted 80% of the economically inactive. This naturally begs the question of how economic activities are defined, and may lead to a distortion of the real picture.

In addition to gender, the capacity to engage profitably in wage employment also depends on age, and most statistics indicate that the 20-40 age group is more involved in wage employment than any other group (Gulbrandsen 1980:7; Abel et al. 1987:7). After the age of forty-five job opportunities are limited, and most men in particular will return to farming and cattle raising on a fulltime basis. It is therefore common for men of working age to invest part of their earnings in building up a herd of cattle in preparation for this period. According to most elderly Bangwaketse, a wise young man is one who invests his wages in this way while he can, sends money home to make sure that those left behind will look after his cattle properly.

Education is another important factor on the job market, and is becoming increasingly so. In 1981 almost half of the total population of Kanye had never been to school, the figure being slightly higher for women. At the same time, the percentage of women and girls still at school was a lot higher: women and girls represented 63% of all persons attending school in 1981. This reveals a fairly high literacy rate among women in the village, which may however be contrasted with their lower participation in wage employment. The discrepancy between the high female literacy rate and their low participation in wage employment shows that capacity to participate in the latter is not determined by education alone, but that gender plays an important role. Furthermore, higher literacy rates are not synonymous with skills, and fewer women are trained in the skills needed for wage employment than men. Related to this is the fact that while drop-out rates are almost the same for boys and girls at primary school level, the picture changes drastically at secondary school. National education statistics show that as a percentage of enrollment, girls drop out of secondary school four times more than boys. One of the major causes of female drop-out from school is pregnancy, which as we noted has increased dramatically in recent years.

Although statistics on females who drop out of schools in Kanye are not available, the issue of pregnancy among teenagers is a matter for concern and is discussed often at village assemblies. The older members of the community in particular blame it upon lowered sexual morals and the loosening of their control over young people. Discotheques and other late night social activities are blamed for this development, and there have been consistent calls to ban them. It is interesting to note however that while most elderly people in Kanye are critical of teenage pregnancy, their objection is not so much to the fact that it happens outside marriage. Rather, they reason that these young girls are destroying their chances to obtain a good education which would enable them to get jobs. Most people welcome the birth of children to women from their early twenties onwards, irrespective of their marital status, as long as they have finished school and can get a job to contribute to the support of their children and the household in general. In the words of one of my elderly informants, 'today, a girl's husband is

her education; if she does not take it seriously she is doomed, for these days there is no marriage'. Thus while extra-marital pregnancy among adult women is not exactly encouraged, there has been social acceptance of it over the years. Social attitudes against in Kanye are certainly not as strong as they are said to have been at the turn of the century (cf. Ingstad and Saugestad 1987).

We now turn to consider the judicial and administrative institutions in Kanye which deal with the settlement of disputes such as those arising from extra-marital pregnancy.

5.1.4 Administrative and judicial institutions

Like most major villages in Botswana, Kanye inherited a parallel system of administration and justice, with traditionally based institutions existing side by side with 'modern' western-based state institutions. Administrative powers and functions are shared by four local government institutions: the district administration, the land board, the district council and the tribal administration. The district administration is the local arm of the central government, and is charged mainly with the implementation of government policy at district level. The district council, on the other hand, is the local political body which is presided over by elected councillors. It is however administered by bureaucrats appointed by central government, which makes it something of a semi-government institution. This leads to an overlap of functions and confusion among the population, a situation compounded in Kanye by their operation from the same premises.

The third institution is the tribal administration, which is a modified version of the traditional Tswana *kgotla* system of government (chapter three). While before colonial times the chief and *kgotla* enjoyed a monopoly over legislative, administrative and judicial power, today most of these have been usurped by state institutions. The last and youngest institution is the land board, which is responsible for, among other things, the allocation and control of land in the district. Consisting of representatives from the first three bodies, the land board also contributes to an overlap of functions between these four local government institutions.

The parallel administrative set-up is duplicated at the judicial level, with the customary courts headed by the chief's kgotla existing side by side with the magistrate's court which administers state law. These are not the only institutions which exercise judicial power in the village: the land board hears some land disputes, and the district commissioner (DC), head of the district administration, also has judicial powers. The latter is a legacy from colonial times when DCs acted as magistrates as well, which has been retained to the present day, causing another confusing overlap of functions and jurisdiction. In Kanye for example, before the appointment of a fulltime magistrate in 1981, disputes were registered with the DC's office. Some of these he settled administratively, some judicially, while others were reserved for hearing by a visiting magistrate. Since the appointment of a full-time magistrate almost ten years later however, villagers continue to take their cases to the DC's office, who continues to exercise some vague judicial powers². We shall find out subsequently that this has had adverse consequences for unmarried women seeking support under state law. Some still take their complaints to the DC, who although having no power to hear affiliation cases sometimes effects a reconciliation between the parties, or facilitates a compensation or maintenance agreement under his general administrative/judicial powers. When this does not work, and the woman seeks to enforce what she considers to be a court order at the magistrate's court, her case may be dismissed because the one year period stipulated by the Affiliation Proceedings Act has lapsed. This demonstrates the failure of the state administration to provide a straightforward structure for the settlement of disputes under state law.

The overlap in functions and jurisdiction is also discernable in the customary court system, which is a result of the discrepancies between those courts the state chooses to recognise and those it does not. We

2 The precise judicial powers of DCs, especially in districts where there is a resident, magistrate are not clear. The Government Paper on Local Government Structure did not specifically address this question, stating only that DCs will continue to exercise judicial powers 'until sufficient magistrates are available at all centers' (Botswana Government 1981c:5).

earlier observed that there are at least seventy wards or dikgotla in Kanye, which derive from the traditional kin-based settlement pattern. It will be remembered that each of these traditionally comprised a kgotla, a distinct administrative unit, and a court of first instance for its members. Some of these still operate in this way, and villagers still take their disputes to their headmen for resolution. This is in spite of the state's declaration of only seven of these wards as officially 'gazetted' or recognised courts, with their headmen receiving a salary from government. In practice, each one of these seventy or so wards considers itself a court by right of tradition; their elders do adjudicate over disputes involving their members which the latter accept as binding. The continued operation of ward courts which are denied state recognition shows that what the residents of Kanye regard as their way of resolving disputes has survived more than two hundred years of attempts at official regulation. Because the vast majority of disputes in the village are disposed of in these courts, they ease the burden of the 'recognised' courts. As a result, the state often turns a blind eye on them, except in cases where there is a conflict of jurisdiction between these courts and the 'recognised' ones.

Jurisdictional conflicts are not uncommon, and tensions exist in the administration of justice within the village, which are exacerbated by the contradictory state policy towards the customary courts. There is competition for jurisdiction over criminal cases between the customary and state courts. State law institutions such as the police and the magistrate's court accuse headmen especially of hearing cases that fall outside their jurisdiction. The tribal administration, seen by the state as the supervisor of customary courts in their area, often join this chorus, as the following extract shows:

Find the following being the established customary courts of record and those of arbitration within the Ngwaketse district for your information. I have furnished this list to ask presiding officers, local police to avoid prosecuting cases outside their area of jurisdiction especially where there are courts established. Again court clerks should refrain from issuing summonses on behalf of other established court³.

3 Savingram, 4.7.89, from the secretary, Bangwaketse tribal administration to 'all customary courts, Ngwaketse'.

The position of the chief and tribal administration vis-à-vis the state and the lower customary courts is a complicated one, and is sometimes used by the chief to consolidate his own power base. The latter's administration of customary justice has increasingly become the only substantive form of official power since the loss of his political powers to the state (see Botswana Constitution and Chieftainship Act). Although this had been the case before colonialism, today the chief is more likely to use his administration of customary justice as a way of retaining control over village politics. Needless to say, this has led to tensions with the headmen of certain wards, especially those who do not belong to his 'inner circle' of advisors, and whose courts are not likely to be recommended for 'recognition' by the state.

Aside from jurisdictional conflicts, the existence of 'recognised' and 'unrecognised' customary courts has presented other practical problems. Because the latter's proceedings are not recorded, cases which eventually end up in state courts often have to be started anew, causing inconvenience to litigants and wastage of time. In maintenance cases for example, women usually attempt to obtain compensation through customary channels, and often utilise the 'unrecognised' courts. When they experience delays, or simply give up on the customary solution, they may register a complaint with the magistrates court. In such cases, magistrates are often at a loss whether to dismiss the complaint under section thirteen of the Affiliation Proceedings Act, or hear the case afresh. One magistrate intimated that he used his discretion in such cases, sending the case back to the customary court if there are prospects for reconciliation. Where there appear to be no such prospects, and the man in particular uses the proceedings in the customary court as a delatory tactic, he normally hears the case afresh⁴. The operation of the dispute settlement system in the specific context of extra-marital pregnancy will be discussed in detail, and illustrated with case studies in subsequent chapters. Before that is done, the next section presents a profile of unmarried mothers in Kanye, which provides the socio-economic background against which the subsequent case studies should be understood.

⁴ Interview with magistrate no.5 at Kanye, 17.10.89.

5.2

A profile of unmarried mothers in Kanye

The profile to be presented in this section is based upon the findings of the survey which is described in the methodology section of chapter one. It will be remembered that the questions posed in the survey sought demographic, socio-economic characteristics, attitudes, as well as the extent to which unmarried women used the law to obtain compensation and support for their children. This section is devoted to a discussion of these characteristics, and the relationship, if any, between them, as well as their influence on women's decision to mobilise the law. These characteristics were selected from a number of others, on the basis of their contribution to understanding the case studies to be discussed later in this study. They are discussed under three headings: socio-economic characteristics, attitudes towards extra-marital motherhood and marriage and the involvement of women in compensation and maintenance claims.

5.2.1

Socio-economic characteristics of the women

Some of these basic socio-economic characteristics of the women in our survey are summarised in table 1 below. This table shows that the majority of the unmarried mothers in our survey were aged between 21 and 30 years. This is fairly comparable to Gulbrandsen (1980:29), where 45% of his sample were in this age category. Although the number of teenage mothers in our sample is low compared with those in the 21-30 age group, 18.6% is still significant, and reflects the nationwide increase in teenage fertility. There were very few women over the age of 40 years, thus the picture which emerges is one of a young sample of women at the peak of their child-bearing years, and which is fairly representative of the population of the village (see 5.1.2).

Table 1: Basic characteristics of unmarried mothers (total sample=178)

characteristics	percentage of sample
1. age - group	
a. less than 21 years	18.6
b. 21-30 years	54.8
c. 31-40 years	18.6
d. above 40 years	8.0
2. number of children	
a. 1-3 children	75.9
b. 3-6 children	21.3
c. over 6 children	2.8
3. educational level	
a. none	17.0
b. some primary	65.0
c. junior certificate	14.1
d. higher or other	3.9
4. formally employed	15.0
5. economically dependant on others	76.0
6. established own household	10.0

As far as fertility rates are concerned, the women interviewed had fewer children than the national average, which in 1988 was five children per woman (Botswana Government 1988a). The vast majority of the women interviewed had between one and three children, which is once again, fairly comparable with Gulbrandsen's (1980:29) sample, where 73% of unmarried women had between one and three children. A few women in our sample had more than three children, and even fewer had more than six children. The average number of children per woman in our survey is approximately 2.6, which is quite comparable to Molenaar's (1980:12) 2.4. The lower than national average fertility figures in our case are clearly affected by the prevalence of young women in our sample, who have not reached the end of their child-bearing years.

The group of women we interviewed represents a fairly well-educated sample, especially when compared with other studies made in the same district (cf. Gulbrandsen:1980). A larger percentage of the women in our sample had some primary education than Gulbrandsen's: 65% as compared with 48% respectively. Unmarried women constituted 60% of the total

female respondents in Gulbrandsen's sample, so that the two sets of data are quite comparable.

Only 17% of the women in our sample had no education at all, as compared with Gulbrandsen's 46.7%. The relatively high educational level of our respondents may have to do with their age: as they are predominantly young, they are more likely to have been to primary school at least. A significant number even had junior certificate, which is the first stage of secondary education attainable three years after grade seven. The numbers however become less the higher up the educational ladder one goes; thus very few were educated beyond junior certificate.

Their relatively well-educated status may be contrasted with their low participation in formal employment, an observation earlier made about women in the village generally (5.1.3). Thus as far as socio-economic status is concerned, our findings clearly reveal the marginality of unmarried mothers: most of them are not formally employed, and depend mainly upon other persons for support.

These figures cannot, however, give us a total picture of how these women earn a living, an indicator of the limitations of the survey method. An analysis of individual questionnaires and more in-depth follow-up discussions with some of the women however revealed that many were involved in all manner of income-generating activities such as beer brewing and selling, handicrafts and irregular domestic work for other households. Many of Gulbrandsen's female respondents were similarly engaged in beer brewing and sale, the vast majority being young women between the ages of 21 and 40 years, for whom this was a regular activity and source of income.

Still, the fact that in 1986 eighty percent of households in the district depended upon remittances from wage employment (Abel et al. 1987:7) shows that the women in our sample are a fairly marginal economic group, judging from their limited participation in formal wage employment. Those few who are formally employed earn wages below the national average of P266 per month (Botswana Government 1986a:66). Eleven of the women twenty five women who were formally employed earned between P50 and P100 per month, while six earned above P200. Of the remaining eight, four earned between P50 and P100 per month and four were in the P101-P200 wage bracket. The rest of the women earned no

formal salary, depending on income from relatives and from the informal sector, which we earlier noted is both lower and less reliable than that from formal wage employment. This means that the general economic situation of the women in our sample is quite marginal and dependent on relatives and unreliable sources for support. This conclusion also confirms the findings of previous research on the socio-economic position of unmarried mothers in the district (Gulbrandsen 1980:31; Moleenaar 1980:18 and Windhorst 1989:49).

We noted in chapter three that the development of female-headed households has been a recurrent theme in the literature on Botswana. However, very few of the women in our sample had established households of their own (10%); the vast majority still lived in their natal households. This corresponds with our earlier observation that many were still dependent upon their families for support. In order to find the extent to which wage employment influenced the ability of a woman to establish her own independent household, we compared the responses to these questions. Rather surprisingly, it appears that there is little relationship between formal employment and the establishment of an independent household. On the one hand, of the eighteen formally employed women who answered this question, only four had established an independent household. On the other hand, nine out of the thirteen who had established their own households are not formally employed, which means that they are involved in other income-generating activities apart from wage employment, which they did not define as self employment.

There is yet another interesting finding related to the apparent absence of a relationship between wage employment and the establishment of an independent household. This is that of the four women who earn the comparatively higher wages of more than P200 per month, only one has established her own household. This means that even with that income, it may still be difficult to establish a viable household. Thus a woman may find it more sensible to remain in her natal household, pooling her resources together with other family members in order to ensure viability.

Another factor influencing the establishment of an independent household is the woman's age, and it can be assumed that household viability

comes at a later stage in a woman's life. In our sample, nine of the thirteen women who had established their own households were between 26 and 40 years of age, the rest being above 40 years. Still, the vast majority of women in both these age brackets remain in their natal households, which suggests that the establishment of one's own household is not an easy feat to accomplish.

5.2.2 Trends and attitudes towards unmarried motherhood and marriage

In further pursuance of the prevalence of, and attitudes towards extra-marital motherhood, we asked the women whether their own mothers had ever been married or not. Nearly 75% of the respondents came from households where their parents had been married, while the rest did not. One quarter were borne by women who had never married and who, considering their probable age, are not likely to be married. This implies that while reproduction is still by and large associated with marriage, there is certainly a trend towards a separation of the two. It also suggests that considering the probable age of our respondents' mothers, this is a process which has been occurring over a longer period of time than is often assumed. It may also explain the increasing social acceptance of extra-marital reproduction, a question we pursue in the following pages.

In our attempt to understand the underlying reasons for the increasing trend towards extra-marital reproduction and its seeming acceptance, we were presented with two methods of inquiry. The first was to engage in general discussions with the residents of Kanye about these developments. This avenue yielded few new explanations apart from the usual lamentations of older people about the demise of traditional Tswana social control. In fact, most older members of the community in Kanye denied that social attitudes towards extra-marital birth were changing at all. Theirs, they said, was a resigned acceptance of an inescapable reality; at the same time, their reaction to unmarried adult women who were childless was usually one of disappointment and pity, not pleasant surprise. Hence it seemed that the society preached one thing and practised the opposite, a common contradiction that has been observed

by researchers elsewhere (see F. von Benda-Beckmann 1989).

This led us to pursue the second method of obtaining information on changes in social practices and attitudes, which was to direct the questions at the participants themselves, that is, unmarried mothers. Several questions were therefore posed to the respondents of our questionnaire about the circumstances surrounding the birth of their children. One of these was whether they had planned to have their children or not. In this way, we could determine whether or not unmarried women deliberately set out to have children against traditional ideals, and if so, what motivated them to do this.

Rather surprisingly, more than half of the women who answered this question (55%) said they had planned to have their children, while the remaining 45% had not so planned. A further question related to this was then posed, whether the woman maintained an intimate relationship with the father(s) of her children. In response to this question, 58% of our respondents said they maintained an intimate relationship with one of the fathers of their children. It is possible the women who planned children were those involved in fairly stable relationships, which could possibly lead to marriage, and had children on that understanding.

Another way of establishing whether most women had children in the context of stable relationships which had the potential of maturing into marriage, was to find out from the women who had more than one child whether the same man had fathered all their children or not. Over half of those who answered this question had had children by different men, which may suggest that they did not do so within the context of a stable, enduring relationship with the expectation of marriage. This once again confirms the trend towards the increasing separation of reproduction with marriage in Kanye, as well as a more lax attitude towards this.

In further pursuit of the hypothesis that there has been a positive change in social attitudes towards extra-marital pregnancy, we addressed two further questions bearing directly upon marriage and reproduction. The first question sought to find out what the experiences of the women with social attitudes towards extra-marital motherhood were. As many as 56% said they experienced no negative attitudes, most stating

that their families, friends and the community at large rarely made them feel different or inferior. On the contrary, they were proud that they had acquired adult status as a result of having had children. This was especially the case when they compared their treatment by older people with the way their childless counterparts were treated. For example, the former are often 'called after their children' (e.g. 'X's mother'), an honour usually bestowed upon married women, whereas the latter are called by their first names.

Some of our respondents did however have negative experiences with single motherhood (35.4%). Most of these stated that their behaviour was considered by their families to have been improper and sometimes even shameful. They felt that they were treated as socially inferior to their married peers, and cited their exclusion from traditional ceremonies such as marriage preparations as examples of this. The other 8.4% found social attitudes towards their status ambivalent.

Continuing our line of inquiry on social change, we were also interested in the extent to which cohabitation without marriage was prevalent in the village. A relatively small figure of 4% in our sample stated that they cohabited in a household with a man without marriage, which illustrates the fluidity of male-female relationships in Tswana society, and changes in the institution of marriage. These women may well have been at a certain stage in the marriage process, and may consider their relationship not to have yet matured into a complete marriage. This was visible in the reactions we obtained to the question whether a woman was married: many of the women would in turn ask 'you mean have we signed?' - referring to completing the marriage register. This suggests that the term marriage is being increasingly associated with civil marriage, which entails completing formal documents. In Kanye this may have been encouraged by the early attempts at formalising traditional marriage by Chief Bathoen II in the mid 1940's, who insisted that all marriages in the village be registered at his kgotla⁵. At the same time, the terms husband and wife are commonly used to refer to

5 The Bangwaketse tribal administration is the only customary institution in Botswana to issue a customary marriage certificate. Still, many marriages in Kanye remain unregistered.

couples who have not completed these formalities, an observation also made by Comaroff and Roberts (1981:134) about the Bakgatla.

These findings suggest that attitudes towards the institution of marriage and reproduction, especially extra-marital reproduction, have changed significantly over time. This change can be said to have been from the apparent abhorrence expressed by Schapera's elderly informants at the turn of the century, to a significant degree of tolerance towards it today. More tolerant social attitudes towards extra-marital reproduction were observed by Schapera as early as 1933, and more recent research has pointed to an even larger degree of acceptance (Gulbrandsen 1984:1; Suggs 1987:115; Ingstad and Saugestad 1987:11). Our own survey results certainly point in the same direction, and an interesting question becomes the factors behind this change, two of which may briefly be stated.

First, the high premium that Tswana society attaches to fertility in general, and the status which it gives to women. We observed earlier that many of the young women interviewed felt accepted as adults after having had children. Although it was apparently preferable that one should have children within marriage, it may be that the society recognised that with the decline of polygamy, it was no longer possible for all women to be married at the right time, if at all. In the words of one of my informants, while there is a shortage of husbands, 'there is certainly no shortage of men to give us children'.

The second explanation for changing social attitudes may be an economic one, which is the value of children as a source of labour and economic security for their parents. We saw earlier that traditionally households depended upon the labour of their young productive members for farming and cattle herding. Under today's changed economic circumstances, many households are heavily dependent upon their working members to provide an income from wage employment. Thus children remain an important source of economic security, and it may no longer matter whether they are born within a marriage or not. In other words, confronted with the reality of a weakening economic support system, the society has quite rationally adapted its attitudes towards extra-marital reproduction. Most of the women interviewed emphasised the importance of children as a source of economic security in their old age,

and stated that the more children they had, the more likely that one or more would render such support.

Economic security also played a large part in the women's attitudes towards the institution of marriage. The majority (72%) displayed a favourable attitude towards marriage, initially because it was 'natural' or expected. Asked to elaborate, many stated that they wished to marry because of the economic security the presence of a husband provides. Like having children, many women also felt that marriage was an important rite of passage in their lives which greatly enhanced their social status. A further reason given in favour of marriage was that it was good for the children to have the same father, who lived in the same household with them.

The few women (16.5%) who expressed a decidedly negative attitude towards marriage felt that 'nowadays' marriage provided no guarantee of financial security, because many of their married friends experienced the same or worse problems as themselves. They therefore reasoned that it was better to know that they were alone with their children, than rely on the support of a husband which may not be forthcoming. The rest of the women did not express strong feelings in favour of or against marriage.

Our findings therefore suggest that most of the women in our sample had a favourable attitude towards marriage, which may be contrasted with the findings of Gulbrandsen (1984:28) who did research in the same district. Although he accepts that most of his young female respondents typically said they wished to be married, he insists that there is some ambivalence to marriage among Bangwaketse women. He supports this with the observation that many young women who had 'stable' relationships frequently associated with other men and became pregnant during the absence of their future husbands. In our view, this conclusion is rather far fetched, and Gulbrandsen does not convincingly support it with data. He does not, for example, show what the infidelity of women during the absence of their prospective husbands has to do with their attitudes towards marriage. Moreover, he does not explain what he means by 'apparently stable (though informal) relationships'. Our observation and discussions with both men and women in Kanye revealed that like anywhere else, intimate relations between men and women varied conside-

rably. These may be placed on a continuum which stretches from casual encounters lasting a few days to those in which the families know and approve of the relationship, to the extent of beginning marriage negotiations and exchanging gifts. In between these two extremes is a large variety of intimate relationships which may or not produce children, and where the level of commitment or stability is difficult to judge.

This is made even more complex by the different expectations and interpretations attached to the relationship by the parties themselves and their parents. In the normal course of events, the precise nature of these relationships need not be precisely defined, until an important event such as pregnancy occurs, or one party insists on its definition. Thus these relationships are regularly negotiated in the context of dispute settlement involving pregnancy, as we shall see when we discuss the case studies. Comaroff and Roberts (1977:114) make similar observations about heterosexual relationships among the Bakgatla.

Gulbrandsen's dismissal of the economic attraction of marriage to women is equally unconvincing. He argues that marriage offers few economic advantages for a woman whose children have become productive, because the potential husband will have by then reached an age where his wage-earning capacity is diminishing, and he has a limited agro-pastoral base. This argument is weak and unconvincing for three reasons. First of all, its emphasis upon women whose children have become productive means that the author is referring mainly to women in their forties, whose chances of marriage are usually not very high in any case. Thus their ambivalence towards marriage should not come as a surprise, but this should not be used to support the conclusion that Bangwaketse women in general are ambivalent towards marriage.

Secondly, Gulbrandsen's assertion that considering their age and wage-earning capacity, the potential husbands of these women have little to contribute to the latter's economic viability. This shows once again the emphasis upon older men, which should not be used to generalise about the rest, some of whom are younger and economically attractive as husbands. This argument also assumes that wage-earning men do not prepare themselves for a time when they can no longer depend upon a wage. While some unwise wage earners may indeed do this, it should not be generalised, as it goes against both good sense and the findings of

research on people's general economic survival strategies. Research conducted in the same district as well as in other parts of the country reveals a general practice by wage-earning men to invest their income in cattle and crop production (Abel et al. 1987). Casual observation and discussions with wage earners revealed in any event that people generally avoid 'putting all their eggs in one basket', and typically engage in a variety of economic activities, in order to minimise the risks of depending on one source of income alone.

Thirdly, and related to the above is Gulbrandsen's presentation of young Bangwaketse men outside of the context of their natal households. He paints a picture of rather individualistic, pleasure-seeking bachelors, who 'live for the moment', enjoying the luxuries they can afford while they have a job, hardly investing it in cattle for future security. This approach is considered rather extreme, and cannot be representative of life in rural Ngwaketse. Admittedly, household cohesion has been greatly undermined by socio-economic change, but most wage-earning household members still have some emotional and economic connection with their natal households, if only for their own benefit in the future. In the absence of state-financed social security, most wage earners cannot afford to abandon the very place which guarantees this in their old age. Thus while many of the wage-earning men we interviewed saw themselves primarily as providers to their natal households, they emphasised their own dependence upon its resident members to care especially for their cattle in their absence.

In other words, Gulbrandsen's conclusions on women's attitudes towards marriage is simplistic and over-generalised. The disincentives are exaggerated, and it appears that he attaches undue weight to the situation and views of women of a certain age, and who were economically viable, either in their own right or through relatives. As we observed earlier, the economic situation of women in the area is marginal, and the women described by Gulbrandsen can only be a very small minority indeed. Although some of our respondents did raise several disincentives to marriage, they did not associate them with marriage alone, or see them as a strong reason not to enter marriage. In our in-depth interviews with them, it was quite clear that marriage, with all its problems remained a serious option for them.

Finally, Gulbrandsen's argument is weak in so far as he asserts that young Bangwaketse men can get away with their leisurely lifestyle as bachelors because of the absence of legal sanctions for impregnation. He says that despite the introduction of the Affiliation Proceedings Act in 1970 giving women the right to sue men for support, men are rarely prosecuted. He supports this by citing the low number of seduction and maintenance disputes coming before the official courts, both customary and magistrates. This assertion is not entirely accurate: we earlier noted that many pregnancy disputes are dealt with in the traditional way between the families concerned, and some end at the lower ward courts, which are not courts of record. Thus a perusal of the records of the courts does not give a conclusive indication of the sanctions that are brought to bear on men who impregnate unmarried women⁶.

Although this is dealt with in more detail in subsequent chapters, the following final section briefly assesses the extent to which the women in our sample did in fact use the legal sanctions at their disposal to obtain compensation and maintenance from the fathers of their children.

5.2.3 Women's involvement in compensation and maintenance disputes

It will be remembered that the main aim of the survey was to obtain a picture of the general situation of unmarried mothers and their children outside dispute settlement (Holleman's troubleless cases: 1973). We found in this respect that in only 48% of cases was support from the father(s) of the children forthcoming more or less regularly. This finding raised a number of questions which provide a good introduction to the discussion in subsequent chapters. Firstly, whether, and if so to what extent women obtained compensation for pregnancy or maintenance from the fathers of their children. Secondly, what methods did they use

⁶ Gulbrandsen's statistics of cases coming before the magistrate's court are not reliable; he cites a figure of 37 for 1976. Our research found that 47 cases had been registered at the magistrates court that year, in addition to seventeen which were pending from 1975. It shall become clear in subsequent chapters that the volume of maintenance cases coming before the magistrate's court increased steadily between 1971 and 1988.

to obtain this, and how successful these were. In the case of those who used the formal courts, the factors which motivated them to do this became relevant, especially the influence of the socio-economic characteristics on their decision to litigate. Thirdly, for those who took steps, we were interested to find out why this was the case. The questions are briefly addressed below.

The most common method of dealing with absence of maintenance among the women in our sample was through negotiations with the family of the man: this had happened in 40% of the cases. We shall find out in chapter six that this is the ideal Ngwaketse method of dealing with such situations. While this reflects the continued use of traditional procedures of dispute settlement, our findings show that this avenue is also so effective: more than half (56%) of the women who used it did not reap any positive results. Most said either that negotiations had dragged on for many years until they gave up, or that promises of maintenance or compensation by the man's family had not been fulfilled. In other words, most of these women eventually abandoned any further attempts to get compensation or maintenance from their children's fathers. Only in 33% of cases had negotiations been decidedly successful in the sense that compensation had been paid, or support was forthcoming regularly. In the rest of the cases, the outcome of negotiations was still pending.

As far as the use of dispute settlement institutions to obtain compensation and support is concerned, only 10% of the women resorted to this avenue⁷. Of these fourteen women, eight used the magistrate's court, five the kgotla and one took her case to a social worker. Consequently the question arises as to what prompted those few women who resorted to the formal courts to pursue the matter that far. Most replied that they did this for the obvious reason that the father did not support, and then that applies to many of the other women as well. More interest.

⁷ In order to obtain a more accurate picture of women's use of the courts, and minimise the effect of the bias in favour of the magistrate's court, we removed the data obtained from the 34 interviews conducted at this court. This left us with only the data obtained from 142 clinic interviews, instead of the total sample of 178 which included the magistrate's court interviews (see chapter one).

reasons for mobilising the law included undue delays, a failure of family negotiations, and unwillingness or unavailability on the part of one or both of the families to discuss the matter. This once again confirms the importance of family negotiations in the resolution of pregnancy disputes. Although this question is addressed in more detail in subsequent chapters, the experiences of the few women in our sample who litigated deserve a brief mention. Most of them expressed dissatisfaction with the manner in which both customary and magistrate's courts handled their cases, although the magistrate's court scored slightly better. They complained that the courts were generally disinterested in their cases, that they were subjected to undue delays, and that the orders of the courts were neither complied with nor enforced.

Apart from the reasons given above, we sought to find out from our data the characteristics of the few women who ended up in the official courts - their age, level of education and socio-economic status. Did these characteristics influence the decision to take disputes to the courts? An analysis of the data shows that most women litigants were aged between 20 and 30 years, had primary education, were not employed and had not established their own independent households. In other words, they were no different from the rest of the women in our survey, who were economically dependent upon other people for support. This finding is quite significant, as one might have assumed that age or educational level, for example, might have influenced women to sue the fathers of their children. This question will be pursued in the next four chapters when the case studies are discussed.

What about those women who had not been involved in negotiations or litigation with the fathers of their children, who constituted the other half of the sample? On-going family discussions and promises of marriage were the most commonly stated reasons, which as we shall find out are often used by men as delay tactics. Other reasons why women did not sue the fathers of their children were that litigation was tedious and sometimes risky. A reason frequently stated is that litigation may cast misfortune upon the child, or that the man and his family might bewitch the child, in order to spite the mother and extinguish their

obligations towards the child⁸. Some women preferred to raise their children single-handedly in spite of the difficulties because assistance from the fathers often came with 'strings attached': men sometime used this as an excuse to interfere in women's private lives. It is significant however that while this question was specifically addressed to them, none of the women provided their ability to support single-handedly as a reason for not suing the fathers of their children. This finding is hardly surprising in view of their precarious financial situation, and shows the importance of, among other things, effective legal provisions for the maintenance of extra-marital children. The next two chapters examine the nature and effectiveness of the traditional Ngwaketse remedies for extra-marital pregnancy in detail.

⁸ Belief in witchcraft is quite common in Botswana and Kanye is no exception. Many of the women were however reluctant to discuss witchcraft in detail, and it is rarely raised as an issue in court proceedings.

THE MANAGEMENT OF EXTRA-MARITAL PREGNANCY
UNDER THE NGWAKETSE SYSTEM

In spite of the introduction of the state institutions discussed in the previous chapter, the people of Kanye have retained their own means of dealing with any disputes which may arise between them. These are based upon certain ideal cultural norms which have been passed on from generation to generation. Because the traditional norms have undergone transformations over the years, it is sometimes difficult to generalise with accuracy about their exact content. This is however a characteristic of other societies and legal systems, and should not prevent us from observing the general features of the Ngwaketse dispute settlement system. This chapter therefore discusses the general principles which Bangwaketse identify as their way of dealing with extra-marital pregnancy and any disputes that may arise from it.

Section 6.1 presents the Ngwaketse ideal norms and procedures for the management of extra-marital pregnancy, whether or not a dispute eventually develops. Based upon the findings of our research, this section identifies and discusses three main scenarios which may arise following the impregnation of an unmarried woman, and how these are managed among Bangwaketse.

The following three sections (6.2 - 6.4) then discuss each scenario in turn, using examples from Kanye to illustrate the practical operation of the system there. Most of these examples are based upon the record of disputes heard by the Kanye chief's court, which will be discussed in detail. Borrowing from the 'processual approach' discussed in chapter one, we shall not pay sole attention to the resolution of the disputes in the courts alone. In addition to that, the prior history of the dispute, the goals and strategies of the parties, and the participation of third parties such as headmen, chiefs and others will be examined. Focus will also be centered upon the role of norms in the settlement of extra-marital disputes under the Ngwaketse system.

6.1 Ngwaketse ideal norms and procedures

6.1.1 Procedure following pregnancy

Under traditional Ngwaketse ideals, the impregnation of an unmarried woman is dealt with in accordance with apparently clearly laid down

procedures. Asked how the matter should be dealt with, Bangwaketse informants repeat by and large the procedure that is to be found in the literature on the Tswana (Schapera 1938; Roberts 1972a). The first step in this procedure is that the guardian of the woman follows the guardian of the man pointed to as responsible and informs him as soon as possible after knowing about the pregnancy. The latter is contrary to Schapera's point that among the Tswana discussions are usually postponed until the child is born lest it cast misfortune upon the unborn child. Among the Bangwaketse it is permissible and in fact quite common for discussions to begin at this early stage, although a decision on the amount of compensation normally awaits the child's birth.

Following the report by the woman's guardian, senior members of the two families will meet in the presence of the pregnant woman and the man, this step being commonly known as *go kopanya bana*, literally meaning 'to bring the children together'. The main aim of this meeting is to find out whether the man accepts responsibility for the pregnancy or not. If so, he will be asked whether he intends to marry the woman, and the answer to this question determines what steps may be taken next.

Should marriage be agreed upon, the man's parents depart and set preparations into motion, most importantly the putting together of *bogadi* (*chapter three*). This *first scenario* is not always as unproblematic as it appears, and as section 6.2 will show, disputes can and do break out in these circumstances.

A *second scenario* which may arise is that the man and his family accept responsibility but do not wish to marry, in which case a settlement may be negotiated on the compensation payable to the woman's family. Should these negotiations fail to produce a settlement, a dispute may arise, and third parties such as relatives, friends, or headmen may be recruited to facilitate negotiations. Headmen are used in various capacities, sometimes they may be asked to mediate at the level of negotiations, and other times to adjudicate upon the matter in their ward courts (cf. Gulliver 1969). Headmen are also important if the dispute ends up at the higher level of the chief's court, because they must introduce the matter there. As we shall find out later in this chapter, litigants do not therefore hesitate to recruit headmen as allies early during negotiations, in case the matter does end up at the chief's court.

The *third scenario* is where the man denies responsibility, in which case he will be questioned closely by his own family and the woman's,

and it will be determined whether he is in fact responsible. What happens next varies very much from case to case; for reasons we discuss in *chapter five*, some families do not pursue such matters any further. Others however feel strongly enough to press for further negotiations and demand compensation for seduction. Failure to agree may lead to escalation of the dispute, which may be referred to third-party mediators, and sometimes to adjudication before the courts as was the case in the second scenario.

In all the above situations, the ideal mode and sequence of management is one which has been observed in the dispute settlement systems of other societies (Gulliver 1969). First *negotiation* between the respective families; second *mediation* by third parties such as relatives, friends and headmen should negotiation fail. The third mode, *adjudication* first by headmen and then by the chief, is ideally permitted only as a last resort. In fact these agencies are expected to and do sometimes return litigants who have not sufficiently exhausted the negotiation and mediation stage (see *case two*). It is important to note at the outset that these three stages in the resolution of disputes do not exist in separate watertight compartments. Nor is the sequence always from negotiation to mediation and finally adjudication: in practice litigants may move in between these steps, depending on the circumstances (*case three*).

6.1.2 Norms applied to determine compensation

In keeping with patriarchal ideology, Ngwaketse ideals view a man who impregnates a woman outside marriage arrangements as having committed wrong against that woman's guardian. As earlier pointed out, the wrong is known as *tshenyo*, which literally means 'spoiling' and refers to the spoiling of the woman's virginity, and with it her marriage prospects. Thus the first rule is that it is the woman's guardian who has the right to proceed against the seducer, not the woman herself, irrespective of her age. Bangwaketse say '*mosadi ga a ikgweetse*', which means that a woman has no capacity to litigate independently in the court. This rule is applied rather strictly at all levels of the Ngwaketse system, although there are a few exceptions to the rule. During our research, we came across very few women who had been permitted to bring cases independently to the *kgotla*, most of whom had no parents or

been abandoned by their male relatives. Because participation in negotiations is so heavily dependent upon male assistance for success, women who lack this are placed at a disadvantage. They are not taken seriously during negotiations, and while some may effectively be heads of their households, they are not recognised as such in the politico-jural arena, which requires the participation of men (see case eleven). A second rule among Bangwaketse is that compensation is available only in the case of a woman's first pregnancy; a woman who already has a child has, according to the cultural logic, already been seduced and no compensation is available to her father. The chief's court at Kanye applies this rule rather strictly, especially when compared with other customary courts. The Bakgatla chief's court has for example altered a similar rule and now allows actions for second and subsequent children by different men (see Comaroff and Roberts 1977:97). A view apparently held rather strongly by Chief Bathoen II (1928-1965) is that giving the father of such a woman the right to proceed against the second man might encourage him to make 'business out of his daughter'¹.

There are however exceptions to this general rule, such as where the same man is the father of both children (see cases 165/83 and 39/85, Kanye chief's court). Only in one case was compensation awarded in a situation where the woman already had a child with a different man. The man against whom the award was made believes that this was done because he belongs to a different ethnic group which the presiding officer held in contempt. The decision was eventually quashed by a magistrate on appeal, on the basis that it was not in accordance with ideal Ngwaketse procedures².

The ideal compensation for a woman's first pregnancy under Ngwaketse rules is six head of cattle, an additional one being added as a penalty if the man failed to provide nourishment for the woman during her pregnancy and subsequent confinement. The precise origin of these numbers is not known, informants only remember that these figures were certainly the norm during the reign of Chief Bathoen II (1928-1965). It

1 Not all court elders agree with this restriction. Some headmen allow claims for second pregnancies at ward level (interviews with a panel of elders and headmen, KCC 22.8.89, and with elders at the following wards: Bome: 25.8.89 and 28.8.89; Kgatleng: 30.8.89 and Sebege: 6.9.89).

2 Case 134/84, KCC, also interview with the defendant at Jwaneng 11.10.89.

appears that his father Seepapitso (1910-1916) passed a law to the effect that the parents of both the boy and the girl would each be fined five head of cattle by the court if pregnancy took place outside marriage (see Schapera 1943:74). It is not clear whether this fine was in the place of, or in addition to the compensation for seduction. According to M.L.A. Kgasa, a prominent Mongwaketse elder and presently a member of the national customary court of appeal, Seepapitso ruled that 'rape was the only case that was paid for, and not when there was agreement between a boy and a girl. In such a case no payment was made for a child born out of wedlock' (Botswana Government 1976a:65). This interpretation suggests that the rule laying down six head of cattle may have been passed after Seepapitso's reign, possibly by successive regents or by his son Bathoen II.

Equally unclear is the exact purpose of the compensation: some say that it is meant as a punishment for the seducer, who is regarded as a thief who has wrongly interfered with another man's daughter. Others counter that it is meant to reimburse the woman's father for expenses related to her delivery, confinement and the child's maintenance. Yet others insist that it is meant to establish the child's right to support at its mother's home, as well as provide for its future security. The terminology employed often confuses the matter even further, because some speak about *tefo ya tshenyo* (payment for seduction) while others speak about *tefo ya dikotla* (payment for nourishment). This has led to confusion regarding the precise nature of the customary remedy, and false comparisons between the reimbursement for nourishment and state law maintenance. The two are quite different because while the former is a single reimbursement for confinement expenses, the latter provides for the payment of periodic sums for the child's maintenance in the future. Compensation under the Ngwaketse system should ideally be made in cattle and at one go, but we shall find out later that today, this rarely happens.

Although Bangwaketse informants are quick to state these ideal norms and procedures, when confronted with cases in which they were not applied, their response is neither one of embarrassment nor apology. They point out that ideal rules such as the figure of six cattle are merely a guide from the chief, and may be ignored during negotiations. In the case of the number of cattle recoverable for instance, these may be more or less than six depending on the circumstances, and the fami-

lies' negotiations. If the man has been particularly uncooperative for example, the woman's parents may ask more. On the other hand, the woman's father may settle for less than six cattle if the families are on friendly terms, this showing that willingness to accept responsibility is sometimes more important than the amount of compensation (cf. van Rouveroy van Nieuwaal 1976). Sometimes the woman's guardian may have to settle for less if he was warned by the man's guardian, but nonetheless openly encouraged his daughter to associate with the man. We shall find out in the next chapter that this variation in the number of cattle awarded is equally conspicuous at the higher level of the chief's court³.

Similarly, there are variations in the management of women's second pregnancies by a different man. In some cases, families are able to agree on compensation of fewer than six cattle for second pregnancies through negotiation, while others may fail. Still, the norm that compensation is available for first pregnancies only is quite dominant, and strongly influences negotiations.

The above presents a fairly neat picture of how matters of extra-marital pregnancy should be dealt with in Ngwaketse society. Discussions with informants and a perusal of records from the chief's court at Kanye reveal that it is by and large followed. As is the case in other societies however, the social practice is often different, and a close look at actual disputes reveals a much more complex picture. Two main features characterise this mosaic. Firstly, norms are used by both litigants and third parties in different ways to achieve different goals, and are not always applied in the same way to apparently similar cases. Secondly, litigants often move back and forth between the three avenues of negotiation, mediation and adjudication in a manner which is not in strict accordance with ideal procedures. Third parties such as chiefs and headmen also collude in this process, insisting upon the

3 This is not an entirely new development, and is also visible from records of cases heard by Chief Bathoen between 1944 and 1963. Chief Bathoen appears to have been particularly concerned about the increase in extra-marital pregnancy earlier in his reign. On 16.3.1932 he told the morafe at an assembly that they were colluding in the development by allowing their daughters too much freedom. He intended to deal with it in seduction cases by taking into account whether the parents of the girl had 'made room for the boy'. In case 23/1956 for example, he made no award for compensation for seduction, and instead fined the father of the girl a beast for knowingly allowing a man to cohabit with his daughter.

application of ideal norms and procedures in some cases and ignoring them in others. Similar processes were observed by K. von Benda-Beckmann (1984) among the Manikabau of Indonesia.

In the following three sections, we demonstrate these processes mostly through a discussion of several disputes which came before the Kanye chief's court during the period 1978 to 1988. To briefly repeat, section 6.2 deals with the modes of management in disputes arising out of the first scenario, where an agreement to marry has been reached by both families. Sections 6.3 and 6.4 deal with the situation where the families fail to agree on negotiations based upon scenarios two and three respectively. Our analysis of these disputes will focus upon the following elements:

- a. the prior history of the dispute;
- b. the goals of the parties in pursuing a particular mode or modes of management, and the strategies they employ, to achieve them;
- c. the use of third parties such as headmen as mediators and allies;
- d. the role of norms in dispute management, and the manner in which these are used by the courts.

6.2 Marriage as a remedy for extra-marital pregnancy disputes arising out of scenario one

Before the turn of the nineteenth century, Bangwaketse ideally associated reproduction with marriage. Some informants go as far as to say that a man who impregnated a woman to whom he was not married could be compelled to marry her⁴. Other informants however reject this, pointing out that persuasion and negotiation, not compulsion, were the culturally accepted modes. The latter interpretation is certainly suggested by the records of cases heard in the Ngwaketse chief's kgotla between the 1940's and the 1960's. In many of these cases, chiefs and other members of the court mediating in pregnancy disputes often succeeded in persuading families to arrange marriages, although sometimes they were unsuccessful. Whatever method is used to reach agreement on marriage follo-

4 It appears that this may have in fact been the case before and shortly after the turn of the nineteenth century. In one of the earliest recorded cases, 13/1916, Chief Seepapitso (1910-1916) orders a man who said he had no money to pay compensation for seduction to marry the woman. I am indebted to Prof. I. Schapera for making this and other historical materials available to me.

wing pregnancy, most elderly Bangwaketse informants regard this as the ideal situation. They are quick to point out however that this ideal has become too rare, a view supported by both previous research and this research (Molenaar 1980:16; Gulbrandsen 1980:29; chapter five, this study).

According to ideal principles, once marriage has been agreed upon, the man's family are expected to display their seriousness and good faith intentions by behaving in certain ways. This includes regular visits and occasional gifts to the woman and her family, and the setting into motion of marriage preparations. For their part, the woman's family must keep the man's family informed about the progress of the pregnancy and the birth of the child. Ideally, the woman will not be removed from her natal home until the child has been born, and in some cases more children may be born before this happens. In other cases, she is moved to the man's home but returns to her natal home for her first confinement. Likewise, the man's family may delay presentation of bogadi until the child is born, but in the meantime the man may openly visit the woman at her home under the go ralala custom. All kinds of events may take place during this period, which may last from a few weeks to several years depending on arrangements between the families. In some cases the woman may be removed to the man's natal home under the practice of kadimo, which means 'borrowing', whereby with the agreement of her family, the woman is moved to live at the man's home pending presentation of bogadi. This practice appears to have an economic purpose, as women are an important source of labour in the fields.

Whatever arrangements are made between the two families, this period represents a very fragile moment in the marital careers of the couple, and can 'make or break' their marriage. The woman will typically begin to bear children during this period, and it is a point at which disputes are bound to arise. This is likely to happen if the man's family unduly delay presentation of bogadi, illtreat a 'borrowed' woman or fail to contribute to the child's maintenance. Disputes arising during this period appear to have become particularly problematic as early as the 1900's. This must be what prompted Chief Seepapitso (1910-1916) as early as 1912 to encourage the parents of the woman to report any delay in presentation of bogadi to him (Schapera 1943b). In an attempt to discourage the practice, the same chief decreed in 1915 that a man who permitted a man who had not given bogadi to visit his daughter under go

ralala did so at his own peril because he would not be allowed to claim it later (Schapera 1943a).

The persistence of problems associated with this practice and the undermining of the institution of marriage in general prompted Seepapitso's son Chief Bathoen II to carry on his father's reforms. In 1929, he revived the law against go ralala and even made it an offence (Schapera 1943a:138). He introduced another innovation some time in the 1940's that all marriages in the village be registered at his kgotla, and that bogadi cattle be physically brought for members to witness, and their number entered in the marriage register. Bathoen II is also said to have discouraged the practice of kadimo on the basis that it was a source of many disputes.

Bathoen's successor and present incumbent Seepapitso IV intimated to me in 1989 that these problems persist, especially those arising out of kadimo. According to him, some families abuse this custom, 'borrowing' women around the ploughing season when they require labour in the fields, and thereafter abandoning them and their children. Some elderly informants insisted however that the practice was 'not traditional', but a 'modern' development brought about by socio-economic changes such as the shortage of cattle and some families' tendency to exploit others' daughters⁵.

Although Molenaar (1980:16) claimed that go ralala had disappeared completely in Tsoppe ward, we found evidence that both go ralala and kadimo were still practiced in Kanye. Problems associated with both practices arose in at least two cases heard by the Kanye chief's court as recently as 1985. We discuss one of these cases below, in order to show how disputes can and do arise despite an agreement to marry as a remedy for extra-marital pregnancy⁶.

Case 1: The marriage that was suspended for eighteen years (610/85, KCC)

M impregnated S's daughter in 1967, and at a meeting of both families M indicated that he wished to marry her. It was agreed between both

5 A lively debate on this issue took place between some senior members of Tsoppe kgotla during a meeting with me on 25.9.89. The majority of women we spoke to about kadimo rejected it as exploitative, and said they would not subject their daughters to it.

6 For an example of a dispute arising out of kadimo, see case 179/85, KCC.

families that the two would marry, and during the following twelve years, M visited S's daughter at her parent's home under the *go ralala* custom, and five more children were subsequently born to the couple. Although M did contribute irregularly to the support of all these children in their infancy, he never produced *bogadi*, and took no steps to move the woman to his home to finalise the marriage.

In 1979, following several unsuccessful attempts at persuading M to live up to his promises, S approached the headman of his ward for assistance. At the subsequent hearing before the headman, S made it clear that he had given up on the matter of marriage, and wished to be compensated with six head of cattle. It was agreed that M pay these six cattle to S for the seduction of his daughter, pending the finalisation of the marriage which M insisted he was still planning.

The matter dragged on for another five years, with M failing to produce the six cattle for seduction, and rarely visiting the woman's family or maintaining the children, who were unable to attend school as a result. During this period, S kept applying pressure on M to fulfill his promises of marriage or else pay him compensation for seduction. He reported the matter regularly to the headman, who continued to play a mediatory role, suggesting at some point that M be allocated a plot of land on which to build a house for S's daughter and the children. Despite the allocation of the plot of land, no such house was built, and the children remained out of school, M only once providing a bag of mealie-meal after S had complained to the headman.

Matters were brought to a head in 1984, when S heard from his brother that M had impregnated another woman, a daughter-in-law of S. This, it appears was 'the last straw', and S returned to the headman, who decided to take the matter to the chief's court at Kanye.

The matter eventually came before the Ngwaketse chief's court and was heard by the chief's brother, Deputy Chief S.B.Gaseitsiwe on the 12th of November 1985, and four other members of the court. The headman began by presenting the background of the case, and all their unsuccessful attempts to resolve the dispute at family and ward level. S spoke next, confirmed the headman's presentation of the background, and insisted on his claim for compensation, without stating the precise basis of that compensation as being seduction.

Asked by the chief whether he had anything to say in response, M conceded everything, but pointed out that he had supported the children in their infancy. The following exchange then takes place between the deputy chief and S's daughter:

Deputy chief: What about you, are you complaining, or are you still on the matter of marriage?

Woman: I do not have much to say. I say M should pay my father as he has given me six children. I do not see any marriage, if it comes let it come after he has paid my father; furthermore he has all these years not looked after me and the children. If as he says he has nothing to say, I also have nothing to say, I just want compensation.

Deputy chief: What about the other five children, don't you want anything for them?

Woman: I would like compensation for nourishment (*dikotla*) for them too.

Deputy chief: If you are compensated (*fa o lefiwa*) for the first child don't you want *dikotla*?

Woman: There is no maintenance (*dikotla*).

Deputy chief: Do you want compensation for all the children as well as the promise of marriage?

At this stage the woman does not answer, and M comes in and repeats that he supported all the children during their infancy. After some conflicting versions of when and what M actually did provide as maintenance, M's father is asked for the first time whether he has anything to say. He responds resignedly that there is nothing he can do but pay S.

Delivering his judgement, the deputy chief admonishes the man's father for deceiving S's daughter, and his father in particular for allowing this. He has the following to say:

I shall not enter into the matter of seduction (*tshenyo*) because S did not complain in time. I only deal with the matter of compensation for nourishment (*dikotla*) and promises of marriage. You are going to produce six cattle for breach of promise to marry, and a seventh one for maintenance within thirty days, otherwise your property shall be sold to pay the judgement.

Discussion

The processual nature of Ngwaketse marriage

This case is a good illustration of the processual nature of Ngwaketse marriage; that as opposed to being a single event, it matures over what can sometimes be long periods of time. This characteristic allows men like M to postpone finalisation of the marriage by delaying the payment of *bogadi*. Because this slow maturation is normal and culturally accepted, people like S and his daughter are kept waiting, sometimes in vain. This is in spite of attempts on the part of various Ngwaketse chiefs to discourage this, as well as the *go ralala* custom. The woman in this case remained at her parents' home and was visited by the man under *go ralala*, and six children were born. The eighteen years which passed between the birth of the first child and the presentation of the dispute to the chief's court shows the fluidity of the Ngwaketse marriage process, and its potential for the development of disputes.

As has been observed elsewhere, this shows that disputes can simmer over a very long period, and their presentation to the courts precipitated by the occurrence of an event not directly related to the matter in dispute (see van Rouveroy van Nieuwaal 1977:93). In this case, the

dispute ended up at the chief's court because the man had impregnated another woman.

The parties' strategies and use of third parties

The participants in this case aimed at certain goals, and employed various strategies in their attempts to achieve them. Before resorting to third parties, S tried in vain to pressure M into fulfilling his promises of marriage. After twelve years he gave up, and through his headman demanded compensation for the seduction of his daughter. His continuous involvement of the headman at all stages is an anticipatory strategy, in case the dispute ended up in the chief's court, which it did. The established procedure at the chief's court is that the headman who dealt with the dispute at ward level introduces it. Thus his interpretation of events and the behaviour of the litigants are very important to the outcome of the dispute.

A litigant such as S who actively involved the headman, and showed that he was right and the other party wrong therefore stands a better chance of winning over his opponent at the chief's court. The idea behind this strategy is therefore to ensure that the headman takes their side in his presentation of the dispute at the chief's court, should it end up there. This is a strategy regularly employed by litigants elsewhere, and Comaroff and Roberts (1981:111) observed it among the Bakgatla and Barolong-boora Tshidi.

Headmen therefore play various roles as mediators, allies and adjudicators: this case demonstrates the role of a headman in all these capacities. S recruited and continuously involved his headman in attempts at settling the dispute. The headman's suggestion that M build the woman and her children a house on a plot of land he arranged was a way of testing the seriousness of M's plans to marry. It is also an interesting example of the flexibility inherent in the dispute management process, which allows headmen to switch between their mediatory and adjudicatory roles. In this case, the headman played both these roles, trying mediation first and resorting to adjudication where this failed. Only when his decision was not complied with did he take the matter to the chief's court.

M's pre-court strategy was to apply delay tactics to S's demands by contributing support once in a while, especially when the woman was in

confinement. Under pressure to finalise the marriage, he keeps making empty promises, exploiting the open nature of the marriage process. M knew that S and his family had little choice but continue hoping he would marry their daughter because she already had six children with him and had become unattractive to other men as a wife. He probably also knew that S's demands for seduction compensation had little prospects of success in court, because ideally, these are recoverable only in the case of a woman's first pregnancy, and must be claimed at that time.

The strategies of the parties at the chief's court are also interesting. The headman presents the events in a manner that puts M in a very bad light. The headman emphasises M's improper behaviour, especially by impregnating a relative of S's, something which lay at the basis of S's pre-court strategy. S makes his demand for compensation without specifying that this is for seduction, probably because he realises that in view of the long period of time since his daughter's first pregnancy, this was not a strong basis for his claim. His daughter does the same, does not press the matter of marriage any further, and demands compensation.

The chief's court's approach and the role of norms in the decision

The manner in which the deputy chief deals with the dispute is also very revealing and is illustrative of the point earlier made about the flexibility of the Ngwaketse normative system and procedures. He tries to assist the woman to order her claims more specifically towards compensation for breach of promise to marry and nourishment, and away from seduction. It is noteworthy that this is done without specific reference to norms, but the norm that a seduction claim must be made within a reasonable time following a woman's first pregnancy lies at the bottom of this strategy. Only when making his decision, does the deputy chief openly say that he is eschewing the seduction matter and dealing with breach of promise to marry and nourishment.

In the end, the award the court makes is exactly the same as is usually awarded in cases of the first seduction of a woman, and where the man had failed to support the child. Thus the court arrives at the result sought by S, albeit in a roundabout way because they could not otherwise justify awarding him damages for seduction under Ngwaketse norms.

This demonstrates the point we made earlier, that while norms are not always specifically invoked by litigants or the courts in dispute management (Comaroff and Roberts 1981), they do inform the strategies of the parties, as well as lie at the basis of the decisions of the courts. It is also a good example of the fact that norms are sometimes significant constraining factors to the implementation of the parties' strategies, as well as those of the courts. In this respect, the flexibility of the Ngwaketse system may be seen as limited. That it remains a strong procedural feature of the system is, however, shown by the deputy chief's ability to avoid making an award for seduction and instead make one based upon breach of promise to marry.

This flexibility is further demonstrated by the decision in another case with fairly similar facts to case one, but which was decided differently (case 32/87, Kanye chief's court). In that case, a man had impregnated a woman, and it was agreed that they would marry. Twelve years later, the marriage had not taken place, and the woman's father sued the man for compensation. Instead of awarding compensation for breach of promise as in case one, the chief's court awarded damages for seduction. The difference in decision seems to have been influenced by the fact that the man in the second case had a reasonable excuse for not marrying the woman. He was able to prove that the girl's father had secretly fined another man for having had an affair with his daughter. To fine him for breach of promise appeared unacceptable to the court, as the woman's behaviour went against established betrothal norms, so compensation for seduction was found to be more suitable.

6.3 Acceptance of paternity without marriage disputes arising out of scenario two

The second scenario is where the man pointed to as the father of the child does not dispute paternity, but no marriage is agreed upon by the families. This may be due either to lack of interest on the part of one or both families, or they may feel that the children are too young to marry. Whatever the reason, the situation should ideally be discussed at a meeting of both families, during which negotiations for compensation may take place. We earlier pointed out that at this stage, what happens depends upon the outcome of the families' negotiations, and various forms of agreement may be reached. An agreement may be reached on the nature and amount of compensation, or it may be decided that the

man will support the child at its mother's home, and at an agreed age the child may move to the father's home. As we noted in chapter five, this method is commonly used, with 43% of the women in our survey having been involved in such negotiations. One Mongwaketse informant narrated the following matter in which he was involved:

My son impregnated someone else's daughter in the village, and the father of this girl confronted me about the matter. I told him I had heard him, and that I would speak to my son about it, and let him know what the situation was. My son accepted responsibility without any problems, but said that he did not wish to marry the young lady. In such a situation, I told him that he will have to find money with which to compensate the girl's father before the next meeting. My son and I then went and prepared ourselves, and when the family meeting took place, we had six hundred pula with us. The girl's father tried to argue that it was too little and that he wanted six cattle instead, but I pointed out that it was a drought year, and cattle were difficult to come by, and expensive. I basically told him that we had offered our best, and he could take it or leave it, and in the end he took the money and the matter was concluded⁷.

As this 'troubleless' example shows, negotiations can and do lead to agreement on a settlement, and families of women who are impregnated sometimes have to accept less than they would have preferred.

We found out in chapter five however that this avenue is not always successful: only 19% of the women in our survey had reaped any benefits from attempted negotiations. The families may fail to reach a settlement, or the man's family may not live up to promises to pay compensation, and a dispute may develop. We came across ten such disputes which had been heard by the chief's court at Kanye between 1978 and 1988, and before we discuss some of them in detail, a few observations are made about their general characteristics⁸.

First, the parties in all these cases had gone through the modes of negotiation, mediation and sometimes adjudication at family and ward level, and agreed upon a settlement. Most ended up in court not because of a failure to reach a settlement but as a result of undue delays by the man and his family to pay agreed compensation. Thus many of these cases were brought to court in order to enforce agreements reached at the lower levels. In some cases, the headmen of wards brought parties

7 Interview with B. Dikole at Bome ward, Kanye, 29.8.89.

8 See KCC cases 31/78; 6/80; 354/83; 503/84; 227/88; 242/88 and 359/88. The other three cases came to court because marriage negotiations had broken down (165/83), the defendant refused to pay compensation (134/84) and because of complications caused by the man's wife (88/78; case three).

who had reached a settlement before the chief's court for that agreement to be reduced to writing for enforcement purposes⁹.

A second characteristic of these cases is that at least half involved teenage girls who had to leave school as a result of being impregnated by young men in their twenties who were employed. The fathers of these girls often expressed very strong feelings about this, asking the court to take into account the loss of their daughter's educational opportunities when deciding the amount of compensation. It appears therefore that the action for seduction is no longer based solely upon the spoiling of marriage prospects alone, but also of educational prospects.

A third feature of these cases is that some of the ideal procedures regarded as strong features of the Ngwaketse system were not always strictly followed. For example, although cases continue to be brought by the fathers or male guardians of the women, there is an increasing tendency for the women themselves to participate actively during the proceedings more than before. In some of them, the case proceeded despite the absence of the man's guardian, especially where he originated from outside the district. In yet others, the fathers of the men are present but refuse to accept responsibility to pay on behalf of their sons (cf. KCC 31/78, case six). These developments are not in strict accordance with established Ngwaketse norms and procedures, but the court generally tolerates them. This is a sign that the Ngwaketse system is adapting itself to some of the social changes described in chapters three and five.

Some of these cases will now be discussed in detail, beginning with one which demonstrates the operation of ideal norms and procedures in a situation where paternity is not denied.

Case 2: The man who failed to pay (354/83, KCC)

O impregnated M, whereupon the latter's parents and their headman took the matter directly to the chief's court. The chief returned them on the basis that the families had not sufficiently discussed the matter at home. At a subsequent meeting between the families, with the headman in attendance, the man accepted responsibility for the pregnancy, but indicated that he could not marry the woman, as he was in the process

⁹ The headman of Bome ward said that he brought such cases to the chief's court for agreements to be reduced to writing because the parties cannot go back on their promises as easily as they do on oral agreements (interview, 25.8.89). For some examples, see cases 242 and 359/88, KCC.

of marrying another woman. It was therefore agreed that he would pay four cattle to the woman's family as compensation for seduction, and when the child was old enough to be separated from its mother, he would pay additional cattle as bogadi and take the child. The matter of compensation for nourishment was postponed to a further family meeting, which failed to take place due to the man's absence. Confronted about this by the headman, the man's brother said O had requested to be given a month to find the four cattle.

The headman replied that he was not interested in the matter of compensation for seduction as that had already been agreed upon; rather, he was concerned with finalising the discussion on the compensation for nourishment. He told O's brother that the families should meet at the kgotla a month later to report progress to the chief as promised, but O's family did not turn up.

The chief then sent the kgotla police to fetch them, and they were brought before the chief's court on 7.7.83. There, the headman presented the background to the court consisting of the deputy chief and another elder. O spoke next, explaining that he did not dispute responsibility, and that he had made arrangements with his brother to deal with the matter on his behalf.

Following an exchange between the deputy chief and O, the former made an award of seven head of cattle, six for the seduction and one as compensation for nourishment. The deputy chief warned O that if he did not pay within a month, his property would be seized and sold to satisfy the judgement.

Discussion

This case is a fairly typical example of the conduct of the negotiation, mediation and adjudication of extra-marital pregnancy disputes in Kanye, and the application of ideal norms. Although there was no dispute about paternity, the headman and the woman's parents initially approached the chief before they had sufficiently discussed the matter with the family of the man. In accordance with ideal procedures, the chief sends them back to attempt a solution at the lower levels.

The goals and strategies of the parties

Like case one, the headman in this case played various roles at all levels: as a mediator and adjudicator at home, and an ally at the chief's court. He clearly took the side of the woman's family, as the continuous pressure he exerts on the man's family, and his presentation of the matter at the chief's court shows. Like case one therefore, the woman's family's recruitment of the headman in the early stages of negotiations was a useful preparatory strategy in case the matter ended up at the chief's court. The man appears to have had no real strategy

except perhaps to postpone discussions while he arranged payment. At the chief's court, he readily admits that he is at fault and had no valid excuse for delaying.

The nature of the remedy sought and the court's award

The manner in which the woman's family made their claim is a good illustration of the nature and purpose of Ngwaketse remedies for extra-marital pregnancy. First, the families dealt with the matter of compensation for seduction, and agreed upon four cattle, which shows the variation we earlier pointed at about the amount of compensation. Moreover, the agreement that bogadi cattle would be paid, and the child moved to its father's home at a later stage shows the different arrangements families can come to following pregnancy.

The second matter, that of compensation for nourishment, was postponed to another meeting which the defendant failed to attend. The woman's family and their headman insisted upon the separation of these two matters up to the level of the chief's court. There, the award the deputy chief makes is in line with ideal Ngwaketse norms: six cattle for seduction (*tshenyo*), and a seventh for nourishment (*dikotla*). This separation of seduction and nourishment is significant, and must be understood in its context. In particular, *dikotla* should not be compared with maintenance state law-style. To briefly repeat, among Bangwaketse, it seeks to reimburse the woman's father for expenses he incurred during her *botsetse* or confinement, that is the first few months following the child's birth. This should not be confused with periodic maintenance statutory style, which is intended to provide for the child in the future. Perhaps the source of the confusion is that the English term maintenance has sometimes been used as a poor translation of the Setswana term *dikotla*. An appreciation of the difference has significant implications, especially to the determination of whether proceedings under customary law are for 'substantially the same relief' as that provided by the Affiliation Proceedings Act. This point is further taken up in chapter ten, where the interaction between Ngwaketse and common law remedies is examined.

Disputes arising out of the second scenario are not only caused by failure to fulfill promises to pay compensation. The next case shows the complications that sometimes arise in spite of an admission of

paternity. It also demonstrates how issues of marital status, co-residence and relationship can combine to make negotiation, mediation and adjudication very complicated indeed.

Case 3: The wife who threatened to leave if her husband paid seduction damages for another woman (88/78, KCC)

In 1974 S, a married man aged forty one and living in Mano ward on Kanye hill began to associate with a fifteen year old girl, M, also a close relative of his. His wife made regular complaints to both families about the affair, and at subsequent family meetings aimed at a resolution of the problem, the girl alleged that S had forced her into a sexual relationship. The man denied this, and promised to discontinue the relationship, which he did not. As a result, the girl became pregnant and had S's child in 1977, whom he failed to support. The girl then went to the district commissioner to lodge a claim for maintenance. S successfully dissuaded her from pursuing it, promising to begin negotiations for compensation at home.

At the subsequent family meeting, it was agreed in the presence of the headman of the girl's ward that the man produce four head of cattle as compensation for seduction. The man's wife objected to the award, and threatened to leave her husband and return to her parents if he paid. According to her, any cattle paid to the girl's parents would be for *bogadi* and not seduction, and would mean that her husband was taking another wife.

Faced with such an impasse, the headman of the girl's ward took the case to the chief's *kgotla*, which returned him to make another attempt at resolution. Having failed once again to persuade the man's wife to withdraw her threat, the headman returned to the chief's court, where the matter was finally accepted. It was heard by the chief himself and three other court members on 6.4.78.

As is the usual procedure, the headman began by introducing the matter formally to the court. He presented it as one between the wife and the girl, in which the latter was interfering in the former's marriage. He explained that he found the matter difficult to resolve because while the wife's threat to leave if her husband paid was understandable, the girl also needed assistance in raising the child.

The wife spoke next, explaining that this affair had gone on for too long; she had actually caught them red handed three times herself. Whenever she complained to her husband, he threatened to beat her up, and the girl had mocked her. She told the court that this was the reason she refused compensation for seduction to be paid. In her own words, 'the child was after all deliberately conceived, and if cattle are paid, you will be giving my husband his wife, so I shall leave'.

The girl then spoke, persisting in her allegation that S had initially raped her, which she eventually abandoned after the court interrogated her. She said that she had gone to the district commissioner because she wanted maintenance for her child, which S was not providing.

For his part, S denied the rape allegation, but accepted that he had behaved badly towards his wife and family. In defence to the claim for compensation, he said first of all that the girl's family had never

informed him about her pregnancy and confinement¹⁰. S's second defence was that the girl's parents had themselves conceded that they could not claim seduction damages in view of their daughter's known misbehaviour with him. He therefore expressed surprise at the girl's attempt to sue him at the DC's, and her claim at the chief's court.

At the end of this evidence, the chief made the following remarks:

You are in front of the court because of your wife's complaint that you impregnated a girl, which seduction you do not deny. We also see the child with our own eyes, whom the girl says you should maintain. There is a law which applies to children who have no fathers, which gives the mother a right to complain to the DC or the chief. Without minimising the importance of the seduction, the hurtful words are those of your wife, who threatens to leave if you pay compensation. Your father is also greatly pained by your deeds which may lead to his daughter-in-law leaving. I will not pass judgement now; this is not because I am unable to, but because the parents have asked to be given time to discuss the matter further.

Five days later the court adjourned, and Chief Seepapitso IV delivered a rather lengthy indictment of S and the girl's behaviour. He praised S's wife for her patience, appealing to her to stay for the sake of her children and father-in-law¹¹. He warned S to keep his ears on the ground for further charges based upon his sexual relationship with a girl under the age of consent. His father had asked the chief to administer corporal punishment to S in public, and he himself would have liked to do so, but it is not done in seduction cases, and in any event is prohibited by law on men over the age of forty years. This, the chief warns, does not mean that he should continue his lawlessness, because future punishment may be very severe indeed. The girl herself received a lot of the chief's criticism for being shameless and insensitive towards S's wife, despite the latter's patience. She was then awarded three cattle or P240, to be paid by S within three weeks.

Discussion

The foregoing case reveals the difficulties that sometimes arise when paternity is not denied, but management of the matter is complicated by the context in which it takes place. First of all, the young girl in this case became pregnant following a three year old relationship with an older married relative. This relationship had caused a lot of tension between the three families, and a lot of anguish to the man's wife:

10 This is a common defence to compensation and maintenance claims at both the chief's and magistrate's court. It is usually not meant literally, but is a reference to the fact that the woman's parents did not follow ideal procedures in dealing with the matter.

11 S's father is an important elder, and respected member of the chief's kgotla at Kanye, who is almost always present during the settlement of disputes.

numerous attempts at severing the relationship prior to the pregnancy were not successful.

Although recorded as a seduction case, the case was initiated by the wife, and her name originally appeared under 'complainant' while her husband's appeared under 'defendant' on the case file¹². The wife's name was subsequently deleted from the title 'plaintiff', and substituted with the girl's, while S's name was retained under defendant. Even then, the matter was presented in court as being between the two women, and the wife is treated throughout the hearing as the injured party, while her husband and the girl were the wrongdoers. This shows that western legal terms and categories such as complainants, plaintiffs and defendants can lead to confusion and oversimplification of Ngwaketse dispute procedures. In this case, the girl fits both categories: she is plaintiff in the seduction issue and defendant in the issue of interference in the marriage. In a manner typical of customary systems elsewhere, the two matters are dealt with simultaneously because they are inextricably intertwined (cf. van Rouveroy van Nieuwaal 1977). This is to be contrasted with state law procedures that often insist upon the separation of causes of action, allowing joinder only in certain restricted circumstances.

The parties' goals and strategies

The goals and strategies of the two women in this case are interesting, and their participation is much more dominant than in previous cases. The wife pursued three related goals: at the beginning, she wanted to sever the relationship between her husband and the girl. The strategy she used to achieve this goal was to initiate family meetings at which the matter was discussed, but this failed. Her second goal was to ensure that her husband and the girl were publicly rebuked for their behaviour, which she pursued by initiating further meetings. She knew that she had behaved like a good wife faced with a difficult situation, and in court she went to great lengths to prove this. She clearly succeeded in this goal, judging from the praise and sympathy displayed by the chief towards her.

12 The covers of customary court files nowadays employ this terminology, which is also expressed in Setswana: an example of the influence of state law procedures.

When the girl fell pregnant, the wife formulated another goal, which was to ensure that the girl does not financially profit from her misbehaviour. She tries to achieve this goal by creating a situation of deadlock: threatens to leave if her husband pays the four cattle agreed upon by the families. Unfortunately for her, this strategy does not entirely assist her to achieve the third goal; only a reduction in the number of cattle. This combined with the public rebuke may have substantially satisfied and persuaded her to remain with her husband.

As for the girl, she had a clear goal: to obtain some compensation for the pregnancy. Because she knew that she had previously been warned by all three families to refrain from associating with S, she does not pursue the avenue of negotiations to begin with. Instead she goes to the DC to file a maintenance complaint, where the context of her pregnancy would be irrelevant to a decision on maintenance. Although S eventually persuaded her to withdraw the complaint, in the end this strategy partly satisfied her goal because by threatening him in this way, she compelled him to initiate negotiations which finally led to compensation.

The man's goal was to have the matter resolved with the minimum of public exposure and financial expenditure. His strategy was to persuade the girl to withdraw her complaint from the DC's office because he knew that he may have had to pay up to forty pula every month until the child was thirteen years of age. In the end, his strategy is successful in achieving the goals he sought, especially the financial one. A single payment of P240 is very little compared with the total amount he would have paid under a state law maintenance order (cf. case six and chapter ten). He did not however succeed in his goal of keeping the matter away from public knowledge; on the contrary, he earned himself public contempt and a strong reprimand from the chief.

In this case, the role of the families at the chief's court in this case is quite different from those in previous cases. Although all three families were actively involved during the initial stages of dispute resolution, this was not the case at the chief's court. The proceedings are dominated by the man, his wife and the seduced girl. Another difference between this and previous cases is the role of the headman: he mainly facilitated negotiations and played a mediatory role between the families. On failing, he took the matter to the chief, who sends him back to try again, but the wife's threat to abandon the

marriage creates an impasse which sees the headman back at the chief's court. He explains his dilemma: although the wife's sentiments are understandable, the girl also needed assistance raising the child. This headman thus played a fairly neutral role compared with that played by the headmen in cases one and two. He did not blame anyone for the failure to reach a settlement, nor did he take sides in the dispute. This is probably because of the blood and affinal relationships existing between the three families, which the headman did not want to upset.

The chief's court's approach

This was no doubt a difficult case for the chief's court, as the adjournment of the proceedings twice to allow for further negotiations shows. These adjournments also show that the three stages of negotiation, mediation and adjudication are not used only in that sequence; negotiations are generally welcomed at any stage in the dispute, especially where there is a deadlock as there was here. When the chief passed judgement, he was at pains to balance the interests of the parties. He rebuked the man and the girl, heaped praise upon the wife for her patience and good behaviour, appealing to her to stay for her children's sake. But the chief still feels bound by the Ngwaketse norm that some compensation should be made available in seduction cases.

His award of three and not the usual six cattle, shows his attempt to balance the interests of the parties: seduction there has been, but the context did not justify a regular award. The court eventually decided upon a compromise award, less cattle than had been awarded at the family level, which may eventually have satisfied the wife, and dissuaded her from carrying out her threat to abandon the marriage.

A final observation relates to the chief's use of state law to threaten the man. First he refers to 'a law which applies to children who have no fathers', an apparent reference to the Affiliation Proceedings Act. Secondly, he threatens the man with a charge of defilement, a statutory offence which makes it illegal for an adult to have sexual intercourse with a girl below sixteen years, irrespective of her consent. Although he has no jurisdiction to apply these state laws, the chief used them to threaten and perhaps to secure compliance with his order. We shall observe this tendency to use state law to threaten litigants in other

cases in this chapter.

The next section presents the norms and procedures invoked in cases where paternity is denied, that is in disputes arising out of the third scenario.

6.4 Norms and procedures for the establishment of paternity: disputes arising out of scenario three

In situations where the man pointed to as the father of a child denies paternity, we earlier observed that what happens depends very much on the woman's family, and the outcome of their discussions with that of the man. It appears that some families confronted with this situation give up at this stage, as the survey results presented in chapter five revealed. The reasons for such abandonment were discussed there, and will not be repeated here. Other families do however feel strongly enough to pursue the matter through the normal procedures of negotiation, mediation and failing that adjudication. An important question therefore becomes how they go about seeking to prove paternity, and what norms and procedures are laid down by the chief's court in this respect. It is to this question that this section addresses itself.

Proof of paternity is a difficult matter universally, and most legal systems have certain rules and procedures for its establishment. Bangwaketse informants confirm that cases in which paternity is denied are some of the most difficult to deal with, especially where the man denies any sexual contact with the woman. They are quick to point out however that given time and patience, it is not impossible to find out the truth of the matter. Unlike the common law approach to proof of paternity and other evidentiary matters, there are few norms laid down for proving paternity under Ngwaketse ideals. Bangwaketse elders emphasise that listening to the evidence of both parties, their parents, relatives and friends who may have known of the relationship is the best way of determining the issue. The Ngwaketse method is aimed first of all at establishing whether there is a reasonable case against the man alleged to be the father. Thus proceedings begin in the usual manner, with the headman who mediated or adjudicated in the dispute stating the nature of the case and why it is before the court:

Chief, I adjudicated upon the seduction matter between M and R. I decided that there was not sufficient evidence on which to find the boy responsible. The boy said that he never had sexual intercourse with the girl. The girl's father was not satisfied with my decision,

hence our presence in this court (75/78, KCC).

or:

I am here to present a pregnancy dispute. Our child has spoilt J's child L. We heard the case and found it fitting to pass judgement. In my judgement I made an award lower than the ideal because the girl was involved with another man. I awarded five head of cattle, but the girl's parents are not satisfied; they want eight cattle. We are therefore here because they did not listen to us (133/78, KCC).

Following such an introduction, the woman or her guardian will normally be invited to present their case. Traditionally, it is the father of the girl who is the plaintiff, and he usually speaks before his daughter. As we observed earlier, the cases heard between 1978 and 1988 however indicate a shift from this procedure, with the woman herself presenting her own case despite the presence of her guardian. These cases are marked by the conspicuous silence of the women's parents, and the active participation of the women themselves. It appears that the strict condition of male assistance is only required to establish locus standi but not for the actual presentation of the case.

The women usually give a lengthy account of when they met with the man, where they had sexual intercourse and the events leading to the dispute:

I am complaining because RB has long given me a child. I first told him of my pregnancy in February, and we were together until I was eight months pregnant. At this point my parents approached him, but he responded that he was not aware of my pregnancy. He refused to make his parents available for discussions with mine, and we told his boss at the prison. This is why I came here to the chief's court (436/84, KCC).

The next step is the man's presentation of his version, and the reasons why he denies responsibility. In some cases he denies any sexual contact with the woman, and these can be very difficult and time consuming. In others, sexual intercourse is admitted, but a number of reasons why it could not have resulted in pregnancy raised. The next section deals with some of the defences often raised by men who admit sexual intercourse but deny paternity, and how the chief's court has dealt with such cases.

6.4.1 Proof of paternity where sexual intercourse is admitted

In most of the cases heard by the chief's court under the third scenario, the men did not deny sexual intercourse. Instead, they raised certain defences to support their denial of paternity. The most popular

defence is the setting of a date of sexual intercourse such that the man could not have fathered the child. Such cases are often dominated by conflicting exchanges between the man and the woman about when they last had sex, with court members intervening to examine any contradictions and inconsistencies on the part of one of them. Should the man in particular contradict himself, court members do not hesitate to question him at length until he breaks and concedes, or they are left in no doubt that he is responsible. The following excerpt from a case record shows the typical line of questioning court members adopt (436/84, KCC):

Presiding officer (PO): Do you know this girl?

Man: Yes I know her, we used to be in love.

PO: How long were you in love?

Man: Six months.

PO: Did you hear her say that her parents came to you in August?

Man: That is not true, they came some time between October and November.

Note that the man is trying to show that his relationship with the woman was too brief to have resulted in the birth of a child at that time. He also sets the date of the girl's parents' visit later than she alleged, in order to show that he was not informed of the pregnancy in time.

At this point the court moves on to the crux of the matter:

PO: Did you have sex with her?

Man: Yes I did.

PO: Then why do you deny that you made her pregnant?

Man: Because she took a long time before she informed me of her pregnancy, and she had other boyfriends. One of these men lives in Palapye, and I found the photograph of yet another man in her possession.

PO: Did you hear her say to us that she told you about her pregnancy?

Man: She never told me.

PO: Does your sex not cause pregnancy?

Man: It does.

PO: Who were you stealing (the woman) from?

Man: No one sir.

PO: Then why do you deny paternity?

Man: Because I used a condom.

The presiding officer ignored the allegation about the condom, probably because he considered it a useless avenue to pursue, as the court would have only the woman's word against the man's. Instead, the presiding officer reverts to his previous line of questioning the man about the duration of his relationship with the woman, and the other men she was involved with. This strategy, which involves repeating the same questions in different words is a common method of checking for inconsistencies in the evidence of witnesses at the chief's court. In the end, the

man admitted that he was in love with the woman for the eight months she alleged, and conceded that he had no direct evidence that she had sex with these other men.

At this point it became clear that the man had begun to contradict himself, so other members of the court joined the presiding officer to close in on him. Three court members took turns questioning him on the duration of the relationship and insisted that he name at least one of the men he claims the woman was involved with. He named one B, and the court adjourns for him to be called.

The following day B appeared before the court but denied any intimacy with the woman; still, the man persisted in his denials. Proceedings were then adjourned until the following day for the child to be brought before the court. On the third day, the presiding officer reviewed the evidence of the previous three days, pointing to the contradictions in the man's evidence, and how he wasted the court's time with his stubbornness. He finds him responsible for fathering the child and fines him six cattle or P720, to be paid within thirty days.

This procedure for establishing paternity, which is heavily dependant upon tracing the course of events is a typical one employed at the chief's court. There are other cases however in the evidence does not reveal what court members consider the truth, and these can lead to protracted proceedings lasting weeks and sometimes months. In such cases, documentary proof such as letters passing between the parties is also accepted by the court, as the case below indicates.

Case 4: The man who was caught by his own letter (133/78, KCC)

On 9.5.78, the headman of Wantshe ward in Kanye introduced a dispute to the chief's court in which a young man from his ward was alleged to have impregnated a girl from another ward in the same village. The matter had been discussed by both families, and the man had denied paternity. The headman told the court that he had mediated in the dispute and eventually adjudicated in the matter. He had found the boy responsible for the pregnancy, but had awarded only five head of cattle because there were allegations that another man was involved. Both parties were dissatisfied with this decision, the girls parents demanding eight cattle, and the boy's parents insisting that he was not responsible. The following exchange during the proceedings shows how the issue of paternity is handled.

Boy's father: It is true that I am not satisfied with the judgement because the girl mentioned the name of another man she was involved with. Why should we alone be pursued, and not the other man?

Girl: No sir, I have never mentioned another man, it is your son who

mentioned this. I denied this and insisted that he go and find this man and bring him before the court. I have a letter from the defendant which he wrote to me following the family meetings and hearing before the headman. In that letter he accepts responsibility for my pregnancy, asks the child's name and says that he denied only because he was afraid of the elders. He even visited me frequently after the case was tried at the ward.

Boy: Chief and elders, she is telling the truth about the letter. I made a mistake by writing it.

Court: When did you write the letter?

Boy: I wrote the letter after the family and ward hearings. The headman is committing himself to a matter he is not sure about. I agree with the words of the letter, but I did not make her pregnant, G did.

Court, to boy's father: What have you to say about this letter?

Boy's father: About the letter I have nothing to say, since it was written after the hearings. My son has deceived me and I concede. I must take responsibility for my son's actions. I am still dissatisfied about the pregnancy matter because of the other man's involvement but I shall concede.

Boy, asked by the court what should be done: I have difficulty. Yes sir I would like to marry her. I do not know when I shall marry her, I have to think it over.
(The boy's father agrees that he will marry the girl and take the child).

Girl's father, speaking for the first time: Chief, my opinion is that there can be no marriage here because ever since my daughter became pregnant they have offered us nothing. I would like them to pay compensation for my daughter's seduction first, and only after that talk about marriage¹³. The court should take account of the fact that she was doing form four at school.

Court, to girl: What about you, are you still expecting marriage or do you also want compensation for seduction?

Girl: I do not believe or trust that there can be marriage because he never supported the child. I would agree if he had done something for me previously.

Following this evidence, the chief delivered his judgement, criticising the boy and his father for attempting to mislead the court, and warned them that perjury is an offence. He awarded seven head of cattle to be produced within one month, and warned the girl not to allow the boy to make her pregnant again.

13 Cf. case one, where the girl's father adopted the same attitude.

Discussion

The foregoing case is a typical example of one heard at the chief's court where sexual intercourse is admitted, but paternity is denied on the basis of certain defences. The boy in this case did not deny sexual intercourse, but his defence was that the girl had mentioned her involvement with another boy. Thus he alleged that the girl was already pregnant when they had sex because he became ill afterwards, a defence that is often raised by men denying paternity at the chief's court¹⁴. This reflects a popular belief in the village that having sex with a woman who is already pregnant by another man causes the second man to become ill, a belief to be found in other African communities (cf. van Rouveroy van Nieuwaal 1981). In some cases this is admitted by the chief's court as a defence, but in this case it did not work because there was other evidence which pointed towards his being responsible. Having been caught by his own letter, the boy tries to pursue a delatory strategy by offering to marry the girl, and his father agrees with him. We earlier noted that an offer of marriage is also an acceptable remedy for extra-marital pregnancy under Ngwaketse ideals.

This is however rejected outright by the girl's father, who insists that compensation for seduction be paid first because they do not trust the boy's family any more. This is an understandable counter-strategy which the father of the woman in case one also adopted, which is hardly surprising in the light of both boys' parents' conduct, and the periods of time which elapsed before the marriage in case one was finalised. In case four, the court was equally unconvinced, and the matter is not pursued any further; compensation for seduction damages was awarded in accordance with ideal remedies.

In this case, the girl had wisely retained the letter she had received from the man, which made it relatively easy to prove paternity. In other cases, documented and other means of proof such as witnesses are often absent, and the court has only the woman's word against the man's. The next section discusses these difficult cases, especially where the man totally denies sexual intercourse.

14 Cf. case records 157/1978; 39/1985; 231/1984, KCC.

6.4.2 Proof of paternity where sexual intercourse is denied

Like rape cases, these cases can be very difficult indeed because -as informants put it- the sexual act is by its nature never performed within full view of the public. In such difficult cases, the court uses other methods to persuade and sometimes compel the man to accept responsibility. This is often done through the parents, to whom the court often appeals to prevail upon their son to concede. Parents who are persuaded on the evidence before the court that their son is responsible often accept responsibility on his behalf. The following passage from the father of a man who denied paternity serves as an example:

As far as the case against my son is concerned, I do not see anything more coming out of it except that the chief should pass judgement. I am putting my head on the block for him. We all know that when a thief has clearly stolen he will still deny. It is clear that my son had sex with the girl, but he has been stubborn. As his father I am compelling to him to concede. I however ask the chief to exercise leniency when he passes judgement (369/83 KCC).

In other cases the evidence is so inconclusive that the court is confronted with a stalemate. Unlike the common law approach to proof however, the chief's court does not dismiss such cases on the basis of insufficiency of evidence. On the contrary, the court continues to trace the evidence, even if it takes months to establish the truth. In all the ten cases heard between 1978 and 1988 in which paternity was denied, the court made a ruling on every single one, mostly in favour of the women. The attitude of court members is that the longer and more thoroughly the matter is discussed in court, the more likely that the truth will come out. Time consuming as it may be, this approach does work in the sense that a decision on the question of paternity is eventually reached.

In the more difficult cases where the evidence is inconclusive, the chief's court has displayed a measure of influence from the common law as administered at the magistrate's court. This is borne out by the admission of blood test results by the chief's court in two cases that came before them in 1978, to which we now turn.

Case 5: The man who unwisely demanded a blood test (75/78, KCC)

On 17.2.78, a headman introduced a seduction dispute to the chief's court in which a twenty five year old man was alleged to have impregnated a seventeen year old schoolgirl. According to the girl, they had met and had sex on five occasions during social functions. The man

denied having ever had sexual contact with the girl, although he accepted that he did see her at these functions. He said that he had once sent a friend of his to call the girl for her, but she had refused, and they had never been alone together. Several meetings were held between the families to no avail, as the man persisted in his denial. The matter was taken to a headman, who decided that there was no evidence that sexual intercourse took place, and that therefore the man was not responsible.

Dissatisfied with this decision, the girl's father took the case to the Kanye chief's court. Following the headman's introduction of the above background, and the girl's father's elaboration of his complaint, the girl was invited to present her story. She repeated the five occasions on which she alleged they had sex, and the man in turn repeated his denials. Both were questioned at length by the four members of the court present, particularly about what exactly happened at the social functions. Most questions were addressed to the man, and he was continuously required to explain why he had sent a friend of his to call the girl, and why he later enquired from her whether she was pregnant. This line of questioning continued at length until the man agreed that if the friend he had sent came and told the court that he had gone off alone with the girl he would admit responsibility.

The case was then adjourned, the chief instructing the girl and the man to bring their witnesses to the court three weeks later. At this point the boy requested that blood tests be taken to determine paternity, to which the chief agreed.

Three weeks later, the case resumed with the man telling the court that he had the results of the blood test, which did not exclude him as the father. He then asked that judgement be passed.

Chief Seepapitso IV delivered a lengthy judgement in which he admonished the man for going off with a young girl in the dark at a social function and having sex with her where he knew they would be seen by nobody. He warns him against wasting the court's time, and points out that he fortunately was caught by his own request for a blood test. The chief then makes the following decision:

I find you responsible for impregnating this girl, whose child is by now four years of age. You have never ever looked after her during her pregnancy, and never supported the child after it was born. You are going to give ten head of cattle, or the cash equivalent of P1200 as payment for her seduction and maintenance of the child. This must be paid within four and a half weeks.

Discussion

This case shows the difficulties facing the courts in paternity cases where the man totally denies any sexual contact with the woman. It also demonstrates that paternity disputes can take a very long time to resolve: negotiations between the families, mediation and adjudication by the headman before the matter came before the chief took four years. At the chief's court, the matter took another month to resolve. Still, the girl's parents persisted in pursuing the man, which shows their determination to have the man brought to justice. As for the manner in

which paternity was eventually established, the man initially had a fairly good case because there was no direct evidence pointing to the occurrence of sexual intercourse. In their usual style, the court members kept asking the same questions, eventually driving him to offer that blood tests be taken. In the event, the blood test result does not exclude him as the father of the child.

The use of the results of blood tests from medical doctors in paternity cases is a new and interesting development, and this is the first known case in which the court agreed to this¹⁵. Bangwaketse court elders generally dismiss 'modern or scientific' methods of proving paternity, believing that tracing the evidence is the best way of finding the truth. Thus some argue that in case five, the success of the case cannot be attributed to the blood test, but to their method of persistently questioning the man until he concedes. The blood test request, according to this reasoning was merely the young man's desperate face-saving concession under pressure from the court's interrogation¹⁶.

The admission of blood test results in another paternity case heard a month later than case five may suggest that this has become an acceptable method of proof in such cases (157/78, KCC). In this case, the boy admitted sexual intercourse but denied responsibility on the basis that the girl was already pregnant when they met. Like the man in case five, he cited his illness after sex with the woman as proof of this, and requested a blood test. This was granted, and the results did not exclude him as the father. Unlike the man in case five however, the man in this case disagreed with the result, and indicated that he wished to cross-examine the doctor. This procedure is permitted under the common law at the magistrates court, because such results are not conclusive¹⁷. The man in this case was therefore clearly aware of magistrate's court procedures on proof of paternity.

Chief Seepapitso however dismissed this request on the basis that the

15 The only known case in which blood tests were requested and rejected out of hand was heard by the court during Bathoen II's reign: 39/1952 (Botswana National Archives, DC KAN 7/4).

16 Interview with a panel of elders at the KCC, 22.8.89.

17 The result from the Kanye hospital superintendent, 9.5.78, read as follows: I have today examined the blood of Mr PT, and that of Miss JG and her child EG. From these examinations he could be the father of the child.

man did not possess sufficient educational or medical knowledge to cross-examine a qualified medical doctor. This is an interesting example of the selective use of non-traditional methods of proof by the chief's court. In other words, while this court has accepted a new method of proving paternity, they are not willing to adopt all the procedural steps or consequences that go with them, such as the man's right to cross-examine the doctor.

Furthermore, it appears far-fetched to conclude from these two cases that they have established a right on the part of litigants at the chief's court to demand the taking of blood tests. Evidence of resistance to this new method is provided by most Bangwaketse informants' continued resistance to it. This is reflected in the proceedings of a case heard five years after the preceding two cases, and the decision of the chief's court in relation to proof of paternity. That case once again involved a seventeen year old schoolgirl who alleged that she had been impregnated by a twenty five year old young man employed in the South-African mines¹⁸. The man's defence was that he had been rejected by the girl a year before she became pregnant and could not therefore have fathered her child.

Evidence was heard at length from the parties as usual, and a friend of the man's confirmed that he had sent him to call the girl during the year that she fell pregnant. The court reached a stalemate, where there was only the man's word against that of the woman. Court members resorted once again to their method of persistent questioning until the man himself offered to resolve the stalemate. He requested that blood tests be taken, which the Deputy Chief E.M. Makaba rejected in a very indirect and interesting way.

He responded that the blood of the man and his father first be tested, and only after that the child's. The deputy chief knew quite well that most elderly villagers do not like to have blood taken from them, as they believe that it reduces the amount of blood in their bodies. This is considered unhealthy and a cause of illness. The reaction of the man's father was therefore predictable: he immediately conceded, asking that the chief pass judgement on the available evidence because he did not favour blood tests. The man's mother and his grandfather agreed,

18 Case 369/1983, KCC, cited in an earlier footnote as an example of pressure successfully exerted on the boy's father to make his son accept responsibility.

the mother pointing out that her husband was ill and short of blood, so a blood test was not a good idea. The man was found liable on the available evidence and his parents' concession, and ordered to pay five cattle or five hundred pula. Pronouncing judgement, the deputy chief rejected the man's request for a blood test on the basis that the results were never conclusive, and that in any event, traditional courts had from time immemorial resolved paternity cases by simply tracing the evidence.

These cases are interesting examples of the way customary courts selectively adopt state law procedures, and use them strategically in disputes to achieve certain goals. This explains why results of blood tests are admitted in some cases, but not in others. This obviously results in uncertainty in the exact position, and has significant implications for the position of men who deny paternity. Such uncertainty is however not limited to customary law, as is often believed; it was earlier observed that the same uncertainty pervades the proof of paternity under the state law (chapter four). This matter will be picked up in the concluding chapter eleven.

The next chapter examines the awards made by the chief's court in seduction cases, and assesses their effectiveness.

THE AWARDS OF THE KANYE CHIEF'S COURT AND THEIR EFFECTIVENESS

We observed in chapter six that previous literature and interviews with informants readily claimed that the compensation for seduction under Ngwaketse ideals is six cattle. An extra cow could be added in cases where the man did not support the woman during pregnancy and confinement, or the child after its birth. Our discussion of the cases in the previous chapter revealed that in practice these normative prescriptions were only a guide, and that especially at the levels of negotiation and mediation, the system allows for a significant measure of flexibility.

The norm relating to the amount of compensation is also applied in a flexible manner, as the variation in the awards made by the court in the cases we discussed demonstrates. This chapter focusses upon the nature and implementation of these awards. First, the trends in the awards of the chief's court in seduction cases heard between 1978 and 1988 are discussed. Then the effectiveness of the court's decisions is assessed by analysing the payment record of defendants in these cases. As a final test of the effectiveness of the court's decisions, the extent to which the court is willing and able to enforce its orders is examined.

As sometimes happens in other dispute settlement agencies, it is not in all seduction cases that the chief's court made an award for compensation to be paid. Cases are sometimes abandoned or dismissed for various reasons, such as where the man is not found liable. In others, the man may be found liable, but no order for compensation made nonetheless. In the following section we look at some of these cases, and the reasons for the absence of awards.

7.1

Cases in which no awards were made

During the ten year period under study, at least fifty four seduction cases were registered at the chief's court, but awards were not made in all of them. The records relating to twelve of these were incomplete in the sense that no judgement was entered in the court register; thus it is not clear what their outcome was. According to the clerk of the court, most of these were probably abandoned by the parties, for various reasons. In three cases, the parties were sent back home by the

court for further negotiations, a procedure which we earlier observed was strongly emphasised in the Ngwaketse dispute settlement system. Two cases were dismissed by the court because the man was not found liable, the woman in one of these being fined one cow for having falsely accused the man of impregnating her.

The last case has some interesting features, and will be discussed in more detail because although the man was found responsible for impregnating the woman, the chief made no award against him (157/78, KCC). This is the same case we discussed in chapter six, as an example of the second instance where the chief's court accepted blood test results as evidence in paternity cases. It will be remembered that in this case, the man requested a blood test whose result eventually did not exclude him as the father. The man rejected this result, but the court found him responsible for impregnating the woman. No award was made against him however, the chief simply stating:

You are a rude child, badly behaved and arrogant to this court. I speak with very hurt feelings and would like to tell you that you will never do anything for yourself until the day you are buried. If you think I am going to take anything from you and award it to the girl's parents you are wrong. I find you responsible but you need not pay anything because you are nothing; your behaviour will take you nowhere.

With these words, the chief discharged the man, a decision which did not satisfy the girl's father, who noted a written intention to appeal against it to the magistrate's court. In the end, he did not proceed with the appeal because the chief dissuaded him from doing so. Asked why he did this, and especially why he did not make an award, the chief pointed out that he wished to show the rude young man that the court was not begging from him. In addition, continued the chief, the young man was known to be irresponsible and had no possessions, so an award if made would have been empty and useless (personal communication, 10.10.89).

The latter explanation is rather surprising because the young man was employed in the South-African mines at the time, and therefore potentially able to pay compensation. Further and more importantly, his father is a paid chief's representative. This may partly explain the chief's failure to make an award, and reflects the influence of political status upon the decision. That the case was politically charged is suggested by the following excerpts from the record:

Boy's father (chief's representative): The other day I did not say anything, but I have a complaint. This is the first case I have seen

where the matter is not taken through the traditional procedures of family and ward discussions. My son's case did not follow the proper procedure: the headman of the girl's ward did not adjudicate upon the matter. Although my son agreed to have his blood taken, I do not agree with these tests.

The boy's father made these complaints after the results of the blood tests became known, and just before judgement was passed. Expecting at this point that judgement would be made against his son, he resorts to the failure of the girl's parents to follow ideal procedures of negotiation and adjudication. He also challenges the validity of the blood test results, suggesting by both that his son was being treated unfairly. This is interpreted by the chief as a direct challenge to his authority, which he responds to in the course of his judgement as follows:

A certain member of the court warned me to be very far sighted when deciding this case, and I agree with him. It is up to whomsoever is not satisfied to appeal this matter further, as that is the normal procedure. The only thing that disturbs me is that certain people tried to hijack these proceedings. I have power to conduct these proceedings under the law, and I shall follow that law until that person knows who I am. I do not wish to threaten anyone, but I also do not want to be undermined (emphasis supplied).

These passages reveal some political undertones which show that this was more than just another seduction case, and may explain the absence of an award. An ordinary villager sues the chief's representative for the seduction of his daughter by the latter's son. The headman of the woman's ward, a political junior to the man's father mediates in the matter, but the latter does not cooperate, challenging the woman's father to begin a dispute if he wished. When the dispute eventually reaches the chief's court, the man's father objects to the procedure, which he knows only too well as it is part of his functions as chief's representative to settle disputes. The chief is not pleased with this, as is clear from his words cited above, and reminds the man's father, who is his political subordinate, that under 'the law', he is in charge. The law he refers to here must be the state law, specifically the Customary Courts Act, from which he derives his jurisdiction. We noted in chapter six, especially in case three, that the chief often resorts to state law to threaten litigants who misbehave, or appear to be undermining his authority. The fact that he still refrains from making an order against the boy remains puzzling, and may be attributed to his desire not to displease an important man. In order to appease the girl's father however, he makes some critical remarks against the boy

and his father. When all is said and done however, the girl's father feels he has lost, and only gives up his intention to appeal probably because he respects his chief. The next section discusses the majority of cases, those in which awards for compensation were made.

7.2 Cases in which awards were made

In the vast majority (67%) of seduction cases which come before the chief's court, awards were made for the man to pay compensation. Table two below shows the awards which were made by the chief's court in thirty one of these cases, and indicates the cash equivalent accorded to one beast in each case. The table reveals a number of features in the awards of the court. First, there is a conspicuous variation in the awards made by the court in seduction cases. These awards vary from one to ten cattle or their equivalent in cash; the cash equivalent of one cow also varies from one case to another, even during the same year. A second significant finding is that in some cases the court orders monthly installments to be paid, which is not in accordance with Ngwaketse ideals. These two features and their implications are considered in detail in the following sections.

7.2.1 Variations in cattle or lump sum awards

As far as the awards stated in cattle or cash are concerned, there is a definite variation in both the number of cattle awarded and their cash equivalent. The variation in the cash equivalent for one cow is amply demonstrated by the four cases which were heard within six months of each other in 1978. These show fluctuations of between P70 and P120 as the cash equivalent of one cow. The official national conversion rate at this time was P80 per cow, but this was only applied in two cases. This suggests that like the number of cattle that can be awarded, the Ngwaketse system permits some flexibility in the cash value of a cow, despite official attempts at fixing this.

Table 2: The awards of the Kanye chief's court in seduction cases (1978-1988)

KCC case number	court award			cash equivalent of one cow
	cattle number	pula lump sum	monthly installments in pula and duration	
31/78	n/a	4680	P30 till child 13 years	n/a
75/78	10	1200		120
88/78	3	240		80
133/78	7	490		70
70/79	5	450		90
6/80	6	480		80
165/83	6	480		80
253/83	6	480		80
354/83	7	700		100
369/83	5	500		100
134/84	7	700		100
231/84	4	400		100
436/84	6	720		120
503/84	n/a	10800	P50 till child 18 years	n/a
646/84	7	700		100
39/85	4	400		100
60/85	n/a	6480	P30 till child 18 years	n/a
75/85	1	100		100
430/85	6	600		100
480/85	5	500		100
495/85	1	100		100
612/85	7	700		100
613/85	7	700		100
32/87	6	480		80
75/87	7	700		100
121/87	6	600		100
363/87	7	840		120
436/87	7	840		120
227/88	n/a	n/a	P100 for unstated period	n/a
242/88	7	700		100
359/88	8	1600		200

Notes: 1. This is a sample of only thirty one cases in which the records of the court were complete. The registers for the years 1981 and 1982 could not be located, and no seduction case have been registered at the court during 1986. 2. n/a= not applicable.

Sources: compiled from KCC register and court files.

More specifically, this is sometimes the subject of negotiation between the parties in court, as the proceedings of case four illustrate. In this case, the court had awarded seven cattle, which four months later, the man had failed to produce. Brought before the court for enforcement of the order by the woman's father, he indicated that he had no cattle, and asked that he be allowed to pay in cash. He suggested that a cow

was worth P40, which was rejected outright by the girl's father, who said he knew it to be P100. They eventually agreed upon the cash value of P70 per cow, which shows that this is also potentially the subject of bargaining and negotiation between the parties.

Taken as a whole however, the awards are substantially consistent with the stated ideal, which is six or seven cattle, depending on whether the man previously supported or not. In more than half of these cases, (55%), the awards are consistent with the stated ideal. These are followed by four cases in which the court made the unusual awards of monthly installments and three cases in which five cattle were awarded. The next most common awards are those in which one or four cattle were awarded (two cases each). The least common awards are those in which three, eight and ten cattle were awarded (single cases). We now turn to those cases in which the awards are not in accordance with ideal procedures.

First, the least common awards, among these case three, in which three cattle were awarded, half of the ideal number. It will be remembered that case three was complicated by the threat on the part of the seducer's wife that she would leave him if he paid seduction damages. We observed earlier that the lower than normal award can be explained by the court's anxiety to balance the interests of the seduced girl and those of the seducer's marriage. Thus the presence of special interests or circumstances sometimes cause the court to make an award which is lower than usual.

Next, we consider a case in which the award was unusually high. The highest award of ten cattle was made in case five. Although this was eventually reduced by the chief himself to eight cattle, this is still more than the Ngwaketse ideal. The chief's explanation for this was that the man had wasted the court's time by first denying and only conceding when the blood test results were before the court. He said that he reduced it to eight cattle because some people then appealed to him to exercise leniency, and the girl's family were willing to accept less cattle¹.

Asked to explain the general variation in the awards of the court, the chief and other court elders pointed out that because Ngwaketse law was not rigid, there was no reason why their awards should be consistent.

1 This is a good example of negotiation taking place at the higher level, after adjudication has taken place (cf. case three).

Because each case is different, and people are not similarly financially endowed, awards cannot be the same. Generally however, they explained that low awards are usually made where the man and his family are poor, or they behaved decently towards the girl's family and the court. In particular, the behaviour of the man in court can earn him a reduction or increase in the ideal award. The reasoning that a man who wastes the court's time by denying paternity is punished with a high award is however not consistently applied. It will be remembered that the man's behaviour in case 157/78 which we discussed in section 7.1 was similar, but there, no award was made. Hence the conclusion reached there that other considerations influenced the decision in that case.

7.2.2 Awards for monthly cash installments

These awards, which are typical of magistrates courts' orders for maintenance under common law, were made by the chief's court in four cases. Like the admission of blood test results, this development reflects common law influences on the procedures of the Ngwaketse chief's court. These awards all provide for monthly payments to be made by the man until the child reaches a certain age. It is however not an entirely new development: Chief Bathoen made orders for monthly payments in two cases heard in 1944 and 1963 respectively². This may suggest occasional attempts on the part of the court to take advantage of the flexibility their system allows by making unusual awards in appropriate cases.

Bangwaketse informants do not however support such orders, not only because they are out of step with their ideals. They also believe that they are more difficult to enforce than lump sum seduction orders, and that by maintaining the tie between the man and the woman, they lead to complications in their private lives. Thus they insist that far from introducing innovations into their system, these four cases are simply exceptions in which the court sought to punish irresponsible men. Below, the special features of some of these cases which may have made them suitable candidates for such orders are discussed.

2 Case 51/1944 where the man was ordered to pay two pounds per month until the child reached the age of sixteen; case 43/63 where two pounds was ordered until the child was twelve (Roberts 1972a:227).

Case 6: The father who refused to pay for his son's third seduction³

In 1977, a seventeen year old girl from Tonota in the Central District, was impregnated by M, a 23 year old young man from Tsoppe ward in Kanye. They had met in Gaborone, where she was attending secondary school and he was employed as a civil servant.

On finding out about his daughter's pregnancy, the girl's father made the 500 km. journey from his home in the north of Botswana to Kanye, to discuss the matter with the man's father. The latter received him, but made it clear that he was not prepared to negotiate or pay on his son's behalf, because he had already paid compensation for two other girls he had made pregnant. He told the girl's father to approach the son personally, which he did.

The man immediately accepted responsibility, but said he was not planning to marry the girl, and was willing to pay compensation for seduction. In the presence of two colleagues, the man agreed to pay six cattle for the seduction, plus thirty pula as a refund for the father's travelling expenses. Two months later, the man had not paid, and was summoned to the chief's court at Kanye, where the girl's father had reported the matter.

The matter was heard by Chief Seepapitso IV and three elders of his court on 15.2.78, and the girl's father presented the events leading to the dispute, complaining that the man's father had not treated him properly. The woman herself spoke next, narrating the events leading to her pregnancy, and the man's failure to support the child or live up to his promises. The man confirmed this version of the events, but said he had no cattle, and intended to pay compensation in monthly cash installments.

Invited by the court to speak, the man's father reiterated his earlier position that he had paid enough for his son's previous seductions of other women, and in fact still owed a P20 balance on one of these. He emphasised that although his son was employed, he never gave him any money, so he should pay the compensation himself.

Passing judgement, the chief accepted this position, and stressed that the man has spoilt a young girl's educational prospects, and caused her parents unplanned expenditure. After establishing that the man earned P80 per month, the chief ordered him to pay P30 every month until the child reached thirteen years of age. If paid at once, the chief explained, this would amount to P4,680.

The award by the court of monthly payments is not only a departure from ideal Ngwaketse norms, it is one that typifies awards made by magistrates' courts under the Affiliation Proceedings Act, over which the chief has no jurisdiction. The question which arises therefore is why such an award was made, because this case presented no special features which justified a departure from regular awards.

Chief Seepapitso explained that the award for monthly payments was meant to teach the boy and others who go about impregnating young girls a lesson (personal communication, 10.10.89). An award for the payment

³ Summarised from case record 31/1978, KCC, supplemented by discussions with the chief and defendant's relatives.

of monthly installments for a number of years is obviously quite a lot stiffer than the usual award of a lump sum based upon the cash equivalent of six cattle. Case six illustrates this point quite clearly: if the chief's award had been carried out, the man would have ended up paying a total of P4,680. The order was however eventually altered by the customary courts commissioner in Gaborone to 'customary compensation of six head of cattle (or P480) plus P30 travelling expenses' (p.1 of the case record). In the end, the man only had to pay P510, slightly over 10% of the award made by the chief. This difference naturally encourages 'forum shopping', where litigants choose the court and law which best suits their interests. Thus men preferred to pay compensation for seduction rather than monthly installments of maintenance. On the contrary, women preferred to receive monthly installments for maintenance paid through the magistrate's court⁴.

The fourth case in which monthly cash installments were ordered is case twenty four, which is discussed in detail in chapter ten. The deputy chief in this case made an order for the defendant to pay P50 per month until the child was eighteen years of age. In doing so, the deputy chief referred to 'a law which protects children which should be used', an apparent reference to the Affiliation Proceedings Act⁵. Like case six, there appears no special reason why such an order was made. Unlike that case however, the customary courts commissioner did not alter the order, instead he confirmed it, which reflects the inconsistency of that office.

The other two cases in which monthly installments were ordered were rather different from the others because in both cases, the parties had lived together for long periods of time and had several children together. In case 60/85, the couple had lived together for seven years, after which a dispute arose as a result of the man's decision to marry another woman. Thus like 'the case of the wife who threatened to leave' this was a complex case in which the issue of seduction was intertwined with the right of the first woman to stop the man from marrying another

⁴ Despite this preference, we shall find out in subsequent chapters that women end up accepting lump sums of money as compensation because of the problems associated with the enforcement of monthly cash installments.

⁵ This suggests that customary court officials sometimes attempt to apply the Affiliation Proceedings Act even though they have no jurisdiction to do so (cf. cases three and six).

woman. Likewise in case 227/88, the man was married, and in court himself offered to pay P100 per month as maintenance of the children he had with the woman who had brought him to court. In both these cases, the decision of the court to order monthly payments may be explained by their complex nature, and the exercise of the flexibility of the Ngwaketse system to apply different solutions to different problems.

The awards of the Kanye chief's court in these cases are significant as far as legal change in general is concerned, and pose questions going beyond the Kanye case study.

First of all, taken together with the admission of blood test results by the chief's court, they reflect a tendency by that court to adopt common law procedures. Secondly, the insistence by Bangwaketse elders that these decisions do not reflect any attempt to change their system reflects some resistance to change on their part. Most explain these awards as exceptional attempts on the part of the court to punish and deter young men from making unmarried girls pregnant⁶. Thirdly, the alteration of the award in case six by the customary courts commissioner 'to comply with Ngwaketse ideals' also reflects resistance to change. The interesting thing here is that such resistance is not coming from the customary system itself, but from a state official who is charged with supervising customary courts. Let us assume for argument's sake that through these decisions the Ngwaketse chief's court sought to introduce monthly cash awards into their system⁷. This attempt at judicial innovation would have been frustrated by a state law official. In other words, the customary courts commissioner who altered the order for monthly installments to comply with his understanding of 'customary law' views Ngwaketse law as rigid and unchanging. As we have repeatedly demonstrated in this chapter, many aspects of the Ngwaketse system are flexible, and the awards of the court cannot be placed in a rigid mould.

This raises several difficult questions about the status of customary law which are pertinent to this work. Should state law institutions such as the office of the customary courts commissioner judge the decisions of customary courts in strict accordance with 'traditional

6 This tendency for villagers to represent an idealised version of their customary law is discussed by F. von Benda-Beckmann (1989:137).

7 Customary courts often use judicial decision making as a way of introducing innovations into the law (cf. Comaroff and Roberts 1977).

norms'? If so, who decides what these norms are - the customary system itself, or the officially superior state? If the state system has the last word, should they impose non-customary standards of justice and fairness? Because consistency is regarded as symptomatic of justice in western legal systems, it is likely that apparently inconsistent decision making by customary courts will be quashed by state courts and other institutions. We saw in the preceding sections however that what appears to be inconsistency in the Ngwaketse system is often justifiable within the society's own cultural logic of normative flexibility. To permit state institutions to overrule or ignore that logic as in case six raises the danger that the state sees customary law as rigid and unchanging. Scores of research and literature have repeatedly demonstrated that this is not the case, but the myth continues to be perpetuated by people like the customary courts commissioner in case six (cf. F. von Benda-Beckmann 1989).

Not all state officials may adhere to that attitude, as the official who reviewed case 503/84 demonstrated, by allowing the court's order for monthly installments to stand. This official, who was different from the one who reviewed case six, may have taken the view that Bangwaketse knew their own remedies for seduction better. In other words, that it was not up to state functionaries like himself to ascertain the correct customary law. This approach has the advantage that it leaves room for the customary courts to exercise the flexibility which characterises their system, and which allows them to adapt it to changing conditions. The disadvantage is that if unchecked, flexibility can lead to arbitrary decision making, as case 157/78, discussed in section 7.1 shows.

7.3 The effectiveness of the awards of the chief's court

The effectiveness of the decisions of a court can be measured in various ways. For our purposes, we shall assess the effectiveness of the decisions of the chief's court by considering the extent to which they are complied with. A two-pronged test for effectiveness will be adopted: first, whether men against whom orders are made comply with the decisions of the courts on time. Second, where compliance is not on time, how late payments tend to be made, and whether such payments are in full or only in partial satisfaction of the judgement.

As we observed in table two, apart from the four exceptional cases in which monthly instalments were ordered, the overwhelming trend is for the court to make awards in cattle or their equivalent in cash. An analysis of the records of payment in these cases reveals that in all of them, payment was made in cash, and never in cattle. This is a departure from the practice before the 1940's when payment of compensation and court fines was normally made in cattle. The strong trend to pay in cash is illustrative of the fact that today many people do not have cattle, and of the deep penetration of the cash economy. As we observed in previous chapters, cattle ownership has become highly skewed nationally, and few households in the village own large number of cattle. Furthermore, even those with cattle would be unwise to use them for the purpose of paying compensation when they have a choice to pay cash. We found out in table two that the value attached to a cow in the customary courts is rather low. In reality, the market value of cattle is considerably higher than the amounts fixed for purposes of paying customary court fines. Thus even for people who can afford to pay compensation in cattle, it is cheaper for them to pay in cash, a fact that is well known in both customary and state law circles. This is one of the important reasons why compensation for seduction under customary law should not be regarded as being equivalent to maintenance under common law.

7.3.1 The record of compliance with the court's decisions

Applying the two-pronged test for compliance referred to earlier, an analysis of our material reveals trends in payment which can be classified into five categories. The first category is where full payment is made within the time stipulated by the court. The second category is where full payment is made but late, while in the third category payment is made on time but only in part. The fourth category comprises cases in which payment is made only in part and late. In the fifth category fall those cases in which no payment had been made at all as at 31st September 1989. We now proceed to analyse in detail the record of payment under each of these categories.

8 This is quite a common assumption, as we observed in Chapter three, especially during the discussion of the Affiliation Proceedings (Amendment) Bill of 1976 (cf. Botswana Government 1976a).

Category one: Full payment on time

This category, which may also be labelled strict compliance, comprises very few cases indeed: out of the thirty one cases in which awards were made, full payment within the stipulated period was made in only three. Table three below shows the record of payment in these three cases, and includes data on the amounts awarded by the court, the stipulated period, and the period within which they were actually paid.

Table 3: Strict compliance with the seduction awards of the KCC

case number	amount awarded in cattle and pula	period of payment
231/84	4 cattle or P400 in 2 months	2 months
32/87	6 cattle or P480 in 6 months	6 months
363/87	7 cattle or P840 in 14 days	2 days

Apart from the very low record of strict compliance with the decisions of the court, two further observations may be made about the practice of the court. First, as we earlier observed, there are variations in the court's awards, as well as in the value of a beast. Secondly, large variations are discernable in the period stipulated by the court for payment to be made, and it is not uncommon for this period to be negotiated during court proceedings. A question which arises is whether these three cases possess any special characteristics which may explain strict compliance on the part of the defendants. A closer analysis of these three cases leads us to conclude that different factors influence strict compliance with the decisions of the court.

In case 231/84, the court threatened to add an extra cow if the defendant paid late, and also stated that the defendant was lucky not to have been taken to the magistrate's court where he would have had to pay more. These threats may have influenced the defendant to make timely payment. In case 32/87, the man was at the time making preparations to marry another woman, thus his paying promptly must have been motivated by a desire to sever all obligations to the woman who brought him to court. Case 363/87 presented no special features, and it may be concluded that the defendant in this case possessed sufficient resources to satisfy the court's judgement on time.

Category two: Full payment, but late

Like category one, only three cases fall into this category, which we may also call substantial compliance. Here, one lump sum of money was paid in full satisfaction of the judgment, but unlike category one, later than the period stipulated by the court. Table four below shows the record of payment in this category, and includes data on the amount awarded by the court, and the how late payment was made.

Table 4: Substantial compliance with the seduction awards of the KCC

case number	amount awarded	when paid
88/78	3 cattle or P490 in 3 weeks	1.5 weeks late
70/79	5 cattle or P450 in 30 days	3 years late
242/88	7 cattle or P840 in 30 days	1 month late

As the table makes clear, the lateness of lump sum payments in this category varies substantially from as little as one and a half weeks to three years. Payments in cases 88/78 and 242/88 are not so late, and are almost in strict compliance with the order of the court. As we found out in the section where we discussed reasons for awards lower than ideal, the man in case three was severely criticised for his behaviour, and threatened with prosecution for defilement. Because the litigation threatened his marriage as well, he could not afford to postpone payment for too long, lest he got himself into trouble with both the law and his wife. The man in case 242/88 was not from the Ngwaketse district, and had promised the headman of Bome ward in Kanye that he would pay damages outside court. When he did not do so, the headman brought him to the chief's court to enforce their agreement. This and the fact that he was an outsider employed in the district must have prompted him to comply substantially with the court order.

Category three: First payment timely, but only in part

A more common trend is for payment to be made within the stipulated period, but then only in part, and thereafter to delay payment of the

outstanding amount for periods ranging from a few weeks to several years. This happened in 23% of the cases, as table five below shows.

Table 5: Timely but incomplete compliance with the seduction awards of the Kanye chief's court

case number	amount awarded (in pula)	first payment as % of total payment	% of col. 2 owing as of period (in months)
133/78	490	29	nf
6/80	480	30	nf
165/83	480	83	15
253/83	480	31	nf
480/85	620	19	13
610/85	700	85	nf
612/85	700	85	15

Note: nf= not finished, i.e. cases where full payment had not been made as at 31.9.89; col.= column.

As table five demonstrates, the amount initially paid varies, ranging from as little as 19% to as much as 85% of the total amount ordered by the court. What happens afterwards shows similar variation, but it is true to say that those who pay a substantial part of the total amount do not necessarily pay the outstanding amounts soon thereafter. In case 165/83, it took the defendant another fifteen months to pay the rest of the judgment, a very small amount compared with his initial payment. In cases 610 and 612/85, the defendants paid substantial amounts on time but were still owing the much lower balances four years later. This suggests that non-payment of outstanding sums sometimes has little to do with lack of financial resources.

Only two out of these seven cases had been fully paid by 31.9.89, although it took an average of fourteen months before full payment was eventually made. The rest were still owing balances ranging from 6% to 70% of the total amounts awarded at the date of this research. Considering that the cases in which the bulk of the judgment remains outstanding were decided some six to ten years ago (cases 6/80 and 253/83), the rate of compliance is far from impressive. The tendency to make only part payment within the stipulated period and then postpone payment of the rest appears to be a common delatory strategy on the part of men against whom orders are made. Paying at least some of the money on time indicates their good faith intentions to pay; in that way they buy time and keep their creditors hopeful.

This tendency is not per se criticised by Bangwaketse: they say that it is culturally more acceptable for one to show that they are doing the best to raise the money than to pay nothing at all. A popular Ngwaketse expression is that 'monna oa kibitla, ebile molato ga o bole', which means that a man must struggle to pay no matter how long it takes, because after all a debt never rots. Unfortunately, they complain that some men who can afford to pay on time take advantage of this tolerant attitude, and postpone payments for unreasonably long periods. Thus it can be concluded that the tolerant attitude towards belated payment of debts may partly contribute to limited compliance with court orders.

Category four: Part payment late

Like category three, payment in this fourth category is made only in part, but unlike category three, it is made later than the time stipulated by the court. As table six below shows, most cases fall into this category (32%); initial payments were late by periods ranging from one month to one year.

Table 6: Late and incomplete compliance with the seduction awards of the Kanye chief's court

case no	amount awarded (pula)	% col.2 period late (in months)	col.2 period fully paid (in months)	31.9.89	24
75/78	800	75	5	25	-
354/83	700	42	12	0	17
369/83+	500	20	2.5	40	-
503/84	10,800*	9	1	91	-
646/84+	700	10	5	86	-
60/85	6,480*	9	3	91	-
430/85	600	19	1	0	12
495/85	100	15	1	85	-
75/87	700	14	9	0	24
436/87 +	840	23	7	65	-

Notes: * = monthly instalments over a number of years; + = the percentages in columns 3 and 5 do not add up to 100% because in these cases, the defendants paid the difference in between the first payment and 31.9.89, which are not reflected in the table.

As was the case with category three, the number of orders which had been fully paid at 31.9.89 is very low: only three out of ten cases.

Payments are still outstanding with respect to seven cases, these ranging from 25% to as much as 91% of the total amount awarded. The amounts initially paid as a percentage of the total amount (column 3) however tend to be less in this category than those for category three. Otherwise there is little difference in the payment record of the defendants in the two categories (cf. tables five and six). First of all, initial payments in category four are on average not all that late: five months (table six, column 4). Secondly, when it comes to the period it takes to pay the balance of the court order, the difference between them is not large: eighteen to fourteen months respectively. Thus while the defendants in category three may appear on the face of it to be better compliers than those in category four (because they pay more initially and on time), a closer look at their payment records thereafter reveals little evidence for that conclusion.

Category five: No payment at all

In this category fall five cases which were decided between 1984 and 1988, where there has been no compliance at all with the court's decision. Total absence of compliance in two of these cases may be explained by reference to the circumstances in which they were heard and decided. In case 134/84, discussed in chapter six as an example of compensation awarded in the case of a second pregnancy, the defendant appealed to a magistrate on the ground that the decision of the chief's court was not in accordance with Ngwaketse ideals. The magistrate decided in his favour and quashed the decision of the chief's court. In case 436/84, the defendant had objected to the jurisdiction of the chief's court on the grounds that he wished to be represented by a lawyer. Although the court insisted upon hearing the case and actually made an award, the defendant failed to pay at all, even following an order to have his property sold served upon him in September 1988. His failure to pay five years later may therefore reflect his continued resistance to the court's jurisdiction and decision. A conclusion that may be drawn from these two cases, especially the latter is that failure to comply with the awards of the chief's court is sometimes based upon resistance on the part of the defendants to what they see as unfair decisions and awards.

As for the other three cases in which payments have not been made,

there appears nothing odd about their handling by the court which would justify failure to comply. In fact the award in one (39/85) is rather low at four head of cattle, while in another (133/87) it is consistent with the ideal. In the third, the defendant himself offered to pay monthly instalments of P100 per month, but had not made a single payment by 31.9.89. While it may be argued that payments in these cases are merely late, then they are very late indeed, especially considering our earlier observation that there is a general trend towards at least part payment within an average period of four months. In one of these cases, payment is five years late; in one it is four years late, while in the other it is two years late. Thus applying the standards based upon our earlier observations in categories three and four, we cannot come to any other conclusion except that these cases represent a failure to comply with the decisions of the court.

That the compliance record with the court's decisions is generally very low can be illustrated in another way, that is by looking at the number of orders made by year, adding up the total amount awarded, and then comparing this with the number of orders still owing, and the amount still owing as a percentage of the total amount. Table seven below confirms the poor compliance record.

Table 7: Record of payments in reduction cases at the KCC by year (1978-1988)

year made	number of awards	total awards (in pula)	total owing at 31.9.89	column 4 as % of col. 3	number of orders owing
1978	4	2040	230	11.2	2
1979	1	450	0	0	1
1980	1	480	340	70.8	1
1981	9	2160	730	33.7	3
1982	5	2520	1320	52.3	3
1983	13	3220	1379	42.8	6
1984	9	4580	2270	49.5	3
1985	8	2900	1600	55.1	1
1986	50	18350	7869	42.8*	19
Total					

Note: * = reflects column 4 as percentage of column 3.

Table seven confirms that the overall compliance with the court's awards is quite low. If we use the number of orders still owing as a standard for assessing compliance, nineteen out of a total of fifty

reduction awards made in the ten year period are still owing (38%). Ironically, the year 1988 had the best compliance rate, with only one out of eight orders still owing. This shows that for some reason, the most recent orders have a better record of compliance. The compliance record is still unimpressive when we use the total amount outstanding as a standard: the amount owed on these orders is rather high, representing nearly 43% of the total amount awarded. Therefore by whatever standard or test we assess compliance the incidence of non-compliance is high. This conclusion is based upon our earlier observation that the court are far from effective. The next section addresses this issue.

7.3.2 Statutory methods of enforcement

The customary courts in Botswana have since independence been given statutory powers to enforce their decisions. This comprises a form entitled 'Form eight: Sale Order Against Property', which authorises the messenger of the court or a police officer to cause to be levied against a defaulter's property the sum owed under the judgement. In almost all the cases discussed in this chapter, the court has threatened to use this enforcement mechanism against men who fail to comply with its decisions. An analysis of these cases however shows that despite the fact that as many as 38% have not been fully paid, the court very rarely makes use of this mechanism.

Form eight was served upon defaulters in only four cases: 133/78, 6/80, 354/83 and 436/84. We take a closer look at these cases to find out the circumstances which made them candidates for enforcement, and whether this enforcement mechanism was useful to recover the monies owing. Case 133/78 was initially decided on 9.5.78, and the court made an award of seven cattle or P490, to be paid in one month. Nearly three months later, no payment had been made, and the woman's father went back to the court demanding payment. The defendant indicated that he had no cattle, and requested that he pay in cash. After initially refusing, the woman's father agreed, and accepted the initial payment

9 See Customary Courts (Procedure) Rules, rule 30, made under the Customary Courts Act Cap. 04:05.

of P140 on that day. The next payment of P60 was made some two months later, and following that the defendant made yearly payments of between P50 and P80 per month for the four years between 1978 and 1982. Six years later in 1988, he still owed P30 on the order, and true to the saying that a debt never rots, the woman's father did return to court to enforce this seemingly small amount. The court issued form eight against him in 1988, but on 31.9.89 there had yet been no payment of this amount, which had been outstanding for eleven years. This case belongs to category three earlier discussed, and reflects the failure of the chief's court to implement the statutory methods of enforcement at its disposal. Although the amount outstanding is rather small, it took the defendant four years to pay the bulk of the order, and it was not until ten years later that form eight was issued against him to pay the rest, and even then this threat was never executed.

The next case in which form eight was used is case 6/80, where an award of six cattle or P480 was made against the man on 28.2.80. He paid part of this amount on time, and a couple of other installments the following month. Form eight was issued three months later, but like the preceding case, payment of the outstanding amount had not been made by 31.9.89. This confirms our conclusion that the mere issuing of form eight by the chief's court does not sufficiently threaten defaulters into compliance.

Form eight appears to have had a better measure of success in case 354/83, where the court made an award of seven head of cattle or P700 on 7.7.83. Five months later nothing had been paid, and the court issued form eight. The defendant paid the sum of P300 some seven months later, and the balance another five months after that, thus this case belongs to category four. Although it took a whole year after the issuing of form eight for the defendant to fully comply, it appears that this statutory method of enforcement contributed to payment being made eventually.

The fourth case in which form eight was issued does not however encourage us to conclude that using this method of enforcement to threaten defaulters contributes to payment of outstanding orders. In case 436/84 which we discussed under category five, the court made an award of six head of cattle or P720 on 28.8.85. Almost three years later form eight was issued, but no payment at all had been made a year later on 31.9.89, neither had the defaulter's property been sold to satisfy the

judgement.

The foregoing discussion leads us to conclude that the court's record of enforcing its orders is very poor indeed. First of all, form eight was used in only four out of nineteen cases in which payments were outstanding. In response to queries, the chief complained that his staff were not heeding his instructions to enforce court orders as of course; they instead waited until those owed monies repeatedly came to court to seek enforcement (personal communication, 10.10.89). Further discussions with court staff and an analysis of case files revealed that form eight is used mainly as a threat to defaulters, in the hope that they will pay. The experiences in three of these four cases leave us no doubt that this approach does not work.

Secondly, confirmation that the use of form eight is a half-hearted attempt at enforcement is that there is no indication that in any of these four cases any property was ever sold to satisfy the judgement. It is therefore not surprising that threatening its use has not succeeded in improving the record of compliance with the decisions of the court. Absence or shortage of personnel can hardly be pleaded as a reason for this failure because the customary court at Kanye is very well staffed. Moreover, discussions with court officials revealed that in criminal and other civil cases, form eight is sometimes executed, and the property of defaulters sold to satisfy other judgements of the court. It appears therefore that seduction judgements are not taken seriously by court officials and local police. In fact second to mine-workers, police officers constitute a significant number of defendants in seduction and maintenance cases. It is therefore not surprising that there is a general belief among women in the village that this is the reason the police is generally reluctant to enforce these judgements. Although this accusation was denied by the police, we shall find out in the next chapter that the police is indeed less keen to serve maintenance summonses than criminal ones, as they find the latter much more exciting and dramatic, while the former are against their 'male interests'.

The next and final section considers some of the reasons for low compliance with seduction orders of the chief's court.

7.3.3

Reasons for low compliance

One of the ready explanations for the very low compliance with the court's decisions might be that the defendants simply lack the resources to pay compensation. Our remarks about the economy of the village and its dependence on wages certainly add some weight to this argument. At the same time, the compliance record is equally low even in those cases where the men were employed, and evidence from chapter six showed that lack of resources is not always the reason for failure to comply. In any event, as we earlier observed, Bangwaketse accept absolute lack of resources as a defence to indebtedness as long as the debtor is willing to struggle and pay where he can.

It appears that part of the reason for absence of compliance is due to unwillingness on the part of defendants, or their relegation of paying such compensation to the bottom of their priority list. Some village elders are of the view that non-compliance with court orders is part of a larger problem of discipline, and lack of respect for traditional institutions. They maintain that persons against whom orders were made before the turn of the century complied with the decisions of the court mainly out of social obligation and respect for the court. According to Chief Bathoen, public exposure at the *kgotla* ensured that defendants were shamed into fulfilling their obligations. He contended that this no longer worked well because younger people in particular were not concerned about their reputation, and have a generally irresponsible attitude towards social obligations (personal communication, 10.7.89). Although it may appear simplistic to attribute absence of compliance with the decisions of the court to social or moral decay, the socio-economic changes earlier described must take part of the blame. The traditional settlement pattern and the stronger family obligations must have made it relatively easier to enforce the decisions of the court. The village has grown considerably since the turn of the century, and not everyone who is brought before the court is a Mongwaketse, or member of a clearly identifiable unit in the village. Furthermore, seduction awards are strictly speaking made against the father of the man. Because the family was more of a unified economic unit prior to the penetration of a cash economy, fathers may have been more willing to pay seduction compensation on behalf of their sons. As we saw in case six and case 39/75, they are no longer always willing to

make such payments, especially for sons who are employed but do not support them. Although this attitude is sometimes accepted by the court, they do sometimes insist upon payment by the household head in cases where the man is not working. In case 231/84 for example, while appreciating that the man was unemployed, the court still made an award. They pointed out that damages for seduction are made against the father of the man, and he must find means to pay for his son. The interesting aspect of this case is that it belongs to the first category of cases where payment was made both on time and in full.

Thus although failure to comply timeously with the award of the court may in some cases be due to lack of resources, this is not always the case. Other examples in point include cases in category three, where substantial amounts are paid in part satisfaction of the judgement, and very small amounts are left outstanding for long periods of time (cf case four).

Another reason for absence of compliance with court orders which our male informants raised repeatedly during interviews is that while they may be the biological fathers of these children, psychologically they do not consider themselves as such. They reasoned that because women get pregnant without consulting them, these children must be their responsibility alone. This attitude may further be encouraged by the cultural norm that an extra-marital child is affiliated to its mother's lineage, and is their responsibility. Some of our male informant stated that they felt more affinity towards the children of their unmarried sisters than they did towards their biological children. The explained that this is because they usually lived with and supported their unmarried sisters, whose boyfriends did not support them and their children. So they did not see any reason why they should be required to support the children of 'other men's sisters'. These are other attitudes throw a very important light on the reasons why law are not effective, and the decisions of the courts not complied with. A final reason for low compliance with customary court orders may have to do with the limited resources at their disposal. Being a regional center however, the KCC is relatively well staffed with sufficient *kgotla* or local police, and during the research period, what appeared to be an over-supply of clerical officers. From an administrative point of view therefore, there appears no reason why more 'form eight's' were not sent to defaulters. Transport was however identified as a serio

problem; the court had access to only one vehicle. Thus the weakness of enforcement may be due to a combination of inefficiency of personnel and inability by courts to execute their judgements. This question is also pursued in the next two chapters in so far as the effectiveness of state law is concerned.

THE MANAGEMENT OF EXTRA-MARITAL PREGNANCY UNDER STATE LAW AT KANYE

This chapter focusses upon the operation of the state law regarding extra-marital pregnancy in Kanye, especially at the magistrate's court. The provisions of the state law of maintenance and the institutions which administer it in Kanye were dealt with in chapters four and five respectively. That information should be kept in mind as it provides the background against which this chapter must be understood. Section 8.1 traces the procedure followed in practice at the Kanye magistrate's court, from the point a woman initiates a complaint to the stage at which the court makes a decision. Because many maintenance cases are dealt with through family negotiations, it is important to find out what it is that motivates some women to use the court. The answer to this question cannot be found within the law, but rather in the real life experiences of these women. Thus section 8.2 presents some profiles of these women to illustrate their characteristics, expectations, strategies, experiences and attitudes towards the state law. Section 8.3 focusses upon the two controversial issues in the state law of extra-marital pregnancy which were identified in chapter four: the proof of paternity and the time limitation laid down under the Affiliation Proceedings Act. The aim of this section is to find out whether these two issues have been as problematic as they have been at the level of the high court, and how the Kanye magistrate's court has dealt with them.

8.1 Procedure for claiming maintenance at Kanye magistrate's court

The procedure for claiming maintenance at magistrate's courts around the country is generally governed by the magistrate's court rules, the Roman-Dutch law and more specifically the Affiliation Proceedings Act. This section describes the actual procedure followed at the Kanye magistrate's court in maintenance cases, which is based upon observation of court proceedings and interviews with officials and litigants. Four main stages were identified in this process: preliminary interview, registration, service of summons and hearing.

8.1.1 Stage one: preliminary interview

Applications for maintenance at the Kanye magistrate's court may be made on any day of the week, although wednesdays and fridays are specifically reserved for the hearing of these cases. Women approach the clerk of the court and indicate that they wish to report a man who has failed to maintain their child(ren). In practice, not all cases are automatically registered; the court clerk or some other court official first holds a preliminary interview with the woman. Questions asked include the child's birth date, which is intended to establish whether the application is within the twelve months period stipulated by the Affiliation Proceedings Act. If the application is late, the court clerk sometimes probes into the reasons for the delay, or the case may be registered and the decision left to the magistrate. It appears that the court clerk at Kanye, who has been in that position for thirteen years exercises a lot of discretion in this respect¹.

Another common question asked at this stage is whether any steps have been taken to settle the matter through negotiations between the parents of the parties. Although not a requirement under the law, the court clerk explained that she did this because sometimes applications were subsequently abandoned following agreement between the parents of the parties. Because this resulted in wastages of the court's time, she did sometimes send back women who had not exhausted this avenue. Asked whether this was not risky in view of the twelve months limitation, she explained that she only did this where the child was only a few months old. In addition, she emphasised that the women were told about this risk, and reminded to return before the child reached a year if negotiations did not bear fruit. Other information sought by court officials at this preliminary interview is whether the woman has sufficient evidence of paternity, the man's residential address, whether he is in permanent employment or engaged in other ways of earning an income which would enable him to support a child.

¹ The Affiliation Proceedings Act does not specifically state who should decide whether the case falls within the exceptions laid down in section three. Decisions at the high court suggest that it is for the magistrate to determine as a preliminary issue.

8.1.2 Stage two: registration

Should the court clerk be satisfied that the application is within the time limit, or where it is not, that it falls within the exceptions laid down, she may register the case. The applicant is asked to complete a complaint form which is in the English language, and for those who cannot read English, its contents are quickly explained to them. It requires the names and full residential addresses of both parties, the name, sex and date of birth of the child. It also contains a declaration to the effect that the alleged father has not made sufficient provision for the maintenance of the child. In typical legalistic language, it states that applicant applies for a summons to:

show cause why he should not be adjudged to be the putative father of the above mentioned child(ren), and why an affiliation order should not be made against him.

Assistance is given to those who cannot write, and the complaint form is signed on oath before the magistrate. In cases where the magistrate is absent, the woman must await his return because without his signature as commissioner of oaths, her case cannot be registered. This is the first stage in the procedure at which women experience delays, and it was quite common for women to wait long periods of time for the magistrate who was in court attending to another case, or away from the village. The oath is administered in English, which thenceforth becomes the language of communication, and is translated into Setswana by an interpreter, even where the magistrate speaks Setswana. The woman is then dismissed, and told she will be informed of the hearing date, which cannot be fixed before summons is issued, successfully served, and service returned.

8.1.3 Stage three: service of summons

The period between registration and hearing varies depending upon how quickly summonses are prepared by the court, how soon the police collect and serve them, and how soon the defendant can be located. It may range from a few days to a couple of years; out of sixteen cases from the survey we could find such information on, the average period was eight months. In three cases, it took almost one year before summons was issued, while in another three, the period was up to two years. A common problem in Kanye is locating defendants who work outside th

village, especially in the South-African mines. The vast majority of defendants in the magistrate's court survey were in formal wage employment outside the village, or earned a regular income from self employment. This was the case in twenty four out of the twenty five cases followed up from the magistrates court survey, and only one was a fulltime farmer. Of these twenty four, only four were employed in the village; the rest worked in the nearby towns of Lobatse and Jwaneng (9), other parts of Botswana (9) and the South-African mines (2) (see map 1).

Most defendants who work outside the village have to be sent summonses by post, which gives rise to at least two problems. First, the women sometimes do not know the correct addresses of the men, especially in cases where the men change jobs. In such cases, the court must send the woman a letter requesting a more sufficient address from the applicant. In Kanye, this was apparently so common that a special form was designed by one magistrate which requested a fuller and more reliable address for service. This form, written only in English, was however as legalistic as other documents executed under the Affiliation Proceedings Act. Entitled 'request for further and better particulars', it caused further delays as women regularly came back to court for an explanation of its contents. Further delays were occasioned by the women having to search for the correct addresses, which can be difficult if the defendant's friends, employer or relatives do not cooperate.

A second problem related to service by post is that some defendants simply pretend never to have received such summonses. This seems to be particularly the case with men who work in the South-African mines, whose matters must sometimes await their next leave before a hearing date is set. Out of sixteen cases that had been registered since January 1989 for example, summonses had been issued for five, and only three of these had reached the hearing stage at the end of October 1989. In one of these cases, the hearing date was postponed more than once because summons could not be served. In another case which I attended, the defendant worked in the South-African mines and claimed not to have received a mailed summons. Proceedings in this case had to begin de novo despite the fact that plaintiff had lodged her complaint as far back as 1980. As a result, the order which was eventually made could only run for one more year, because the Affiliation Proceedings Act

restricts the duration of orders to an initial period of thirteen years, and the child was already twelve years old (case 46/84, KMC).

In another case, the complaint was registered in 1986, but defendant absented himself so often that it was finally heard three years later. Again, proceedings had to begin de novo because a different magistrate had by then taken up the position at Kanye (case 105/86, KMC).

Another problem is that police officers are not as enthusiastic to serve maintenance summonses as they are for criminal summonses, a observation which has also been made for other districts (e.g. Brown 1984 for Gaborone). Although this was denied by the police, the explanation for this seems to be that they consider maintenance cases dull and lacking the drama which characterises criminal prosecutions². The women, on the other hand, are of the view that the police do not serve maintenance summonses enthusiastically because they are themselves often at the receiving end, and generally identify and sympathise with defendants.

The summons contains a date (suitable to the magistrate) on which the defendant is expected to appear in court. This may become the hearing date depending on whether it is suitable to both parties; in practice another date is usually set. It is common for only one of the parties (usually the plaintiff) to turn up, while the other (usually the defendant) has been held up on the way to court, at work or is simply in default. Attendance at court is however usually an acceptable reason for employers of working defendants, as long as it is not for unreasonable long periods.

Should the defendant fail to attend several times, an *ex parte* hearing may be held, that is in the absence of the defendant. This is done only where proof of service of summons is available, such as a signed 'return of service'. This appears at the bottom of the summons, and indicates the date and time of service, as well as the signature of the serving officer and the recipient. In those cases where the woman herself does not turn up, she is sent a letter inquiring whether she

2 Two magistrates who had worked in Kanye certainly held this view, one suggesting that it may be a good idea to empower officials other than police to serve these summonses. Another charged the administration of justice with the same neglect of maintenance cases and said that they were not treated like 'real' cases. For example, he pointed out, a backlog of maintenance cases did not usually entitle a district to an additional or visiting magistrate, while criminal cases did.

still intends to pursue the case. Another innovative form designed by the same magistrate responsible for the 'request for further and better particulars' is entitled 'notice of intended dismissal', which is sent to an applicant who fails to turn up five times. She is informed that a hearing will be held on a particular date to enquire into the reasons:

why your matter should not be dismissed... in default of appearance on your part the matter shall proceed without any further reference to yourself.

Like the form earlier discussed, this text is available only in English, and the women normally returned to the court for further explanation. We also observed in chapter five that some women fail to follow up cases because the man has indicated his willingness to negotiate through the families. Case three is an example of this, and we shall find out in this chapter and in chapter ten that registering a case at the magistrates court is a strategy adopted by some women only to threaten the men into negotiating seriously. Such a form might therefore have the effect of putting undue pressure on the woman to proceed with the case at the magistrate's court.

8.1.4

Stage four: the court hearing

Despite the common delays discussed above, some cases do proceed to the hearing stage, if both parties eventually appear. Maintenance proceedings are normally held in the magistrate's office, not in the large courtroom, which is mostly used for criminal trials. Although this must help reduce the feeling of awe, most litigants and witnesses we observed appeared uncomfortable before and during the proceedings. This is hardly surprising in view of the use of English, direct reference to terms like sexual intercourse (especially by persons younger than the litigants), the administration of the oath and the general conduct of court officials. The case presented below gives a vivid idea of the procedure and atmosphere in a maintenance case at the magistrate's court in Kanye.

Case 7: The district commissioner's employee³

S was forty two years old and worked at the DC's office in Kanye as cleaner, where I first met her. When she found out about my research she told me about her own case which was about to be heard at the magistrate's court.

In short, she had a child with a certain R in November 1988, who failed to support her and the child. When she confronted him about it, he played delatory tactics, insisting that S should begin negotiations with his parents. Her parents however showed no interest in initiating negotiations with the man's for compensation, because according to her stepfather did not like her. When she came out of confinement in 1989, she decided to take steps to secure maintenance through the magistrate's court, which she had been advised by the DC. She registered a complaint there, summons was issued on 28.4.89, and she was told to appear in court for the hearing nearly four months later 18.8.89.

On that day, both S and the man arrived on time, and the hearing began around 8.30 am. in the magistrate's office. Both the man and the woman appeared nervous as they were led to the end of a table, and seated awkwardly next to each other. At the opposite end of the table sat the magistrate, who was dressed in formal clothes, and busily flipping through some papers. The interpreter sat to the left of the parties while I sat to their right.

The hearing began as usual with the magistrate informing the defendant of the nature of plaintiff's claim, and asking whether he accepts or denies paternity.

Man: (in a low voice) I do not agree.

Magistrate: Hmm? (man repeats in a louder voice that he does not agree; magistrate flips through papers). Are you the father of A?

Man: Pardon? (magistrate repeats question, the man replies 'no' in low voice, and the interpreter tells him to speak louder).

Mag: Do you know A?

Man: No (laughter from everyone except the man).

Mag: A is a daughter of plaintiff's, born on 18.11.88, are you the father?

Man: Yes.

Mag: (pauses for about half a minute to write down something, bangs on the table occasionally). And you are maintaining the child?

Man: No.

Mag: Why?

Man: I do not work.

Mag: I see (continues to write, and then says to the woman): You must stand up and take oath. (she stands up, and having established that she is a Christian, the interpreter administers the oath to her while she has her right hand on the bible and raises her left).

Woman: (repeats after interpreter in Setswana) I swear to tell the whole truth and nothing but the truth, so help me God (tries to sit down, but is ordered twice to remain standing).

Mag: (asks woman her name, and invites her to tell the court): 'who you met him, what you did, what was the result and why you are here?

Woman: We met in March 1978...

³ Case 10/1989, heard at KMC on 18.8.89, which I attended and recorded the proceedings. I subsequently interviewed the plaintiff on 18.8.89 and several occasions thereafter.

Mag: (interrupts) 1978?

Woman: Yes. (interpreter orders her to speak louder, and she does, explaining how she met the man, became pregnant and informed him.) He told me he had no 'moithwadiso' (capacity to impregnate a woman).

Mag: What is 'moithwadiso'?

Woman: I do not know what he mean. She then continued to explain what happened afterwards, and why she was in court. In between, she was stopped by the magistrate to indicate exact dates, about which she was confused: she said for example that she had met the man in 1978, and had a child that same year, when she meant to say 1988.

Mag: When did you give birth?

Woman: In November.

Mag: When?

Woman: At the end of seventy eight, no, I mean eighty. What year are we in? (looks around and asks defendant to help her remember, who merely grins and looks down; the woman looks embarrassed and giggles nervously).

Mag: What year are you referring to? Do you know how to count/read?

Woman: (appears offended) I already explained that I cannot read or write. (the interpreter asks her whether she knows 1,2,3, and she says yes. Asked what the current year was, she says it is 1980).

Mag: You are nine years behind. Did you have the child at home or at the hospital?

Woman: At the hospital.

Mag: Where are the child's papers?

Woman: At home. (Magistrate inquires how far her home is, and finds out that it is some 3-4 km. away. He asks her to proceed with her case. She continues the story of her affair with the man, the magistrate interrupting her often to slow down so he can write, and requesting clarification on the sequence of events. She is asked whether she is through with her case and says yes).

Mag: Before I allow this man to cross examine you, I would like you to bring the medical certificate showing when the child was born. Do you think you can find it?

Woman: Yes sir. Oh, what certificate do you mean, the child's card?

Interpreter: The child's birth certificate.

Woman: But we have not been given those yet, I only have a piece of paper attached to the child's card which indicates when the child was born⁴.

Mag: Bring whatever document the hospital staff gave you at the time of the child's birth. Come back at two this afternoon because your home is far from here. (the interpreter tries to find out from the woman precisely what document she has, but they fail to understand one another. The woman tries in vain to explain to the young female interpreter-who the woman pointed out to me later has never had a child- what sort of documents are given those who have children).

Mag: (to both parties) Bring your witnesses with you at two o'clock. (the woman says she has none, except for the man's sisters who may not be available as they had not been warned. The magistrate explains that it should not be too much of a problem since defendant admits pater-

4 Birth certificates are prepared by the ministry of Home Affairs in Gaborone, on receipt of applications from hospitals and individuals around the country. This process can take months or even years. The card the woman is referring to is one which clinics give to parents in order to monitor the growth of their children or illnesses.

nity. The woman complains that she may be unable to secure her employer's permission to return at two o'clock but is ignored.

One month later, I spoke to the woman at her place of work, and she told me that she was unable to take the paper to the court that Friday afternoon. When she tried to do so on Monday, she was told the magistrate was out, and a new hearing date could not be set. The court clerk told her to return with the papers, and check with them later when her case can be heard. She told me resignedly:

I phoned them from work to find out when the case will be heard but they said they did not know, so I gave up - if they do not know, how can I know? In a way I have given up because it is too far to walk to the magistrate's court, only to get nothing.

When I confronted her with this accusation, the court clerk countered that the woman was tedious, that she pestered them with phone calls, and expected preferential treatment just because she worked for the DC.

The procedure followed in this case is fairly typical of the cases that came before the magistrate's court at Kanye during the research period. Litigants appeared out of place; in fact although she was nervous, the DC's employee was one of the least inhibited, and in court even tried to be humorous. Her case clearly demonstrates the shortcomings of the approach of the state law towards these matters. First, it shows the pressures which illiterate litigants are subjected to by the requirement that they remember exact dates on which events such as when they met, had sex, gave birth etc. took place. Because the woman was illiterate, she was confused about the years in which events took place, but the magistrate and interpreter continued to insist upon these. The matter of the child's birth certificate was also unfair on the woman because as earlier explained, these are not always available. Magistrates cannot be blamed entirely for this however because the Affiliation Proceedings Act provides that the mother's evidence be corroborated by other evidence, even though the defendant admits paternity.

The second example of the shortcomings of the procedure at the magistrate's court is the insistence on the use of the English language even where everyone, including the magistrate, speak and understand the local language. Although this was previously justified by the fact that most magistrates were expatriates, it is laughable that English continues to be the medium of communication in Kanye, which has since 1982 had Setswana-speaking magistrates⁵. It is also well known that distor-

5 This 'colonial hangover' is to be found in the nation's highest law-making institution, the national assembly, where proceedings are conducted in English as well.

tions often occur in the process of translation, and that different meanings and interpretations are sometimes attached to the same words by different people. Moreover, Setswana translations for legal concepts or terms of foreign origin are not always in existence, and court interpreters, who are not professionally trained, often improvise. This was amply demonstrated by the reference to a birth certificate, which was translated by the interpreter as *lokwalo lwa matsalo*, or the paper of birth. This expression is quite vague and could be used to describe other documents relating to the child's birth, such as the paper the woman referred to. When the woman found out that they wanted a paper she did not have, and tried to explain this, the magistrate and the interpreter assumed she was confused, and probably had the certificate but did not recognise it.

The use of English is not only intimidating, it also causes further delays because translation takes time, and postponements are often occasioned by the absence of the interpreter. The delays which result in the whole system can be illustrated by an analysis of the number of registered cases which were still pending at the end of our research. Table eight below provides a general picture of the total number of cases which were registered, but were still pending at the Kanye magistrate's court. The table shows first of all a large variation in the total number of cases registered each year. Apart from the rather high registration figures for 1978 and 1981 to 1984, there is not much of a pattern to be discerned from the table. The sharp rise in the number of cases registered in 1978 may perhaps be accounted for by the fact that the Affiliation Proceedings Act had been amended in 1977, and had been the subject of heated public debate in 1976 (see chapter four). As for the 1981-1984 peak, this may be explained by the presence beginning 1981 of a fulltime magistrate in the village for the first time. Why the numbers of cases registered then went down again from 1985 to 1988 is however inexplicable.

Table 8: Total number of affiliation cases registered by year at the Kanye magistrate's court but were still pending as at 31.10.89

year	number cases registered	number cases pending	pending as % of registered
1971	28	1	4
1972	66	11	17
1973	63	11	17
1974	57	26	46
1975	31	24	77
1976	47	17	36
1977	75	59	79
1978	175	130	74
1979	66	46	70
1980	68	33	49
1981	102	58	57
1982	108	56	52
1983	150	51	20
1984	110	22	34
1985	79	31	39
1986	93	23	25
1987	64	28	44
1988	37	5	14

What is clear however is that a large number of registered cases were still pending at the time of our research, some from as far back as 1971. Although the number of cases pending as a percentage of those registered vary from year to year, the figures for some years are quite high. Those from 1975, and 1977 to 1979 are very high, where more than 70% of cases registered were still pending at the date of our research. That there are markedly fewer cases pending from 1980 onwards may once again be partly attributed to the provision of a fulltime magistrate at Kanye from 1981. Even then, magistrates from 1981 onwards did not do very much to tackle the backlog of cases from previous years.

The question which necessarily arises is why so many cases were still pending from as far back as eighteen years. One explanation that is based upon our observation of court proceedings and analysis of the court records is that the system is not efficiently run. Delays in the processing of court documents, service of summons and the setting of hearing dates have already been discussed. In such a situation, some women simply give up, and abandon cases they initially registered,

without formally withdrawing them⁶. Others may pursue alternative methods of obtaining maintenance for their children, either through negotiations, or engaging in income-generating activities. Whatever strategies women adopt will no doubt depend upon their particular circumstances and their goals. Some of the experiences and responses of women who opt to continue with the avenue of litigation at the magistrate's court are discussed in the next section.

8.2 A profile of maintenance litigants at Kanye magistrate's court

In view of the finding in chapter five that few maintenance matters ended up in the official courts, the question why some do end up in the courts arises. In our view, the answer to this question cannot be found wholly within the law; it lies mainly outside the legal domain in the goals, expectations, experiences and strategies of actors. Since the major actors in maintenance cases at the magistrate's court are women, we sought to find out what motivated them to register complaints.

In addition to directly asking the women themselves, certain characteristics were identified which could assist in answering this question. The criteria for selection were derived mostly from the lessons we learnt about the Ngwaketse way of dealing with pre-marital pregnancy (chapter six). There, we found out that negotiations were the accepted method of dealing with extra-marital pregnancy, and that compensation was strictly speaking available in the case of a first pregnancy only. We also found out that the loss of educational prospects motivated the fathers of teenage girls to sue for seduction before the chief's court. As a result, we were interested in the age and educational level of women who registered complaints at the magistrate's court, and the number of children they had at that time.

Secondly, we were interested in whether negotiations or litigation had taken place with respect to any of the children, and the outcome of these. Because maintenance is in the final analysis an economic matter, we sought socio-economic data on both the men and the women who were involved in maintenance litigation. Our findings revealed that women who registered maintenance complaints with the Kanye magistrate's court

⁶ Our findings revealed that less than 10% of registered cases are formally withdrawn.

indeed shared certain basic characteristics, which will be discussed in section 8.2.1. There are however variations among the women, which are presented in section 8.2.2 and 8.2.3. By presenting a number of specific profiles, it is demonstrated that these variations do not depart from the general features of women who bring cases before the magistrate's court and the men they sue.

8.2.1 Basic characteristics of maintenance litigants at Kanye Magistrate's Court

The results of the magistrate's court survey indicate that the typical applicant for maintenance at the Kanye magistrate's court is a woman between the ages of twenty one and thirty years, who had her first child during her teenage years. Thus most of these women already had at least one child before the one who was the subject of litigation (68%). This should not be surprising because as we noted earlier, such women do not strictly speaking have the right to compensation under Ngwaketse ideals. We also observed however that in practice, the avenue of negotiation remained open, and some families were able to agree on compensation for second and subsequent pregnancies.

Attempts at negotiations were certainly a common feature among the women in the survey, especially in cases where the parties and their parents were both from Kanye. Failure to cooperate, reach agreement or deliver on promises of compensation eventually led to women bringing cases before the magistrate's court. In the few cases in which no negotiation took place at all, this was usually because parents were too far away, or were unwilling to assist.

As far as education is concerned, most of the women had at least primary education, a few had done some years of junior secondary school, and only two had no education at all. Like those in the larger clinic survey, the women in the magistrate's court survey are reasonably well educated by rural Botswana standards (see chapter five). Our findings therefore suggest a link between education and the use of the magistrate's court. In other words, education is an important tool in acquiring access to information about the state law and its institutions.

Also like the clinic survey, the women litigants did not fare very well however in the area of formal employment: only five out of the twenty five women were involved in formal wage employment. The rest did not have a regular paid job, and claimed to have been dependant on others

for support. Follow-up in-depth discussions with some however revealed a different picture; they make a living by combining various sources of income. Most are in fact engaged in all manner of income-generating activities in the so-called 'informal sector', especially beer brewing and sale. They often supplement this with irregular 'piece jobs' such as domestic work for others, income from drought relief projects, parents and/or current boyfriend and agricultural activities. Although we were not able to find the same data for men as for the women, certain features characterise the men who are brought before the court. Most are in formal employment or self employed: out of our total sample of 63 cases, at least 46 of the men were in formal employment or self employed. This finding shows that women who sue men for maintenance at the magistrate's court do so with the reasonable expectation that an order may be made, and that the men can pay. A second feature which characterises the men is that by the time they are brought before the court, they are living with, or married to other women. The profiles of KB and OL and the dispute between them presented below is quite typical of parties who come before the magistrate's court.

Case 8: KB and OL⁷

The woman's story (KB)

She was born in 1954 and is from Dinaledi ward in Kanye. She was educated up to the last year of primary school, and had her first child at seventeen, and subsequently had two more with the same man. Marriage was agreed upon during family negotiations, but the man delayed until her parents gave up and decided to demand seduction damages. When these were not forthcoming, they took the case to the chief's kgotla, where they were awarded six cattle as compensation. It was also agreed that he would deliver additional cattle as bogadi, after which he could take the children. In the meantime, he was to support the children whilst they lived at their mother's home. This never happened, and her parents were still planning to follow the matter up more than ten years later in 1989.

KB had her fourth child in 1982 with another man, OL from Kanye. Her parents approached his parents for negotiations. The latter were co-operative but did little to persuade their son to support the woman and child during confinement. By now the man had been transferred to work some 300 km. away from Kanye, and according to KB had abandoned her for another woman. He did however visit her occasionally, but never provided any support. After her confinement, she visited him, and found that he was living with another woman, whom he said was his wife. On her return KB informed her parents, and discouraged them from pursuing negotiations with OL's parents, who readily agreed that she could take

the matter to the magistrate's court. On 16.5.83, KB lodged a complaint against OL with the magistrate's court at Kanye, and they were called for hearing on 6.6.83.

In court

Before magistrate no.2, the man accepted paternity of the child, but explained that he had been unable to support because he had debts. witnesses were called, and the man said he could afford to pay P20 per month, which the magistrate ordered to be paid through the court clerk every month with effect from the end of that month until the child reached thirteen years.

The man has since paid so irregularly that at some point he was prosecuted for failure to comply with a court order, and given a suspended sentence. This was on condition he paid his arrears at the rate of P per month simultaneously with the P20 monthly installments. Although cleared part of his arrears, he was still owing five years arrears October 1989.

The woman does not believe that OL will pay the arrears because he only pays an installment whenever she reports to the police and then stops. OL told her himself that he was not intending to pay everything, as was too much.

In the meantime, KB had a fifth child with another man in 1985 who was still supporting in 1989, and promising to marry her.

The man's story (OL)

According to OL, the father to KB's last child is the reason why he does not pay regularly. KB cheated him by having an affair and a child with this man. When he caught them together, she promised to withdraw the case but never did. Instead she had him prosecuted for failure to comply with the order. He complained bitterly that he was paying money to someone who had cheated him; he liked his child, but he would rather have paid customary damages, which he supports because they are a once and for all payment.

OL married another woman in 1987, and has two children with her. He also supports his elderly parents and an unmarried sister who has five children whose fathers do not support them. He complained that KB has four other children whose fathers do not support them but she does not sue them. He criticised the maintenance law because as he put it:

When you're in good terms with a girl there is no problem, but soon as you quarrel, she rushes to the magistrate's court to report you⁸.

KB still lives at home with her parents, and derives an income from brewing and selling beer, with no assistance from her brothers. She came to the magistrate's court regularly during the research period to check whether OL had paid under the order, but found nothing each time.

Although all the women in the survey certainly belong to a marginal economic group, there are differences in the degree of marginality (c

⁸ That women mostly register complaints at the end of a relationship is confirmed by the court material. It therefore appears that maintenance complaints are used by some women to protest at a man's ending of a relationship. It was also mentioned by a magistrate as one of the reasons for late applications.

⁷ Compiled from interviews with KB (Kanye, August and October 1989) and OL (Lobatse, October 1989), and case record 81/1983, KMC.

Gulbrandsen 1980:31). Compared with the woman in case eight for example, the profile of the woman in case nine presented below illustrates this quite clearly. The men share broadly similar profiles, with only small differences.

Case 9: The disputing cousins⁹

The woman's story (KD)

KD was born in 1950, and is from Ntwayagae ward in Kanye, where she did her primary school and the first three years of secondary school. She had her first two children in 1970 and 1974 with different men; the first provided irregular support, and then stopped, while the second never did. She had her third and fourth child in 1978 and 1982 respectively, this time with a distant cousin of hers from Bome ward in Kanye.

This cousin was a farmer of reasonable means, and although he was at the time married to another woman, he visited her at her home, bringing food and sometimes money, and he assisted her to plough her fields. According to the woman, some time after the second child was born, the man failed to provide regular support, and attempts at negotiations were unsuccessful because his parents did not cooperate. Two months after the birth of the second child, she registered a complaint claiming support for both children at the Kanye magistrate's court.

The man's story (RR)

He was born in 1944, lives at Bome ward in Kanye, and did three years of primary school. He is the father of several children with different women, the first two for whom he paid compensation under Ngwaketse norms. The next three he had with a woman he married in 1974, from whom he was eventually separated, but not yet formally divorced. The next two children are those he had with KD, his cousin, and he was very bitter that she reported him to the magistrate's court. Contrary to the woman's version however, the man said that his parents were prepared to negotiate, but were turned down by her's. According to him, he supported the children regularly by ploughing for them, and giving their mother cash, corn, as well as household and personal effects. When we met in 1989 he was living with a woman with whom he had children but whom he could not marry because his divorce had not yet been finalised.

In court

The case was heard three months after the complaint was lodged, and the woman presented her version to the magistrate. The man readily accepted paternity, but countered with his version of events. Although he told the magistrate that he was a farmer and did not draw a monthly salary, he was still required to pay maintenance at the rate of P15 per child per month, until the children were sixteen years of age. This was in spite of the fact that the application for the first child was three years late; the magistrate explained that he ignored this because the

man had previously provided support¹⁰.

The man has paid very irregularly since the order was made, and complained bitterly that he could not be expected to pay in monthly installments when he did not earn an income in that way. Moreover, he said that he stopped paying at some point because the woman did not use the money for the benefit of his children. As a result, the police threatened to prosecute him for failure to comply with the court order, and he had to sell some of his property to pay arrears of over P2,000 to avoid going to prison.

He accused the woman of using this money to start a small business, while his children were not properly clothed and fed. Like the man in case eight, he was bitter that the fathers of the woman's other children were not supporting them, while he was compelled to support his own.

The woman denied the accusation about the business, and said that it belonged to her current boyfriend. She said however that she understood that being a farmer, it was unfair to expect him to pay in monthly installments. She was therefore prepared to reach a final settlement through negotiations at home, as long as he gave her two cattle or their equivalent in cash. The last time I saw both of them (28.9.89), they were at the magistrate's court to explain their agreement to settle the matter at home and cancel the maintenance order.

Like case eight, case nine represents a typical case that comes before the Kanye magistrate's court between a woman and the father of her children. Both women previously had children at a younger age with different men who neither compensated them nor supported their children. In both cases, negotiations had been attempted and failed with respect to their previous children as well as those who were the subject of litigation before the court. They both had at least some primary schooling, and still lived in their natal households, not yet having established their own. Although they were both not formally employed, they were engaged in a combination of income-generating activities. The woman in case nine was however better placed financially than the woman in case eight, as she derived an income from the small business and ploughed her own fields.

The profiles of the men they took to court however diverge in two respects. Firstly, the man in case nine did initially support the woman and first child for some time, whereas the man in case eight never did. Secondly, while the man in case eight was in formal wage employment, the other was a farmer of reasonable means. As we earlier observed, the former is however the dominant profile for men who are sued for maintenance.

9 Compiled from the record of case 47/1982, KMC, and several interviews with KD and RR between July and September 1989.

10 The magistrate wrongly applied the repealed section 4(1)(b) of the Affiliation Proceedings Act (see chapter four).

nance before the magistrate's court. In any case, unlike the women who sued them, both men could rely on a regular source of income from employment and farming. Their profiles are also similar in so far as both men are now living with, or married to different women, and would like to sever all links with the other women. Furthermore, both men expressed very strong feelings about having to support their children when the other men did not, a complaint we came across frequently. We now turn to discuss the cases which revealed variations in the characteristics identified above. The most significant of these are those in which the women were in formal employment, and those in which they registered a complaint with respect to their first child.

8.2.2 Women in formal employment

Although the one fifth of women in the magistrate's court survey who were in formal employment may seem economically privileged compared with the others, they are still marginal. These women are engaged in low paying jobs: the lowest paid was a shop assistant who earned P130 per month, while the highest paid was a library assistant at P300 per month. The remaining three were cleaners who earned P160 per month; thus on average they earned P182 per month, which is below the national average of P266 per month (Botswana Government 1986c:66). The profile of the highest paid woman in this category is presented below.

Case 10: The library assistant¹¹

The library assistant was born in 1959, and studied up the first three years of junior secondary school. She lived with her sister at Ramokgosi ward in Kanye, and worked as a library assistant earning P300 per month. She had her first child at eighteen, and two more with the same man in 1978 and 1980 respectively. The father to these children was ordered by a customary court to maintain them, but never did so. In 1985 she had a fourth child with a different man, also from Kanye, but who operated a business about 300 km. away. This man did not provide for her during her pregnancy, nor for the child after it was born. When the child was almost a month old, she tried to register a complaint with the Kanye magistrate's court, but there he requested time to settle the matter at home. Six months later he had done nothing, and the woman returned to the magistrate's court, this time to formally register a complaint. Summonses were issued against the defendant several times, but he

11 Compiled from interview with her in Kanye, 11.7.89, and the record of case 29/86, KMC.

failed to turn up, the woman appearing alone on these occasions. It took another three years before the defendant could be brought before the court. There, he insisted that he still intended to pay six cattle as a final settlement, which the woman turned down. He then offered maintenance at P40 per month, and P500 as a contribution to expenses incurred since the birth of the child. The woman agreed to this, and it was made an order of the court.

In July 1989, the man had paid only one installment of P40, and when we met the woman at the magistrate's court, she was there to report that he was not complying with the maintenance order. In the meantime, she had her fifth child with another man in 1988, who in 1989 did not support regularly, and their relationship was over.

The profile of the library assistant shows some of the factors which influence women to pursue the fathers of their children as far as the magistrate's court. First, her experience with the father of her first three children must have influenced her to distrust negotiations. Her decision to bring the other man before the magistrate early confirms this, as does her returning to formally register a complaint when he did not fulfill his promise. In court, she refused his further offers of paying in cattle because he had shown himself to be unreliable, and he himself offered to pay maintenance as well as a lump sum of money. The whole process however took more than three years, and even then she still faced problems of enforcement, which reflects the ineffectiveness of the state law procedures.

Secondly, this profile shows that while it may be assumed that women who earn a regular wage are less likely to take the trouble to sue, other factors, such as the number of children they have may influence them to do so. While she may earn the highest wage compared with the other five employed women in the sample, the library assistant has the most children. This means that she carries a heavier financial burden, and may explain why even with a comparatively good salary she still pursues the father of her child for maintenance.

Although she is different from the women in cases eight and nine in the sense that she can rely on a regular income from employment, the library assistant still shares certain basic features with them. Like the latter, she had her first child in her teens, with a man who did not support, despite customary court orders to do so. Also like the women in cases eight and nine, she has since had another child with a different man. In all three cases, the relationship between the women and the men they sued have been terminated, and they are all involved with other partners. These findings reflect the instability of male-female

relationships in the village, and the unreliability of men to live up to their promises to pay customary court orders (cf. chapter five). This in turn may influence women to sue the fathers of their children at the magistrate's court.

Clearly, the reasons why women sue the fathers of their children at the magistrate's court are as varied as they are complex, especially in view of the delays they are often subjected to. Apart from financial need, another factor appears to be the restrictive Ngwaketse norm that compensation is not available with respect to second and subsequent pregnancies. Thus it is not surprising that 68% of the women litigants already had at least one child prior to the child who was the subject of litigation at the magistrate's court. Most stated this, in addition to the requirement of parental assistance, as a reason why they did not pursue customary remedies.

In pursuit of other factors that influence women to litigate at the magistrate's court, the next section discusses the rare situations in which women made maintenance complaints with respect to their first child, when they are fully entitled to compensation under ideal Ngwaketse norms.

8.2.3 Women who sought maintenance for a first child

Although most women who register maintenance complaints already had one child, a small number of women did so with respect to their first children. As these eight women (32% of the sample) were entitled to claim compensation under Ngwaketse ideals, we were interested to find out what influenced them to opt for the magistrate's court. These women shared the same features as the rest, except for two: five of them had been as far as secondary school, while four came from households in which there was no fully resident male. The latter factor is important because as we earlier observed, the success of negotiations is heavily dependent upon the participation of male elders. The profile of the neglected niece presented below illustrates this, and its influence on the decision to register a complaint with respect to a first child at the magistrate's court.

Case 11: The neglected niece¹²

She was born in 1963 to an unmarried mother, who was able to send to primary school with the meagre income she made from beer brewi. She went on to secondary school, but in 1983 fell pregnant while in second year and had to drop out of school. The father to this child a local government employee in a nearby village, but who origina from Tlokwen, about 125 km. from Kanye.

During her pregnancy, her mother and some male relatives made the 1 journey to the man's village to begin negotiations for compensati. His parents received them well, but he denied paternity and regula absented himself from meetings, which led to several unsuccessful tr by the woman's mother and her brothers. Her last trip (the tenth) to report news of the child's birth as had been agreed between elders, and his elders promised to persuade their son to accept resp sibility and compensate them for the pregnancy, or support the chi. The woman herself wrote to the man informing him of the birth, but neither responded nor supported her and the child. In the meantime, mother took care of her and the child through brewing and selling be supplemented by money from an employed son.

When the child was approaching its fifth month, the woman's mother still not heard from the man's elders, and she decided to abandon negotiations. She informed them that she intended to go to the magistrate's court, to which they responded that there was nothing t could do if he was not willing to accept responsibility. Mother daughter then proceeded to register a complaint, but had to wait months before they could get a hearing date, which they considered long because by then the child was ten months old. The court proceedings are not relevant here, and will be discussed in the next chapter. In the meantime, the woman had another child in 1989 with a man work in the nearby mining town of Jwaneng, who requested secret negotiati as he was married. Although he promised to pay compensation, he had yet paid up on 5.10.89, and the mother blamed her own brothers (woman's uncles) for not following up on the matter, especially si they live and work in the same town. She indicated that she was reluctant to pursue the matter alone because as an unmarried woman, she taken less seriously, and her brothers may blame her for acting independently. At the same time, they were not pressing the man to compensation, and she was suffering the consequences.

This profile provides us with yet another factor which influences women to opt for the magistrate's court to obtain maintenance with respect to a first pregnancy. This is the failure of negotiations which her mother had repeatedly pursued at a great expense, both in terms of money and time. Because she had learnt of the time limitation on registering a complaint at the magistrate's court at a kgotla meeting, she did so at that time. The behaviour of the man's family shows the increasing tendency for elders to be disinterested in entering into negotiations of beh

¹² Compiled from two interviews with her, 10.7.89 and 5.10.89, the second including her mother. Supplemented by information from the record of case 126/1984, KMC.

of their children (see case seven). This makes things particularly difficult when the families live some distance from each other, as in this case.

The mother's response to her daughter's second pregnancy is also revealing; despite her negative experiences with negotiations in the first case, she still pursues this avenue. This should not be surprising in view of the fact that her resort to the state law system in the first case did not produce the results promised by the court (see case sixteen). Moreover, she respects the man's marriage and promised him and her brothers that she would keep the matter secret; at the same time they are not living up to their promises. Her predicament reflects the difficulties confronting a woman who is the de facto head of her household but who is not accepted as its de jure head in the politico-jural arena. Such a woman is dependent upon her male relatives to represent or accompany her in negotiations for her daughter's pregnancy and other matters. In this case, the woman's uncles appear disinterested in ensuring that their niece's pregnancy is compensated. In the meantime, her mother has to support her and her children from the meagre income she makes from beer brewing, and money from a son who is employed.

The experiences of this mother and daughter illustrate the complicated context within which extra-marital pregnancy sometimes takes place, and which law, especially externally introduced law must take into account. As we observed earlier, legislators and judges are far removed from these contexts, and do not show sensitivity to them. The next section, which deals with two legal issues arising in maintenance cases at the Kanye magistrate's court, shows that although physically operating within these contexts, not all magistrates are willing to take them into account in making their decisions.

8.3 An analysis of two legal issues in maintenance disputes at Kanye magistrate's court

The legal centralist scholar searching for the law of maintenance in the records of the Kanye magistrate's court would be quite disappointed. This would be particularly the case if such a scholar looked out for direct references to sections of the Affiliation Proceedings Act, principles of the Roman-Dutch law and citations of cases on which the decisions of the magistrates are based. This is not to say that magistrates decide maintenance cases without any reference to the law; in

fact they do. What is meant is that the judgements of magistrates in maintenance cases at Kanye involve little 'legal analysis' of the type to be found in the decisions of superior courts (see chapter four).

This general observation is however subject to two exceptions. First, this varied from one magistrate to another: some magistrates were more legalistic than others. The first three magistrates who presided over maintenance cases at the Kanye magistrate's court during the first ten years of the operation of the Act were less legalistic than the fourth, while the fifth falls somewhere in between¹³. The first three did not, for example, always require that evidence be led by witnesses in cases where the defendant did not deny paternity. They rarely made direct references to legal provisions in their judgements, and their recording of the proceedings and judgements were brief. In short, maintenance proceedings appear to have been much simpler, more administrative and less judicial during the term of the first three magistrates.

The fourth was however more formal, and adhered rather strictly to 'the letter of the law'. For example, he insisted upon documentary proof of birth dates and that evidence be led despite an admission of paternity. He made direct references to legal provisions, read them out to the litigants, made verbatim recordings of the proceedings and wrote lengthy judgements, stating the reason for his decisions. As a result, his proceedings were longer and case files more bulky. We shall also find out that his attitude towards late applications was markedly stricter than the first three. As a result, he was feared and sometimes disliked by litigants who appeared before him (case fourteen).

Magistrate no.5 falls between these two categories; although he made a verbatim recording of the proceedings, he only insisted upon oral and written evidence where there was some doubt (case seven). He was more tolerant towards late applications and although he had a similar style of recording to that of magistrate no.4, his judgements were briefer

13 The following is the sequence of magistrates who have held court at Kanye between 1980 and 1989: no.1 P.M. Acheampong, a trained lawyer from Ghana (1980-1982); no.2 G.G. Tlhwane, lay local magistrate (1982-1984); no.3 E.E. Motlhajwe, lay local magistrate (1985-1986); no.4 J.M. Seema, a trained local lawyer (1987-1988); no.5 N.Z. Bopa a trained local lawyer (1989-present). These magistrates will henceforth be referred to by the numbers appearing before their names.

and he rarely read out the provisions of the law to litigants¹⁴. The second exception to the observation that the judgements of magistrates in maintenance cases involve little legal analysis is that this depends on the nature of the case. Most maintenance cases at the lower court level do not raise complex legal issues because as one magistrate put it, 'they involve simple, inarticulate people'. Be that as it may, it is clear from a reading of magistrate's judgements that while they do not always discuss rules and principles in court or include them in their judgements, they apply them nonetheless. In other words, even though they may not discuss them openly, their decisions are generally based upon a mental interpretation of the rules applicable to maintenance cases. This observation is interesting because this process is similar to that employed by the chief's court, and is often wrongly associated solely with customary law. Obviously, courts at the lower levels of the state system sometimes have to cast away their legalistic lenses, if they must deal properly with rural litigants. The next two sections focus upon two legal issues which arise in maintenance cases to illustrate the points made above. These two issues were discussed in relation to the high court in chapter four. Section 8.3.1 examines the manner in which Kanye magistrates make decisions about paternity, while 8.3.2 shows the approaches of the different magistrates towards complaints which are filed late.

8.3.1 The establishment of paternity at Kanye magistrate's court

In matters of paternity as in others, the first three magistrates at Kanye rarely made direct references to the rules and principles they applied. As we noted earlier however, this does not mean that they did not apply any rules and principles in their decisions. Like the chief's court, these magistrates generally evaluated the evidence before them,

¹⁴ Interviews with magistrates nos.3, 4 and 5 revealed that these differences are a function partly of age, social outlook and training. Magistrate no.3 came across as an older father figure, who saw his role not only as applying the law but also as ensuring that the children of unmarried mothers are supported. Nos.4 and 5 were younger law graduates of the university of Botswana, part of the first crop of locally trained magistrates. No.4 came across as someone who regarded himself as a legal technician whose task is to apply the law, and not solve social problems. No.5 was somewhere in between these two.

then decided the matter on the basis of the consistency and credibility of witnesses. Where the defendant admitted intercourse, he would be questioned on the dates, and if taking into account the normal period of gestation the child was born at roughly the right time, a decision in favour of paternity would be reached. In the few cases in which paternity was denied at the Kanye magistrate's court, decisions were generally reached in this manner. Case twelve, briefly summarised below is illustrative.

Case 12: The boy who denied paternity¹⁵

The woman's story

She was born in 1967 in Kanye, and had while at secondary school met and fell in love with a boy from the same village in December 1982. They had sexual intercourse in January 1983, and that same month she missed her period. When she met the boy in March 1983, she told him she was pregnant but he did not reply, so she wrote him a letter to which he did not reply either. In September 1983 she had a baby whom he failed to support, so she registered a complaint with the magistrate's court. She chose the magistrate's court because the boy was an orphan, thus negotiations would have been ineffective.

The man's story

He fell in love with her in May 1982, and first had sex with her in June 1982. The next occasion on which they had sex was November 1982; since then they did not have sex. He was therefore surprised to learn that he had fathered her child.

After hearing this evidence, magistrate no.2 made the following decision:

While defendant was definitely sure that he had sexual intercourse with her on the 3.1.1983 and that she had Panki as her witness to this effect who was sent by defendant to call her. Defendant as was expected of him argued that he had sexual intercourse during June and November 1982 in order to show that he could not be the father of a child who was born on 7.9.83 and which was an offshoot of intercourse which took place on 3.1.83. Nevertheless I am convinced that plaintiff has told the truth that defendant was the father of plaintiff's child born on 7.9.83 which date is consistent with intercourse having taken place in January 1983.

Although the magistrate did not specifically refer to specific legal provisions, he certainly brought certain assumptions and principles to bear upon his decision. In fact he may as well have been applying the Roman-Dutch law rule that a presumption of paternity arises following the man's admission of intercourse (see chapter four). The man in this

¹⁵ Compiled from the records of case 186/83, KMC, and interviews with the woman in Kanye, 6.10.89 and the man in Jwaneng, 11.10.89.

case admitted intercourse, but at earlier dates which could not have resulted in the birth of the child at the time it was born. Following that admission, the magistrate assessed the credibility of the parties, their witnesses and decided on the matter. All this was done without reference to a single legal provision, but legal rules relating to the effect of an admission of intercourse, the burden of proof and credibility were brought to bear upon this decision¹⁶.

A rare discussion of the legal principles applied to paternity cases at the Kanye magistrate's court was however made by no other than magistrate no.4 in case thirteen, discussed below.

Case 13: AT and KT¹⁷

The woman's story

AT was born in 1962 in Kanye, and had her first two children in 1982 and 1984 with a man who promised to marry her. When he went back on his promise, her parents demanded compensation for seduction. This was never paid, and her parents abandoned the matter as they did not wish to litigate.

In September 1986 she began an affair with another man and became pregnant, told him about this during the first month, and he promised support. When the child was eight months old, support was still not forthcoming, and her elders were not eager to begin negotiations, so she reported the matter to the magistrate's court. Six months later they were called for a hearing before magistrate no.4.

The man's story

He was born in 1965 and is from Letlhakane, a nearby village, and works in the nearby town of Lobatse. He had a child with a girl whose parents demanded P800 compensation, but was able to persuade them to accept P400. In 1989 he had a child with a girl who was known to his parents and who he was planning to marry.

As for this case, he admitted to having had a love affair with the woman in 1986, but says he did not see her for a long time and assumed she had found someone else. This is why he was surprised to be summoned to answer a maintenance complaint.

In court

The man denied paternity, although he admitted sexual intercourse, but did not raise any defence except to say that he was never informed of the pregnancy. The woman presented her story, and the man asked her

16 As a result, a common complaint among men is that magistrates decide against them as soon as they admit sexual intercourse with the woman. The man in this case complained bitterly about this, and said the magistrate told him that boys were fond of having sex with girls and then denying paternity, but that 'the law was made to protect girls'.

17 Compiled from the record of case 17/88, KMC, and interviews with both parties at Kanye.

many questions, dwelling mainly on the impropriety of the procedure she followed. If he was really the father of the child, he argued, her parents should have approached his for negotiations. While she admitted that she had not followed Ngwaketse tradition, she explained that her parents had been unhelpful in initiating negotiations, so she had no choice but go to the magistrate's court.

After hearing the evidence of both parties, and allowing them to question each other, magistrate no.4 retired for a day to prepare a long judgement. The following day he reviewed the proceedings, and had the following to say about the law regulating proof of paternity:

It is upon plaintiff to establish her case on a balance of probabilities, and defendant bears no great burden. Plaintiff has testified of having had sex with defendant in October 1986, a matter not disputed by defendant, and of birth of a child on 2.7.87.

The magistrate proceeded to cite the legal precedents, which we noted in chapter four were regularly used at the high court:

In making admissions of sexual intercourse defendant would of course fall under *S vs Jeggel* 1962 3 SALR 704 and *R vs Swanepoel* 1954 (4) SALR 31. Both these cases were referred to in the case of *Mosarwe vs Masoba* civil appeal 7/82.

The man was declared the putative father of the child, and a maintenance order of P15 per month made against him.

This is one of the very few cases in which a magistrate at Kanye specifically makes reference to legal precedents, and is typical of the style of magistrate no.4. Although the case was registered and heard under the Affiliation Proceedings Act, the magistrate applied mainly Roman-Dutch law to the issue of paternity. He cited South-African judicial precedents, a trend also observed in relation to the Botswana high court in chapter four. It is worthy of note however that the magistrate did not take account of the recent trends in the decisions of the latter, which as we saw have been critical of the approach adopted by the South-African cases. Apart from showing that magistrates are sometimes unaware of developments in the higher courts, this is further evidence of the unevenness and uncertainty in the application of state law in the courts. This observation equally applicable to the issue addressed in the next section, the approach of magistrates in Kanye towards late complaints.

8.3.2 The issue of late complaints: applying section four of the Affiliation Proceedings Act at Kanye

It will be remembered from chapter four that the Roman-Dutch law did not lay down any special limitations on the period within which applications for maintenance may be made. Section four of the Affiliation Proceedings Act however introduced the general rule that a maintenance

complaint under it must be made within twelve months of the baby's birth. Two exceptions were laid down: first, where the alleged father had been outside Botswana during that period, a complaint may be lodged within the twelve months following his return. Second, a complaint may be made at any other time if the man alleged to be the father said or did something with the dishonest intention of influencing the woman not to register a complaint. The latter exception has over the years proved to be the most problematic, as the discussion of its application by the high court revealed.

The application of this provision at the Kanye magistrate's court has been equally problematic and inconsistent, varying from one magistrate to the other. In the total sample of sixty three cases, twenty two (35%) were filed after the expiry of twelve months following the birth of the child. This shows that a significant number of women are not aware of this rule, or that for some of the reasons we discussed in previous chapters, they are unable to register their cases on time. Most of these cases were allowed to proceed nonetheless, and only nine were dismissed. Further analysis revealed that the first three magistrates were more tolerant towards late filing of complaints, while the fourth was the most strict¹⁸. Magistrate no.1 adopted the most liberal attitude, and heard cases in which the complaints had been filed late without holding a preliminary hearing to determine whether the cases fell into one of the exceptions to section four of the Act (cf. cases 152/78; 34/79 and 10/80).

Magistrates nos.2 and 3, on the other hand, would hear late complaints as a preliminary matter, and then decide whether they fell into one of these exceptions¹⁹. Magistrate no.2 explained to me that he did this because he was aware of the delatory effect of family negotiations and the fact that women still reported their cases to the district commissioner as used to be the practice before 1980. Therefore he usually had the woman swear an affidavit stating the reasons for late filing, then he would hold a preliminary hearing to determine whether her case fell

18 Magistrate no.4 was responsible for eight of the nine dismissed cases in the sample.

19 For cases heard by magistrate no.2, see 47/82 and 86/86, where he heard cases in which the complaints were late, on the basis that the fathers had contributed support within the twelve months. Note that this provision had by then been repealed by Act 31 of 1977, thus the magistrate applied old law.

within the exceptions to section four²⁰. This attitude may be contrasted with the tendency of the court clerk to sometimes make this decision herself without resort to the magistrate. In this way, some women may be turned away whose cases a magistrate such as no.3 may have allowed to proceed.

This liberal attitude towards late filing of complaints came to an end with the arrival of magistrate no.4 at the Kanye magistrate's court. His arrival also heralded a new 'legalism' at that court, which is clear from a perusal of the records of the cases he heard. Like nos.2 and 3, this magistrate held preliminary hearings in cases where complaints had been filed late, in order to determine whether they fell within the exceptions to section four, especially (1)(b). The preliminary hearings of magistrate no.4 were much more formal however, and he had a much stricter attitude towards what constituted justification for late complaints. He applied the Act strictly, and read its provisions out to the litigants in court. His dismissal rate was high: out of twelve late complaints he heard in a sixteen months period, he dismissed eight and allowed four²¹. As a result, this magistrate was feared, and quite unpopular among some of the women I spoke to. The experiences of the woman in the case presented below is a good example of this.

20 Interview with magistrate no.3, Lobatse high court, 19.10.89. The section itself does not in fact say exactly how and by whom the decision whether the complaint falls within one of the exceptions is to be made.

21 An analysis of the four he allowed to proceed reveals that the justifications had little to do with the maintenance law as such. In cases 75/85 and 69/86, he played a mediatory role between two families, which will be discussed in more detail later in this chapter. He allowed case 41/87 to proceed because the woman had been prevented from doing so earlier by the court staff, who had told her to go home and await the arrival of a new magistrate. Case 62/87 is the only one in which no preliminary hearing was held at all, in spite of the complaint being a year and nine months late.

Case 14: The woman who will never forgive magistrate no.4²²

The woman's story

She was born in 1954, and is from Mafikana ward in Kanye. She had her first child in 1977, with a man who had promised her marriage, but who turned out to have been married to another woman. Following negotiations between this man and her uncle, he supported her and the child until they separated due to violence on his part. This man still contributed irregularly to the support of his child at the time of the research.

She had her second child with another man, who worked in the nearby town of Lobatse in November 1983. This man had disappeared as soon as she had told him of her pregnancy, but resumed support after negotiations had taken place between him and her parents. In November 1986, he again withdrew support, and since her parents were not keen to continue the negotiations on her behalf, she eventually took the matter to the district commissioner at Kanye. The DC told her that cases such as hers were dealt with by the magistrate, so she proceeded to register a complaint with the magistrate's court at Kanye on 12.9.87. At the magistrate's court, the court clerk asked her why she had not reported before the child was a year old, but according to her did not explain to her that this was a legal requirement. She had to wait another year and two months before she was called to the magistrate's court, where her case was heard by magistrate no.4 on 27.10.88. The following is the full record of the proceedings.

In court: Magistrate, plaintiff (ptf), defendant (def) and interpreter.
Court: Both parties being present, I shall explain to defendant nature of complaint as made under section three of the Affiliation Proceedings Act.

Def: The child is mine but she takes money every month. Yes I dispute her claim of non-support.

Court: (explains to plaintiff) The child you complain of was born on 15.11.83.

Ptf: Yes.

Court: Is there reason as to why complaint was not made within twelve months after birth of the child?

Ptf: Yes. I used to talk to defendant but he did not listen to me, and he kicked me out of his home. It was in 1987 in July. At that time defendant was taking care of the child. I refer to the period from 15.11.83 to 15.11.84.

Court: What did he do to influence you not to complain?

Ptf: I say at first he took care and then terminated.

Court: Explain to plaintiff section 4(1)(a) and 4(1)(b) and 4(1)(c) (reads out to plaintiff Act 31/1977).

Plaintiff: Does this mean the man has no obligation to support?

Court: Explains again to plaintiff.

Plaintiff: The man stopped me not to report in 1983. I came here as the man failed to take care of me in December 1986. I wrote a letter to him and he gave me P70 and thereafter did not provide support. On my visits to Lobatse he gave me P20, P30, and said he was learning traditional medicine. In 1987 he kicked me out of the home.

I had been speaking to defendant in the house thinking he'd listen

22 Case 45/87, KMC. I also discussed the case at length with the woman at her home in Kanye on 21.9.89.

(asked why she did not complain under section 4(1)(a)). He further said that he was afraid of his wife, and said that I should not report, it was in July last year. It was in 1986 when he said I should not report, it was around June. I did not come to report and in December he started to disappear. I waited to talk to him. He came in January and brought P70 and after that nothing came. I would visit him in Lobatse and thought if I spoke to him he'd listen. I spoke to him (asked why she did not complain between January 1987 and July 1987).

In response to a question by defendant: You said you had a wife who would hear. You stopped me.

Court: Does she have any witnesses to call on this preliminary issue?

Plaintiff: I have no witnesses to call. I close my case.

Def: No.

Ptf: I want him to support.

The court then handed down the following Judgement on the same day:

Complaint has been made in terms of section four of the Affiliation Act by plaintiff against defendant. Complaint was made on 12.8.87 and the child is registered as having been born on 15.11.83. Thus complaint was made some four years after birth of the child which would be out of time (see section 4(1)(c)). Complainant was granted time to address the court on the preliminary point of her case being out of time. Plaintiff told the court of defendant influencing her not to report. She says it was in 1986 June; defendant, it is said, said he had a wife and did not want to have this wife hear of another child. For complaint to be entertained under the Affiliation Act one must fall under section 4(1) (reads out subsections a-c). Plaintiff in this case has made attempts to fall under section 4(1)(b). Plaintiff does not however account for not reporting between 15.11.83 and 15.11.84 due to defendant's influence on her not to report.

Plaintiff alleges defendant did support but does not say if this influenced her not to report. Even if this influenced her not to report can it be said that (1) defendant intended to influence her not to complain and (2) in so doing there is reasonable ground to believe that he was being dishonest?

I do not think plaintiff has been able to discharge and establish as to why her complaint should be entertained and accordingly I dismiss the application.

The preceding case is a clear illustration of magistrate no.4's strict application of section four of the Affiliation Proceedings Act, and the plight of a plaintiff ignorant of the law. The magistrate read out legal provisions and asked the woman why she had not complied with them. He questioned her on why she did not report between certain dates which are crucial to the decision, but because she was unaware of the rule that she should report within twelve months, her answers did not help her case. In short, she was unprepared in so far as she did not know the rules according to which the game was being played. If she did, she may have said that the man influenced her not to report between the date of the child's birth and when it turned one year. Had

she been aware of the further requirement that dishonesty on the part of the man had to be proved, she may have alleged this as well²³. The magistrate was however unmoved by the fact that women such as this one were generally ignorant of the exact provisions of the law. His legalism is explicitly stated in the following passage from a similar case he dismissed two months later:

If parties are to institute proceedings of this nature they must familiarise themselves with the Act and laws pertaining to affiliation. It appears that most people believe that one has to just complain for that matter to the DC and then litigate. It is taken that it is a matter of calling the alleged father and questioning him as to why he does not take care of the child. The position however is not so²⁴.

The magistrate was therefore aware of the fact that some complainants did not know the state law, but he insisted upon the adage that 'ignorance of the law is no excuse'. His remarks also show that he knew some of the reasons why women failed to file complaints in time, but felt he had to apply the law. Although he admitted to me that the section under discussion was problematic in that it burdened mothers and was not in the best interests of the child, he insisted that he could not be flexible, lest this 'created a precedent and opened the floodgates' (personal communication, 14.9.89). The legalistic, insensitive and sexist approach of this magistrate could not have been better expressed. One would however have expected a magistrate working in a rural area to be more sensitive to the social context in which he operated.

We earlier observed in the case of the high court that the requirement under the Act that the woman prove that the defendant influenced her dishonestly not to complain earlier and its strict application is

23 She said bitterly that she would never forgive the magistrate, and that she had certainly learnt a lesson and would apply it in the future. When I spoke to her in September 1989, she was in confinement for her third child, who had been fathered by a young man who disappeared when she was three months pregnant. She said that this time, she would ensure that she filed her complaint on time, and 'see what happens'. In the meantime, she makes a living by buying and selling beer and helping at her parent's lands.

24 Case 41/1988, in which the complaint was six months late, but the girl's mother had reported the matter verbally to the DC. The girl had no idea why the case had been dismissed, while the defendant, a policeman, had been aware of the time limitation all along; in fact he raised it as a defence himself in court (interviews with both parties, Kanye, 23 and 28.9.89).

certainly insensitive to the social reality. Not only does it assume knowledge of the law and its implications, it also ignores the finding that almost all cases that eventually come before the magistrate's court have been subjected to some negotiation, which as our data showed can last months and even years. It is illogical to expect a woman whose child is being supported to prove to the court that by so doing, the man was intending to be dishonest. The previous provision that a complaint could be registered late if the man had supported within the twelve months was more realistic, as it did not require proof of dishonest intention²⁵.

Although it is mostly women who suffer from the strict application of this provision, it would be inaccurate to assume that ignorance of the law is limited to women. As the protracted case presented below shows, a woman in possession of some information about the law, legal assistance and connections with the judicial system can use all this to her advantage.

Case 15: The magistrate's secretary²⁶

The woman's story

The magistrate's secretary was born in 1952 and had her first child in 1972 with a man who promised to marry her but who failed to fulfill his promise. No steps were taken against this man for compensation or maintenance because her parents were against it.

In 1980 she fell in love with another man who was working at the local district council, and that same year fell pregnant. According to her, he responded that it was fine, and that he would look after the child. After she gave birth to the child in April 1981, he failed to maintain him except for bringing a can of milk once. When she threatened to take him to the magistrate's court where she was working as a typist, he indicated that he was willing to pay in cattle. She demanded six cattle or P600, and he said he wanted to confirm this with the chief first. When he did not return as promised, the woman lodged a complaint with the magistrate's court at Kanye in July 1982, which was three months too late under the Affiliation Proceedings Act. She said this did not worry her because she was aware of the exception under which complaints could be brought late, and that defendant was responsible for her

25 See repealed section 6(3), Affiliation Proceedings Act of 1970. The remarks of Judge Hannah in Kgamane vs Diteko (chapter four) show that judges are aware of the unfairness of this provision but feel they can do nothing until it is amended by parliament.

26 Originally case 63/82, KMC; subsequently appealed to the high court as civil appeal 10/83; retried as 86/86 at Kanye magistrate's court, and re-appealed to the high court as civil appeal 1/87. Compiled from records of these cases, interview with plaintiff 18.9.89, and with defendant 7.9.89 at Kanye.

delay.

The man's story

He met the woman through a female relative, and subsequently fell in love with her on the understanding that he was married with three children. She said she also had had a policeman boyfriend, whom he once found at her house one night. He claimed that he never saw the woman since that day, and next saw her when he was called by a letter to the court in July 1982.

When he got to the court, the court clerk threatened 'to put the law against him' if he did not support the child, whereupon he asked for time to discuss the matter with the woman. In response the court clerk, who the man thought was the magistrate, suggested that he buy milk for the child. That same month he bought some milk and took it to the woman, but his attempts to persuade her to sort the matter outside court failed. Two weeks later he received a summons to appear before the Kanye magistrate's court on 6.8.1982.

In court

The first in what was to become a series of hearings spanning a period of seven years began on 6.8.82 before magistrate no.2. The woman began by presenting her story, and was cross-examined by the man. Court adjourned for two weeks to enable the woman to call her witnesses. Two weeks later, the hearing adjourned with testimony from the court clerk, who admitted that he had called defendant to his office before taking the matter to the magistrate. He said the defendant admitted to being the father of the child, and promised to settle the matter with the woman outside court. He then told defendant that if he did not do so, he would take the matter before the magistrate.

The second witness was the woman through whom the two had met, and she testified that on several occasions in 1980 she had accompanied the man to the woman's house. On one occasion, she and the woman had spent the night at his house, where the woman slept in the same bed as the man. The woman had informed her of her pregnancy in 1980, and the man had subsequently come to her house with a can of milk for the baby. He explained to her that the woman threatened to take him to court but that he preferred to discuss the matter with her outside court. She also confirmed that plaintiff had demanded six cattle, whereupon he promised to pay their equivalent in cash after finding out the value. The man gave evidence in his own defence, and said that he had used condoms, although the woman did not favour them. He said she had not told him of her pregnancy until December 1980, but that he was not worried because he knew he had used condoms. After the child was born, she asked him to maintain the child, and he promised to discuss the matter with her. He admitted to having bought milk for the child, and that he was called before the court by the court clerk on 3.8.82.

The magistrate rejected the man's evidence that he had used condoms, and found him to have been the father of the child on the basis of his admission of intercourse, and the evidence of the two witnesses. He also took into account his provision of the milk, referring to it as an attempt 'to pre-empt plaintiff from taking the case to court'. Having ascertained that the man earned P491 per month, the magistrate made an order of P50 per month against him. This was to be paid through the clerk of the court with effect from the end of August 1982 until the child reached sixteen years. The man was not satisfied with this decision because according to him

the magistrate favoured the woman, and gave her more time to speak. He was also aggrieved by the fact that the court clerk was allowed to give evidence, and felt that the hearing could not have been fair in any case as the woman was an employee of the court. Moreover, he felt that the court clerk had trapped him by asking him to buy milk for the child, as this could be taken as an admission of paternity, or as a good reason for filing the complaint late²⁷. That notwithstanding, the man made irregular payments under the order, while he consulted friends in the police and others about the legalities of the decision. It is then that he found out about the twelve months rule, and that he was paying P10 above the maximum allowed by statute. Therefore he decided to appeal to the high court.

The man appeared in person before the high court at Lobatse on 16.12.83, and Justice Hannah set aside the decision, ordering that it be heard before a different magistrate. The case was heard by another magistrate in Gaborone on 7.3.84, and this time the man instructed a lawyer. On the matter of the timing of the complaint, this magistrate decided that the case fell within the provisions of section 4(1)(b). The magistrate reasoned that the man had dishonestly influenced her not to complain within twelve months, and therefore decided that the woman could institute her proceedings *de novo*²⁸.

It took another two years before the case came before a new magistrate at Kanye (no.3). The man still denied paternity and indicated that he wished to engage a lawyer, so the case was postponed for another month to enable him to do so. When the hearing resumed on 29.10.86, the defendant had not instructed a lawyer as promised, and he applied for another postponement.

The magistrate rejected this and invited plaintiff to proceed with her case, which she did and called the same witnesses as before. The defendant also gave evidence, and after two more hearings, the magistrate decided that he was the father of the child, and was ordered to pay P30 per month through the court until the child reached thirteen years. The order was to run retrospectively from the child's date of birth, which arrears had to be paid at the rate of P20 per month.

The man was still dissatisfied by this decision, and felt that even this magistrate was against him, especially because in his opinion he made the same order as the previous one²⁹. Consequently he paid irregularly, and eventually lodged another appeal to the high court, where his case was set for 16.3.87. On that day the man went to the high court at Lobatse and waited in the main court building for his case to

27 See repealed section 6(3) Affiliation Proceedings Act 1970, which the man based this reasoning upon. Cf. also the decision in case nine, which shows that the incorrect assumption that this repealed provision still applies is also held by some magistrates.

28 Being unaware of the technical fact that this issue had been disposed of by the high court, the man criticised his lawyer for having failed to dwell upon the issue of the court clerk's impropriety. He also accused court officials of 'calling each other on the phone and influencing the outcome of cases'.

29 The man reasoned that the requirement that he pay two installments of P30 and P20 every month as maintenance and arrears respectively was effectively the former order in a disguised form.

be called. In the meantime the woman and her lawyer waited in one of the smaller court houses where the case was scheduled to be heard. When the man did not turn up, they successfully applied for a default judgement against him.

Following this fiasco, the man continued to make sporadic payments, which resulted in several reminders from the court clerk to pay his arrears or face prosecution for failure to comply³⁰. Some time in 1988 he wrote a letter of complaint to the high court but received what according to him were unsatisfactory replies. He continued to pay irregularly, and in March 1989 was eventually prosecuted and convicted on nine counts of failure to comply with a maintenance order. He was fined P10 on each count or three months imprisonment, and ordered to pay P450 within three months. Since then, he has paid irregularly and continued to receive threats of another prosecution from the court clerk and the police.

The man was so aggrieved that he even wrote a letter of complaint to the minister in charge of the administration of justice, but his secretary replied that his case was 'not yet ripe for appeal to the state president', and advised him to pursue the matter with his attorneys. He continued to default; in July 1989 he owed arrears of P950 under the order, and received a reminder to pay or face prosecution. That same month, he made an application for his appeal to be reinstated on the high court roll. The woman's lawyer lodged a 'notice of opposition' in August 1989, and the matter had not yet come before the high court at the end of the research period two months later.

This case amply demonstrates that awareness of the law and easier access to legal institutions through one's employment can make a big difference in affiliation cases which are filed late. It also shows that while the requirement under section 4(1)(b) has been strictly interpreted by most high court judges and some magistrates, others, like magistrates nos.2 and 3, interpret it less strictly. This uneven application of the law results in uncertainty which is a weakness in the state legal system often wrongly associated with customary law alone.

The case also shows that while it is mostly women who suffer from the restrictive provisions of the Act, ignorance of the state law is not restricted to them. It could be said therefore that men benefit from the Act by default because it is drafted in a restrictive manner, not because they are aware of its provisions. In this case, the woman was not only aware of the law, she also consistently engaged a lawyer to draft her papers and advise her. The man, on the other hand, did not do

30 The court records show that five such notices were sent between April 1987 and December 1988 for arrears ranging from P150 to P750. The court clerk also sent three requests to the police to consider prosecution.

this; he engaged a lawyer only once and the rest of the time survived on the parttime assistance of friends who had claim to some knowledge of the law. As a result, he did not even know that the high court held sessions in different rooms for different cases, ended up at the wrong room, and had his case dismissed.

Finally, the fact that this case was still pending seven years later, having been heard five times in three different courts, shows how long disputes can remain unresolved. The man in this case continued to appeal because he felt very strongly that he did not father the woman's child, said that he knew the father, and that the woman chose to sue him because the other man had died. He was also of the view that the whole administration of justice was against him because the woman was employed there. These strong feelings contributed to the protracted litigation, as well as to his failure to pay regularly under the order. We shall find out in the next chapter that these and other related socio-cultural factors often explain why men fail to comply with maintenance orders, which is a sign of resistance to the state law and administration of justice.

**THE ORDERS OF THE KANYE MAGISTRATE'S COURT
AND THEIR EFFECTIVENESS**

This chapter examines the orders made by the Kanye magistrate's court in maintenance cases, and their effectiveness. Section 9.1 examines the nature of these orders, and the manner in which magistrates reach decisions on the amount of maintenance to be paid. The following section (9.2) assesses the rate of compliance by defendants with these orders. The important question of the enforcement of maintenance orders in cases of non-compliance is addressed by section 9.3. Finally, section 9.4 seeks to explain some of the reasons for the limited compliance with maintenance orders.

9.1 The nature of the court's orders

Assuming that the plaintiff has been able to cross the hurdles discussed in chapter eight, the next stage is the decision on whether a maintenance order should be made. In other words, filing her complaint within the twelve months, having the case heard and decided in her favour does not automatically entitle the plaintiff to a maintenance order. Section 6(2) of the Affiliation Proceedings Act provides that this may be done only if the court 'thinks fit in all the circumstances of the case'. Thus in some cases men have been found to be the putative fathers of children, but no maintenance orders made against them. In one such case, the magistrate reasoned that there was no evidence as to the defendant's means, except that he was employed as a labourer in the South-African mines (case 23/88, KMC).

While this may imply that the plaintiff must as a rule lead sufficient evidence of the defendant's means, it is not evenly applied. In another case where the plaintiff failed to lead such evidence, the same magistrate enquired from the defendant himself about his means, and proceeded to make an order on that basis (case 17/88, KMC). This is yet another example of inconsistency in the application of state law within the same court, and which leads to uncertainty in the expectations of litigants, especially plaintiffs.

In most cases where defendants are found liable however, magistrates usually made maintenance orders against them, under section 6(2) of the Affiliation Proceedings Act. It provides for monthly or weekly sums of money to be paid for the maintenance and education of the child. It

will be remembered that this amount was limited to a maximum of P5 per week or P25 per month in 1970, but was increased in 1977 to P10 per week or P40 per month. This amendment also provided for the first time that lump sums of money, instead of payment by weekly or monthly installments could be made by magistrates¹. The next two sections examine these two types of orders, and the factors which magistrates take into account in making them.

9.1.1 Orders for monthly cash installments

The vast majority of orders made by the Kanye magistrate's court have been for the payment of monthly installments in cash, as compared with weekly or lump sum payments. This is probably because most men brought before by the court earned their wages on a monthly basis, and magistrates regarded payment in this way most suitable. Table nine shows the average amounts awarded per child per month during the period 1971 to 1988.

This table shows that the average amounts awarded by the magistrate's court at Kanye vary considerably from one year to another. They were very low between 1971 and 1976, even considering that the maximum amount permitted by statute was only R25 at the time². They however underwent a sharp increase in 1977, most probably due to the increasing of the statutory maximum provided under the Affiliation Proceedings Act to P40. They steadily increased until 1981, when they stabilised until 1985, when there was a noticeable increase going up to and above the P30 mark. Thus the 1977 amendment undoubtedly influenced the amount awarded by magistrates in Kanye. Even then, the average amounts in these orders are still nowhere close to the statutory maximum of P40 per month. These general trends in the orders made by the Kanye magistrate's court are comparable with those in our magistrate's court survey. There, more than half of orders were between P20 and P30 per month. The next most common category were awards under P20 per month

1 Act 31/1977, discussed in chapter four.

2 At the national level, the select committee on the Affiliation Proceedings (Amendment) Bill 1976 reported that magistrates awarded average amounts of R2 to R3 per week. The committee observed however that members of the public seemed to think that such amounts were very large, hence their preference for lump sum payments.

(26%), while 19% were between P31 and P40. There is no doubt therefore that the amounts awarded on average by magistrates in maintenance cases are generally low.

Table 9: Average monthly amounts awarded in affiliation cases at Kanye magistrate's court (1971-1988)

year of awards	average amount awarded per child per month	
	current value	constant value, 1980
1971	R 5.77	n/a
1972	4.51	n/a
1973	4.06	n/a
1974	4.61	n/a
1975	5.86	10.43
1976	P 8.85	13.76
1977	13.00	17.93
1978	14.00	17.86
1979	17.00	18.83
1980	20.00	20.00
1981	26.00	22.41
1982	19.70	15.13
1983	19.04	13.36
1984	22.25	14.48
1985	29.50	17.55
1986	33.07	17.99
1987	31.00	15.20
1988	29.00	13.07

Notes: before 1976, the South-African currency, the rand (R) was legal tender in Botswana.

Sources: compiled from KMC maintenance register and Botswana Government, 1980.

This is particularly the case if the constant value of those amounts are taken into account; which further minimises the effect of any increases (column four, table nine). The fact that the cost of living went up so much between 1977 and 1988 shows lack of realism in retaining the statutory maximum of P40 per month.

A question which arises from the foregoing is how magistrates compute the amount to be paid by defendants in maintenance cases, and the factors they take into account in this respect. An analysis of court records revealed that the major factor is the defendants' income. Usually, magistrates enquired whether the defendant was in employment and if so how much he earned, then proceeded to make an order based upon this. Where defendant was not in employment, the magistrate usual-

ly probed into other income-generating sources, and made an order based upon this. We earlier noted however that some cases are sometimes dismissed because plaintiff failed to lead evidence of defendant's precise income. Most women do not have this information; usually they only have an idea of the defendant's place of employment, perhaps his occupation and no more. Even then, some women have not hesitated to demand specific amounts they require for the child's maintenance. Magistrates at Kanye often asked the woman how much she thought she needed to support the child, or how much she actually spent on the child's maintenance. The defendant was also sometimes asked how much he could afford. Although not provided for under the statute, some women demanded to be re-imbursed their confinement and other expenses relating to the child. The defendant is then asked to respond to the woman's claim, and most complained that the amount claimed was too high in view of their other commitments³. Based on this information, the magistrate then makes an award which is usually a compromise between the parties' claims. The case of the neglected niece, discussed earlier as case eleven, is a fairly typical example of this process.

Case 16: The neglected niece in court⁴

In court, the woman presented her case, claiming P40 per month as maintenance. The man countered that he could only afford P20, because although unmarried, he was the sole breadwinner for his divorced mother, brothers and sisters, whom his father did not support. He was also prepared to pay a lump sum of P200 to cover the period of support since the date of the child's birth. The woman objected to P20, and suggested P30 at least, to which the man countered with P25. Eventually, the magistrate made an order for P28 per month until the child reached thirteen years, and a lump sum of P200 in addition to cover the period during which the man had failed to support. He was given three months to pay the lump sum, but required to start paying the monthly installment with effect from the end of that month. The man paid the first P140 in time and P60 later, and has since been paying the installments irregularly. When we first met the woman in July 1989, she had come to the magistrate's court to find out whether any payments had been made, as the man was twelve months in arrears. She brought this to the attention of the court clerk, but according to her, she was told that there were many cases similar to hers, thus nothing could be done.

3 Many defendants in our sample are either married with children or are committed to another woman with whom they have children.

4 Case 126/84, earlier discussed as case eleven.

The manner in which the decision on the amount of maintenance was reached in this case shows how the parties bargained on this matter. It also demonstrates that litigants often use courts as institutions where they can bargain between each other, with a third party facilitating agreement. This process has been described as 'bargaining in the shadow of the law' (Gallanter 1981), and will be discussed further in the next chapter. Suffice it to say here that it is contrary to the commonly held assumption that magistrates and judges in state courts make such decisions only in accordance with objectively determined legal formulae.

Magistrates may indeed wish to encourage such bargaining because it assists them in reaching their decision; without it they having nothing except the statutory limit of P40 to guide them. It may also be more desirable for the parties' future relations to reach a decision in this way, by means of a compromise. This is particularly useful in cases where the parties come from the same ward or village, and are engaged in far more complex relationships than the matter before the court. In such cases, it is useful to avoid procedures which result in bitterness and strained relations between the parties. We earlier noted that this was an important feature of the Ngwaketse system, and that it generally guided the decisions of their courts. State courts, on the other hand tend to be more removed from the socio-cultural realities of the community, and magistrates are not always sensitive to this.

The case of the cousins, earlier discussed as case nine, is an example in point. It will be remembered that in that case, the parties were distant cousins who had two children with each other. Although the defendant was a farmer of reasonable means, he did not earn his income on a monthly basis, but the magistrate made an order for him to pay in monthly installments. Such an order was clearly unrealistic and not likely to be complied with, as the man's poor payment record subsequently revealed.

An order for a lump sum of money, provided for under the Affiliation Proceedings Act would have been more appropriate in the circumstances. Instead, the order for monthly installments led to a lot of bitterness on the man's part because he felt that he was being unfairly treated. To show how the parties valued the relationship between their families, they had agreed to settle the matter once and for all by the delivery of two head of cattle or their equivalent in cash. If a lump sum order

had been made in the first place, it would have avoided the wastage of the time spent to enforce the order, and minimised the bitterness between the parties and their families.

Although the vast majority of maintenance orders made by magistrates at Kanye have been for the payment of monthly installments, they have not been restricted to these. In a few cases, the court has made orders for payments which are based neither on the statute nor on the Roman-Dutch law. One example of this is where the court ordered defendants to pay a certain number of cattle to the plaintiff.

9.1.2 Orders for payment in cattle

In at least eight cases, magistrates ordered defendants in maintenance cases to pay plaintiffs in cattle⁵. This is an interesting finding because cattle awards are typical of customary courts, and magistrates in fact have no authority to make them. Although we discuss this development as an example of the strategic use of law by litigants in the next chapter, it is important at this stage to briefly comment upon how such orders come to be made. An analysis of these cases shows that magistrates do not make these orders of their own free will. They come to be made because one of the parties, usually the man and his family, make a request to the magistrate that the matter be settled through negotiations in the customary manner.

In some cases, the man indicated that because he is not employed but owns some cattle, it is better for him to pay in cattle (case 6/82 KMC). In others, the man may be employed but his family are of the view that negotiations have not been fully exhausted. The parties are then given a fixed period within which they should report their agreement on the number of cattle to the court, which is eventually made an order of the court. The following case, which is reproduced verbatim, shows the manner in which such orders are often made.

⁵ See the following cases: 6/82; 133/83; 115/83; 16/84; 75/85; 41/85; 86/85 and 7/87.

Case 17: The man who offered to pay in cattle at the magistrate court (86/85, KMC)

Present: magistrate, plaintiff and defendant (15.9.87).

Mag(istrate): Is defendant challenging the proceedings instituted plaintiff?

Defendant (dft): No. I am the father of the child born to the plaintiff. I am not working. I am unemployed. My parents are in Kanye, I my mother works away from Kanye.

Mag: Case to resume at 2.00 pm. Parties to bring their parents.

At 2.00 pm.

Plaintiff (ptf): I have brought my parents.

Dft: My parents are also present.

Ptf's father: I am the woman's father, and this matter has not been taken by us as parents, though I once approached defendant's parents. request that the matter be set aside for us.

Dft's father: I am the defendant's father. We have not talked to the woman's parents and request that we discuss the matter first.

Mag: Matter to be referred to parents who are given until 15.10.8 Parties to come to court on that day with the parents.

On 15/10/87

Present: Magistrate, interpreter, plaintiff, her father and the defendant's father; the defendant is absent without explanation.

Dft's father: I am the father of the defendant. We met with plaintiff parents and they ordered that we should pay seven beasts. So far have paid out two beasts. The beasts were delivered to the girl parents today. Defendant did not come since we settled the matter. The other five beasts will be paid out in due course. We shall try to get the beasts.

Ptf's father: I am the girl's father. We have reached an agreement. The beasts were delivered this morning, five beasts are to be delivered in addition to the two.

Ptf: I have nothing to say.

Mag: Matter has been settled in accordance with Tswana customary law. There was consultation and settlement between the parties. Seven beasts were agreed upon and two have been delivered. I shall strike the matter off our record since amicable settlement has been reached though five beasts have not been delivered, the parents of defendant have promised to make efforts to deliver the beasts in due time. I wish to point out however that in the event of non-delivery as promised there is the possibility that plaintiff may wish to have the matter brought to this court again.

This case shows some of the circumstances in which orders for the delivery of cattle are made by the magistrate's court. Here, the reason was that the man was not employed, and the parents were willing to negotiate. This must have persuaded the magistrate to give negotiation a chance, as an order for monthly installments would have been meaningless (cf. case nine). In the event, the parents were able to agree part of the compensation paid, and the matter was struck off the records of the court. In order to ensure compliance with their promise

the magistrate warns the man's parents that the woman may revive her claim with the court if they do not deliver. As we shall find out in the next chapter, this process is also a sign of interaction between customary law and state law, which is caused by litigants' strategic use of the two systems. Women sometimes register complaints with the magistrate's court in order to put pressure on men and their families to negotiate seriously, or pay compensation as promised. In such cases, instead of making an order according to state law, magistrates play a mediatory role between the parties by facilitating agreement on the amount of the customary award.

This development further reflects a degree of influence by the customary law on the state courts, the corollary of which we observed in chapter seven. It was there noted that the chief's court had adopted state law procedures such as blood test results in paternity cases, and orders for monthly installments. Thus the influence of the two systems is not one sided but mutual.

While the cases in which orders for the delivery of cattle remain more the exception than the rule, they are certainly not isolated applications of customary law remedies by state law courts⁶. In a particularly interesting decision, a magistrate ordered a man who had failed to support two children to pay bogadi cattle he had promised to the woman's parents but had failed to do so (6/82). Nor are such cases always brought to court by young people to the exclusion of their parents. As we saw in case seventeen, the parents and other elders are sometimes involved, and themselves take cases to the magistrate's court should negotiations fail⁷.

The following section deals with the circumstances in which the magistrate's court at Kanye made orders for the payment of a lump sum of money, as opposed to monthly installments.

6 For other examples of such cases, see the following magistrate's court case records: 133/83; 115/83; 75/85 and 86/85.

7 See also case 7/87, where the fathers of both parties participated in the case at the Kanye magistrate's court. They ended up requesting the magistrate to make an order, as they had failed to agree on the award. Six cattle were ordered by the magistrate, to be delivered in three months.

9.1.3

Orders for the payment of a lump sum

In another recent trend, the court has in a number of cases made order for the payment of a lump sum of money instead of monthly installments⁸. It will be remembered that this possibility was introduced into the state law by the 1977 amendment of section 6(2) the Affiliation Proceedings Act. This amendment did not however provide an upper limit as with monthly installments, or any guidelines for magistrates in computing the sums to be awarded. Nor did the amendment specify the types of cases in which such awards should be made; thus much was left to the discretion of magistrates. A brief analysis of some cases in which the Kanye court awarded lump sums may throw some light on how magistrates have exercised this discretion.

First, we sought to find out whether these cases possessed any special features that made them suited to the award of lump sum payments and not monthly installments. We had expected such orders to be made in cases where the men were not in formal employment, and who could not therefore pay in monthly installments. On the contrary, all the men in three of these cases were formally employed and earned a monthly wage so we had to look for other characteristics.

We found that generally, magistrates tended to make lump sum orders in cases where for various reasons the parties were still prepared to reach a negotiated settlement. In three of the cases for example, complaints had been filed later than twelve months after the birth of the children, which may partly explain why magistrates readily encouraged a negotiated settlement. In all three, the men insisted that they were willing to settle outside court, but the women said they had not shown sufficient seriousness in this respect. As was the case with those in which cattle awards were made, these are therefore cases in which magistrates played a mediatory role between the parties by providing a forum under whose 'shadow' negotiations could proceed (Gallanter 1981).

In view of the absence of statutory guidelines, we were interested in finding out how magistrates computed the amounts to be paid as a lump

8 See cases 144/83; 75/85; 67/86 and 69/86. As was the case with cattle orders, it appears that Batswana magistrates were more inclined to make orders for lump sum payments. We did not come across any awards for cattle or lump sum payments made by the only non-Motswana magistrate.

sum in maintenance cases. We found that as was the case with monthly installments, magistrates often relied on the parties themselves to negotiate on this. In one case for example, the woman claimed a lump sum of P400 to which the man agreed, which was eventually made a court order, defendant having thirty days to pay it (case 144/83, KMC). The other two cases show a different approach by magistrate no.4: he sent the parties away for negotiations, with instructions to return on a specified date with their parents, and having agreed on some amount⁹. On their return he made their agreement an order of the court, but informed them that the money be paid to the court in a certain manner, and by a certain date. Otherwise he usually reminded them that if the defendant did not pay, the plaintiff could re-institute proceedings under the Affiliation Proceedings Act. In one of these, he actually called for evidence to be led under this Act in case the defendant failed to live up to his promise. This is a way of securing payment by threatening defendants with the state law, which we noted with respect to the chief's kgotla as well.

Where the parties are unable to agree on the amount of the lump sum, magistrates face quite a difficult task doing so themselves. This difficulty was experienced by magistrate no.4 in a case where the man was unemployed but was willing to settle by paying a lump sum. The manner in which the magistrate arrived at the lump sum payment to be paid in that case is presented below.

Case 18: The woman who was awarded a lump sum (67/86, KMC)

After the magistrate heard the background to the dispute between the parties, the man indicated that he was unemployed, but was willing to settle by payment of a lump sum. The magistrate did not however invite the parties to bargain on the amount, instead he began by summarising the legal position in the following manner:

Our Affiliation Act provides for weekly and monthly payments, the monthly payments being a sum not exceeding P40. Provision is also made for payment of a lump sum though no amount is specified as in the weekly and monthly installments.

Then he proceeded to express the difficulty:

It is a difficulty to compute such a lump sum and in this case more difficult as (1) no one presented the needs, expenses of the child now and in the future (2) defendant did not disclose his earnings and appeared to be depending on his parents (who did not feature in this matter).

⁹ The parties in cases 75/85 and 69/86 agreed on P900 and P750 respectively.

Tracing the origins of this type of payment, he continued:

The business of lump sum payment I believe stems from seduction damages/claims and traditionally one would pay out a number of beasts. The practice would differ from tribe to tribe in this country though in some instances there is uniformity. Converting such a practice to maintenance in monetary terms creates problems as in the case of maintenance one looks at the welfare of the child, the interests of the child as being supreme to all others (emphasis supplied). Consideration will of course be given to other factors in order to serve as best as possible these interests of the child. The court was not offered opportunity to reflect on the lump sum order trends, the trend in respect of lump sums or payment by beasts.

Then he applied his formula:

Lump sum payments I however believe range from P500 to P1,000. I know no authority on computation of lump sum payments. I shall however endeavour to act as best as possible taking into account that the child was born only in 1986 and is therefore aged two years at this stage. The child however presuming its survival will require financial support through its stages of growth and one would expect a lump sum to cover or cater for this.

One has got to take into account the financial position of the provider, defendant's abilities and station in life, and in this instance he does not disclose his earnings and seems to be dependent on his parents. One must also take into account the burden on the mother as she may after settlement by lump sum have no outlet by which she could claim support from the child's father (emphasis supplied). The award must also take account of such factors as cost of living, inflation etc.. I shall even in light of difficulties make an award:

1. Defendant is to pay a lump sum of P850. I shall give him four months to have paid the whole sum;
2. Payment is to be effected via the clerk of the court, Kanye and monthly installments may be paid¹⁰.

The passages cited above show the difficulties encountered by magistrates in computing lump sum orders under the Affiliation Proceedings Act. The magistrate raised some factors to be taken into account in this respect, such as the defendant's earning capacity, the cost of living and inflation. He was also sensitive to the fact that the child was only two years old, and that a lump sum order had the effect of extinguishing the woman's right to sue for monthly installments.

But mentioning these was as far as the magistrate went, no attempt was made to analyse these factors further in order to come to an appropriate figure. For example, he did not take account of the differences in amounts between lump sum payments and monthly installments over a period of years, which we noted were quite large (case six). Instead,

¹⁰ Defendant paid the first P400 six weeks later, and the remaining P450 three months after the deadline set by the court.

he draws a comparison with seduction damages under customary law, observes their range, and awards P850. The latter figure however still appears rather arbitrary because all the factors the magistrate listed, such as income, cost of living and inflation were not analysed. While he admitted that he knew of no authority on the computation of lump sum payments, the magistrate still claims that they range between P500 and P1,000. It appears that he simply used the amounts awarded under various customary systems as a guide, and then decided on an average figure. This has adverse implications for unmarried women and their children because a lump sum award extinguishes their rights to claim monthly installments in the future.

The next section assesses the effectiveness of maintenance orders made by the magistrate's court at Kanye.

9.2 The effectiveness of the orders of the Kanye magistrate's court

As was done for the chief's court, the effectiveness of the maintenance orders made by magistrates at Kanye will be assessed by the extent to which they are complied with. Because the majority of magistrate's maintenance orders were for monthly installments over a certain period of time, we shall apply only one element of the two-pronged test elaborated in chapter seven. Thus instead of looking at both whether installments were paid on time and how much was paid, we shall only look at the former. In other words, whether the defendants in these cases were fully paid up or were in arrears of payment at the time of the research. In cases where they are in arrears, we shall identify how far behind payments are in months, what steps have been taken to enforce, and whether these have been successful or not.

Although not mandatory under the law, every maintenance order made at the Kanye magistrate's court between 1978 and 1988 required payment to be made through the clerk of the court, and not directly to the mother. This is intended to avoid problems encountered previously when men would claim to have paid the women, and the latter denied this, or disagreed on the amount actually paid. Thus defendants are warned that they give money directly to the mother at their own risk.

Because the majority of defendants in the magistrate's court survey were employed outside the village, most payments are not made directly to the magistrate's court at Kanye. They are made to courts in the

districts where defendants reside or work for subsequent forwarding through the government treasury to Kanye. Others paid by sending postal order to the court clerk at Kanye, who in turn makes out payment vouchers to the women, who cash them at the government treasury in the village. Predictably, this results in delays in women receiving payment, and provides men with convenient excuses for not paying on time. To what extent did the men in the magistrate's court survey comply with the maintenance orders made against them? Out of the thirty six cases in which orders for monthly installments were made, all the women did receive some payment at one point or another. Strict compliance with the court's orders is however rare, as table ten shows. The table shows that the rate of full compliance with maintenance orders among defendants is quite low at 22%, although it is two times higher than that of the chief's court. As we did in the case of the chief's court, a category of substantial compliance was created for the magistrate's court in order to take account of the delays occasioned by postal payment from outside Kanye.

Table 10: Defendants' compliance with affiliation orders made at Kanye magistrate's court (as at 1.10.89)

record of payment	defendants	
	absolute numbers	percentages
no arrears	8	22
1- 3 months arrears	6	17
4- 6 months arrears	4	11
7-11 months arrears	2	6
1- 2 years arrears	5	14
2- 5 years arrears	9	25
more than 5 years	2	5
total	36	100

Note: for sampling details, see figure one. Three cases contain insufficient information on payment.

Sources: compiled from KMC register and case files.

Thus it may be useful to include those in which payments are one to three months late under the category of full compliance. This would result in a figure of 39% in which defendants pay more or less according

ding to the court order; at less than half, this remains quite low¹¹. This leaves the majority of defendants who are at least four months behind, with most owing arrears of between one and five years. It can quite safely be assumed that this sample reflects the 'best payers' because most of the women interviewed came to court to collect money. It can further be assumed that in most of these cases, some previous payment must have been made which raised reasonable expectations on the part of the women. If this is the case, then we have to conclude that compliance with the maintenance orders made by magistrates is low. Court officials and the police pointed to lack of compliance with maintenance orders as one of the most serious challenges they faced in the administration of justice in the village. The court clerk estimated that at the most, roughly a quarter of men pay more or less regularly, while the rest were in arrears and had to be persistently followed before they could pay.

This conclusion applies equally to those few cases in which orders other than monthly cash installments are made. In the case of the four lump sum orders we discussed earlier, only two of these have been fully paid. Even then the defendants did not strictly comply with the court order because it took both six months before they had paid fully¹². As for the orders for the delivery of cattle, the picture is not any better. The trend here is the same as we observed for the chief's court: full payment on time is rare, with the common trend being for defendants to make part payment on time, and delay the balance for long periods of time. This shows that the popular belief that lump sum payments and customary awards are more likely to be complied with has no basis in practice at Kanye¹³.

In view of these low compliance records, the question of enforcement

11 Compared with the chief's court however, this figure remains nearly two times better, even taking account of substantial compliers there.

12 See cases 75/85 and 67/86 (chapter nine). As for the other two cases (144/83 and 69/86), the men paid part of the money on time but had not yet paid the balance. The defendant in case 144/83 still owed P300 six years later, while the one in case 69/86 owed P650 three years later. It is noteworthy that both defendants were employed.

13 It was observed in chapter four that this was one of the arguments used to introduce lump sum payments into the Affiliation Proceedings Act in 1977. It is also a view commonly expressed by men at Kanye during the research period.

becomes pertinent. It is to this issue that the next section is devoted.

9.3 The enforcement of maintenance orders at Kanye magistrate's court

What happens when payment under a maintenance order is not forthcoming at the stated time? As we noted in chapter four, there is no shortage of legal provisions dealing with this question. First, the Affiliation Proceedings Act itself attempts to provide these orders with an enforcement mechanism. Section eleven of that Act gives orders made under it the force of a civil judgement which is enforceable under the rules of court. Further, it provides that a 'garnishee order' may be issued against a defendant's future earnings in respect of installments of maintenance not yet due under a maintenance order. This means that magistrates have the authority to order that part of a man's wages be attached every month to satisfy the maintenance order. Despite this provision, we did not come across a single case at the Kanye magistrate's court in which this had been done. Most magistrates we spoke to were rather evasive about the reasons why they are hesitant to make garnishee orders. Some suggested that they considered them a too drastic a measure, while others stated that they were only useful if employers were prepared to cooperate.

The second source of legal enforcement powers is the Maintenance Orders Enforcement Act, also discussed in chapter four. This statute provides for payment of maintenance orders to be made through the court in cases of non-compliance. We observed earlier in this chapter that all maintenance orders made at the Kanye magistrate's court require payment to be made through the court in any case. The most important provision of this Act is that which makes failure to comply with a maintenance order a criminal offence, and non-compliers may be prosecuted and sentenced to imprisonment for up to one year. Lack of means not due to unwillingness to work or misconduct is an acceptable defence to a prosecution under the Act.

Research into the enforcement of maintenance orders at the Kanye magistrate's court revealed that court officials are not quick to resort to prosecution as a method of dealing with non-compliance. Like the chief's court use of 'form eight', the magistrate's court uses the provisions of the Act mainly to threaten defaulters with prosecution.

Our findings regarding the enforcement procedure employed at the Kanye magistrate's court are outlined in the following sections.

9.3.1 Enforcement step one: three notices

Like the chief's court, the magistrate's court does not of its own motion automatically enforce maintenance orders which are not being complied with; their beneficiaries must first make a complaint to that effect. This has led to misunderstandings because many women we spoke to were not aware that they had to initiate the enforcement process. Although the court clerk complained that women took their time reporting cases of non-compliance, magistrates were of the view that orders should be automatically enforced by the courts.

On receiving a complaint that an order is not being complied with, the court clerk first sends the woman to the police to swear an affidavit to that effect. A notice is then sent to the man concerned warning him that he risks prosecution for failure to comply with the order. The court clerk does regularly send notices to defaulters: this was done in at least seventeen of the cases in our survey of thirty six.

Three such notices are sent, and only when he does not respond positively does the clerk consider prosecution. In practice, more than three notices are sent, and an analysis of the records of cases in which enforcement was attempted revealed that defaulters had developed strategies to deal with this. The main strategy is for men to respond by paying some money, usually a couple of months arrears and then stop again to await the next notice. Thus the notices secured only temporary compliance with the court order, and even then, they had to be persistently sent to the defendant. This is illustrated by the typical payment record in the case summarised below.

Case 19: The man who developed a strategy against enforcement (40/80, KMC)

On 12.11.80, a man was ordered by the Kanye magistrate's court to pay P20 per month as maintenance for the two children he had with a certain woman. He was to pay this money through the clerk of the court until the children reached thirteen years. For the first two months he paid nothing, and was sent the first notice on 2.2.1981. Two weeks later he paid for the months of November and December 1980, and thereafter made irregular payments. A year later, he still owed seven months' installments, and was sent the second notice. A week later he responded by paying two months arrears, but he paid

nothing for the next four months, at which point he received the third notice. He paid an installment for one month arrears eight days later and paid nothing for more than a year. One year later he received his fourth notice but still paid no heed; a fifth was sent yet another year later, to which he responded by paying five months arrears.

At the end of 1984 he had still not settled his arrears, and he was sent the sixth notice, to which he responded by still paying irregularly. In March 1985, he was brought before the magistrate's court on charge of failure to comply with the order. He was found guilty and sentenced to seven days imprisonment on each count, which was wholly suspended for two years on condition that he paid his arrears within that period (criminal case 35/85, KMC). Following the prosecution, he continued to make irregular payments under the order up to June 1987 when the first child reached thirteen years.

On 22.5.1989 he still owed P670 arrears, and was sent what the court clerk indicated was the last notice before another prosecution. Almost one month later, the man paid the whole lump sum of P670 in final settlement of his arrears.

This record of payment is typical of cases in which the court has attempted to enforce its orders, and shows that the defendant generally failed to comply with the court order until he received a notice threatening prosecution. Following the receipt of such notices, he would pay some of the arrears, giving himself some 'breathing space' until the next notice. In total, he received six notices threatening him with prosecution before he was finally prosecuted. Even following the prosecution, he still paid irregularly because after all, his prison sentence had been wholly suspended for two years. His payment of the substantial lump sum of P670 after receiving the seventh order shows that he did not really have serious financial problems. Most men we spoke to did not take the notices seriously, nor did they feel threatened by them. This is not surprising in view of the nine year-long procedure followed by the court in the foregoing case before the threatened prosecution materialised. Hence the development of strategies whereby defaulters make some payment, but only whenever they receive a notice threatening prosecution.

9.3.2 Enforcement step two: request to the police

Should the man fail to respond to several reminders, the court clerk writes a savingram to the police requesting it to consider prosecuting him for failure to comply. On receiving this, the police does not respond by prosecuting; rather, their officers begin an investigation on the means of the defaulter. In particular, the police seeks to find

out whether he is employed, and if so what his salary is, a fact difficult to verify especially with men working in the South-African mines¹⁴. If he is not employed, they investigate his sources of income if any, which can be problematic if he and his relatives are uncooperative. In practice, the police calls defendants who have the means and try to persuade or threaten them into paying. The police claims that this often works, especially in the case of educated defaulters, but is not very successful with mineworkers for example, who know that it is difficult to catch them once they leave for the mines¹⁵.

Where threats and persuasion fail, the police will sometimes seriously consider prosecution. In our survey of thirty six cases, we could only find evidence of prosecution in four cases, despite the fact that 61% of the men were in arrears ranging from four months to over five years (see table ten). The police could not come out with specific criteria for prosecution in these four cases beyond saying that it depended on the circumstances of the case.

9.3.3 Stage three: the prosecution

Whatever criteria the police uses to decide in favour of prosecution, some defaulters are eventually charged with failure to comply with court orders under the Maintenance Orders Enforcement Act. Table eleven shows the number of such prosecutions conducted by the police at Kanye between 1982 and 1988. The table shows that some defaulters are prosecuted at the Kanye magistrate's court for failure to comply with maintenance orders, although the numbers do not correspond with those in arrears. This is not surprising in view of the lengthy procedures followed by officials before they decide upon prosecution. More than half of the defaulters charged are found guilty, mostly being sentenced to periods of imprisonment.

14 Interview with Inspector Ntopo, 22.9.89, at Kanye police station. He explained the difficulties of getting employers to cooperate in this respect, and the delays this caused.

15 There appears to be competition between the police and mineworkers in the village; the latter accuse the police of 'grabbing' their wives and girlfriends while they are in the mines. They also take the view the police has no business with maintenance cases, which they feel should be settled in the traditional manner by their families.

Table 11: Prosecutions conducted under the Maintenance Orders Enforcement Act at Kanye magistrate's court

year	number of cases	number guilty	number discharged, acquitted or withdrawn	no information
1982	31	21	9	1
1983	22	14	8	-
1984	18	8	4	6
1985	20	12	3	5
1986	32	11	15	5
1987	16	7	9	-
1988	9	7	1	1
total	148	80	49	18

Note: figures for 1978 to 1982 were unavailable, and the register entries for 1984 and 1985 are incomplete; thus there may have been more prosecutions during 1984 and 1985.

Source: compiled from the KMC criminal register.

These are almost always wholly suspended for a specified period on condition they pay their arrears, and are not convicted of a similar offence during that period. The duration of sentences range from one week to nine months, with three months being the average period, while the average period of suspension is around two years. About one third of defendants are acquitted, discharged with a warning, or their charges are for various reasons withdrawn by the police. Reasons include insufficient evidence as to the means of the defendant, payment of arrears during the course of the trial, or the reaching of a negotiated settlement between the parties. The significant number of such cases may be partly explained by the fact that these prosecutions are conducted in the same manner as other criminal prosecutions, with the burden of resting on the state to prove all the elements of the offence.

As was observed in the case of serving maintenance summonses, the police did not show as much zeal in prosecuting maintenance defaulters as they did with other criminal cases¹⁶. Magistrates confirmed that for example, the police did not take as much trouble to find, and ensure the attendance of witnesses, as they did for other criminal cases. This

16 We observed both types of criminal proceedings on several occasions at the KMC. One magistrate complained that the same attitude is to be found at the national administration of justice, where maintenance cases are not considered 'real' cases. Thus a magisterial district that has a long backlog of maintenance cases is not given as much priority in the allocation of additional personnel and other resources as one with mostly criminal cases.

may be explained by the fact that the police does not find these prosecutions as dramatic and exciting as those for other crimes; the procedure is indeed rather dull and repetitive. The defendant is charged with as many counts as the number of months he is in default; the magistrate reads each one out, and asks him plead to each. He is also asked why he did not comply with the order on each count, so that the process is a time-consuming repetition of the accused making a similar plea to each count and giving the same reasons for failure to comply.

The most common explanation or defence is that the defendant had other commitments such as supporting other children, a wife and his parents, or that he had debts to pay. A second common defence is that the defendant was temporarily unemployed at a certain point and when he resumed employment had to pay other debts. Others claim to have given the woman some money privately, which it will be remembered the court has sought to avoid by insisting that money be paid directly to the court. All these defences can only be rebutted by evidence to the contrary, which is not always available. This has often provided defendants with easy grounds for acquittal, encouraged them to postpone payment, or make payment only temporarily.

A third common defence to charges of failure to comply with maintenance orders is that the matter is being or has been settled once and for all between the families. We earlier observed that the avenue of family negotiations remains open, especially where the parties are from the same village, or are known to each other. Thus in some cases, the families may agree to relieve the man from paying under the order if he delivers cattle or pays a lump sum in full settlement, but the woman may wish payments to continue. In other cases, the woman may be involved with or married to another man who does not wish her to have any connections with other men. In such cases, an informal agreement may be reached that maintenance payments cease without the court's involvement. When circumstances change, the woman may wish payments to resume and revives the maintenance order. Such cases are difficult to resolve because often there are no witnesses to prove what actually transpired. Case twenty below demonstrates this quite clearly¹⁷.

17 Compiled from the record of case 152/1978. Interviews were conducted with both parties on 10.8.89 (woman) and 23.9.89 (man).

Case 20: The man who said he was relieved from a maintenance order

The man's story

A man from the nearby village of Moshupa, had a child with a nineteen year old girl from Bome ward, Kanye, in 1977. He supported the child for ten months and then stopped because according to him, she left him for another man when he lost his job. Her parents did not approach him for negotiations; instead she lodged a complaint against him at the Kanye magistrates court in 1978.

In court

He appeared before the magistrate's court at Kanye in 1980, where he explained why he was not supporting. Asked whether he was employed, he said that he only assisted his uncle in the running of a small business, and did not earn a regular salary. He told the court that he was not married, had no other child, and offered between P10 and P15 per month as maintenance. Although the woman had demanded between P40 and P60 per month, he was ordered to pay P15 per month.

The man moves to Jwaneng

He paid irregularly under the order until he moved to the nearby town of Jwaneng, in 1981, where he has been working ever since. According to him, he found the woman there living with a man to whom she was married, and this man was against any contact between him and his wife. It was agreed between the three of them that he would stop seeing the woman, stop paying maintenance, and that she would 'cancel' the maintenance order.

The man receives a summons

Seven years later in 1988, the man says he was surprised to receive summons from the police to the effect that he was to be prosecuted for failure to comply with the maintenance order, under which he owe P1,065. Before going to court, he says he contacted the woman for clarification, and she promised to come to court to explain their 'arrangement'. The woman never turned up in court, and the man found himself alone without any written evidence, so he was convicted of failure to comply, sentenced to a couple of months imprisonment which was wholly suspended on condition he paid the arrears and complied with the order in the future.

Since then, the man has been paying his arrears as well as the monthly installments, and said he felt cheated. According to him, the woman revived the order because her husband had by then left her, but the woman denied all these allegations.

It is difficult in such cases to find out exactly what transpire between the parties outside court, and who to believe, although there is one point on which the man's story is contradictory. Although I told me that when he made the woman pregnant he was already married the court record revealed that he was not. He also said that the woman agreed that she would cancel the order after the case was heard, but in court he said that she said so before the hearing. Cases like this or show that parties who come before the court are sometimes involved :

complex social networks and relationships which the law does not always take into account, and which necessarily limit its effectiveness. The next and final section takes a brief look at some of the reasons why compliance with maintenance orders at the Kanye magistrate's court is so low, and enforcement so problematic.

9.4 Reasons for low compliance with maintenance orders

It will be apparent by now that there is no single and simple reason why men fail to comply with maintenance orders; rather, this is due to a variety of reasons, some of which were discussed in chapter seven. Some of these reasons apply equally to defaulters at the magistrate's court, who are in turn encouraged by the lax enforcement mechanisms we just described. We noted that lack of sufficient resources was one explanation, but in the case of magistrate's court orders, we also noted that the vast majority of defendants were in regular wage employment. Thus they were among the more privileged members of the community, and in any case, proven lack of means is a sufficient defence to a charge of failure to comply with maintenance orders. Thus lack of resources cannot be a strong explanation for men's very low compliance with these orders.

We noted in the case of the chief's court that part of the reason for low compliance was unwillingness on the part of men, or their relegation of compensation for pregnancy to the bottom of their priority list. This in turn was attributed to the high prevalence of extra-marital pregnancy today, and the socio-cultural attitude that children born in such a situation are primarily the responsibility of their mothers' family. Interviews with men who had maintenance orders made against them by the magistrate's court revealed that this was a very strong reason for their failure to comply. They particularly resisted monthly cash installments because they encouraged the maintenance of a link between them and women they are no longer intimately involved with. This, they argued, was a common source of marital friction, which is why it was better to pay in cattle or a lump sum of money at once and sever all links with the woman.

We earlier noted that this reasoning is also common at the national level, as the evidence given to the select committee on the Affiliation Proceedings Bill in 1977 revealed. This is however contradicted by our

findings in Kanye that customary awards at the chief's court and lump sum orders at the magistrate's court are not complied with any better than those for monthly installments. On the contrary, although still problematic, compliance with the latter type of orders is better than with customary style orders. Furthermore, the latter have in practice now been turned into payments by monthly (and sometimes yearly installments) by the defendants (chapter seven).

Men's expressed preference for a customary settlement is therefore mostly an excuse to evade financial responsibility for their children because they are still failing to live up to the customary requirements themselves. The selective preference for customary solutions may be further demonstrated by the fact that the few men who indicated their willingness to deliver bogadi and take the children rather than pay maintenance every month had made no serious attempts to negotiate with the women's families. The man in case eight said he had not yet tried because the child's mother would probably refuse as 'she was more interested in the money'. Both the men in cases twelve and thirteen had vague plans to initiate negotiations 'in the future, once they had settled down and married'. It is noteworthy that all three only raised the issue of taking the child when they were challenged to reconcile their preference for a customary settlement with the fact that it was also possible under customary law to deliver bogadi and take the child. In the light of the above examples, we must conclude that men's failure to fully comply with maintenance orders at the magistrate's court is partly a reflection of their resistance to the state law, which obliges them to take responsibility for the upbringing of their children. As is the case with the chief's court, limited resources may partly account for the limited compliance with the orders of the KMC. We noted that the administration of justice did not treat maintenance cases as seriously as criminal cases, and that courts with a backlog of the former were not usually allocated additional resources. This limits the ability of the court to enforce its decisions, and combined with other problems earlier identified, encourages men to default. The next chapter examines the interaction between customary and state law remedies for extra-marital pregnancy at Kanye, and the strategies women have developed to cope with the resistance to these remedies.

INTERACTION BETWEEN CUSTOMARY AND STATE LAW:
STRATEGIC USE OF THE TWO SYSTEMS AT KANYE

This chapter assesses the interaction between customary law and state law in the context of extra-marital pregnancy and maintenance disputes at Kanye. Two types or levels of interaction are identified, which also reflect two different approaches. The first, formal interaction, may be sought and found at the level of the official relationship between the sources of law, and the institutions which administer them. Such interaction could be found for example in the rules laying down the circumstances in which customary law and/or state law apply (chapter four). Dealings between state and customary courts, such as when the former review or hear cases on appeal from the latter could also shed light on the interaction between the two systems at this formal level.

While this first type of interaction is important, and gives a general idea of how laws and institutions interact at the official level, this approach is 'top-down'. It misses a whole range of other interactions that may not be intended or sanctioned by the law, but which are nonetheless important for understanding legal pluralism. Thus a second, 'bottom-up' approach is necessary to complement the first at the local level. This looks for interactions brought about by the actions of people in their use of the various legal systems in the context of resolving their disputes. Because it focusses on the actors, this approach unearths information which the first usually does not, and gives a more accurate picture of the working of legal pluralism on the grassroot level.

In pursuance of these two types of interaction, the chapter is divided into three main sections. Section 10.1 presents what we label the 'rules of demarcation' which lay down the circumstances in which customary and/or state law will apply. This will involve a brief reiteration of the general relationship between the various laws discussed in chapters two and four, but more focussed upon its operation to the area of extra-marital pregnancy. The limitations of the approach adopted by these rules of demarcation, are also discussed. Section 10.2 moves on to the second type of interaction, that which is brought about by the strategies of litigants. Various strategies employed by people involved in extra-marital pregnancy disputes and the responses of the courts in Kanye are presented. Finally, section 10.3 analyses the consequences and implications of these processes.

10.1 The rules of demarcation: the choice of law approach

It will be remembered from chapter two that special legislation was enacted laying down certain rules concerning the relationship between customary law and state law¹. To briefly reiterate: customary law is the system primarily applicable to civil actions between 'tribesmen' subject to three exceptions. First, where the parties expressly or impliedly intended common law to apply; secondly, where the transaction out of which the action arose is unknown to customary law, and thirdly where the parties express their written consent to the application of common law. In cases involving 'non-tribesmen', the position is the reverse: common law applies to them unless they give their written consent, or expressly or impliedly intended customary law to apply.

This 'choice of law' approach was borrowed from international private law, where the problem of competing jurisdictions or conflict of laws is dealt with by providing rules laying down the law applicable to certain situations. According to this approach, litigants are required to follow the legal system pointed to by the rules of demarcation. They may not select the legal system or court which best suits their interests, or engage in what has been labelled 'forum shopping'.

This is the approach adopted by the state law in Botswana, and is reflected in the rules of demarcation applicable to extra-marital pregnancy matters. As the rules and principles of both customary and state law in this area were discussed in detail in chapters four, six and eight, they will not be repeated here. Here, we are interested in the manner in which the state law attempts to regulate the relationship or interaction between the two systems, in the particular context of the resolution of extra-marital pregnancy disputes.

We found out in chapter four that a special provision was added to the Affiliation Proceedings Act in 1977, which was intended to clarify the relationship between customary and state law remedies for extra-marital pregnancy (section thirteen). We noted there that this was meant to prevent a situation where men were brought before both customary and state courts in relation to the same child, or 'forum shopping'. Al-

¹ Customary Law (Application and Ascertainment) Act of 1969, Cap. 14:03, Laws of Botswana. For reasons of brevity, we shall refer to this simply as the Customary Law Act.

though vaguely worded, this provision sought to do this by requiring women to select only one forum in which their matter would be heard. Once a woman chose to take her case to a customary court, she may not bring the matter before a magistrate if she sought 'substantially the same relief' in relation to the same child.

This choice of law approach is based on a set of related assumptions and expectations which do not always find a basis in social reality. Firstly, it requires that people confronted with a dispute should make a clear and straightforward choice between customary law and state law. Secondly it requires that once made, this choice should be followed throughout; in other words, people should not move between the two systems, or use both in relation to the same case. This suggests that customary law and state law apply in an 'either/or' fashion, to the exclusion of each other².

Thirdly, and related to the second, is the assumption that the choice of procedures in one system implies a choice in favour of the remedies and institutions of that system. In other words, it is assumed for example that once a woman registers her case at the magistrate's court or the chief's court, she wishes state law or customary law to apply to her case respectively.

We shall find out subsequently that people confronted with extra-marital pregnancy disputes in a situation of legal pluralism do not always act in accordance with these assumptions. This should not be surprising because the remedies provided by the two systems are not the same. We observed in previous chapters that customary and state law remedies for extra-marital pregnancy are quite different in nature and purpose. Compensation under customary law is for seduction, and sometimes for nourishment during confinement; cattle or cash are awarded to the woman's family, who in turn are responsible for the child's maintenance. Maintenance under state law, on the other hand, is paid to the woman herself, and is aimed at providing for the child's upbringing until it reaches a certain age.

We also noted that materially, there are large differences in amount between seduction awards and the total normally payable as maintenance at the magistrate's court (case six). It is therefore unrealistic to

² Exceptions to this observation are the repealed section 6(3) of the Affiliation Proceedings Act of 1970, and section 8(2) of the Customary Law Act.

expect litigants not to use the two systems selectively, depending on which one benefits them. Thus men prefer to have pregnancy disputes settled under customary law because this is less costly, instead of under state law. Women, on the other hand, generally prefer the periodic payments provided by the state law of maintenance, as this amounts to more. Although this is obvious and was common knowledge at the time the Affiliation Proceeding Act was amended, the state law nonetheless continues to adopt the 'choice of law' approach.

Unfortunately, this approach only postpones the problem, 'passes the buck' to the lower courts which have to deal with the consequences of legal pluralism on a daily basis. It is therefore not surprising to find uncertainty and contradictions in these courts' handling of extra-marital pregnancy disputes. This may be illustrated by reference to the following dispute, heard on 30.7.84 by the Kanye magistrates court, on appeal from a customary court.

Case 21: The customary court president and the defendant's lawyer³

On 31.7.84, a woman brought a case before the urban customary court in the town of Jwaneng, alleging that she had been impregnated by a certain man from Logaba ward in Kanye. The latter admitted having had a sexual relationship with the woman, but insisted that he was not the father because she had another boyfriend. The court allowed the two to question each other at length, and then invited the woman's alleged boyfriend to give evidence.

After he too was questioned by the presiding officer and the defendant, the former decided that the man pointed to by the woman was in fact the father. The man was then ordered to compensate the woman with eight cattle or P800.

The defendant complained that he neither had cattle nor money, but the presiding officer replied by giving him fourteen days within which to comply with his order. He also advised him of his rights of appeal within thirty days.

The defendant did in fact appeal thirteen days later, after consulting a lawyer in the nearby town of Lobatse. The latter sent the following notice to both the magistrate's court at Kanye and the Jwaneng customary court:

TAKE NOTICE that the appellant having been ordered to pay P800 compensation to the respondent by the Jwaneng customary court on 2.8.1984, hereby appeals to the above Honourable Court against the decision of the court president on the following grounds:

1. The learned court president had no jurisdiction to adjudicate in affiliation matters in terms of the Affiliation Proceedings Act Cap. 28:02 because under the provisions of the said Act only a subordinate court of the first class has jurisdiction to try affiliation

³ Jwaneng customary court case 24/84 and case 28/84, KMC. The Jwaneng customary court generally applies Ngwaketse customary law.

matters;

2. The court president erred when he held that it had been established on a balance of probabilities that appellant was the putative father of respondent's child because evidence indicates that the child should have been born premature when the period of gestation taken from end of May 1983 and yet respondent's child was a normal child at birth;
3. The compensation ordered by the court was unrealistic and excessive taking into account all the circumstances of the case.

What the man's lawyer did here was to deliberately construe the award of the customary court as having been for maintenance and not seduction. This strategy, sometimes described as 'issue bargaining' is used by the lawyer in order to oust the jurisdiction of the customary court. This is because lawyers are not entitled to appear before customary courts, although they may do so in appeals from there to magistrate's courts. Of course he could still have challenged the decision of the customary court on the customary law, as lawyers may argue on points of customary law in magistrate's courts. But not being well versed in the customary system, and seeing an easier opportunity to argue on the jurisdictional point, he 'converted' the issue into state law, with which he is more familiar.

The president of the customary court was however not deceived, and his response was quick and sharp:

It is not a matter for the court president to entertain people who do not understand the different charges or offences laid to appellant in the customary court, but to try and explain to the appellant in front of the presiding officer after the charge is being read to him. The appellant was brought before the above customary court on a charge of seduction NOT AFFILIATION PROCEEDINGS as it is related to you by the appellant and his mother (emphasis supplied).

Facing a jurisdictional challenge from the lawyer who perhaps deliberately misunderstood his system, the customary court president also engages in issue bargaining. He decided to name the issue as being seduction, and not maintenance. Like the defendant's lawyer, he does this because it is on this issue that he has jurisdiction, and not in affiliation matters. Thus he reminded the man's lawyer of his court's powers under state law:

The above customary court has all the powers and jurisdiction to try all seduction cases and give all the relevant verdict as laid down in law. It is not understood when you give your own suggestions that the compensation ordered by the court was unrealistic and excessive... This customary court would appreciate your comments regarding

compensation surrounding seduction cases⁴.

The man's lawyer sent no comments; instead he replied:

I note that in your letter you go into the merits of our grounds of appeal which appeal has been noted in terms of the Customary Courts Act. As the matter is now outside of your jurisdiction, I do not see the reason for explaining the grounds of appeal to you as you have already passed judgement in the case. It will be up to the appeal court, namely the magistrate's court, to decide on the merits of this appeal... Any comments on the question of affiliation or seduction will be heard by the magistrate...⁵

When the Kanye magistrate heard the appeal five months later on 30.7.84, he agreed with the man's lawyer. He decided that the record of the proceedings of the customary court showed clearly that they were apparently dealing with an affiliation application while it purported to be dealing with a seduction case under the customary law. If it were a seduction case, reasoned the magistrate, it was not properly before the court, so he set aside the proceedings. The man was told that he did not have to make any further payments in addition to the P650 he had made pending the finalisation of the case. The magistrate advised the woman, who was unrepresented, to consult the clerk of the court about her next step.

It appears that the court clerk advised her to register an affiliation complaint because six months later, an action apparently brought by the woman was dismissed by a magistrate on the grounds that it was time barred⁶. It also appears that the Jwaneng customary court had thereafter summoned the man to answer criminal charges of failure to comply with its orders⁷. The lawyer threatened that if the criminal case against his client continued and resulted in any grievance, they reserved the right 'to take action against the court officials and the

4 Letter from president, Jwaneng urban customary court, 22.8.84, copied to the clerk of the court, Kanye, and the commissioner for customary courts.

5 Letter from the lawyer, 27.8.1984, copied to magistrate's court clerk, Kanye, and commissioner for customary courts.

6 Under section four of the Affiliation Proceedings Act. This is additional proof of the high price that women sometimes pay for using the customary system first (see chapters four and eight).

7 This information is contained in a letter from the lawyer to the Jwaneng customary court, 24.11.87, and cites this case as KN 19/86. We were unable to locate the record of these particular proceedings.

government in the high court and such damages will be very substantial'. This threat appears to have laid the matter to a rest, although we could obtain no information on whether the woman reimbursed the man his money.

This case is illustrative of the limitations of the official choice of law approach to legal pluralism, and that the 'rules of demarcation' between state and customary remedies are not sufficiently clear. Perhaps they never can be, because after all, the two systems of law do not exist in two watertight compartments, isolated from each other and their social context. They are bound to influence one another, or be caused to interact by those who use and apply them. Moreover, it reflects the contradictions in the system: on the one hand, litigants are required to choose the system they wish applied to their dispute, to the exclusion of any other. On the other hand, it allows appeals to proceed from customary courts to magistrate's courts, where different standards and interpretations of customary law are adopted.

The customary court president claimed to have been dealing with seduction, and in my view in fact made a seduction style award. The magistrate, on the other hand, says that he was in fact dealing with an affiliation matter, and only 'purported' to have been dealing with seduction. The magistrate did not explain what it was about the proceedings which made them affiliation and not seduction proceedings. My own reading of the customary court's proceedings in this case led me to conclude that the presiding officer was dealing with a seduction case. This is because apart from the fact that the presiding officer sat alone, the conduct of the proceedings was similar to that followed at the Kanye chief's court in seduction cases. Such a situation is the direct result of the failure of the state law and its institutions to take account of the differences between customary and state law remedies for extra-marital pregnancy. The uncertainty brought about by unclear rules of demarcation such as section thirteen of the Affiliation Proceedings Act allows those litigants who are represented by lawyers to name the issues, and gives them more bargaining power than the unrepresented side. Because magistrates enjoy a wider jurisdiction than customary court presidents, the insistence by the latter that he was dealing with seduction and not affiliation was ignored.

These observations take us back to one of the main research questions we raised in previous chapters, which is who decides what the content

of customary law is? Is it those who administer the system such as chiefs and presiding officers, or is it the state, as represented by institutions such as magistrates courts? Or is it to be defined by the people who live their lives in accordance with it? Cases six and twenty one seem to suggest that in the final analysis, state institutions prevail over customary courts in matters of the interpretation of customary law. This is certainly the case when disputes enter the state level on appeal and review, where state courts enjoy a wider jurisdiction than customary courts, and may quash the latter's decisions. This does not imply however that customary law generally occupies a position of powerlessness *vis-à-vis* the state law. Rather, it means that various types or levels of customary law emerge as a result of these processes. Simply put, we could then identify three levels of customary law: that of the people, as reflected in their daily lives; that of the chief's court as reflected in their decisions, and that which has been accepted and institutionalised by the state and its institutions (cf. Woodman 1985:143). As far as what may be called 'people's' customary law is concerned, despite its undermining by socio-economic change and state power, it is still alive and utilised by its consumers. As previous chapters and the next section will demonstrate, customary norms and procedures continue to play an important role in the resolution of extra-marital pregnancy disputes at Kanye.

10.2 Interaction caused by litigants' strategic use of law

The material to be presented in this section further reveals the shortcomings of the choice of law approach to legal pluralism. In particular, it questions the expectations made by that approach about the manner in which people confronted with a pregnancy dispute ought to use available legal options. Two broad findings were made about the actual use of the law in pregnancy disputes in Kanye. First of all, in practice most people are unaware or possess at best incomplete and inaccurate information about the 'rules of demarcation' according to which they are expected to behave when confronted with pregnancy disputes. This finding should not be surprising because while some people may have some idea of the state law, its precise content is generally unknown to most people (cf. J. Griffiths 1990 and Molokomme 1987b). This is particularly the case with these rules of demarcation, which

are legalistic tools intended for use by judicial officers to mechanically answer the question of the applicable law (cf. Roberts 1979b). is therefore unrealistic to expect ordinary people to have any knowledge of these specialised rules.

A second finding that was made about the actual use of the plural law at Kanye is that even the few who are aware of these rules (such as judicial officers) tend by and large to ignore them. Instead, they often use the law in a strategic manner to satisfy their own, usually unstated goals (cf. K. von Benda-Beckmann 1984). We observed in chapters six and eight that people confronted with extra-marital pregnancy disputes use the law in pursuance of certain goals. Although not entirely limited to that, the most common goal of women and their families is to obtain compensation for the pregnancy, maintenance for the child or both. The expectations of the choice of law approach is that those who wish to receive compensation for seduction should use the indigenous model or procedure, which may end in adjudication by the chief's court. Those wishing to claim maintenance, according to this reasoning, would do so at the magistrate's court under the Roman-Dutch law and the Affiliation Proceedings Act. This approach does not cater for those who may desire both remedies, or who may wish to abandon one system because it does not work for them, and try the other.

An analysis of the Kanye material shows that in dealing with extra-marital pregnancy disputes, people do not always use the two systems in the manner in which the state law requires them to. Thus instead of making a clear choice between the remedies and procedures of either state law or customary law, they use both systems strategically, depending on their goals and interests. The strategies of women and men's responses to them may broadly be classified into two categories: 'bargaining in the shadow of the law' (Gallanter 1981), and 'forum shopping', a term originating from international private law which has also been applied to the study of legal pluralism (e.g. van Rouveroy van Nieuwaal 1977 and K. von Benda-Beckmann 1984). These strategies are not mutually exclusive; they often overlap and sometimes represent different stages in the dispute settlement process. They are discussed in the following pages.

10.2.1 Bargaining in the shadow of the state law

Faced with men who are unwilling to negotiate, delay negotiations or compensation, women have adopted a strategy where they threaten to register the matter with the magistrate's court. This may or may not be put into practice; in some cases the women are simply 'bluffing' the men into believing that they will do this. Because the magistrate's court and its remedies are so unpopular among men, the women hope that the mere threat to take them there will induce them to negotiate seriously and compensate them for the pregnancy. In some cases, this strategy is successful, and the man and his family negotiate and eventually compensate her for the pregnancy in accordance with Ngwaketse norms. Should the man and his family not take heed, she may proceed to register the complaint without necessarily intending to have it heard. Her goal is to continue to apply pressure on the other side to negotiate and compensate her for the pregnancy, and having the case registered may help. It is also a fall-back strategy in case negotiations do not produce the desired results. Sometimes this fall-back strategy is invoked, as we found out from the cases in chapter eight, especially case eleven. Whether this threat is carried out or not cannot be said in advance, and depends on various factors.

Two important factors seem to be the women's economic situation and the state of their relations with the man and his family. Where the woman has reliable and alternative sources of income, she may not find it worth taking the trouble to go through litigation at the magistrate's court. We earlier noted however that most of the women in the magistrate's court sample occupied a marginal economic position, while the men they sued earned regular incomes. Even the few women who were employed earned low wages, and in some cases had many more children than they could afford to raise. Most no longer maintained an intimate relationship with the man they sued, nor were they related to him or his family in any special way. A woman like 'the neglected niece' in case eleven, whose financial situation was precarious, and who had no relationship with the man's family is therefore likely to carry out her threat to sue at the magistrate's court, as she has nothing to lose both in material and social terms.

On the other hand, while the woman in case three may also have been in financial need, she was less likely to end up litigating in the magis-

trate's court because of the long history of the dispute and the close relations between the families. It will be remembered that this young lady realised that her chances of getting compensation through negotiations were slim because she had earlier been warned to stop associating with an older married relative. So she registered the case at the magistrate's court, and only withdrew it when the man assured her that he would compensate her for the pregnancy.

These two examples show that in practice, litigants do not use the two systems in an either/or fashion; rather they combine them in a way that they think will best serve their interests. In particular, they show that by initially choosing the procedures of one system, women are not necessarily making a choice in favour of the remedies of that system.

This conclusion is especially important because the state law of maintenance is based upon a further assumption which is sometimes wrong. This is that a woman who registers a complaint at the magistrate's court thereby expresses her wish to have her dispute resolved there and under state law⁸. In other words, it is sometimes wrongly assumed that choice of forum goes hand in hand with choice of law or remedy.

In actual fact, the Kanye magistrate's court material shows that this depends upon the varying goals and interests of the women: some may indeed desire state law remedies, such as an order for monthly cash installments. Others however do not, as they believe that monthly installments are unreliable, and sometimes encourage men to feel that they are justified to interfere in their lives. Such women may instead opt for a lump sum compensation for pregnancy under Ngwaketse ideals. But because they have been unable to obtain this through negotiations, they use the magistrate's court to pressurise the men into compensating them⁹. This strategy is vividly illustrated by the case briefly summarised below.

8 This is confirmed by the common complaint on the part of magistrate's court officials that too many women register complaints and subsequently fail to follow up. Some of the numerous cases recorded pending may have been registered by women who merely intended there to pressure men into compensating them.

9 Discussions with women in the village revealed that they believed that the state system was better able to coerce men into paying than the customary system. We noted in chapter nine however that this belief may be a little exaggerated.

Case 22: The woman who threatened to sue (16/84, KMC)

A woman from Sengwaketse ward in Kanye had a child in 1983 with a man from the same village, and who was employed in the South-African mines. Although her parents informed him in the traditional manner, the man and his parents did nothing, and failed to support the child completely. When the child was five months old, the woman registered a complaint with the Kanye magistrate's court, where they were called for a hearing another five months later. Summons had to be issued three times, and it took altogether one year before the defendant could be brought before the court. The proceedings are reproduced verbatim below, so as to give an idea of the strategy pursued by the woman.

On 12.6.85

Present: Magistrate, both parties in person before the court.

Mag(istrate): What is the position?

Man states: I admit paternity but apply that the matter be referred to parents for settlement.

Woman states: I am opposed to the matter being referred to parents unless I am given an undertaking to return to the magistrate's court should no settlement be reached.

Mag: The court adjourns the application for hearing on 24.6.85 at 8.30 am. Both parties advised to enter into negotiations with parents and to report progress in the matter by 24.6.85.

On 24/6/85

Coram as before; court resumes sitting; both parties before the court.

Mag: What is the position?

Woman states: The matter has been resolved customarily. The defendant has been ordered to pay five head of cattle as damages for pregnancy and maintenance for the child.

Mag to man: What comments do you have on the matter?

Man states: I confirm that the matter has been resolved. I propose to pay or deliver the cattle to the plaintiff's people within two months from date.

Mag: Are you aware that failure to effect the delivery of the cattle may cause the plaintiff to revive the maintenance claim in respect of the support of the child?

Man states: I am fully aware.

Mag: By consent of both parties the application for maintenance is withdrawn on condition that the five head of cattle are paid as support of the child.

The woman in this case initially sought compensation for her pregnancy through the established Ngwaketse procedure of parental negotiations, but the man and his people failed to respond. Then she registered her case with the magistrate's court, and there, the man requested that negotiations between the parents be given a chance. Based on her previous experience with the man and his family, the woman however did not trust them. Thus she opposed the request for further negotiations, demanded an assurance from the magistrate that she could return and revive the claim should negotiations not produce results. The fact that

the magistrate agreed to her demand shows that he was willing to assist her in carrying out her strategy, and the case was withdrawn on this condition.

This strategy is contrary to the expectations of the 'choice of law' approach that litigants ought to make a 'once and for all' choice between the two systems, and that they should stick to this choice throughout. Instead the woman in this case moved between the systems and used them in a strategic manner: she began by attempting to use the indigenous Ngwaketse procedures of dispute settlement. Because the success of these procedures is dependent upon family cooperation which was not forthcoming from the man's side, she resorted to the potential coercive power of the state to compel this. Thus her involvement with the magistrate did not necessarily end up in the application of state law. Rather, the magistrate ended up playing the role of a mediator and the woman used him and his court as a 'shadow' under which she could pressure the man into compensating her for the pregnancy.

It is not in all cases however that this strategy is successful because the men have developed counter-strategies or tactics in response. These include men persuading women to withdraw their cases by promising to compensate them. Having succeeded in this, the men delay payment indefinitely until the woman tires of pursuing the matter and abandons it. Others keep delaying, or provide irregular support until the child is one year old, and an application is time-barred. Yet others pay some part of the agreed compensation, and delay payment of the rest indefinitely, or until the woman takes serious steps to enforce the promise. The latter strategy was also observed with respect to men's compliance with the orders of both the chief's and magistrate's courts (chapter seven and nine). The realisation that the enforcement procedures of both courts are rarely invoked and ineffective may in turn encourage this strategy. The idea here is to 'buy time' by showing one's willingness to pay at least part of the compensation, and keep the woman hoping to receive the rest sooner rather than later. Hence the men's common offer to have the matter referred back to the parents, rather than have it heard under state law (cf. case seventeen).

In a variation of the strategy discussed above, women use the magistrate's court not only to pressure men into compensating them, but also to actually bargain on the nature of the remedy itself. This may happen where for example the two sides fail to agree on the nature of the

remedy. The woman then registers the case, and the magistrate is used as a mediator who facilitates bargaining in court between the parties. Unlike case twenty two, where the application for maintenance is then withdrawn, in such cases a court order is sometimes made, usually for the payment of a number of cattle or a lump sum within a certain period.

The case discussed below is an illustration of the working of this strategy.

Case 23: The hard bargainer (41/85, KMC)

She had a child in 1984 with a man who showed no interest in entering into negotiations for compensation and did not support the child. When the child was eight months old, the woman approached the district commissioner (DC), who twice summoned the man to appear before him without success. When the child was a year and three months old, she registered a complaint at the Kanye magistrate's court, in other words three months too late, but the magistrate ignored this. The case was eventually heard nine months later, and summons had to be issued more than once.

In court, the man admitted paternity, and the magistrate invited the woman to prove her case under section six of the Affiliation Proceedings Act. The woman related the story of their relationship, and her failed attempts to obtain maintenance from the defendant. The woman then made the following claim:

I am applying that the defendant be ordered to contribute monthly towards maintenance and support of our child. I am requesting that he be made to pay P40 per month until the child is thirteen years of age...I further apply that payments be effected through the clerk of the court, Kanye.

In case that did not succeed, she made an alternative claim:

If the defendant is prepared to pay in bulk he may pay twelve head of cattle.

Asked what the equivalent of twelve cattle in cash was, she replied that she did not know, but said that she had spent P648 on her confinement and transport costs, which bill she tendered to the court.

The following exchange then takes place between the parties during cross examination:

Man: I am not working and I don't think I can manage to pay P40 per month.

Woman: If you cannot pay P40 per month, you should then pay twelve head of cattle.

Man: I put it to you that it is our tradition to pay six head of cattle and that I am prepared to pay six head of cattle.

Woman: It would not be sufficient.

After the man gave evidence repeating his offer of six cattle, the magistrate summarised the evidence in the style of cases heard under the state law, and found the man to be the father of the child. He

ordered that the man pay eight cattle within two months 'as maintenance and support of the child'. Such payment was to be proved to the clerk of the court by the plaintiff, who should confirm in writing that the cattle had been delivered.

The strategy pursued by the woman in this case differed from that of the woman in case twenty two: she meant to have the case heard, and did have it heard under state law. Clearly well informed about state law remedies, she makes an unequivocal claim for the maximum permissible under statute. In the alternative, she claimed double the number of cattle available under Ngwaketse ideals, and insisted upon this. Like the man in case twenty two and others, the man in this case responded to the woman's claim by referring to the ideal Ngwaketse award. It is not surprising that he expressed his willingness to pay this because as we noted earlier, this is much cheaper than the total amount he would have had to pay under a maintenance order. In the end, the magistrate plays a mediatory role by deciding on a compromise between their respective claims (cf. Gallanter 1981).

Magistrates are used by litigants as mediators or adjudicators in the same way as headmen (cf. chapter six). Although not exactly authorised to do so under state law, most Kanye magistrates have been willing to be recruited in this way, which reflects their sensitivity to the social context in which they operate¹⁰. Magistrates have not, however, been willing to be used in this way in cases where litigants are engaged in the second set of strategies: 'forum shopping'.

10.2.2

Forum shopping

Although the two strategies are not mutually exclusive, this category of strategies is treated separately because the women who pursue it do more than invoke a combination of customary and state law to serve their interests. Unlike the women in cases twenty two and twenty three who used only one court as a 'shadow' under which to bargain, the forum shoppers actually pursue this strategy in various courts. In other words, the women who adopt this strategy go to both the magistrate's

¹⁰ This includes the legalistic magistrate no.4, who has facilitated some of these negotiations, but excludes the only non-Motswari magistrate. This suggests that this may be a function of cultural conditioning.

and the customary court, in an attempt to obtain a remedy under that system. The term forum shopping is therefore used here in a more restrictive sense than usual. It has often been used in a broad sense to include the selective use of law to suit the litigants' interests, whether or not this takes place in a court or other court-like forum (see K. von Benda-Beckmann 1984). Understood in this way, the concept includes all kinds of strategic behaviour including that discussed in section 10.2.1.

In other words, it would also include those who simply 'window shop'; thus the women in cases twenty two and twenty three would, according to this definition, also be forum shoppers. We exclude these women from our category of forum shoppers because used so broadly, the concept becomes a rather imprecise way of describing different litigant behaviour. The strategy of the woman in case twenty three is an example in point: she remained in one forum but made claims under both customary and state law. In our view, it is rather confusing to label her a forum shopper; it seems more accurate to describe her behaviour as a 'remedy shopping' or 'bargaining in the shadow of the state law'.

It is however conceded that these categories may overlap, and a woman whose behaviour is classified under the bargaining strategy may later become a forum shopper, depending on whether or not she succeeds in the first forum. If she succeeds in her bargaining, she is likely to remain in that forum, whereas if she fails, she may move to the second one. The case discussed below is illustrative of the behaviour of a forum shopper in the restricted sense.

Case 24: The successful forum shopper (503/84, KCC)

In 1981 a seventeen year old schoolgirl from the village of Moshupa within the Ngwaketse area was impregnated by a twenty year old boy, who worked in the mining town of Jwaneng, some 80 km. from Kanye. Because the man originally came from Tobane, a village more than 300 km. away in Central District, the girl's parents first approached the boy personally. He accepted paternity of the child, but indicated that he would not marry the girl. The girl's parents obtained the boy's parents' address, wrote them a letter explaining the situation, but they never responded.

In the meantime, the girl made demands upon the boy to provide her with money in order to buy clothes for the child she was expecting. Her demands met with some success shortly before her confinement when the boy gave her P80 for the child's clothing, and following the child's birth he irregularly gave her sums of money whenever she requested it for the child's milk.

Having observed that support was irregular and the boy was not visiting

mother and child, the girl's father summoned the boy to his home negotiations, where he turned up with two relatives. The boy and relatives took the position that he was too young to support a child and that the girl's father support the child in the same way that he had raised his own daughter. Alternatively, they suggested that the child be handed over to the boy's mother to look after. The girl's father was extremely annoyed by the first suggestion, and rejected it, but did not himself do anything to follow the matter up.

The girl herself then approached the customary court at Jwaneng, refused to entertain her matter, apparently because she was not assisted by a male guardian. She then proceeded to the district commissioner, who called the boy and made an order for P50 per month as maintenance of the child. The boy rejected the order, and failed to comply with it, whereupon the girl and her parents took the matter to the chief's court at Kanye.

The case came before E.M. Makaba, the deputy chief, and three members of the chief's court on 5.9.84. The girl began by presenting the events leading to the dispute, alleging mainly that the boy failed to support the child. For his part, the boy accepted paternity but disagreed with the girl on the amounts of money he had given her. Having established that the boy earned P250 per month, the deputy chief made his decision:

There is a law meant for the protection of children which should be used...I order you to pay P50 every month as maintenance until the child reaches eighteen years of age. It is up to the girl's parents to follow up the matter of seduction with the boy's parents.

The sequence of resolution of this dispute shows that the woman and father initially followed the ideal Ngwaketse procedure which begins with negotiation, to deal with her pregnancy. In what is today a considerable variation of ideal procedures however, negotiations first took place between the young people themselves. When this failed, negotiations were attempted between the woman's father, the man, and relatives other than his parents, as the latter were too far away. When these did bear fruit, the father lost interest, but the woman continued to pursue the matter at the Jwaneng customary court.

Upon being denied a hearing by the Jwaneng customary court, she proceeded to the district commissioner (DC), a state law official who awards P50 per month as maintenance¹¹. Like a typical forum shopper, the woman took her case to the chief's court at Kanye when the order was not complied with. That the Kanye chief's court received the case and actually adjudicated upon it without insisting upon the participation of a headman is surprising. But then as we earlier observed, this ideal procedure is sometimes not followed, especially where

11 If the DC heard the case under the Affiliation Proceedings, the award exceeded the maximum of P40 permitted under that statute.

parents of one party are far away.

The award made by the chief's court is however not in accordance with ideal Ngwaketse procedures, but is typical of statutory awards usually made at the magistrate's court¹². The passage from the deputy chief's judgement makes it clear that he was making an award for maintenance, and not for seduction. This is confirmed by his advice to the girl's parents to pursue the matter of seduction separately. This advice is surprising in view of the fact that the Kanye chief's court usually deals with both matters simultaneously, and makes a single award (see chapter six). His advice appears to encourage the woman and her family to bring another claim against the man; this is a situation section thirteen of the Affiliation Proceedings Act was specially enacted to prevent. Effectively, the deputy chief encourages the woman and her family to go forum shopping.

Not all forum shoppers have the same goals, or like the woman in case twenty four move to another forum because they have been unsuccessful in the first. Furthermore, they do not always start at the chief's court: some begin shopping at the magistrate's court, and then end up at the chief's court. Yet others have part of the matter heard in one court and the rest in another court, depending on their goals and interests. For example, a tribal policewoman knowledgeable in the law took her case to the magistrate's court because she wanted maintenance in the form of monthly installments from her boyfriend who had left her¹³. Although she also wanted to recover her property which was in his possession, she did not even raise this matter the magistrate's court. This was probably because she knew that she would have a more difficult time doing this at the magistrate's court, as the state law does not recognise cohabitation without formal marriage as giving rise to rights and obligations between the cohabitants. While customary courts generally adopt the same position, they have shown flexibility

12 It will be remembered that while this is not common, similar awards have been made at the Kanye chief's court (case six). Like the Jwaneng district commissioner however, the sum awarded by the chief's court is above the maximum permitted by statute, which normally expires when the child reaches thirteen years. Unlike case six however, the award was approved by the customary courts commissioner, which reflects the inconsistency of that office.

13 See case 37/1988, KMC. She obtained an order for the payment of P40 per month until the child reached thirteen years.

and are usually willing to listen to such disputes and attempt a fair division of assets. So one year later, she brought a case before the customary court at Kanye to recover her property from the man. Although some members of the court suggested that she return to pursue the property case at the same court which dealt with her maintenance case, the chief's court heard her case. They decided that the parties should bring the property claimed by the other before the court ten days later for division. Although it took another three months and a reminder from the deputy chief before the man complied, the woman eventually recovered most of the property she claimed through her use of the chief's court¹⁴.

The chief's court appears to be more receptive to forum shoppers than the magistrate's court. This may be because the former have limited jurisdiction compared with the magistrate's court. Thus they may be more willing to hear whatever disputes are brought before them, as this shows that litigants still recognise their authority. Kanye chief's court elders complained bitterly that young people no longer recognised their authority, but instead resorted to the magistrate's court for a resolution of their disputes. Magistrates, on the other hand, need not prove this point as they are in any case already inundated with a heavy load of maintenance cases. Hence their willingness to be used as a 'shadow' in which litigants bargain, facilitate settlement and strike off the case. In this way, they reduce the number of maintenance cases they have to hear, decide and enforce under state law.

Thus their responses to forum shoppers has been less welcoming than that of the chief's court. A perusal of material at the Kanye magistrates court and discussions with magistrates revealed that they send back litigants whose cases are either pending or have been decided by the chief's court. Another reason is that they are very careful not to engage in jurisdictional conflicts with the chief's court, especially in confrontations with the chief himself. The case discussed below is an example of this.

14 See case 83/89, KMC. This case was also discussed with Deputy Chief Ngwaketse Gaseitsiwe in September 1989.

Case 25: The unsuccessful forum shopper (94/84, KMC)

This case was brought by a woman who had lived with a man for seven years and with whom she had five children. Following the birth of the fifth child in 1981, the parties had a misunderstanding because the woman complained about the man's relationship with another woman. This flared into a dispute that eventually came before the chief's court two years later, following an assault by the man on the woman. It was decided that her father remove the woman and children from the man's home and thereafter institute proceedings to recover compensation from the man's family. The latter however pre-empted this claim by delivering six cattle to the customary court, which they said were bogadi in exchange for the children.

Although the woman's father and two members of the court objected to the delivery of the cattle, the chief ordered that they be received and the children be handed over. The woman's father accepted the cattle under protest, and pointed out that he took them to be damages for seduction and not bogadi. The man's parents subsequently demanded that the children be handed over to them, but the woman refused, saying they could have their cattle back instead. She also challenged them to take the matter back to the chief's court, which they did not do. On 20.6.84 the woman registered a complaint with the Kanye magistrate's court, where the case was heard a week later. She presented the above background, and claimed maintenance whilst the case at the chief's court was still pending.

At the magistrate's court, the man countered that he would not pay maintenance whilst the case was still pending at the chief's court. He said that his parents had been trying to encourage her parents to register the case at the chief's court, but that the latter had failed to do so.

At the end of this evidence, the magistrate made no order, but advised the parties, especially the plaintiff, to register the case with the customary court and have it finalised as soon as possible.

This case illustrates a number of interesting points. First of all, it shows a combination of the strategies litigants use to achieve their goals. Following the decision by the chief's court that the woman be taken back by her father and a compensation claim instituted, the man's family adopted the following strategy. They effectively pre-empted a seduction claim by offering cattle as bogadi in exchange for the children. They did this because seduction damages would not entitle them to the children whereas bogadi would (see chapter six). The response by the man's father that he took the cattle as compensation for seduction was his strategy to get both the cattle and keep the children.

This is an example of the strategy of 'issue bargaining' which we observed with respect to case twenty one. When the woman refused to hand over the children, the case reached an impasse, with each side taking the position that the other should revive the case first.

This is the point at which the woman decided to go forum shopping, by

registering a case at the magistrate's court. There, she frames her case in terms of maintenance for the children while the case at the chief's court was still pending. She did this because she knew that this is the issue over which the magistrate had jurisdiction, not seduction and custody. By sending her back to the chief's court however, the magistrate effectively dismissed her claim.

The magistrate did not explicitly refer to section thirteen of the Affiliation Proceedings Act, which forbids forum shopping, but he does so implicitly. The assumption behind this dismissal appears to be that the remedy she sought at the magistrate's court was either the same or 'substantially the same' as that she sought at the chief's court. But was it? It is clear that the case at the chief's court was much broader, concerning the general relationship between the parties and their rights to the children. The children's maintenance was only a part of this larger dispute, which encompassed accusations of infidelity and the delivery of bogadi cattle in exchange for the children.

Although the woman in this case was engaged in 'forum shopping' she did not try to conceal the fact that it had been heard at the chief's court. In fact, she herself began by presenting the background, explaining that the case at the chief's court was at an impasse. She was however unequivocal about her claim at the magistrate's court: she wanted maintenance in the meantime. It is odd therefore that the magistrate was unwilling to deal with the issue of maintenance alone, and leave the rest to the chief's court. This leads us to conclude that the magistrate wished to avoid jurisdictional conflict with the chief's court, hence his decision to send the parties back there.

The second point which this case confirms is one which we made earlier in this chapter, which is that the remedies of customary law and state law for extra-marital pregnancy are quite different. At a more general level, it is also a vivid illustration of the fundamental differences in procedure between customary law and state law. We observed when discussing the Ngwaketse procedure at the Kanye chief's court that related claims such as those involved in this case are not usually separated. Thus the matters of infidelity, the children's custody and maintenance would have been dealt with in the same proceedings.

The magistrate's court, on the other hand deals with, and has jurisdiction over only one issue: maintenance, and would usually separate this from custody, even though they concerned the same parties and the same

children. By claiming only maintenance at the magistrate's court, the woman adopted a strategy which was in line with this practice. But she failed because the magistrate decided that she should allow the whole case to be resolved at the customary court. In effect, he stopped her attempt at forum shopping, and compelled her to stick to her initial choice in favour of the customary law, irrespective of whether she made this choice herself (cf. case 89/83).

10.2.3 Implications of the strategic use of law

The strategies described in the foregoing section lead us to an important conclusion about the relationship between customary law and state law. This is that irrespective of the type of court disputes may eventually end up in, the indigenous model of negotiation--mediation--adjudication generally informed the resolution of pregnancy disputes in Kanye. Attempts at resolving most of the pregnancy disputes we discussed here and in previous chapters almost always began with negotiation, especially where both parties were from Kanye. The ideal sequence of resolution was however not always followed; it has been affected by other processes, such as the undermining of kinship cohesion and the mobility of young people. Because it is a flexible model, litigants have adapted it to socio-economic change as well as legislative intervention. Figures four and five provides a sketch of the ideal and adapted models respectively.

Figure 4: Ideal model and sequence of dispute settlement and participants involved

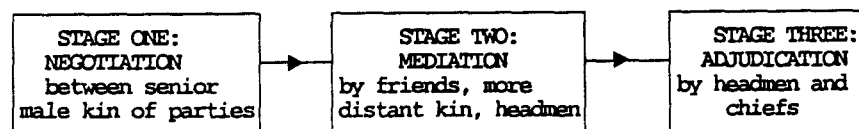
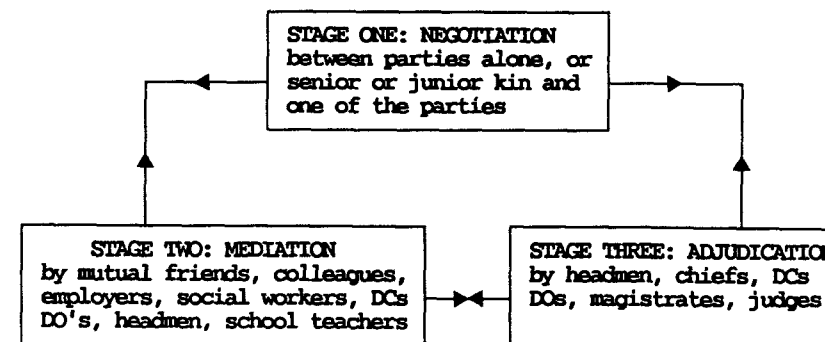


Figure 5: Adapted model of dispute settlement with varied sequence and participants



The indigenous model (figure four) has been adapted mainly by expanding the number of participants involved in dispute resolution (figure five). At the level of negotiation, today this may involve the parties alone, or their kin who need not be senior or male; as we saw, the relatives of only one side are sometimes involved. Should the first stage fail, the matter may be subjected to mediation, but not necessarily; in some cases it goes directly to adjudication. In some, cases which were initially taken to adjudication return to the negotiation stage (e.g. case twenty two). The important thing to note here is that mediators and adjudicators can be from either the customary system or from the state law system.

What has happened is that instead of taking entirely to the 'new' procedures provided by the state laws of maintenance, the villagers have retained their basic indigenous model and adapted it by incorporating into it some aspects of the state law. Whether officials of the customary or state law are recruited, or both depends on the circumstances of the litigants. An important factor, we found out in previous chapters, is their goals, and the strategies they use to achieve them. This is an indication that none of the systems by itself is seen by the residents of Kanye as sufficient for addressing issues of extra-marital pregnancy. Hence the adaptation of the indigenous model by the inclusion of selected state law remedies and procedures.

Finally however, it must be pointed out that such strategic adaptation are not available equally to everyone that wishes to use them; nor are they always successful. Case twenty five shows the limits to which

litigants can use the law strategically to suit their interests. This is particularly the case for women, who under many customary systems are under male guardianship for their whole lives (cf. Armstrong and Ncube 1987; Armstrong and Stewart 1990). Although some systems have shown flexibility in this respect, in Kanye women cannot bring cases to the chief's court without male assistance. Such women have little control once their dispute has been introduced into the arena of the chief's court by their male relatives. In case twenty five, the woman's father was in possession of cattle he insisted were for her seduction, but which the man's family said were for bogadi. The woman refused to hand over the children, and was willing to hand back the cattle instead. But the relevant actors who have bargaining power in the customary system are the male elders, and the woman has little say in the matter. To compound her situation even further, her resort to the state law was rejected, apparently on the basis that she was engaged in forum shopping. Thus hurdles to bargaining and forum shopping exist in both customary and state law, and in extra-marital pregnancy cases put women in a less favourable bargaining position than the men they sue. We also noted that economically, women were comparatively more marginal than the fathers of their children. These are important factors which any analysis of law from the perspective of the strategic use of law must take into account, an issue which we address in the final chapter.

SUMMARY AND CONCLUSIONS

11

This study stated as its main concern the laws dealing with extra-marital pregnancy and maintenance of extra-marital children in Botswana. This broad concern was narrowed down to a number of specific objectives or research questions, which will briefly be restated. First, we sought to comprehend the reasons for the increase in extra-marital reproduction and its seeming tolerance by the society. Second, the nature of the laws governing this issue, and their relationship to each other would be reviewed. Third, the manner in which they were used, and their effectiveness, would be investigated. Fourthly, the study sought to understand the interaction between these laws, both at the institutional and grassroot level.

Using the findings of research conducted on this topic, the preceding ten chapters of this study attempted to answer these questions. This final chapter is intended to summarise the major findings of the study, as well as their implications. Section 11.1 summarises the main findings with respect to the research questions posed. Section 11.2 evaluates the methodologies and theoretical perspectives discussed in the introductory chapter in the light of our findings. Finally, section 11.3 briefly considers some policy implications of these findings.

11.1

Summary of main findings

11.1.1 Prevalence and tolerance of extra-marital reproduction

Although reproduction in traditional Tswana societies was apparently associated with, and generally took place within marriage, this is no longer the case. Today, reproduction outside marriage has become so common that at national level, unmarried mothers account for more than half of all mothers. Extra-marital reproduction should not, however, be confused with pre-marital reproduction. The latter appears to have been traditionally accepted and common at least among Bangwaketse, as reflected in the customs of kadimo and go ralala. Under these practices, women could begin to bear children before the delivery of bogadi as long as the respective families were in agreement about marriage. These practices had an economic function: women were a major source of labour in themselves as well as in their capacity to reproduce labour in

agricultural societies. The persistence of these practices today shows that they will continue as long as women continue to be viewed primarily as a source of labour and reproduction.

What has become more common today however is for reproduction to take place without marriage arrangements, hence the term extra-marital reproduction. While it was not possible to say precisely when this trend began, it appears to have become pronounced around the turn of the nineteenth century. Socio-economic changes such as the decline in polygamy, the introduction of a cash economy and labour migration were found to have been mainly responsible for this. That extra-marital reproduction has become generally tolerated by the society is evident from previous literature as well as from the findings of this research (chapters three and five). This does not mean, however, that marriage is no longer considered desirable; rather it represents an adjustment by society to changed socio-economic circumstances. This tolerance only applies to adult women; teenage motherhood, which has also increased dramatically, is still considered socially unacceptable.

Even in the case of adult women, the material welfare of their extra-marital children is regarded as problematic. Traditional kin-based production and support systems have been weakened, and such women and their children can no longer count on their relatives to support them. This was confirmed by the survey results presented in chapter five, which showed that most unmarried mothers belonged to a dependent and marginal economic group. Although most had at least primary education, their participation in formal employment was very limited; even the few who had jobs received very low wages. Many were engaged in income-generating activities in the so-called 'informal sector', where returns are unreliable and very low.

Despite the apparent increase in what has been referred to in the literature as 'female-headed households', most of the women in our survey had not established their own independent households. This was partly attributed to their comparatively young ages (21-40 years), which is too early for them to have achieved household viability without the economic support of a husband. Thus most remained in their natal households, where they could pool their resources together with other household members to ensure viability. For many of them, supporting themselves and their children remained an uphill task with less than half receiving assistance more or less regularly from the fathers

of these children.

The most common method of obtaining support from the fathers was through negotiations, but we found that in more than half of the cases, this avenue had been unsuccessful. This raised the question of what role law can play in ensuring that *unmarried mothers receive assistance* from the fathers of their children. Hence this study's primary focus on the functioning of legal remedies for extra-marital pregnancy and their effectiveness. The next section summarises the findings of the study in so far as these laws are concerned.

11.1.2 The plural laws governing extra-marital pregnancy

The findings of this study revealed a plurality of sources of regulation dealing with extra-marital pregnancy, both in the weak juridical sense and in the strong sense (J. Griffiths 1986). As far as the weak juridical sense is concerned, the two main sources of regulation were identified as customary law on the one hand, and state law on the other.

11.1.2.1 The Ngwaketse approach to extra-marital pregnancy

The question of the precise content of customary law was found to have been exacerbated by its unwritten state, and the fact that like other laws, it is not rigid but dynamic. Using the Ngwaketse system as a case study, we found that claims by previous literature of apparently uniform and clear rules for dealing with extra-marital pregnancy were not always supported by social and judicial practice. Through in-depth interviews with informants and analysis of case records, it became clear that the situation was much more varied and complicated. The methodological implications of this finding are discussed in section 11.2.

The ideal procedure following extra-marital pregnancy among Bangwaketse mainly involved negotiations between the family of the woman and that of the man concerned. Different arrangements could be made, and a trouble case did not have to follow if the families agreed on an appropriate solution. Where trouble cases did develop, we noted that mediation and finally adjudication by third parties could follow, although the sequence was not always the same. Ideally, compensation in

cattle was awarded for seduction if marriage was not agreed upon. Although the amount of compensation appears to have been fixed at six cattle by the chief's court, we found that at all levels, this was subject to negotiation between the families.

Two other ideal norms were found to constitute an important feature of the Ngwaketse system. Firstly, the requirement that women should always be assisted or accompanied by a male guardian, which we saw was applied rather strictly by the Kanye chief's court. Although there was an increasing tendency for women to attempt negotiations independently with the men involved, this was usually unsuccessful (see case eleven). Men and their families often used failure to comply with this norm as an excuse for not paying compensation. The second norm is the restriction of compensation to a woman's first pregnancy only, which was also strictly applied by the chief's court, with very few exceptions. We found however that during negotiations, some families were able to agree upon reduced compensation even in case of women's subsequent pregnancies.

While these ideal norms and procedures were often followed in dealing with extra-marital pregnancy, their strategic manipulation was found to be a strong feature of the system. Apart from being used as a framework for the resolution of disputes by the courts, these ideal norms provided a background against which negotiations could take place at the lower levels. In other words, they provided the parties with 'bargaining chips' (Gallanter 1981:6) which they could use against each other (see cases eleven and twenty three).

Norms are not used in this way by litigants alone, they are also a very important source of power for the courts. The importance of ideal norms and procedures is demonstrated by the reluctance of the chief's court to decide cases without regard to these norms. Based on our findings, it is argued that this tendency is motivated by both an internal and external factor. The internal factor is that the court and village elders are anxious to retain and protect their customary system from what they see as undermining by the state system.

The external factor relates to the fact that since their decisions are subject to appeal and review by higher state courts, the fear of being overruled motivates them to decide cases within the basic borders of their normative system. This is demonstrated by the customary court commissioner's alteration of the chief's court's order for monthly

installments in case six. The substitution of this order by one 'in accordance with Ngwaketse norms' shows that state law officials have a rather rigid view of customary law. A magistrate's reversal of the same court's decision awarding a woman seven cattle as compensation for a second pregnancy by a different man illustrates the same trend (case 134/84).

Both examples reveal the danger that customary law is made rigid through institutionalisation by state courts and officials (cf. Woodman 1985:143). As we noted in chapter ten, this may in turn lead to the emergence of different types or levels of customary law: that of the people, that applied by the customary courts (which may also vary locally) and that recognised and applied by the state. This leads to even more pluralism, and uncertainty in the precise content of customary law. Thus customary law should not be regarded as a uniform system, because it varies even within small communities (cf. F. and K. von Benda-Beckmann 1991:119).

11.1.2.2 The state law regarding extra-marital pregnancy

From the point of view of Botswana's legal history, we noted that state law is a relatively recent arrival, especially to the area of the resolution of extra-marital pregnancy disputes. The components of the relevant state laws in this area were identified in chapter four as Roman-Dutch law and statute law. The principles of Roman-Dutch law were introduced during the colonial period from what was then the British colony of the Cape. It is partly because of this indirect process of reception that the precise nature and content of Roman-Dutch law was found to have been rather problematic.

This was demonstrated in chapter four, where the rules regarding proof of paternity were discussed. There, we found that the rule of evidence that a presumption of paternity arose whenever a man admitted sexual intercourse had been subjected to different interpretations by the South-African courts. One view was that the presumption arose irrespective of the dates of the admitted intercourse and the subsequent birth of the child (van den Heever 1954; S v Swart 1965). Another held that such a presumption only arose where the admitted intercourse took place at a time when the child concerned could have been conceived (R v Swanepol 1954).

According to the South-African jurisprudence, the Roman-Dutch authorities had themselves been in conflict in this respect. Reflecting the dependence on South-African precedents for their sources of Roman-Dutch law, the same controversy was discerned in the decisions of the Botswana high court (*Lardener v Mosege* 1974 and *Matenge v Ramadi* 1982). An interesting finding was however that recent decisions of that court have adopted a different line from the predominant view at the highest court in South Africa (*Otshabeng vs Gopolang* 1984). This was seen as a sign that perhaps the Botswana high court may at last be casting away its tendency to uncritically apply South-African precedents as Roman-Dutch law without regard to their suitability. Unfortunately however, we saw in chapter eight that this has not filtered through to the lower courts. In the few cases where the Kanye magistrate's court was faced with this issue, the trend was to still uncritically apply South-African precedents. Furthermore, some magistrates appeared not to keep themselves abreast with legal developments, and sometimes applied repealed or controversial interpretations of state law (cases nine and thirteen). The result was that state law was unevenly applied in the state courts, which leads to uncertainty in the precise legal position. In the area of legislation, chapter four traced the origins and major provisions of the Affiliation Proceedings Act of 1970. This legislation was introduced because the remedies of Roman-Dutch law were unknown and inaccessible to the majority of the population. Furthermore, parliament was of the view that traditionally based remedies for extra-marital pregnancy had been undermined by socio-economic change. The solution for this was not home grown; like other statutes of that time, the Affiliation Proceedings Act of 1970 was a transplant from England. It gave unmarried women the right to independently sue the fathers of their children for maintenance in magistrates' courts through a simple and inexpensive procedure. The findings of this research on the working of the Act at Kanye revealed that for various reasons, it has fallen far short of achieving these objectives. First, the Act failed to clarify its relationship with the Roman-Dutch law, especially in cases where their provisions were in conflict. We saw that this has presented the courts with problems of interpretation, and that they have consequently sometimes reached conflicting decisions. In practice, judges and magistrates have approached this problem by primarily applying the statute, and where the statute is silent,

resorting to Roman-Dutch law principles. This trend was particularly visible in the area of proof of paternity, which we discussed at length in chapters four and eight. This led us to a general conclusion with respect to the status of Roman-Dutch law in the Botswana state legal system. This is that for the judges and magistrates, Roman-Dutch law occupies the status of a true 'common law' whose principles are used to elaborate upon the scanty and often imprecise provisions of statutes. This finding leads to an interesting point of comparative law; that the Botswana state legal system has become a true hybrid of what were traditionally referred to as civilian legal systems on the one hand and common law legal systems on the other. The two have however switched roles: while the statute is used in the same way as a code in civilian systems, it is of English origin and codifies English concepts. On the other side of the same coin, a system of civilian origin is used as 'common law' to give substance to the scanty provisions of the statute. Secondly, we noted that far from being simple and inexpensive, the procedure for claiming maintenance under the Act at Kanye is rigid time consuming and costly. The various stages through which women had to go before they could obtain maintenance orders were identified in chapter eight, as well as the administrative bottlenecks in this respect. Some of these had to do with the legalistic interpretation of the Act's provisions, such as the requirement that evidence must be led irrespective of a man's admission of paternity. Others had to do with the fact that court proceedings are generally conducted in English which must be translated because it is not understood by the majority of litigants. This was in spite of the fact that court members and litigants in Kanye usually spoke and understood Setswana. This led to inordinate delays, which resulted in many cases pending, withdrawn or simply abandoned (table seven and case seven).

The third manifestation of the shortcomings of the Affiliation Proceedings Act was its failure to take account of the social context in which it operates. Especially in rural areas such as Kanye, we found that the most common method of dealing with extra-marital pregnancy is for negotiations to first take place between the families. Chapter five revealed that this had happened in the case of 43% of the women in our survey. The cases discussed in chapter six demonstrated that these negotiations could take long periods of time, from a few weeks to several years (see e.g. case one).

Many women who ended up at the magistrate's court had first attempted to negotiate for compensation or maintenance with the fathers of their children (see cases eight to fifteen). The major reason these women eventually registered complaints with the magistrate's court was that negotiations had failed, or promises to compensate them had not been fulfilled. We also noted that although not provided for under the Act, the court clerk regularly turned back women who had not exhausted the avenue of negotiations.

It is against this background that the requirement that complaints at the magistrate's court be registered within one year of the birth of the child is clearly unrealistic and insensitive. It was noted in chapter eight that in practice, this provision has been applied in an inconsistent manner by high court judges and Kanye magistrates alike. Although the first three magistrates at Kanye did not apply this provision strictly, we noted that the fourth one did, and that he regularly dismissed women who registered their complaints late. The lack of realism of this provision, especially its requirement that a complaint may be registered late if the man fraudulently influenced the woman not to do so within one year, was demonstrated by case fourteen. The woman in that case first obtained maintenance from the father of her child through negotiations. The man subsequently withdrew maintenance, and the woman first reported to the district commissioner, where such cases were registered before 1981. By the time she registered her case at the magistrate's court, twelve months had lapsed, and the magistrate dismissed her case.

That case showed that while some women were generally aware of the existence of the state law of maintenance, its precise provisions and details of operation were not known to them. At the same time, the requirements of the state law are premised upon knowledge of its provisions. Magistrates like number four in case fourteen insisted upon adopting this attitude among rural communities where this is obviously not the case. Even those magistrates who may be willing to take their social context into account by applying this provision of the Act less strictly run the risk of being overruled on appeal by the high court. This is borne out by the predominantly strict interpretation of the twelve months requirement at the high court (see chapter four).

It was there noted that Roman-Dutch law, which does not impose a special limitation on the registration of maintenance complaints, has not

been resorted to except in one case at the high court (Moathodi v Oduetse 1978). The rest applied the provisions of the Act strictly, holding that substantial compliance with the twelve month provision was not sufficient. Some of these were based on the reasoning that the same strict approach had been adopted by the English courts, from where the Act was transplanted (Sichinga v Phumetse 1981). Apart from demonstrating the plurality of interpretations of state law and its uneven application by the Botswana courts, this case led to another observation. This is that judges in Botswana were sometimes either unaware of legal developments in other jurisdictions, or that they were not prepared to fashion 'Botswana grown' solutions for local legal problems. That Roman-Dutch law was likewise not resorted to in late cases at the Kanye magistrate's court was explained by the fact that lawyers, who were most likely to raise such arguments on behalf of women, were rarely involved in maintenance cases at lower court level. A rare exception to this was case fifteen, where a woman who filed her complaint late still succeeded because she worked for the administration of justice, and obtained the assistance of a lawyer. This protracted case was not discussed in order to show that many women were aware of this state law provision, because many are not. Neither was it meant to suggest that men were victims of the application of the state law of maintenance. Rather, it was meant to illustrate the conclusion that possession of knowledge about state law or legal representation could make a big difference to the outcome of maintenance cases. This conclusion is further supported by the outcome of case twenty one, where the man benefitted from legal assistance, while the unassisted woman's complaint was eventually dismissed because it was registered late. This shows that far from being welfare-oriented, simple and inexpensive, maintenance proceedings at the Kanye magistrate's court are still subjected to rigid judicial procedures which require legal assistance. This places unmarried mothers in a position of further disadvantage because as we noted in chapters three, five and eight, they generally occupy a marginal economic position in relation to the men they sue, and cannot afford to instruct lawyers.

11.1.3 The nature and effectiveness of court orders

Chapters seven and nine were devoted to an assessment of the types of orders made by the chief's and magistrate's court in extra-marital pregnancy cases, and how effective they were. The test employed in this respect was defendants' rate of compliance with these orders, and the extent to which the courts enforced them in cases of non-compliance.

11.1.3.1 The effectiveness of the orders of the chief's court

Although Bangwaketse informants had readily claimed that the ideal compensation for a first pregnancy was six cattle, or seven, where the man failed to provide nourishment during confinement, chapter seven revealed variations in this respect. In practice, the most common awards at the chief's court were expressed in cattle or their equivalent in cash, which varied from one to ten cattle, and from P70 to P120 respectively (table two). In more than half of the cases however, the awards were consistent with the Ngwaketse ideal. Those cases in which lower or higher awards were made were explained by reference to the negotiability of the Ngwaketse dispute settlement process. The same explanation was made with respect to the variation in the cash equivalent of one cow, in spite of the fact that this was fixed by the central government. We found that in this respect too, the amount was sometimes the subject of bargaining between the parties. Payment in cash was the most common, which was explained by the fact that many people do not own cattle; more importantly, the cash equivalent of a cow at the customary court was much lower than its market value. By paying in cash therefore, men made significant savings as compared with if they had paid in cattle.

A significant finding was that in a few cases, the chief's court made orders for the payment of monthly installments until the child reached a certain age (table two). Although not an entirely new development, we noted that like the admission of blood test results, this was a sign of the influence of state law on the chief's court. At the same time, this development was not a general trend, and has been resisted from within as well as from outside the Ngwaketse system. Bangwaketse elders did not favour orders for the payment of monthly installments because they considered them 'untraditional' and more difficult to enforce than

cattle or lump sum orders.

As far as the effectiveness of the orders of the court was concerned, chapter seven revealed a picture that is far from impressive. Full compliance with the court's decisions was rare, accounting for only 10% of the cases. Even when the cases in which the men complied substantially with the order were added to this category, the figure remained very low, at 20% of all cases. The most common trend was for men to pay only part of the award, but thereafter delay payment of the balance (tables five and six). In the few remaining cases, there had been no compliance at all with the orders of the court. Table seven showed that out of fifty awards for compensation made by the court during the period 1978-1988, nineteen were still owing at the time of the research. The total amounts owed under these orders were as high as 43% of the total amount awarded, with half of these having been owing for periods of between five and ten years.

In the area of enforcement, it became clear that traditional methods of securing compliance with the chief's court's judgements through social pressure did not work. Moreover, the court rarely resorted to the enforcement mechanisms made available to them by the state law, which involved the sale of defaulters' property to satisfy their judgements. Rather, the court merely threatened to use these statutory methods of enforcement against defaulters in the hope that this would induce them to pay. The usual practice was for 'form eight' to be served, warning the defaulter that his property would be sold in satisfaction of the judgement if he did not pay. Despite the fact that such men continued to default, we did not come across a single seduction case in which this threat was actually carried out. It was therefore not surprising that the court's 'threatening strategy' did not work in the majority of these cases. These findings in our view cast doubts upon the capacity of the chief's court to provide sufficient justice in seduction cases.

11.1.3.2 The effectiveness of the orders of the magistrate's court

Some attention was paid to the manner in which magistrates reached decisions on the amounts to be ordered as maintenance, and a major factor was found to have been the defendant's income. It was also noted however that like the chief's court, bargaining was a feature of the process of making awards at the magistrate's court in maintenance cases

(cases sixteen and twenty three). Most of the orders at the Kanye magistrate's court were for the payment of monthly installments until the child reached the age of thirteen years. Table nine showed that on average, magistrates mostly made orders for amounts well below the maximum permitted by statute. Although these average amounts went up following an increase in the statutory maximum in 1977, we noted that even after that date, most remained well below the maximum.

It was also observed that in a relatively recent development, the magistrate's court made a few orders other than those for monthly installments. First, some orders were made for the delivery of cattle, which are not provided under statute or Roman-Dutch law, but were seen as a sign of influence from customary law. Secondly, lump sum orders were made under the amended section 6(2) of the Affiliation Proceedings Act. We saw that this provision did not provide any guidelines as to the circumstances in which such orders may be made, or how lump sums should be computed. In practice, it turned out that magistrates awarded lump sums in cases where one of the parties, usually the man, requested this because it was more convenient. As far as amounts were concerned, magistrates were at a loss in such cases, as case eighteen demonstrated. Although the magistrate in that case listed a number of factors to be taken into account in this respect, it was not clear how he converted them into the round figure he eventually awarded. We concluded therefore that the manner in which the lump sum amounts were computed appeared arbitrary and that in actual fact, this is mainly done on the basis of customary law awards. Lump sum awards may therefore be seen as customary law awards 'dressed up' in the language of the state law, a by-product of the public's resistance to the payment in monthly installments in 1977 (chapter four).

In the area of the effectiveness of the court's orders, slightly better trends were observed as compared with the chief's court. Table ten showed that full compliance was only 22%, and together with substantial compliance accounted for almost 39%; twice that of the chief's court. Still, we noted that the majority of defendants (61%) were at least four months in arrears of payment. Most of these were in arrears of between one and five years, and it was observed that compliance with maintenance orders was the most difficult challenge facing the magistrate's court. Contrary to the popular belief that lump sums are more likely to be complied with than monthly installments, this applied

equally to those cases in which cattle or lump sum orders were made. While there was no shortage of enforcement provisions in the state law, the magistrate's court's record of enforcing its orders in cases of non-compliance was found to be as wanting as that of the chief's court. The ultimate weapon against defaulters was identified as a criminal prosecution under the Maintenance Orders Enforcement Act. Like the chief's court's use of 'form eight' however, we found that the mere threat of prosecution was the most commonly used method of enforcement. Defaulters did not take these threats seriously, and case nineteen showed that they had developed strategies against this. These mainly involved paying part of the arrears on receiving a threatening notice, and thereafter defaulting once again until the next notice. This was not surprising, in view of the long and arbitrary procedures followed by court officials and the police in exercising their discretion to prosecute.

Prosecutions for failure to comply with maintenance orders were found to be rare; thus although twenty two out of the thirty six men in the magistrate's court survey were in arrears of between four months and five years, only four of them had been prosecuted. Generally, we found that police officers did not show as much zeal in prosecuting these cases as they did with other criminal matters. As table eleven showed, about a third of men were acquitted or discharged on the basis of insufficient evidence, while charges against others were withdrawn for various reasons. The majority of those convicted received prison sentences averaging three months, which were wholly suspended for an average of two years, on condition they paid their arrears within that period. We came across only two cases in which defaulters were actually committed to prison, thus it was not surprising that men continued to default even following prosecution for failure to comply; as long as they remained within the period of suspension, they knew they were 'safe'. We also found that the central administration of justice did not consider maintenance cases as 'real cases' and were unwilling to invest additional resources in districts where there was a long backlog of these.

11.1.3.3 Reasons for limited compliance with court orders

A combination of factors were found to contribute to the very low records of compliance with the orders of both courts. Inability to pay was one, but it was not considered a major factor because even those who could afford to pay defaulted. Moreover, total inability to pay was an acceptable defence under both customary and state law. We concluded that a major factor which explained low compliance with the orders of the courts was the attitudes of men towards their extra-marital children. Socially, they did not consider themselves the 'real' fathers of these children, as they did not live with them in the same household; rather, they felt more affinity to the children of their unmarried sisters. This, we noted, may be encouraged by the cultural norm that extra-marital children were affiliated to their mother's lineage, and that the latter were primarily responsible for them. This may explain why some families refrain from pursuing men against whom seduction orders are made, which may in turn encourage further non-compliance. Although the reasons for failure to comply with orders were found to be fairly similar for both courts, there were some differences. Total inability to pay was found to have been even less likely at the magistrate's court because almost all the men in the survey were in formal employment, and earned monthly wages. Moreover, the amounts they were required to pay per month were quite low, and were not adjusted to the inflation rate with the passage of time. In addition to the lack of socio-cultural affiliation to their extra-marital children, another factor seemed to lie at the basis of their failure to comply with state law maintenance orders. This was their commonly expressed resistance to the state law of maintenance, especially its provision for the payment of monthly installments over a number of years. We saw that men resented this because it encouraged a link with the woman, which they considered a source of instability in their current marriages or relationships. Hence their preference for paying 'once and for all' in cattle or a lump sum in accordance with customary law. On the basis of our findings in chapters seven, nine and ten, we concluded however that this was mostly an excuse by men to evade responsibility for their children.

11.1.4 The relationship between state law and customary law

We noted that an attempt was made to lay certain rules regarding the relationship between customary law and state law (see chapter four). Our research findings lead us to conclude that it is risky to make generalisations about this relationship at an abstract level. We found that it is useful to distinguish two broad levels at which this relationship may be examined. The first is the general national level, which is normally looked at from the point of view of legal centralism. At this level, customary law appears to be subordinate to state law, because it is defined in terms of its compatibility with the latter. In addition, state law institutions enjoy a wider jurisdiction than customary ones, and we saw the decisions of customary courts sometimes being overruled on entering the arena of state law. Institutions of the state law may at this level actually define the content of customary law, as we saw in cases six and twenty one.

We noted in chapter ten however that this is only one level at which customary law and state law interact, and even then very rarely. We found that the two systems also interact at a lower level which is closer to the daily lives of ordinary people in places like Kanye. In order to comprehend this interaction, it was necessary to cast away the lens of legal centralism, and adopt a methodology that was suited to legal pluralism. This methodology looked at interaction not from the point of view of state law and institutions alone, but from that of the consumers of the law, or the litigant's perspective. Using this perspective, we found out that irrespective of the type of court disputes may eventually end up in, the indigenous model of negotiation--mediation--adjudication generally informed the resolution of pregnancy disputes in Kanye. The ideal sequence of resolution was however not always followed; it has been affected by other processes, such as the undermining of kinship cohesion and the mobility of young people. Because it is a flexible model, litigants have adapted it to socio-economic change as well as legislative intervention.

Thus we noted variations in the conduct of negotiations, such as the increasing tendency for the young persons concerned to themselves attempt negotiations for compensation. As for mediation, we observed an increase in the kinds of mediators who are recruited in addition to the ideally preferred relatives, friends and headmen. Mediators are now

varied, and include friends, colleagues, employers, social workers, school teachers, magistrates, district officers and commissioners. We concluded therefore that from the point of view of the litigants, institutions like the chief's and magistrate's court are just one forum in a long continuum comprising negotiation, mediation and adjudication (figures four and five). This was regarded as an indication that none of the systems by itself is seen by the residents of Kanye as sufficient for addressing issues of extra-marital pregnancy.

We found out that the courts were also involved in this strategic use of law: they allowed litigants to use them as a 'shadow' under which they could bargain with each other. Moreover, we observed that like the litigants, both the magistrate's and chief's courts were sometimes engaged in 'remedy shopping'. For example, they have in some cases made decisions or awards which are associated with the system other than their own. Thus the chief's court sometimes admits evidence from the results of blood tests and makes statutory-style orders, while the magistrate's court made orders for the payment of cattle. We argued in chapter ten that this is more than just evidence that the courts influence each other in the remedies they employ. What is important in our view is that it comes about not due to spontaneous adoption by court officials, but due to the strategies of litigants, to which the courts have been responsive. This shows the limitations of a dichotomous approach to legal pluralism, which views the two systems of law and courts in separate watertight compartments. It also has other methodological implications which are discussed in the next section.

11.2 Evaluation of the study's methodologies

The methodologies of the study in the light of the above findings may now be evaluated. As was pointed out in chapter one, a combination of traditional legal and social science methods were utilised in the collection and analysis of data for this study. The traditional legal methods comprised a description and analysis of statutes, authoritative texts, restatements of the law and the decisions of the superior courts of record (chapters two and four).

These methods provided a useful starting point for the research, especially for answering the second research question, which sought to find out the nature of the laws governing extra-marital pregnancy. This

is because these sources were mostly written and accessible, and brought us into touch with the formal rules of the legal system on this issue. From there, we could proceed to find out how the law operates (if at all) in practice.

Reviewing the parliamentary and extra-parliamentary history of the Affiliation Proceedings Act, and the decisions of the high court revealed legislative and judicial attitudes towards extra-marital pregnancy and its legal consequences. Similarly, the writings of Roman-Dutch authorities on the issue of seduction and maintenance yielded some historical insights into the background to some of the rules which today form part of the Botswana legal system. The few written sources of customary law likewise provided a useful starting point for the investigation of the different levels of customary law that have developed. Finally, an investigation of the institutional framework within which the formal legal system operates led us to pose additional questions about the relevance and sufficiency of the court system (chapters seven and nine).

It must be conceded in the light of our findings however that on their own, traditional legal methods and the theory they imply are far from sufficient to understand legal pluralism. This is because they are based upon certain untenable assumptions about the nature of law and society. Because these methods lead us only to those laws which are recognised by the state, the underlying assumption is that the state has a monopoly on legal regulation. Our findings confirm that this perspective of legal centralism (J. Griffiths 1986) is insufficient because various sources of regulation operate, especially at the grass-root level, in addition to those of the state. For example, we found that among Bangwaketse, a variety of arrangements may be made following the occurrence of extra-marital pregnancy. In some cases, marriage may be agreed upon; in others, the father may maintain the child at its mother's home until a certain age, whereupon he paid bogadi and took the child. In yet others, compensation for seduction and reimbursement of confinement expenses may be agreed upon during negotiations, or awarded by chiefs and headmen in trouble cases. To isolate the latter arrangement alone as legal only because it occurs in a trouble case, and involves a third party, is clearly arbitrary. This is the result to which the use of traditional legal methods alone would lead (cf. Schapera 1938 and Roberts 1972a). Our use of the survey and extended case

methods in addition enabled us to discover the variety of other arrangements which are made in both trouble and troubleless cases of extra-marital pregnancy. The social reality is therefore variation and plurality, and not uniformity of regulation, as traditional legal methods and their legal centralist perspective assume.

The two approaches need not however be juxtaposed; legal pluralism is a much more comprehensive approach, and encompasses elements of the narrower concept of legal centralism. The use of research methods based upon some notion of legal centralism cannot, in our view, be entirely avoided in research about law, especially state law. We noted in chapter one for example that while much has been written about the nature of the relationship between customary law and state law, very little work has paid attention to the plurality of state laws themselves. It was observed that this was due to the rejection, especially by legal anthropologists, of the legal centralist approach to the study of law. The findings of this research lead us to conclude that this is an unfortunate omission because state law does affect people, whether or not they understand it (chapters eight and nine). We observed for example that women in Kanye are increasingly resorting to the magistrate's court for the resolution of extra-marital pregnancy disputes. A similar observation was made in the village of Molepolole by A. Griffiths (1984), where women resorted to the magistrate's court because customary procedures had been unsuccessful. These findings therefore underline the importance of analysing the rules of the state law, and their impact upon women and children.

As a result of the failure to pay sufficient attention to the content of state law, it is sometimes assumed that state law is a single or uniform system. We saw in chapters two and four that this is far from accurate; state law is also characterised by pluralism in its provisions and application. There is also a significant degree of uncertainty in state law which is sometimes wrongly associated with customary law alone, simply because it is unwritten. This became quite clear in chapter four, where we observed that the two sources of state law, Roman-Dutch law and statute each laid down certain rules and procedures with respect to the maintenance of children born out of marriage. These rules and procedures were often in conflict with one another, as the statute was based upon English legal principles, which were not always the same as Roman-Dutch law ones. Moreover, the content of state law is

often distorted through varying interpretations by different court officials (chapter eight). The resultant legal uncertainty created gaps in the law which have real implications for the rights of litigants. It also provides an opportunity for strategic manipulation by courts and litigants alike (chapter ten).

We noted in chapter one that legal pluralism was more of a state of affairs, a starting point, than a theory or methodology. Thus ways of analysing the plural remedies for extra-marital pregnancy had to be found. Resort was made to what Comaroff and Roberts (1981) have labelled the processual approach, which emphasises the importance of social processes as well as rules.

This approach turned out to be more useful in understanding the working of the Ngwaketse dispute settlement system, especially the part played by rules therein. This is because unlike the legal centralist approach which takes rules and their functions for granted, this approach treats them as problematic. According to the processual approach, the function of rules is not limited to application to disputes, nor they always determine their outcome. Thus we found that what partly explained variations and apparent contradictions in the Ngwaketse dispute settlement system was due to the different functions played by rules. Apart from being applied to deal with cases that came before the courts, they also informed the goals and strategies of the parties during negotiations outside the courts. This does not mean that rules are not important in the Ngwaketse dispute settlement system, or that it is all about strategic manipulation. This is a trap into which some processual scholars, keen to shed the positivist over-emphasis on rules, have sometimes fallen. Among Bangwaketse, rules and their knowledge are indeed important, especially certain procedures which are highly emphasised in the resolution of extra-marital pregnancy disputes. Such rules may not always be specifically stated or invoked in negotiations or adjudication, but they inform the litigants' strategies. They also provide a shadow in which parties bargain during negotiations, as well as lie at the bottom of the decisions of the courts (case one).

By looking beyond the rules however, the processual approach made it possible to understand why externally introduced law often fails to achieve its desired objectives. In this respect, J. Griffiths' (1990) recent contribution towards a sociological theory of legislation is particularly relevant (chapter one). Like others around the world, the

post-independent state in Botswana has sought to bring about social change through legislation in various sectors (chapter two). In the area of extra-marital pregnancy with which we are concerned, the passage of the Affiliation Proceedings Act of 1970, among others is an example in point. The findings of this study revealed that this legislation has had limited success in effecting social engineering. Our data showed that some of the reasons for this may be understood by applying J. Griffiths' analysis of the social working of law. We saw that this legislation has been strongly resisted by traditional communities seeking to protect their own jurisdiction over matters of extra-marital fertility (chapter four). These communities may be seen as constituting and possessing semi-autonomous social fields (SASFs) which strive for maximum autonomy by resisting any attempts to introduce external state norms to compete with their own (Moore 1973). Chapters seven and eight showed that the chief's court at Kanye has in some cases done precisely this, although it has sometimes also adopted some of the procedures of the external law. The resistance by men to the state law is manifested in their failure to comply with the maintenance orders of the magistrate's court (chapters eight and nine). Such resistance has been encouraged by the fact that the state as the external SASF has not invested sufficiently in the 'penetration' of its norms. Thus it has hardly engaged in what J. Griffiths' calls proactive mobilisation of the legislation, but has instead relied on its reactive mobilisation by single women at the magistrate's court.

Furthermore, the two factors J. Griffiths points out as pre-requisites for reactive mobilisation of external law -communication and activating the relevant actors- are missing. The findings of this study in chapters eight and nine revealed that rural women are unaware of the state law, or they possess at best inadequate and inaccurate information about it (case fourteen). The state has made no effort to disseminate the contents of the Affiliation Proceedings Act, nor have additional resources been allocated to the Kanye magistrate's court to improve efficiency. Hence the limited effectiveness of the state law of maintenance at the Kanye magistrate's court.

Finally, J. Griffiths' point that whatever a mobilising actor does is done 'for her own reasons and not for those which moved the external legislator' is confirmed by the findings of this study (chapter ten). This approach, which looks at law and disputes from the litigant's

perspective, was found to be useful in understanding the outcome of certain cases (see cases twenty two to twenty five). These cases showed that litigants used various strategies to achieve certain goals.

The findings of this study showed however that the processual approach is not without its limitations. First of all, its emphasis on the strategic use of law can lead to distortions, especially in cases involving unequal participants. This may be illustrated by an example from our research. While all litigants in pregnancy disputes adopted certain strategies in pursuance of their goals, not all were equally free to do so. Women in particular were constrained by the norm that compensation is available for first pregnancies only. Although it is possible to negotiate reduced compensation for second and subsequent pregnancies, bargaining during negotiations took place 'in the shadow' of this norm, and placed women in a position of disadvantage (cf. Gallanter 1981:23). We found out in chapter ten that the strategies adopted by women to overcome this have met with limited success due to another constraining factor. This is the reality of the structural economic inequalities between men and women in Botswana society: men have better access than women to both traditional and modern resources such as land, cattle and wages. Thus the vast majority of female litigants in our survey did not earn a regular wage, and were dependent on others for support, while the vast majority of male defendants earned a regular wage. As a result, men were able to insist upon women accepting small cash settlements during negotiations, instead of the higher monthly installments under the statute because of the women's marginal economic situation and urgent cash needs.

In the light of this example, an over-emphasis upon strategic manipulation and negotiability carries with it two risks. First, it underplays the importance of rules as constraining factors for the formulation and implementation of litigants' strategies. Secondly, it may conceal other constraining factors such as power differences between social groups in general, especially those between men and women. The extent to which unmarried mothers are able to successfully use the law strategically is therefore limited. Thus the perspective emphasising strategic manipulation of law by litigants should take account of the power differences between men and women.

The second set of shortcomings may be levelled at J. Griffiths' theory of the social working of law. Despite its undoubted suitability to this

study, it is limited to the application of external law such as legislation, and has little to say about the failure of customary laws. In other words, while his analysis of why legislation does not work is plausible, it says nothing about why customary remedies such as those of the Bangwaketse in extra-marital pregnancy cases are failing. Perhaps it could be applied to customary law by the reasoning that because customary law is itself plural, local SASFs within the Kanye community resist attempts from other SASFs such as the chief's court to impose their norms. Looked at from the point of view of these local SASFs therefore, the chief's customary law may be seen as external law. Thus the reasons for its ineffectiveness may be the same as those for the ineffectiveness of the state law.

Secondly, while J. Griffiths' criticism of instrumentalism is justified, it tends to suggest that it is impossible to effect some degree of social engineering through law. The findings of this work showed that although legislative innovations in the area of extra-marital pregnancy have not been an all-round success, they did bring about some change. This change was particularly visible in the increasing tendency for women to bring cases before the magistrate's court rather than the chief's court. We saw that some of these women have 'captured' certain aspects of the externally introduced state law, and absorbed them into their dispute settlement model (chapter ten). It is also demonstrated by the adoption of state law procedures such as orders for monthly installments, by the chief's court. Both these examples show that law can play some role, albeit a limited one, in social engineering.

11.3 Policy implications of the study

The foregoing findings have certain implications for general policy on law reform in Botswana, especially in the area of extra-marital pregnancy¹. The most important policy lesson of all is that in order to make an impact on the lives of ordinary people, state intervention must take account of the reality of pluralism. This study has shown that state intervention has had a limited effect on the position of unmarried women and their children. This is because it has been 'top-down' and not taken account of the social context, which is characterised by

1 A list of specific recommendations for law reform in the area of extra-marital pregnancy appears in appendix A.

a variety of relationships and arrangements. State reforms such as the Affiliation Proceedings Act, on the other hand, have tended to assume uniformity. Moreover, they have offered themselves as alternatives to local customary arrangements, which people could use instead of their own. We saw that in practice, this was not the case; people used a combination of customary and state laws and procedures. This means that none of the two systems by itself is regarded by Kanye residents as sufficient for dealing with issues of extra-marital pregnancy. The proper policy approach should therefore be one which is flexible enough to be accommodated by the consumers of the law into their own realities, not the other way around.

This means that law reform should not be regarded as a simple process of transplantation of statutes from other jurisdictions. If any borrowing of solutions should take place, this must be preceded by research into their compatibility with existing laws and realities. Proposed new laws should be scrutinised for their suitability to the social context of contemporary Botswana, bearing in mind the fact that most of the population live in rural areas, but also taking account of socio-economic changes. Provisions such as the time limitation laid down by the Affiliation Proceedings Act certainly do not do this. Consultations with the public on law reform should involve both men and women, and go beyond the superficial style adopted by the parliamentary law reform committees. Current remedies should be properly explained to the public in this process, so they can make informed choices and contributions to law reform.

Once enacted, the basic provisions of welfare-oriented state laws such as the Affiliation Proceedings Act should be disseminated to the people, so they can exercise informed choices in using the legal system. This is particularly important for women in maintenance cases, who we saw often had their complaints dismissed because of inadequate or inaccurate information on state law procedures. More importantly, the state must be willing to invest sufficient resources to ensure the effectiveness of such welfare-oriented law reforms.

Policy lessons are not to be learnt by the state alone; local institutions such as customary courts can be more effective in ensuring the success of legal remedies. This study showed that the chief's court at Kanye was not always willing to be flexible in their application of certain ideal norms and procedures. Their strict application of the

rule requiring women to be accompanied by senior male kin, and the restriction of compensation to first pregnancies only, were cited as examples. The wide prevalence of extra-marital pregnancy, and the erosion of kinship cohesion revealed by this study require that customary courts should be more flexible in their application of ideal norms. That customary law is capable of such adaptation is demonstrated by the successful abandonment of both these norms among the Bakgatla through the innovative decisions of a chief. Although they are today dependant upon the state for their resources, customary institutions such as the chief's court at Kanye should also be willing to enforce judgements made in cases of extra-marital pregnancy.

Finally, this study has confirmed previous findings showing that the socio-economic position of unmarried mothers as a group is marginal (see chapters three, five and eight). It is clear that while they can make a contribution to improving the situation, legal reforms in the area of extra-marital pregnancy alone are far from sufficient. From a national policy point of view, these must be supplemented by a more comprehensive and effective programme that addresses problems of poverty among unmarried mothers and other disadvantaged social groups.

REFERENCES

- Abel, N.O.J., Flint, M.E., Hunter, N.D., Chandler, D. and Maka, G., 1987. Cattle Keeping, Ecological Change and Communal Management in the Ngwaketse. Ministry of Agriculture, Gaborone.
- Aguda, A., 1973. Legal Development in Botswana: 1885-1966. Botswana Notes and Records, 5:52. Gaborone.
- Alexander, E., 1991. Women and Men in Botswana: Facts and Figures. C.S.O., Ministry of Finance, Gaborone.
- Alexander, P., 1970. Chiefs, Commandants and Clerks. In Crowder, M. and Imeke, O., (eds.) West-African Chiefs, pp 2-14. University of Ife Press, Ile-Ife.
- Allot, A.N., 1970a. New Essays in African Law. Butterworth, London.
- Allott, A.N., 1970b. Judicial and Legal Systems in Africa. Butterworth, London.
- Armstrong, A. and Ncube, W., (eds.), 1987. Women and Law in Southern Africa. Zimbabwe Publishing House, Harare.
- Armstrong, A. and Stewart, J., (eds.), 1990. The Legal Situation of Women in Southern Africa. University of Zimbabwe Publications, Harare.
- Arntzen, J.W., 1989. Environmental Pressure and Adaptation in Rural Botswana. Phd-thesis, Free University, Amsterdam.
- Benda-Beckmann, F.von, 1989. Scapegoat and Magic Charm: Law in Development Theory and Practice. Journal of Legal Pluralism, 28:129-147.
- Benda-Beckmann, K.von, 1984. The Broken Stairways to Consensus: Village Justice and Courts in Manikabau. Foris Publications, Dordrecht.
- Benda-Beckmann, F. and K.von, 1991. Law in Society: From Blindman's Bluff to Multilocal Law. Recht der Werklykheid, Special Issue 1991:119.
- Bennett, T., 1985. Application of Customary Law in Southern Africa: the Conflict of Personal Laws. Juta and Co., Cape Town.
- Bettles, F., 1980. Women's Access to Agricultural Extension Services in Botswana. Ministry of Agriculture, Gaborone.
- Boberg, P.Q.R., 1977. The Law of Persons and the Family. Juta and co. Cape Town.
- Bond, C.A., 1974. Women's Involvement in Agriculture in Botswana. Ministry of Agriculture, Gaborone.
- Botswana Council for Social Services, 1983. Report of the Workshop on the Disappearing Father. Gaborone.

Botswana Government

1970. Official Report of the Proceedings of the National Assembly. Vol. 34, Government Printer, Gaborone.
1974. Rural Income Distribution Survey. C.S.O., Gaborone.
- 1976a. Report of the Select Committee on the Affiliation Proceedings Bill. National Assembly, Gaborone.
- 1976b. Oral and Written Evidence Received by the Select Committee on the Affiliation Proceedings (Amendment) Bill. National Assembly, Gaborone.
1979. Report of the Presidential Commission on Local Government Structure. Government Printer, Gaborone.
- 1980a. Report of the Law Reform Committee. National Assembly, Gaborone.
- 1980b. Statistical Abstracts. C.S.O., Government Printer, Gaborone.
- 1981a. National Population and Housing Census. C.S.O., Government Printer, Gaborone.
- 1981b. Guide to the Towns and Villages of Botswana. C.S.O., Government Printer, Gaborone.
- 1981c. The White Paper on Local Government Structure. Government Printer, Gaborone.
- 1981d. Summary Statistics on Small Areas. C.S.O. Government Printer, Gaborone.
1982. Report of the National Migration Study. Ministry of Finance and Development Planning, Gaborone.
- 1983a. Report of the Seminar on the Participation of Women in National Development Planning. Women's Affairs Unit, Government Printer, Gaborone.
- 1983b. Report of the National Conference on Women in Botswana: Strategies for Change. Women's Affairs Unit, Government Printer, Gaborone.
1985. Country Profile. Central Statistics Office, Ministry of Finance and Development Planning, Gaborone.
- 1986a. Kanye Development Plan. Town and Regional Planning Department, Ministry of Local Government and Lands, Gaborone.
- 1986b. Report of the Law Reform Committee. National Assembly, Gaborone.
- 1986c. Labour Statistics Bulletin. C.S.O., Government Printer, Gaborone.
1987. Education Statistics 1986. Ministry of Education, Gaborone.
- 1988a. Statistical Bulletin. Vol. 13, C.S.O. Government Printer.

- 1988b. Family Health Survey. Ministry of Health, Government Printer, Gaborone.
1989. Household Income and Expenditure Survey. C.S.O. Bulletin, Ministry of Finance and Development Planning, Gaborone.
- Brewer, I., 1974. Sources of the Criminal Law in Botswana. Journal of African Law 18:1:24.
- Brown, B., 1980. Women, Migrant Labour and Social Change in Botswana. African Studies Center Working Papers, Boston University, Boston.
- Brown, B., 1985. Report on the Child Maintenance Laws. Women's Affairs Unit, Ministry of Home Affairs, Gaborone.
- Campbell, A., Roberts, S. and Walker, J.M., 1971. A Restatement of the Maletse Law of Family Relations, Land and Succession to Property. School of Oriental and African Studies, Restatement of African Law Series, London.
- Comaroff, J.L., 1973. Competition for Office and Political Processes among the Barolong Boora Tshidi. Phd-thesis, University of London, London.
- Comaroff, J.L., 1978. Rules and Rulers: Political Processes in a Tswana Chiefdom. MAN, 13:1-20.
- Comaroff, J.L., and Roberts, S., 1977. Marriage and Extra-Marital Sexuality: the Dialectics of Legal Change among the Kgatla. Journal of African Law, 21: 1:97.
- Comaroff, J.L., and Roberts, S., 1981. Rules and Processes: the Cultural Logic of Dispute in an African Context; University of Chicago Press, Chicago.
- Dauids, J., 1965. Strict Liability in Paternity Cases-Or nemo me impugne tangit? South African Law Journal, 82:448.
- Gallanter, M., 1981. Justice in Many Rooms: Courts, Private Ordering and Indigenous Law. Journal of Legal Pluralism, 19:1-47.
- Griffiths, A., 1983. Legal Duality: Conflict or Concord in Botswana? Journal of African Law, 27:150-161.
- Griffiths, A., 1984. Support for Women with Dependent Children under the Customary System of the Bakwena and the Roman-Dutch Common and Statutory Law of Botswana. Journal of Legal Pluralism, 22:1.
- Griffiths, A., 1988. Law and the family in Molepolole: A Study of Family Disputes in a Kwena village. Phd-thesis, London School of Economics and Political Science, London.
- Griffiths, J., 1986. What is Legal Pluralism? Journal of Legal Pluralism, 24:1.
- Griffiths, J., 1990. Legal Pluralism and the Social Working of Law. Paper presented to a seminar held at Wageningen, The Netherlands (unpublished).

blished).

Gulbrandsen, O., 1980. Agro-pastoral Production and Communal Land Use: a Socio-Economic Study of the Bangwaketse. Ministry of Agriculture, Gaborone, and University of Bergen, Norway.

Gulbrandsen, O., 1986. To Marry or not to Marry? Marital Strategies and Sexual Relations in a Tswana Society. 51 ETHNOS 7-21.

Gulliver, P., 1969. Dispute Settlement Without Courts: the Ndendelui of Southern Tanzania. In: Nader, L. (ed.), Law in Culture and Society. pp. 24-68. Aldine Publishers, Chicago.

Hahlo, H.R. and Kahn, E., 1968. The South African Legal System and its Background. Juta and co., Cape Town.

Heever, F.P. van den., 1954. Breach of Promise to Marry and Seduction in South African Law. Juta and co., Cape Town.

Himsworth, C.M.G. 1972. The Botswana Customary Law Act of 1969. Journal of African Law 16:1:4.

Hoebel, E.A. and Lywellyn, K.N., 1941. The Cheyenne Way. Norman, University of Oklahoma Press.

Holleman, J.F., 1969. Chief, Council and Commissioners: some Problems of Government in Rhodesia. Royal van Gorkhum Ltd., Assen.

Holleman, J.F., 1973. Trouble Cases and Troubleless Cases in the Study of Customary Law and Legal Reform. Law and Society Review, 7:585. Reprinted in Benda-Beckmann, K. von and Strijbosch, F., 1986. (eds.), Anthropology of Law in the Netherlands: Essays in Legal Pluralism. Foris Publications, Dordrecht.

Holm, J., and Molutsi, P., (eds.), 1988. Democracy in Botswana: the Proceedings of a Workshop. Macmillan (Botswana), Gaborone.

Hooker, M.B., 1975. Legal Pluralism: an Introduction to Colonial and Neo-colonial Laws. Oxford University Press, Oxford.

Huber, U. The Jurisprudence of my Time. Translated from the Fifth Edition by Gane, P., 1939, Butterworth and co. (Africa) Ltd. Durban.

Ingstad, B. and Saugestad, S., 1987. Unmarried Mothers in Changing Tswana Society: Implication for Household Form and Viability. Forum for Utviklingsstudier, Norsk Utenrikspolitisk Institutt no.4. Norway.

Izzard, W., 1982. The Impact of Migration on the Roles of Women. In: Botswana Government 1982: 3:654, Government Printer, Gaborone.

Kerven, C., 1984. Academics, Practitioners and all Kinds of Women in Development: a Reply to Peters. Journal of Southern African Studies 10:2.

Kocken, E.M. and Uhlenbeck, G.C., 1980. Tlokwen, a Village Near Town. ICA Publication no.39, Institute of Cultural and Social Studies, Leiden University, Leiden.

Kuper, A., 1970. Kalahari Village Politics: an African Democracy. Cambridge University Press, Cambridge.

Kuper, A., 1987. The Transformation of African Marriage in Southern Africa. In: Kuper, A., 1987. South Africa and the Anthropologist. Routledge and Kegan Paul, London.

Lee, R.W., 1936. Commentary on Grotius' Jurisprudence of Holland. Oxford University Press, Oxford.

Lee, R.W., 1953. An Introduction to Roman-Dutch Law. Oxford University Press, England.

Molenaar, M., 1980. Social Change Within a Traditional Pattern: a Case Study of a Tswana Ward. M.A.-thesis, Leiden University.

Molokomme, A.L.,

1985a. The Reception and Development of Roman-Dutch Law in Botswana. Lesotho Law Journal 1:1:121-134.

1985b. The Woman's Guide to the Law: an Outline of how the Law Affects Every Woman and her Family in Botswana. Women's Affairs Unit, Ministry of Home Affairs, Gaborone.

1987a. The Mosaic of Botswana Maintenance Law. Botswana Notes and Records, 19:129-136.

1987b. Marriage: What Every Woman Wants or 'Civil Death'? The Status of Married Women in Botswana. In Armstrong A. and Ncube, W., (eds.), Women and Law in Southern Africa, pp. 181-192.

1987c. Formulating and Communicating Family Law Options in Botswana. Paper presented to the Conference on Social Change and Legal Reform in East, Central and Southern Africa, Harare.

1990. Women's Law in Botswana: Laws and Research Needs. In: Armstrong, A. and Stewart, J., (eds.), The Legal Situation of Women in Southern Africa pp. 7-46.

Molokomme, A.L. and Otlhogile, B., 1988. Cases on the Botswana Law of the Family and Succession. Unpublished teaching materials, University of Botswana Educational Resources Centre, Gaborone.

Moore, S.F., 1973. Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Field of Study. Law and Society Review, 7:719.

Morice, G., 1905. English and Roman-Dutch Law in South Africa. Butterworth and co., London.

Otlhogile, B., 1989. Is Customary Marriage a 'Union'? Botswana Notes and Records, 21:61.

Odell, M.J., 1985. Local Government: Traditional and Modern Roles of the Kgotla. In Picard, L.A., (ed.), 1985. The Evolution of Modern Botswana p.61. University of Nebraska Press, Lincoln.

Peters, P., 1983. Gender, Developmental Cycles and Historical Process: a Critique of Recent Research on Women in Botswana. Journal of Southern African Studies 10:2.

Pospisil, L., 1971. Anthropology of Law: A Comparative Theory. Harper and Row, New York.

Roberts, S.

1970. A Restatement of the Kgatla Law of Domestic Relations. School of Oriental and African Studies Restatement of African Law Series, London.

1971. The Settlement of Family Disputes in the Kgatla Customary Courts: Some New Approaches. Journal of African Law, 15:60.

1972a. Restatement of African Law: Botswana:1: Tswana Family Law. Sweet and Maxwell, London.

1972b. The Survival of the Traditional Tswana Courts in the National Legal System of Botswana. Journal of African Law, 16:2:103.

1977a. The Kgatla Marriage: Concepts of Validity, in Roberts, S., (ed.), Law and the Family in Africa. Mouton, The Hague and Paris.

1977b. Law and the Family in Africa. Mouton, The Hague and Paris.

Roberts, S. and Schapera, I., 1975. Rampedi Revisited: Another Look at a Kgatla Ward. 45 Africa 258.

Rouvery van Nieuwaal, E.A.B. van, 1977. To Claim or not to Claim? Changing Views about the Restitution of Marriage Prestations among the Anufom in Northern Togo. In: Roberts, S., (ed.), Law and the Family in Africa, pp. 93-114.
Rouvery van Nieuwaal, E.A.B. van, 1981. In Search of Justice. Documentary Film with Commentary. Afrika studiecentrum, Leiden.

Sanders, A.J.G.M.

1983. Comparative Law, Law Reform and the Recording of African Customary Law. De Jure, 16:27.

1985a. The legal Dualism in Lesotho, Botswana and Swaziland: A General Survey. Lesotho Law Journal, 1:1:47.

1985b. The Internal Conflict of Laws in Botswana. Botswana Notes and Records, 17: 77.

Schapera, I.,

1933. Pre-marital Pregnancy and Native Opinion: a Note on Social Change. Africa, VI:59.

1935. The Social Structure of the Tswana Ward. Bantu Studies, 203-224.

1938. A Handbook of Tswana Law and Custom. Frank Cass & Co. London.

1940. A Short History of the Bangwaketse. African Studies, 1:1-26.

1943a. Tribal Innovators: Tswana Chiefs and Social Change, 1795-1940. The Athlone Press, London.

1943b. Tribal Legislation Among the Tswana of the Bechuanaland Protectorate. London School of Economics: Monographs on Social Anthropology 9: 72, London.

Schapera, I.,

1943c. The Work of the Tribal Courts in the Bechuanaland Protectorate. African Studies, 2:27.

1947. Migrant Labour and Tribal Life: a Study of Conditions in the Bechuanaland Protectorate. Oxford University Press, London.

1953. The Tswana. International African Institute, London.

Snyder, F.G., 1981. Anthropology, Dispute Processes and Law: A Critical Introduction. British Journal of Law and Society 18: 141-180.

Snyder, F.G., 1983. Review of Comaroff, J. and Roberts, S. Rules and Processes: the Cultural Logic of Dispute in an African Context. Modern Law Review, 46:527-532.

Syson, L., 1972. Unmarried Mothers in Botswana. Botswana Notes and Records, 5:41.

Suggs, D., 1987. Female Status and Role: Transition in the Tswana Life Cycle. Ethnology, XXVI 2:107.

Velsen, J. van, 1967. The Extended Case Method and Situational Analysis. In: Epstein A.L., (ed.), The Craft of Social Anthropology pp. 129-151, Tavistock Publications, London.

Voet, J., Commentary on the Pandects. 1956 edition translated by Gane, P., Butterworth and co. (Africa) Ltd. Beach Grove.

Windhorst, R., 1989. The Changing Position of Tsopye Women. M.A.-thesis, University of Leiden.

Women and Law in Southern Africa, 1990. Newsletter, vol.4.

Woodman, G., 1985. Customary Law, State Courts, and the Notion of the Institutionalisation of Norms in Ghana and Nigeria. In Allot, A.N. and Woodman, G. Peoples' Law and State Law: The Bellagio Papers. Foris Publications, Dordrecht.

Appendix A

RECOMMENDATIONS FOR LAW REFORM

These general and specific recommendations are divided into three categories. Because the field of compensation for extra-marital pregnancy cannot be viewed separately from other areas of the legal system, the first category of recommendations addresses general policy on the national legal system. The second category addresses the customary law and courts, with special emphasis upon the operation of the Ngwaketse system at the Kanye chief's court. Thirdly, a number of recommendations addresses the functioning of the state law of maintenance with particular reference to the Kanye magistrate's court.

General policy on the national legal system

1. There should be a more systematic review and assessment of the different aspects of the legal system, especially the relationship between the various sources of law. Particular attention should be paid to the circumstances in which customary law and state law apply, and the 'choice of law' approach should be applied in a more flexible manner.
2. The judicial powers of district commissioners should be more precisely defined, especially in areas where there are full-time magistrates. The present overlap of functions confuses the public and sometimes leads to maintenance claims being dismissed by magistrates for being too late (cases fourteen and twenty four).
3. The review and appellate powers of magistrate's courts over customary court decisions may have been justified before the constitution of the national customary courts of appeal in 1986. Now that these have been constituted, this is no longer necessary; instead it creates uncertainty and conflicts between state courts and customary courts on the nature and application of customary law (see case twenty one). Such powers should now be revoked, cases should be reviewed by the office of the customary courts commissioner and appeals heard by the customary courts of appeal.

Customary law

4. The Ngwaketse chief's court should display more flexibility in applying the rule that women should always be accompanied by senior male kin in seduction cases. The same goes for the rule that compensation is available only in the case of a first pregnancy. The court should give serious consideration to abandoning both these rules, as the Bakgatla chief's court did in the 1960's. The reality, as we saw, is that senior male kin are not always available or willing to assist, and it has become common and accepted for unmarried women to have more than one child. This could also boost the authority of the chief's court, because more women are likely to approach them than at present, when they use the magistrate's court instead.
5. The chief's court or the ministry of Local Government and Lands should revise the official cash equivalent of cattle used in the payment of customary court judgements and fines. This should take account of the inflation rate and the real market value of cattle, otherwise

the awards of customary courts in seduction cases will be reduced to token payments which take little account of the child's welfare (table two).

6. The chief's court should desist from merely threatening to sell the property of defaulters in seduction cases; they should use their enforcement powers to do so where the man has property of value. In any event, we saw how trifling most of the court's awards were once they were converted into cash, so this would not be as drastic as it seems.

State laws and institutions

7. The meaning and application of the Roman-Dutch law presumption of paternity should be more precisely defined to avoid its uneven application by the courts. It is suggested that it be applied only when it is reasonably likely, taking account of the normal gestation period, that the child in question could have been conceived at the time of the admitted intercourse.

8. Section 6(1) of the Affiliation Proceedings Act, which lays down the rule that evidence be led despite a man's admission of paternity should be repealed because it is time consuming and confuses litigants (case seven).

9. The time limitation of one year laid down by section four of the Affiliation Proceedings Act and its exceptions should be entirely removed because as we found out, many cases are first subjected to negotiations before being brought to court. The courts need not wait for the legislature to amend the Act; they can hear late cases under the Roman-Dutch law, which does not place any special limitation in such cases (Moathodi vs Oduetse 1979).

10. The P40 maximum per month laid down by section six of the Affiliation Proceedings Act should be totally removed because it is arbitrary and takes little account of the inflation rate, the needs of the child and the financial position of the parents (table nine). Instead, magistrates should be left the discretion to decide each case according to its circumstances.

11. Magistrates should apply clearer and more realistic criteria in computing lump sums, and not follow the unsatisfactory approach of customary courts (see recommendation five). This is particularly important because the effect of a lump sum award is to extinguish any future maintenance claims. It is suggested that a formula which takes account of the number of years the child will be dependent on its mother, and the income of both parents be employed instead.

12. The police and national administration of justice should treat maintenance summonses and prosecutions for failure to comply with maintenance orders as seriously as they do criminal cases. More resources should therefore be allocated to those courts which have a heavy load of maintenance cases.

13. The procedure in maintenance cases should not be as rigidly applied as at present, where the normal judicial procedures under the rules of court are strictly applied. Especially where paternity is admitted, the procedure should be more administrative than judicial, as is the case under the Deserled Wives and Children (Protection) Act.

14. Legal proceedings should be conducted in Setswana or other local language where the magistrate and litigants speak that language. The use of English is intimidating for the majority of litigants, time-wasting for everyone and in any event unnecessary in a country where

most people understand Setswana (see case seven). With the rapid localisation of the judiciary in recent years, this is not an unrealistic recommendation.

15. To facilitate the implementation of recommendation no.13, welfare-oriented state laws like the Affiliation Proceedings Act and the court documents which go with them should be translated into Setswana and disseminated to people who are supposed to benefit from them. A legal aid scheme for the poor, many of whom are unmarried women, should be set up.

16. Magistrates should issue garnishee orders against the future wages of men who regularly default on their maintenance orders; although this is provided under the Act, it was not resorted to in a single case at Kanye. Court personnel should enforce maintenance orders more vigorously, instead of using the mere threat of prosecution over long periods of time in the hope that the men will pay. We saw in chapter nine that this did not work, and that defaulters have developed strategies in response to it.

17. The state courts of Botswana, especially the high court, should play a more activist role in the settlement of maintenance disputes than at present. Although they are bound by state laws of foreign origin, judges and magistrates should apply them in such a way as to develop a jurisprudence based upon locally relevant solutions to such issues. We saw in chapter four that high court judges in particular applied these laws much too legalistically, uncritically following South-African and English precedents. Even in cases where they saw injustice, they have preferred to 'pass the buck' to parliament. It is suggested that in the area of extra-marital pregnancy, the uncertainty sometimes brought about by plural sources of law in fact gives them the flexibility to create appropriate solutions.

18. The relationship between remedies for seduction under customary law and those provided by the Affiliation Proceedings Act should be better defined. An amendment of section thirteen of that Act is necessary, which should take account of the differences between these remedies. This section should be repealed and replaced by the repealed section 6(2), which provided that in making a maintenance order, the magistrate should take account of any compensation awarded by a customary court.

19. Finally, both customary and state law courts should be prepared to respond to the social milieu in which they operate, by playing a role beyond the mechanical and inflexible application of laws. They should recognise that litigants use the courts as a 'shadow' in which to bargain, so they should be willing to mediate between them. Especially in maintenance cases, magistrates should not be quick to adjudicate cases under the law; rather, they should assist the parties to reach a negotiated settlement. It is important however that in this process, the power differences between men and women which place them in unequal bargaining positions be taken into account.

APPENDIX B

FULL CITATION OF CASES USED

Botswana high court

Gomotho vs Selelo; 1977 BLR 86
 Kalaben vs The State; criminal appeal 138/1983 (unreported)
 Kalyvas vs Dire; 1975 (BLR) 51
 Kgamane vs Diteko; civil appeal 13/1983 (unreported)
 Lardener vs Mosege; civil appeal 1/1974 (unreported)
 Leboko vs Lebuka; civil trial 278/1982 (unreported)
 Makwati vs Ramohago; civil appeal 10/1983 (unreported)
 Mampane vs Mashiakgomo; civil appeal 51/1982 (unreported)
 Matenge vs Ramadi; civil appeal 9/1982 (unreported)
 Matseke vs Gaolatlhe; civil appeal 15/1980
 Maurice vs Ralefala; civil appeal of 1982 (unreported)
 Moathodi vs Oduetse; 1979 BLR 33
 Moisakamo vs Moisakamo; 1979-80 BLR 131
 Molefi vs The State; criminal appeal 137/1983 (unreported)
 Mosarwe vs Maseba; 1982 (2) BLR 70
 Nthebolang vs Mphetlhe; civil trial 278/1982 (unreported)
 Otshabeng vs Gopolang; civil appeal 11/1984 (unreported)
 Sichinga vs Phumetse; 1981 BLR 161
 Tom vs Kealotswe; civil appeal 5/1983 (unreported)

Note: Law reporting in Botswana is eight years behind, thus most of the cases cited above are unreported, even though they deal with important points of law. Most of these are reported in Molokomme an Otlhogile (1987).

South-African cases

Holloway vs Stander 1969 (3) SA 291 (AD)
 R vs Swanepol 1954 (4) SA 31
 S vs Jeggels 1962 SA 704
 S vs Swart 1965 (3) SA 454 (AD)

Kanye chief's court cases

Boiki vs Monnawapula; 430/1985
 Bome vs Bome; 436/1987
 Gabaake vs Mashabe; 503/1984
 Gadinewe vs Ditlhabi; 227/1988
 Ghanie vs Telekelo; 157/1978
 Gokgathane vs Mapogo; 369/1983
 Gopolang vs Maxo; 6/1980
 Kgosisejo vs Tlhabane; 253/1983
 Kole vs Moshimehi; 70/1979
 Mabalane vs Sebereki; 613/1985
 Mmusi vs Setlhatlhane; 31/1978
 Moepjwa vs Kelebale; 646/1984
 Mokuta vs Ramosankete; 495/1985
 Molefe vs Kerobale; 436/1984
 Molefe vs Rammidi; 363/1987
 Montshonyana vs Tubane; 32/1987

Mooka vs Modisana; 480/1985
 Morapedi vs Seloka; 39/1985
 Mosala vs Ntsime; 354/1983
 Mosarwa vs Ramoreotsile; 75/1978
 Mosimanyana vs Keanna; 231/1984
 Nkala vs Mogajane; 133/1978
 Otukile vs Modise; 359/1988
 Otladisa vs Ramosi; 242/1988
 Phitsane vs Hoki; 165/1983
 Ramontshonyana vs Tubane; 32/1987
 Rampati vs Hunyepa; 134/1984
 Seganeleng vs Sebereki; 121/1987
 Selelo vs Maabong; 75/1985
 Solomon vs Tselaesele; 88/1978
 Thelo vs Bena; 75/1987
 Thihe vs Dioka; 60/1985

Kanye magistrate's court cases

Baitse vs Namati; 40/1979
 Baleseng vs Mmerekhi; 19/1987
 Botshelo vs Gadiele; 23/1982
 Bome vs Molefe; 21/1987
 Dibeela vs Silas; 173/1981
 Dinoge vs Rowland; 47/1982
 Gabatshwane vs Mashadi; 86/1986
 Gouws vs Moshimehi; 2/1989
 Kearilwe vs Molelowamodimo; 34/1979
 Keepile vs Lefatshe; 49/1980
 Keitirelwang vs Koboyankwe; 152/1978
 Ketisitse vs Setlang; 16/1984
 Ketlogetswe vs Matlolane; 29/1988
 Kganyame vs Suping; 20/1988
 Kgosiemang vs Mangisi; 41/1988
 Kolwang vs Molefe; 66/1987
 Koogane vs Keabotse; 20/1985
 Kooreke vs Montle; 4/1983
 Lemmuele vs Ramatlae; 114/1983
 Lenong vs Kgaswane; 126/1984
 Lerakane vs Ratladi; 89/1983
 Letebele vs Mosimakoko; 10/1980
 Lethusang vs Senatla; 41/1985
 Losike vs Kgosietsile; 186/1983
 Machobedi vs Mompoti; 6/1982
 Mahumetsa vs Modisapoo; 21/1988
 Maruping vs Kgari; 56/1987
 Matshediso vs Makale; 62/1987
 Mfosi vs Kamodi; 50/1987
 Mmono vs Mminakgabo; 109/1986
 Mmusi vs Mabote; 7/1987
 Modirwa vs Seshabo; 63/1987
 Mogotsi vs Kebone; 115/1983
 Mokgatle vs Ramohudi; 69/1986
 Mokotedi vs Lefatshe; 45/1987
 Mooketsi vs Molefi; 133/1983
 Moreetsi vs Phaurosi; 61/1981

Morekisi vs Pule; 86/1985
 Mosase vs Masala; 30/1987
 Mosweu vs Legopelo; 23/1979
 Mosweu vs Olefile; 23/1988
 Mosweu vs Thupane; 51/1987
 Motihaleemang vs Mabote; 79/1983
 Ngwanaamotse vs Ndhlovu; 75/1985
 Ntsoma vs Mbikiwa; 112/1986
 Paledi vs Basima; 91/1985
 Peleng vs Dannison; 29/1986
 Pitoro vs Wadikgomo; 16/1989
 Ramantaga vs Makabi; 108/1986
 Ramogonono vs Tsheko; 68/1987
 Ranoi vs Motlhanke; 94/1984
 Raphorena vs Basimo; 108/1983
 Samatlhaku vs Mokgatlangane; 65/1982
 Sejese vs Chibana; 81/1983
 Senna vs Mmolawa; 41/1987
 Seametso vs Stegling; 3/1985
 Siamang vs Mpheretlhe; 105/1986
 Siamang vs Toto; 147/1983
 Stegling vs Sefiwa; 144/1983
 Siele vs Gasennelwe; 67/1986
 Teemane vs Chelenyane; 37/1988
 Telekelo vs Chelete; 72/1987
 Tlammane vs Tsholang; 17/1988

SAMENVATTING

Dit proefschrift handelt over het recht in Botswana dat zich bezighoudt met de vergoeding voor buitenechtelijke zwangerschap en onderhoudsverplichtingen voor buitenechtelijke kinderen. In hoofdstuk een wordt de probleemstelling nader beschreven en uitgewerkt. De keuze van de probleemstelling vloeit voort uit de sterke toename van het aantal buitenechtelijke kinderen in de laatste twintig jaar. Daarnaast blijken de materiële omstandigheden waarin die kinderen verkeren zorgwekkend zijn. Een laatste reden is dat er nagenoeg geen studieresultaten voor handen zijn die potentiële oplossingen aandragen voor deze problematiek.

Deze studie beoogt het volgende:

- a. de oorzaken op te sporen van de toename van buitenechtelijke kinderen en de ogenschijnlijke tolerantie die de maatschappij in Botswana daarvoor toont;
- b. een diepte-onderzoek te verrichten naar het volksrecht, het romeins-hollandse en het overige gecodificeerde recht dat op het onderhavige onderwerp betrekking heeft, alsmede de interactie tussen die verschillende rechtssystemen;
- c. de wijze waarop en de mate waarin ongehuwde moeders van dit recht gebruik maken en de effectiviteit van de verschillende soorten recht;
- d. inzicht te verwerven in de onderlinge samenhang in deze rechtspluralistische sfeer zowel op institutioneel als buiten-institutioneel niveau.

In het eerste hoofdstuk komt ook de methodologie, geplaatst binnen theoretische perspectieven, aan bod. De eerste methode van onderzoek heeft betrekking op de gebruikelijke juridische methode, te weten een onderzoek naar de betrokken wetgeving, uitspraken van hogere rechtsinstanties en andere geschreven bronnen van recht. De gehanteerde methodiek reikt verder dan alleen de uitspraken van hogere rechtsinstanties en behandelt ook de uitspraken van lagere rechtsinstanties in het dorp van onderzoek (Kanye). Deze jurisprudentie wordt onderworpen aan een uitvoerige analyse, die onder andere aandacht besteedt aan de voorgeschiedenis van het geschil, de geschilsbehandeling zelf, de afwikkeling alsmede de situatie na de uitspraak. Voor dit laatste onderdeel wordt

een tweede categorie van onderzoeksmethoden gebruikt die in de sociologie en antropologie gebruikelijk zijn: een survey van ongehuwde moeders in Kanye, gestructureerde en ongestructureerde interviews met diverse informanten, een overzicht van bestaande sociaal-economische literatuur op dit gebied en tenslotte participerende observatie.

In hoofdstuk drie wordt de sociaal-politieke organisatie van families en de maatschappij in Botswana beschreven; daarbij wordt veranderingen benadrukt die zich binnen het huwelijk en nakomelingschap voltrekken. Verschillende factoren die betrekking hebben op de toename van buitenechtelijke kinderen, passeren de revue. Hoofdstuk vijf concentreert zich aanvankelijk op het nationale niveau om tenslotte uit te monden in het dorpsleven van Kanye als concentratie-punt van dit onderzoek. Daarbij hoort een beschrijving van Kanye en de resultaten van een survey uitgevoerd onder 178 ongehuwde moeders. Uit de gegevens komt een aantal opvallende kenmerken naar voren waarvan een van de meest in het oog springende is de sociaal-economische marginaliteit waarin ongehuwde moeders verkeren. Een gering aantal moeders ontvangt geregeld materiële bijstand van de vaders voor hun kinderen en blijft dus afhankelijk van hun verwanten voor de opvoeding van hun kinderen. Een nog kleiner aantal moeders slaagt er daadwerkelijk in een onafhankelijke huishouden op te zetten; het merendeel blijft wonen in de huishoudens waar zij geboren zijn. Menig ongehuwde moeder probeert een vergoeding te krijgen voor haar zwangerschap door middel van onderhandelingen binnen de familie, maar meer dan 50% slaagt daarin niet. Een gering aantal doet een beroep op volksrechtelijke- en staatsrechtbanken om onderhoudsverplichting van de vaders voor hun kinderen te eisen.

Om de rol van het recht bij de oplossing van dit vraagstuk volledig te begrijpen, is een kort overzicht van het nationale rechtssysteem noodzakelijk. Daarom worden in hoofdstuk twee de hoofdlijnen van het nationale pluralistische rechtssysteem beschreven, bestaande uit volksrecht, romeins-hollands recht en (ander) gecodificeerd recht, in dit onderzoek stelselmatig aangegeven als "state law". Zowel de inhoud van als de formele relaties tussen deze rechtsbronnen blijken problematisch en complex. In hoofdstuk vier wordt deze complexe situatie besproken, alsmede de regels die van toepassing zijn op buitenechtelijke zwangerschap. Inhoudelijk zijn de regels uit het volksrecht én het "state law"

in dit opzicht weinig duidelijk. Uit de besproken casuïstiek blijkt dat dit heeft geleid tot inconsistenties in de toepassing en een conflicterende uitleg van het recht door de betrokken rechtsinstanties.

Binnen het dorp Kanye wordt het functioneren van het rechtspluralisme inzake buitenechtelijke zwangerschap onder de loep genomen. In hoofdstuk zes wordt de werking van het volksrecht besproken, waarin de ideale regels en conflictoplossing voor geschillen rond buitenechtelijke zwangerschap onder de Bangwaketse uit Kanye aan de orde komen. De ideale procesgang is onderhandeling (*negotiation*) tussen de betrokken families, in sommige gevallen gevolgd door bemiddeling (*mediation*) en geschilsbeslechting (*adjudication*) door volkshoofden. Er werden twee andere ideale normen geïdentificeerd:

- a. ongehuwde moeders dienen gesteund te worden door oudere, mannelijke verwanten op elk niveau van het geschilsbeslechttingsproces;
- b. een vrouw kan alleen voor haar eerste zwangerschap een vergoeding vragen.

Bij nadere beschouwing van de praktijk levert een meer gevarieerd beeld op, ondanks het feit dat over het algemeen deze ideale regels worden gevolgd. Uit gesprekken over buitenechtelijke geschillen aan het hof van Kanye's hoogste traditionele gezagsdrager, blijkt dat dit te wijten is aan de relatieve flexibiliteit van het Ngwaketse (rechts)stelsel. Dit geldt in het bijzonder bij onderhandeling en bemiddeling. De betrokken partijen alsmede de geschilsbeslechtende instanties blijken op strategische wijze de regels van het rechtssysteem te manipuleren. Men moet overigens deze manipulatie niet overschatten, omdat er grenzen aan worden gesteld door de regels zelf en door beperkende factoren zoals de sociaal-economische machtsverhoudingen en de man-vrouw relaties.

Hoofdstuk zeven onderzoekt de effectiviteit van de geschilsbeslechting aan het hof van Kanye's hoogste traditionele gezagsdrager inzake buitenechtelijke zwangerschappen. Over het algemeen kent het hof als vergoeding een aantal stuks vee toe (of het equivalent in geld), met een zekere variatie. Het overgrote deel echter van de betalingen heeft plaats in geld en niet in vee, omdat veel mensen geen of weinig vee bezitten, maar ook omdat mannen voordeliger uit zijn door geld te betalen. Naleving van de uitspraken van het hof kent echter zijn gren-

zen, want de meeste opgelegde betalingen vinden of te laat plaats, of worden slechts gedeeltelijk nagekomen. Bovendien is de uitvoering van de uitspraken van het hof tamelijk halfslachtig en ineffectief. De redenen daarvoor liggen op het vlak van de uitholling van de volksrechtelijke executie-procedures als gevolg van sociaal-economische veranderingen; een andere factor is dat mannen niet goed voorbereid zijn op hun taak van maatschappelijke verantwoordelijkheid jegens hun buitenechtelijke kinderen.

In hoofdstuk acht wordt het functioneren van het nationale (gecodificeerde) recht inzake onderhoudsverplichting besproken. De procedure in dit soort zaken is rigide, tijdrovend en kostbaar, waardoor vele geschillen lang onbeslist blijven en vrouwen tenslotte afhaken. Een ander probleem is dat verzoeken tot onderhoudsverplichting op een later tijdstip worden geregistreerd dan de wetgeving aangeeft. Op grond van uitvoerige discussies wordt duidelijk dat deze tijdlimiet (een jaar) onrealistisch is vanwege het algemene gebruik van onderhandelingen vóórdat partijen hun toevlucht tot de door de staat ingestelde rechtsinstanties nemen. Daarbij vormt de onbekendheid met het nationale recht een extra probleem waarvoor sommige rechters nog bepaald ongevoelig blijken.

Hoofdstuk negen gaat over de effectiviteit van de uitspraken over onderhoudsverplichtingen van de 'vrederechter' (magistrate's court); het overgrote deel betreft maandelijkse betalingen. Vergelijken we de effectiviteit van de uitspraken van de 'vrederechter' met die van het hof van het hoogste traditionele gezag, dan blijkt de 'vrederechter' hoger te scoren. Maar die hogere score is nog verre van indrukwekkend. Evenmin als aan het hof van de hoogste traditionele gezagsdrager het geval is, worden ook bij de 'vrederechter' nauwelijks processen gevoerd over de naleving van de uitspraak en zelfs als dit werd gedaan, blijken ze geen effect te sorteren. Naast de gevallen die aan het hof van de hoogste gezagsdrager als zodanig kunnen worden getraceerd, wordt duidelijk dat mannen zich niet schikken in de uitspraken van Kanye's vrederechter uit sterk verzet tegen het gecodificeerde recht inzake onderhoudsverplichting. De argumentatie (van de man) is dat periodieke betalingen aan vrouwen waarmee de man geen relatie meer onderhoudt, afbreuk doen aan zijn huidige huwelijk of relatie. Mannen geven er de

voorkeur aan een bedrag ineens te betalen (zoals dat in het volksrecht gebruikelijk is) en daarna de relatie met de vrouw volledig verbreken.

In hoofdstuk tien staan twee verschillende types van interactie tussen volksrecht en nationaal recht centraal. Ten eerste op het formele institutionele niveau, waar volksrecht ondergeschikt lijkt aan het nationale recht. Dit beeld van dominantie en onderschikking is echter al te eenvoudig: op bepaalde punten beïnvloeden de twee rechtssystemen elkaar over en weer. Enerzijds hebben volksrechtbanken enkele procedures van 'state law' overgenomen zoals bloedproeven en soms periodieke betalingen van de alimentatie. Anderzijds schuwt de 'vrederechter' niet om de volksrechtelijke wijze van onderhoudsverplichtingen, zoals overdracht van vee, over te nemen. Er doemt dus een beeld op van een wederzijdse invloed (hoewel ongelijkwaardig) die zich niet door termen als superioriteit en inferioriteit laat uitleggen.

Het tweede niveau waarop de interactie zich voordoet is het niveau van de partijen zelf. Op grond van uitvoerige gesprekken zowel met leden van de volksrechtbanken als van staatsgerechten, blijkt dat partijen soms beide rechtssystemen meesterlijk met elkaar laten interacteren. Dan blijkt hoe belangrijk in Kanye het volksrecht is bij het berechten van buitenechtelijke geschillen. Uit de studie blijkt voorts dat, onafhankelijk van het type rechtsinstelling, zulke geschillen uiteindelijk eindigen in het inheemse model van onderhandeling, bemiddeling, en geschilsbeslechting, en de oplossing van het geschil mede bepalen. Kanye's inwoners hebben dit model aangepast door selectief bepaalde procedures over te nemen en door het gebruik van ambtenaren uit het staatsrecht-stelsel. Dit leidt vervolgens tot de conclusie dat geen van de twee rechtssystemen afzonderlijk in staat geacht kan worden om problemen van buitenechtelijke zwangerschap adequaat tegemoet te treden.

In hoofdstuk elf worden de belangrijkste bevindingen van het proefschrift samengevat. Voorts wordt de gebruikte methodologie geëvalueerd en worden de beleids-implicaties van de studie kort verkend. Het gebruik van puur juridische methoden alleen blijkt voor dit soort onderzoek ontoereikend te zijn en de ideologie van rechtscentralisme is onhoudbaar. Rechtspluralisme als uitgangspunt is meer in overeenstemming met de werkelijkheid en zal uiteindelijk tot een beter theoretisch

sche inzicht leiden in een meervoudige rechtssystematiek. Dat ligt aan het feit dat recht en geschil binnen de allesomvattende context geplaatst wordt van de betrokken samenleving zonder beiden van elkaar te scheiden.

Bepaalde aspecten van deze theoretische benadering moeten echter met een zekere terughoudendheid worden benaderd, zoals de neiging de strategische manipulaties van rechtsregels al te zeer te benadrukken. Dit zou tot een verwording van de werkelijkheid kunnen leiden, in het bijzonder ten aanzien van de verschillen in machtsverhoudingen, bijvoorbeeld binnen de man-vrouw relatie. De combinatie van juridische en sociale onderzoeksmethoden bleek tenslotte nuttiger om een beter inzicht te verwerven in rechtspluralisme. Deze twee benaderingen zijn niet zozeer tegenstrijdig als wel aanvullend.

Vanuit een algemeen beleidsperspectief wordt tenslotte vastgesteld dat, terwijl het onmogelijk is algehele sociale veranderingen door rechtshervorming tot stand te brengen, recht in dit opzicht toch een rol kan vervullen. De belangrijkste les voor beleidsmakers is dat elke toekomstige rechtshervorming voldoende rekening moet houden met de realiteit van rechtspluralisme. Zo dienen in het bijzonder wettelijke innovaties flexibel genoeg te zijn om zich te kunnen voegen naar de realiteit van het volk en niet erop gericht te zijn de volksrechtelijke procesgang geheel te willen bruskeren. Volksrechtbanken spelen daarin een belangrijke rol en moeten bereid zijn bij te dragen aan de dynamiek van het volksrecht. Gedetailleerde aanbevelingen voor rechtshervorming voor buitenechtelijke zwangerschap zijn in appendix A opgenomen.

(vertaling: E.A.B. van Rouveroy van Nieuwaal)

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