

## The evolution of women's property rights in colonial Botswana, c.1890–1966

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### Abstract

*The legal rights of women to inherit and own property, independent of husbands or male guardians, were first established a century ago among the BaNgwato by Khama's Law. It applied to royal women but afterwards spread to commoners and other parts of Botswana. However, after a series of property disputes raised by defiant women in colonial courts in the 1920s, these advances were reversed. "Traditional" laws and customs expunging such rights were imposed by the colonial authorities on the reactionary advice of Western-educated men such as Tsheledi Khama, and were codified in Isaac Schapera's Handbook of Tswana Law and Custom (1938). Women's property rights in customary law and their access to colonial courts were not fully restored until the 1950s, by a combination of new colonial legislation and female activism.*

### Introduction

In modern Botswana the right of women to own property is fully recognized in both government and traditional courts. The modern legal code, drawn primarily from Roman-Dutch law, guarantees women's individual ownership of property and, for instance, allows wives to inherit their husband's estate. Generally speaking, women receive equal shares of family property arising from inheritance and divorce cases. Traditional law is less generous to them, but nevertheless ensures that women have full control over their own property, and that they have the right to some share of their spouse's or parent(s)' estate.

Such laws reflect the current situation, in which women's ownership of cattle, urban property, money, cars, and the like, as well as their control of "communal" assets in rural areas, are both ubiquitous and unremarkable. In fact, the picture usually given by elderly informants in rural areas is that Tswana women have traditionally always had this right:

According to our tradition and custom the son gets a bigger share in his father's estate... than the daughter.<sup>1</sup>

Estate of the Deceased?—the son gets the upper share and the daughter gets less.<sup>2</sup>

Estate of the Deceased?—the large share went to the son and the daughter got less compared to the brother.<sup>3</sup>

Such folk explanations are true enough on one level. In an idealized situation with a functioning married household with a number of children, the eldest son would receive the majority share of the father's estate once his mother died or allowed him to have it. Given that the majority of households are matrilineal today, though, most assets are actually passed down through the mother to the most dependable of her children.

But the striking feature of this folk explanation of custom is how easily it accepts the woman's right to inherit or to control property. The daughter must get a share—no ifs, ands, or buts.

What I want to explore in this paper is the way in which women gained this right to property, because at the turn of this century Tswana women had no right to own anything beyond their personal effects. Nor did they own much beyond that. At the turn of the century, though, a Christian chief, Khama, gave the women in his reserve the right to inherit—and thus by implication the right to control property independent of their husbands or guardians. But only during the 1950s, after a series of bitter court cases involving a host of defiant, but unconnected, women, was this right actually realized. In the interim, Khama's Law spread slowly and was accepted across the rest of Botswana, but was also attacked and repressed for some time by conservative men—most notably Khama's own son, the influential Tshekedi Khama. This is a story which has never been told before.

### Women and property in precolonial times

At the turn of the twentieth century, when the issue of women's rights to property first emerged as an issue, it was commonly noted that "according to the Ancient Native Custom and law a woman cannot inherit a father, brother's, or even a husband's property."<sup>4</sup> Hence, as the missionary W.C. Willoughby found when he investigated the matter in the 1890s, a woman "has no... rights in the property of her husband, and is dependent upon his generosity. A widow does not inherit, but is equally dependent on her son's doles."<sup>5</sup>

Such statements as these indicate that precolonial Tswana women had rights roughly equivalent to women elsewhere in southern Africa. That is, they were considered to be jural minors under the control of either their fathers, their husbands, or, if widowed, under either their eldest son or the brother of their husband. As Schapera noted in 1938, "Women are on the whole regarded as socially inferior to men, and in Tswana law are always treated as minors."<sup>6</sup>

According to Schapera, custom allowed for women to own only a few categories of property. These consisted mainly of personal belongings and domestic utensils and smallstock, including fowl and pigs. In addition, married women were to be allotted a field for their use by their husbands, and they had absolute control over the produce of this field and its proceeds.<sup>7</sup> Such custom meant that women had few rights in the all-important category of cattle ownership—the main form of wealth. Women could not inherit cattle, but could only receive presents of cattle from men, but had to pass them on to their oldest son. Nor did they have complete control over animals they owned, since men had to herd them. As a result, women had to seek permission if they wished to dispose of their cattle.<sup>8</sup>

In theory then, Tswana custom prevented women from owning any significant property, and made them dependent on men. How did this situation actually work out in practice? This is a crucial issue since women in many agrarian societies have often had *de facto* control over a lot of

property, despite the fact that they remained jural minors as Tswana women were.<sup>9</sup>

The precolonial documentary record reveals few indications of women owning anything, and indicates that in practice men controlled all the main assets. Looking at the key form of property—cattle—there are practically no specific references to any individual woman owning any, or indeed, no generalised references. Nor have I come across any relevant family traditions.<sup>10</sup> Widows left without sons had their cattle controlled in trust by the men of their village until their daughters had a son.<sup>11</sup> Meanwhile, there are a host of indications of women's lack of cattle or any other property. Margaret Kinsman and John Iliffe have described the fate of widows and barren and deserted wives in Tswana society, as well as other categories of women who fell outside of family structures. Needless to say, all such women were practically destitute.<sup>12</sup> A specific case of inheritance from the 1870s shows that an Ngwato headman's cattle herd was divided between the eldest sons of his three widows, with none of the daughters or widows receiving anything.<sup>13</sup>

Hence, an argument of silence shows that Tswana women of all classes did not own property beyond their personal effects, a little livestock, and the grain that they produced on fields allotted by men for their use. I know of only one 19th century reference to a female cattleowner, who was in fact the widow of the Bakololo king Sekeletu who had fled to Ngamiland with her own distinctive cattle herd.<sup>14</sup> Available records suggest that men of subjugated groups such as the Bushmen owned more cattle than the women of their masters.

What I want to suggest next, though, is that in the later stages of the nineteenth century, women belonging to senior-ranking or otherwise wealthier families, saw an improvement in status as these families became increasingly monogamous and integrated into regional trade. On the one hand the rapid growth in slavery after 1850 meant that the labour of wives and children became less important. Additionally, involvement in the hunting and transport trades meant that households increasingly sought to earn cash. Large multi-house families based on the control of numerous wives and sons fell away, and were replaced by monogamous ones. Christianity spread rapidly among the various elites in the late nineteenth century only further sped up this process.<sup>15</sup> As a result the status of wives and their daughters increased within these senior-ranking families.

Slavery was closely tied to the improvement in status of women in families who owned such human property. Crucially, it freed these women from manual labour, and turned them into supervisors of agricultural and domestic workers. Consider the following description of the Ngwaketse Chief's wife and daughters in 1892:

We passed with interest an idle afternoon therein, watching with interest the women of [Bathoen's] household, lying on rugs before the palace, and teaching the children to dance to the sound of their weird music, and making the air ring with their merry laughter. In one corner Batuen's slaves were busy filling up his granaries with maize just harvested.<sup>16</sup>

Such women supervised male and female slaves in both agricultural and domestic work, and as a result it is not surprising that women actually became owners of people sooner than they became owners of cattle. Slaves became seen as necessary property for senior-ranking women to have within their own sphere. The veteran missionary J.T. Brown summed up the logical extension of this development in 1925:

The law of serfdom was that the children of a female serf were the serfs of her master or mistress, and when a freeborn daughter left her home on marriage, one or more of the domestic serfs of the family would sometimes be sent to her to become the handmaids of the new home.<sup>17</sup>

Hence it is not uncommon to find in the colonial records and in family histories instances of specific women as owners of slaves. A case in point case was when a preacher's son impregnated a slave belonging to such a woman owner. In the words of her Chief, complaining about the issue: "His son destroyed a young woman belonging to the wife of Rregoka and he judged her."<sup>18</sup> The issue of ownership is unmistakable here. Consider the following court testimony by two senior-ranking women in 1926:

*Baboni*: I treat the Masarwa servants of mine like a mother....My servants were claimed by Tshekedi... I refuse to give up my Masarwa girls to the Chief.

*Oratile*: I had been given three Masarwa girls by my father. One was about three years old when I got her. The second one was mine because her mother was given to me.<sup>19</sup>

### Khama's Law and the inheritance of cattle

With women of the élites gaining improved status and also gaining control over human property, it is not surprising that in the late 1890s they received the right to inherit cattle from their fathers. The architect of this law was Khama III, the fervently Christian Chief of the Ngwato, whose reformist laws were often used as precedents by other chiefs in the Protectorate. During the first two decades of the century, Khama's Law came into use in parts of the Protectorate, and also began to affect the distribution of property.

Before explaining exactly how Khama's Law can be detailed, some remarks must be made concerning the evolving nature of property in general. First, it has to be noted that traditionally Tswana societies restricted the ability of all people to own cattle. In many cases, a significant share of the cattle in the society were descended from animals loaned out by the Chief, and hence gave the Chief the right to call in animals and to regulate the herding strategies of most of his subjects. In the Ngwato chieftdom, at least, this was the case until the 1870s, when Khama III renounced his right to all these cattle, telling all cattle owners "from now on the cattle which are in your possession are your own to do what you like with"<sup>20</sup> In addition, it should be noted that in the 1880s and 1890s Khama began to pay his own slaves and to allow them ownership over the animals they had herded for

him, though it is unclear how often others followed his example. Hence, property was being liberalised.

Finally, it should be noted that some men, out of personal preference, wished that their wives and daughters should inherit their estates. During the precolonial era wives of leading men often had dairy (and other) cattle set aside for their personal use, but such animals always were inherited by their sons.<sup>21</sup> Clearly, many men wished to give these cattle to their wives outright. For instance, the missionary W.C. Willoughby's former wagon driver and guide, Bobebotsile, said the following on his deathbed:

He told me of the stock he has, and of his wish that it should all go to his wife when he has gone'... He said the Becwana are like wild dogs; when a person died everybody tried to seize what they could of the stock and left the widow with nothing... He was very anxious that the wife (sic) had been good to him all these years should have what property he left.<sup>22</sup>

What then was Khama's Law, and when was it passed? It seems clear that the law itself was decreed roughly at the turn of the century in Khama's *kgotla*. There is no contemporary description of the law, by either Khama or colonial officials. It was described in various ways:

Khama's laws are well known; a girl has rights to her father's property such as a boy has to it... There is not a Monwato who could dispute the law because we have all shared accordingly, not only with our father's children of tender years but with our sisters.<sup>23</sup>

Khama regarded a woman as a person and that she was entitled to the Estate of her husband. If there were only daughters the Estate would be divided between the mother and the daughters and the offspring.<sup>24</sup>

These descriptions are not entirely accurate, in that they overstate the amount of cattle women inherited, though they correctly indicate the way in which the law ameliorated women's positions as jural minors. Khama's own former "Chief Messenger" is nearer the truth, when he stated that after Khama's Law the eldest son still "received a major portion" of the estate, while younger brothers and the sisters received equivalent smaller shares.<sup>25</sup> This is more likely to have been the case, and equates with the situation Schapera found in the 1930s, with the testimony of modern informants as seen in my introduction, and with laws adopted by other Tswana chiefdoms following the lead of Khama.<sup>26</sup>

Khama's Law, once enacted in the Ngwato Reserve, began to affect women's status dramatically. First of all, in the context of a society where polygamy had all but disappeared, family sizes shrank. Hence, there were fewer children to divide cattle among. Moreover, the smaller numbers of children born made it much more likely that there were no sons being born, meaning that widows and their daughters came to control property on their own.

Second, there is no doubt that other Chiefs of the Protectorate followed Khama's lead. In Ngamiland, for instance, Mathiba, who Khama had helped

install in 1906 by a *coup*, quickly implemented the law in his own territory.<sup>27</sup> The Ngwaketse chief, meanwhile, asked the men at his *kgotla* to change inheritance laws in 1913, apparently because more men were dying with no sons. "I ask you if it is right that female children should not inherit their father's estate?" he asked. The response: "It is not right that they should lack consolation for their father's death." The assembly also gave widows the same right of "consolation", with the *kgotla* saying, "we mean that they should be given cattle."<sup>28</sup> By the 1930s daughters were being allowed to inherit in other parts of the Protectorate as well.

The available evidence, which is almost entirely qualitative, shows that these laws did indeed result in a transfer of property between the sexes. Hence, a very elderly informant of mine in Ngamiland, born before the turn of the century, inherited a number of cattle while she was still a teenager—even though she had many brothers.<sup>29</sup> In 1917, in a sensitive case involving the ascent of a woman regent as leader of a group of exiled Tawana in the Chobe area, an array of the Protectorate's chiefs backed her right to inherit cattle over male claimants when the government asked for their advice.<sup>30</sup> Elsewhere, women begin appearing as cattle owners in the records, for instance applying for permits to move animals across reserve boundaries.<sup>31</sup>

This does not mean that female inheritance immediately became the prevailing norm everywhere, even if it had become an accepted practice. Civil issues across the Protectorate were commonly dealt with within the various wards,<sup>32</sup> although appeals from them could be heard by the Chiefs' courts. Some wards were enthusiastic about granting women nearly equal inheritance rights with men, while others retained a more patriarchal character. Yet others had no definite standards, and simply judged each case depending on the wishes of the family involved.<sup>33</sup> However the rules varied, women gained possession of more and more cattle. By the late 1920s the Ngwato royal Johnny Ratshosa was noting that in Serowe women had "hundreds of cattle owned by themselves left to them by their fathers. Others have taken their cattle with them to their husbands, others though married their cattle are still remained [sic] with their parents... Hundreds of wealthy women are in Serowe inheriting their father's cattle."<sup>34</sup>

Customary law, then, came to grant many women the right to own all forms of property and to inherit part of their families' wealth in the first decades of the century. An indication of the acceptance of this norm can be found in a complaint by Chief Mathiba of the Tawana, about the practices of Herero refugees in his reserve. Referring to the patriarchal behaviour of these newly-arrived subjects of his, Mathiba was horrified by the fact Herero women were denied any inheritance rights by their fathers, brothers, and uncles: "The Herero have customs which are contrary to ours and contrary to the laws of human kind... There is no provision made in the Herero laws to protect those who have no power, [sic] from them is taken what they possess."<sup>35</sup>

### Colonial law and women's status

So far I have concentrated on customary law, which continued to dominate the lives of the vast majority of Africans in the Protectorate. Customary law, in the first decades of the century, was the driving force in the improvement of women's status. European common law was also a potential ameliorating factor, as Martin Chanock has shown in east-central Africa, because common law marriages theoretically granted women equal status with men. What I want to suggest, though, is that common law was much less consequential before the Second World War than after—because the colonial authorities refused to allow African women the full benefits of common law marriage.

Colonial laws as initially framed always had the potential to give women far more freedom in their marriages, particularly since the authorities in the Protectorate took time to establish a coherent policy. On European-owned land outside the jurisdiction of chiefs, there are cases of widows in customary marriages who took control of their husbands' cattle. Such women had to be recognised as owners because of grazing fees.<sup>36</sup> With regard to marriage policy, in 1891-92 the Protectorate government made several proclamations providing for common law marriages in a way which did not discriminate between White and Black. As a result, senior-ranking Tswana began to be married by government officials. Even so, there was no clear idea about what rights African women had in such marriages, even when married in "community of property". When pressed by missionaries for clarification, the government agreed to sustain the common law rights of Africans in such marriages, provided that each individual situation did not "lead to consequences incompatible with peace, order, and good government."<sup>37</sup> Hence, the government was unwilling to guarantee any African, male or female, the right to opt out of customary law. The authorities wanted all inheritance cases to be decided according to "the Native Law of Succession", but realised that there was no basis in law for such an arrangement. Hence, they vacillated.

As a result, women during the early colonial years married in "community of property" in civil marriages were treated in an *ad hoc* manner. Khama III himself, for instance, in 1899 applied for divorce in court against his third wife Sefakwane on the grounds of adultery, and the court did not deal with the division of property, leaving it to the customary court. Chief Sekgoma Letsholathebe, meanwhile, obtained divorce against his wife, Khama's niece Bitsang, on the same grounds. This time, the court specifically refused to grant her a share of the property as she was held responsible for the divorce, and hence did not delegate the matter to customary law.<sup>38</sup> In the same manner, government authorities were unwilling to allow the widow of Chief Sebele II the right to inherit significant property as contained in his will, because the will was "in conflict with native laws and customs." However, the authorities' legal advisors encouraged the government to recognise the will because the law recognised common law unions.<sup>39</sup>

Only in 1917 was a coherent piece of legislation devised, which ratified the right of Africans to marry according to common law. The law, though, was conservative, in that African women were given no automatic right to

their half of the family property or to inherit their husbands' estates: "The property of the spouses...may be disposed of, and, unless disposed of by will, shall devolve according to native law and custom." Written ante-nuptial agreements were also to be recognised.<sup>40</sup> This law was amended slightly in 1927, to give magistrates the authority to deal with estates and divorces of common law couples, provided that the spouses lived in an untraditional manner. The effect of such laws was to ensure that only wives of literate men who used lawyers could expect to fall outside custom. Nca Montsioa of Lobatse, for example, made his wife "the sole and universal heir of the whole of my estate and effects," and renounced "as far as possible the Native law and custom of my tribe or the effect of the same is so far as the disposition of my property after my death is concerned."<sup>41</sup>

Hence, colonial authorities were ultimately unwilling to ensure Tswana women access to common law, except in a few instances. Because customary law was granting women greater access to property and recognising them as adults, the government's inconsistency did not provoke any public reaction from Batswana women, as far as I can tell. But in the late 1920s and early 1930s, when a male backlash began to reassert patriarchal property laws in customary courts, the scene was set for women's protests.

#### Tshekedi Khama, the Ratshosas, and Khama's Law

Ironically, the man who sought to reverse Khama's Law was his own son, Tshekedi, the Bangwato Regent from 1925-1950.<sup>42</sup> By far the most influential, intelligent, and hardworking man in the Protectorate, Tshekedi was able to set back women's access to property for a generation, and to stall an evolution that had begun in his father's time. The primary reason behind his actions was not ideological, as far as I can tell, because Tshekedi at times supported women's inheritance rights. Rather, it was Tshekedi's desire to destroy the integrity and wealth of his enemies, at any cost, which was his primary motive. If women were allowed to own property legitimately, then only the assets of the men who opposed him could be attacked—whereas Tshekedi was always determined to take his revenge against a male opponent's entire family.

Tshekedi did not enter the Ngwato regency with any apparent aim of reversing Khama's Law, but was sucked into the issue by two interrelated matters—the assassination attempt made against him by the Ratshosa brothers in 1926, as well as the contested wills of his two predecessors, Khama III and Sekgoma Khama (1923-5). Needless to say, the issues involved were Byzantine, and reflected decades-old patterns of intrigue over the control of the Ngwato chieftaincy. Since Khama's Law and the liberalization of customs relating to women were the basis of the claims of the Ratshosa family, then it is hardly surprising that these laws came to be repudiated.

Some of the key issues involved dated back to the 1890s, when Khama III had quarrelled with his oldest son, Sekgoma, prompting the latter to relocate himself to the desert with his followers. With Sekgoma disavowed, the heir now became Besi, Khama's oldest daughter and child. If Besi herself was not



particularly ambitious, she nevertheless became the wife of Ratshosa Motswetle, Khama's main advisor, cattle manager, and all-purpose hatchet man. The couple had ten children, including three sons, Johnny, Simon and Obeditse, who were South African-educated boys with free-spending habits and a strong feeling of entitlement.

The Ratshosas<sup>43</sup> lost their heir-apparent role in 1905, when the ageing Khama had a second son, Tshekedi, by his fourth wife—a commoner called Semane who was held in utmost contempt by the Ratshosas. At this point, Ratshosa senior began to build an alliance with the exiled Sekgoma, and encouraged a rapprochement between him and his father. This strategy paid good dividends, as Sekgoma returned to his father's fold in 1916 and was redesignated as the heir to the Ngwato chieftainship. Not too long after that Sekgoma's only child, his daughter Oratile, was wedded to Simon Ratshosa. Hence, once again, the Ratshosas' ambitions were being recognised through the female line. So when Ratshosa senior died in 1917, his life's work seemed to have been successful.

But just as the claims of Khama's daughter Besi and the Ratshosas had been stifled by the birth of Tshekedi in 1905, so their new claims through Sekgoma's daughter Oratile were interrupted in 1921 when the ageing Sekgoma produced a male heir, Seretse—later the first president of Botswana. Even so, Johnny and Simon remained critical insiders, with Johnny as long-standing Tribal Secretary. Following Khama's death in 1923, the brothers retained their standing under Sekgoma—whose reign was to be very short, ending in 1925. Soon thereafter, the appointment of the twenty year-old Tshekedi as the Ngwato regent augured the end of Ratshosa influence. Tshekedi, who was recalled during what promised to be a brilliant university spell at Fort Hare, promptly fired the Ratshosas and installed a more compliant group of advisors around him. Less than a year later, after endless tension, the Ratshosa brothers tried to assassinate Tshekedi, when he tried to have them flogged for refusing to turn up for regimental duties on the day of their sister's wedding. It was from the court cases and law suits resulting from this act that Tshekedi was to refute Khama's Law.

Before turning to these court battles, there is one more Ratshosa marriage needing explanation. Following the death of Besi, Ratshosa senior had married Ntebogang, the sister of the Ngwaketse Chief, Seepapitso—who, we noted earlier, had adopted Khama's Law in 1914. When Ratshosa died in 1917, Ntebogang returned to the Ngwaketse Reserve with her three daughters, leaving behind a considerable cattle herd left to her by her husband according to Khama's Law. These cattle were supervised by her stepson Johnny, although very inadequately, and the colonial authorities were forced to keep an eye on them.<sup>44</sup> Ntebogang, now widowed, was to be suddenly thrust in the spotlight following the assassination of her brother, Seepapitso, after which her mother Gagoangwe became the regent of the Ngwaketse. Ntebogang herself was to become regent from 1924-28 on behalf of her nephew while he finished his schooling at Lovedale. Hence, at the very same time she was in power in Kanye, her stepsons collided with Tshekedi back in Serowe.

In the aftermath of the failed assassination attempt in 1926, Tshekedi took exacting revenge versus the Ratshosas. First he had their houses burned down, which was the long-standing Tswana custom used by chiefs against traitors. Second, he allowed the Protectorate authorities to try the Ratshosas for attempted murder, and indeed the three were found guilty, imprisoned, and banished from the reserve. At this point, Tshekedi was still to be drawn into women's inheritance matters. Continued legal action by his would-be assassins forced him into a change of heart. The Ratshosas sued Tshekedi for burning down their houses, and won a judgment against him in the highest court in the Protectorate. Following this case, Tshekedi was forced to appeal to the Privy Council in London, where he eventually won his case in 1931 on the grounds that he had the right to govern his reserve in terms of traditional law.

The intrigues, the attempted assassination, the time-consuming lawsuits, and the insults and contempt made against Tshekedi by the Ratshosas eventually led him in the late 1920s to destroy them by whatever means possible.<sup>45</sup> Mainly this was done by attacking their extensive cattle holdings, which were spread out across the eastern section of the Ngwato Reserve. The Ratshosa herders were threatened, their slave herders were purloined, allowing cattle the opportunity to stray or be stolen. Meanwhile, Tshekedi oversaw the liquidation of some Ratshosa debts—which inevitably meant that animals were sold off at ridiculously low prices. As a result of these actions, some 4,000 Ratshosa cattle were liquidated or lost by the end of 1927.<sup>46</sup>

In the aftermath of the dissolution of the Ratshosa cattle herds, Ratshosa women used the Protectorate courts in an attempt to recover property that had belonged to them as individuals. They claimed to own property as individuals, and claimed not to be liable for the actions and debts of the three brothers. To a certain extent, Simon and Johnny Ratshosa were anxious to assert these claims on their behalf, because it represented an obvious avenue for them to regain some wealth. But leaving such self-serving motives aside, the case is interesting because it brought into focus individual property rights within customary law, in particular whether women's property could be held separately from that of their fathers, husbands, or family. Whereas Khama's Law had given women clear rights to own property, it had failed to take matters further. Hence, by the late 1920s women still could not appear in traditional courts on their own behalf. Moreover, many aspects of traditional law, such as treason, made families as a whole liable for transgressions committed by individual members. So women could own property, but their ownership rights were far from absolute.

Tshekedi himself benefited enormously from Khama's Law. His mother, Semane, had been given five cattleposts and £3,000 in 1907 when Khama III drew up his will. Ultimately, as her oldest son, he would control this large estate along with considerable other assets laid aside for him at the time. In addition, Semane's wealth survived the attempts of Sekgoma himself to gain access to it, since Sekgoma believed that Khama's will was nullified following his own return as heir in 1916.<sup>47</sup> But Tshekedi did not allow his enemies to benefit in the same way.

The first Ngwato woman to assert claims over inherited wealth through the Protectorate authorities had been Mmakgama, one of the sisters of the late Sekgoma. In the months prior to the attempted assassination, she had refused to accept a mere £100 from Khama's estate, noting: "some years ago the late Chief Khama announced to his tribe that he was changing the law of succession and that in future all children would share alike and that daughters would no longer left to go hungry."<sup>48</sup> Mmakgama never received more than token gifts from Tshekedi, who divided the Ngwato royal cattle between those set aside for his mother's house, and those he supervised on behalf of Sekgoma's heir, Seretse.

Claims for cattle on the basis of Khama's law were to continue. The Ratshosas, once imprisoned, began to invoke the issue. Hence, an anonymous circular penned by one of them noted that Khama's daughters were being maltreated by Tshekedi as they "were driven away without having received anything from the Estate of their Father: it is well known by the Bamangwato that Sekgoma set something aside for his daughter Oratile... Khama's laws are well known; a girl has rights to her father's property such as a boy has to it".<sup>49</sup> Nor were such matters only discussed anonymously, but were routinely discussed in correspondence between the Ratshosas and the Protectorate authorities—as Tshekedi's men kept seizing cattle belonging to the Ratshosa brothers' wives, sisters, and mother-in-law.<sup>50</sup> Despite the record of the Ratshosas, the colonial authorities initially agreed with them on this issue, particularly since they knew Tshekedi was destroying the Ratshosa cattle herds. Hence, late in 1927 the High Commissioner lectured Tshekedi about the property rights of women married under common law, and told him that property "must be disposed of according to that law."<sup>51</sup> Whatever actions the government took to protect the property of these women, their cattle were almost all taken away—except for those of Ntebogang, whom Tshekedi was working with to oppose new government regulations affecting the power of Chiefs.

Oratile, Simon Ratshosa's wife, suffered from Tshekedi's actions, and eventually sued him in a colonial court in 1930.<sup>52</sup> Her claims were several. First, she noted that she had never received her inheritance from her father, formerly supervised by her brother Chief Sekgoma. And, following the death of Sekgoma, she had not received her property—which was taken by Tshekedi. In addition, she claimed that her private property, including about 200 cattle, a wagon, a team of oxen, and four slaves—much of it derived from wedding presents from her father in 1918—had been taken by Tshekedi in his persecution of the Ratshosas in 1926-7.<sup>53</sup>

Oratile's claims were thrown out by the court, largely on the basis that she lacked written proof for her claims. There cannot be much doubt, though, that Tshekedi had sequestered her property.<sup>54</sup> That she failed to receive a share of the Khama family wealth is also evident. Had the same burden of evidence been placed on Tshekedi's mother and on Chieftainess Ntebogang, neither one would ever have inherited the cattle and money left to them by their husbands.

### Codification of Tswana law and custom

In 1932, a further sequel to this episode arose when a close relative of the Ratshosas, Mogomotsi, died, leaving no male heirs and an estate of 580 cattle and £364 in cash.<sup>55</sup> Because the case eventually required government intervention to solve, it eventually prompted the government to codify inheritance laws. In the process, women's inheritance rights were curtailed. Following the death of Mogomotsi, Tshekedi then personally undertook the division of the estate, dividing the cattle between Mogomotsi's mother, Baboni, his wife Pshyee, and daughter Oethile. Baboni was another daughter of Khama III, thus Tshekedi's own half-sister. He had had expelled from the reserve in 1926, after she had led a lynch mob accusing Tshekedi's mother of poisoning Segkoma. Baboni, as an ally of the Ratshosas, raised a fuss by claiming all of her son's estate, and followed Oratile's example by appealing against Tshekedi's division of the estate to a higher, colonial court.

The case of Baboni *versus* Tshekedi did not revolve around the issue of whether women could inherit (though Tshekedi noted that there was "no direct heir"). Rather, it revolved around the Chief's power to divide estates. The colonial authorities chastised Tshekedi for his authoritarian behaviour in the matter, because many of Baboni and Mogomotsi's male relatives in fact backed her case. In any case, at the final level of appeal, the Resident Commissioner quashed the appeal: his judgment being "I will not show sympathy to people who are only trying to cause trouble."<sup>56</sup>

Following the immense fuss over Oratile and Baboni, the Resident Commissioner drafted the Administration of Estates Proclamation of 1933. Not only had considerable administrative energy been spent on these cases, but colonial officials on the ground felt extremely confused. Some wished to uphold Khama's Law and grant women more property; others felt the situation was "in an uncertain state", while still others rejected the idea that Khama's Law was valid custom.<sup>57</sup> What this new set of laws did was to close off the ability of Tswana women to use colonial courts in inheritance disputes. And it also denied all Tswana the right to pass on property through a written will, hence bypassing custom. What the Proclamation did was to set up a rigid racial division in the way the law applied—hence, white women could marry in community of property and inherit, while black women could not. All such cases involving Tswana people were to "continue to be administered according to native law and customs of the tribe to which the deceased native belonged"<sup>58</sup>

Tshekedi had been successful to the extent that all inheritance disputes now had to be heard in customary courts. At the same time, he had been fighting a losing battle to keep the government from instituting the 1933 Native Affairs Proclamation, which sought to define chiefly powers clearly and to bureaucratize traditional government. One of the key issues for Tshekedi in his opposition to the bill was his desire to keep all legal matters relating to marriages within the realm of customary courts—including civil marriages. Although the government had been denying women their "community of property" rights by sending divorced couples back to the *kgotla* to have their property divided, Tshekedi did not feel this was enough:

"The Paramount Chief's Courts should adjudicate not only in Sechuana Divorce suits but also in those where Bechuana are married under Christian rites."<sup>59</sup>

Divorce and inheritance cases were the most common ones where colonial and traditional law intersected, and hence were part of Tshekedi's request to the authorities that a "native Code" of traditional law be drawn up to guide the authorities and younger chiefs.<sup>60</sup> The Resident Commissioner proceeded to commission the young anthropologist Isaac Schapera to compile one. Schapera conducted extensive research, and, through his official connections, consulted leading men in parts of the Protectorate and wrote a first draft within 18 months. His drafts were read and critiqued by a range of people, many of whom submitted written responses to it.<sup>61</sup>

What Schapera's *Handbook of Law and Custom* did in matters relating to women's property rights, unsurprisingly, was to move the clock back to the era prior to Khama's Law. As Schapera noted with regard to inheritance, "the general rule... is that sons inherit all cattle and other property specifically used by males." With regard to divorce, he says "The cattle as a rule all remain with the husband, including any that he may have allotted to his wife."<sup>62</sup> This is not to say that Schapera was in any way ignorant of Khama's Law or of any wider developments discussed above. Schapera was later to write a remarkable treatise on the history of Tswana customary law, showing how it changed and was altered between 1800 and the present day.<sup>63</sup> But Schapera does not stress twentieth century modifications as much in his older *Handbook*, as the following passage shows:

Daughters formerly received no cattle at all, nor did the widow. The heir was obliged to maintain and support them while they were living with him. This is still said to be the general rule in most tribes. Among the Ngwato, however, Kgama introduced a law that daughters should also be given cattle... their share, however, is always much smaller than that of their brothers<sup>64</sup>

This sole passage, in the middle of many pages describing "pure custom" that kept all property in male hands, minimises the dramatic effects of Khama's Law, which was being used practically throughout the Protectorate.

Schapera's information came largely from senior men, such as Tshekedi, or other male elders who dominated proceedings in customary courts. In the huge amount of materials he used in his research on law, only a minute fraction came from women. And when perusing his research notes and correspondence on customary law in the 1930s,<sup>65</sup> it is clear that a lot of his informers were reactionary. One example is Moanaphuti Segolodi, his only informant from the Tawana Reserve. Segolodi, the son of a headman known popularly as the "Bush Lawyer" since he represented clients in customary cases, was himself a batterer of women going through a divorce case when corresponding with Schapera.<sup>66</sup> Moanaphuti maintained that in "native law" only husbands had the right to institute divorces, and that a woman who deserted her husband was liable to be dispossessed of all she owned. "A wife had no protection whatever according to native law." Meanwhile, in terms of inheritance, "wealthy men" often gave their daughters cattle before they

died, and these animals were inalienable. But once the father died, the matter changed. Inheritance was, "an exclusive privilege belonging to an heir. According to Sechuana Custom, a female child is not recognised to inherit her father even though she be the only child"<sup>67</sup> Hence, Moanaphuti misrepresented events in a reserve which had been the first to adopt Khama's Law, which had allowed senior-ranking women considerable property, and which was to later supply a number of women litigants seeking greater use of European law.

The effects of codification and of Tshekedi's backtracking from Khama's Law were to enshrine reactionary tenets in what became (and still is) the authoritative text on custom. For the rest of the colonial era, customary courts could and would deny women access to property. This did not mean that they always did so, because Khama's Law was still used to varying degrees in various parts of the Protectorate. The written wills of liberal-minded men might not be recognised. While it is true that in the latter stages of colonial rule the colonial authorities allowed women to appeal cases to colonial courts, the vast majority of cases were not appealed. Old-style custom applied to the majority.

### Women and colonial courts during the late colonial era

Only in the latter stages of the colonial period did Tswana women reassert the rights that they had to a great extent lost in the 1930s. This was unlike the earlier parts of the century, when male initiative and reform was the motive force behind legal changes. Tswana women began to actively advance and protect their rights in colonial courts—their right to inherit cattle through both custom and through written wills, their right to a share of property in divorce cases, and their right to control such property in their own right.

As far as we can see, there was no organised movement or conspiracy behind women's renewed use of colonial courts. It was rather a case of women across the Protectorate beginning to take advantage of new and more liberal colonial laws. Such laws permitted women to appeal civil cases from customary to colonial courts, and also allowed them to make use of professional lawyers for the first time. The combination of these factors made it inevitable that the contradictions inherent in colonial statutes since the 1890s would be finally ironed out.

### Notes & References

1. Mphawe Mmualefhe (born 1912), Serowe 19 June 1984, interview appended to T. Mooko, "The Role of Royal Women in Bangwato Politics Under the Regency of Tshekedi Khama, 1926-1949," (University of Botswana, BA Honours Dissertation 1984), copy in Botswana Collection, University of Botswana library.
2. Motselwe Direnyane (born 1887), Serowe 6 June 1984, interview appended to *ibid.*
3. Khande Rapelang (born 1910), Serowe 5 June 1984, interview appended to *ibid.*
4. Botswana National Archives, Gaborone (hereafter BNA) S.32/3 *Kgosimotse* to Resident Commissioner 1 September 1917.

5. Selly Oak Colleges, W.C. Willoughby Papers (hereafter SOC WCW Papers), File 711, "Personal Property," n.d. Written in the early to mid 1890s prior to the passage of "Khama's Law".
6. I. Schapera, *A Handbook of Tswana Law and Custom*. (1938; reprint of 1st Ed Munster: LIT Verlag, 1994), 28.
- 7 Ibid, see chaps. 11-13.
8. Ibid, 220-1.
9. A.L. Erickson, *Women and Property in Early Modern England*. (London: Routledge, 1995).
- 10 In the course of compiling *PreColonial Botswana: An Annotated Bibliography and Guide to The Sources* (Gaborone: Botswana Society, 1995), I read through the corpus of published and unpublished records on the precolonial era.
- 11 Evidence of Khama III's brother, describing the law in the time of his father, BNA S. 261/5 Resident Magistrate Serowe to Assistant Resident Commissioner, Mafeking 11 March 1932.
- 12 J. Iliffe, *The African Poor: a History* (Cambridge: Cambridge University Press, 1988), 76-8; M. Kinsman, "Beasts of Burden: the Subordination of Southern Tswana Women, c.1800-1840", *Journal of Southern African Studies*, 10, 1 (1983), 53
- 13 SOC WCW Papers File 761 "Government", n.d. citing the case of Tumedu in the time of Sekgoma I.
- 14 Rhodes House Library, Oxford University, MSS British Empire 1158, "Journals of Jules Ellenberger, Special Commissioner to Ngamiland in 1908..." II, 18-19. After Masellwane fled Ngamiland in the early 1870s, her cattle were confiscated and given to her husband's senior wife, and were later inherited by her oldest son-but not her daughter.
- 15 Explained in far more detail in B. Morton, "The Hunting Trade and The Reconstruction of Northern Tswana Societies after the Difaqane, 1838-1880," *South African Historical Journal* 36 (1997): 234-7.
- 16 J.T. Bent, *The Ruined Cities of Mashonaland* (1895; repr Bulawayo: Books of Rhodesia, 1969), 10. Cf. A. Schulz and A. Hammar, *The New Africa: A Journey up the Chobe and Down the Okavango Rivers* (New York: Scribner, 1897), 349-51.
- 17 J.T. Brown, *Shomolokae: The Apostle of the Marshes* (London: LMS, 1925), 75.
- 18 London Missionary Society Collection, School of Oriental and African Studies, London, LMS Annual Reports Africa-South, Box 2 Sekgoma Letsholathebe to A.E. Jennings 26 February 1905 (my emphasis).
- 19 BNA DCL 7/1 Rex vs Ratshosa Bros, 1926, testimony of Baboni Morwe and Oratile Sekgoma. Other testimony on the same lines can be found in DCS 8/12 Special Court Lobatse, Oratile Sekgoma vs Chief Tshekedi, June 1930.
- 20 See BNA S. 34/6/1 Assistant Commissioner Francistown to Resident Commissioner 23 June 1907. Cf. Khama's own description, in BTAdmin 11/6 Khama's Speech to the High Commissioner, 28 March 1916.
- 21 This is made evident in the numerous files dealing with the royal cattle herd of the Tswana chieftaincy, which was under dispute from 1906-13. On cattle set aside for the wives of the various chiefs, see BNA S. 30/4/2 Statement By Sekgoma [1907?].
- 22 SOC WCW Papers File 711 "The Widow", n.d. [early to mid-1890s].
- 23 BNA S. 6/1 Sebele II, Tshekedi Khama and Ntebogang to Resident Commissioner 20 July 1927.
- 24 BNA S.261/5 Resident Magistrate Serowe to Assistant Resident Commissioner, Mafeking 11 March 1932, quoting Mokhutswane directly.
- 25 BNA S.261/6 Resident Magistrate Serowe to Assistant Resident Commissioner, Mafeking 11 March 1932, quoting Oitsile.

- 26 Schapera, *Handbook of Tswana Law and Custom*, 231-2. With regard to daughters, he notes, "their share, however, is always much smaller than that of their brothers".
- 27 Interview with a former headman Baolwetse Moetse, Maun 16 November 1993. See also BNA Schapera Papers 1/5/10 "Bechuana Native Law and Custom" by M.R. Segolodi, January 1934, which recognises the right of daughters to inherit as if this had always been the case.
- 28 Quoted in Isaac Schapera, *The Political Annals of a Tswana Tribe* (Cape Town: UCT School of African Studies Communication, n.s. 18, 1947), 66-7.
- 29 Interview with Searabeng Maruping, Maun 13 January 1994.
- 30 See BNA S. 32/3, passim, in which the Bakwena, Bangwato, and Bakgatla chiefs all backed the claims of Motshabi Letsholathebe versus her cousin Mathiba Moremi. Only the newly-installed Kgosimotse of the Bangwaketse, whose brother had only four years earlier changed the law in his reserve, claimed that "Ancient Native Custom" forbade a woman to inherit a man's property.
- 31 BNA DCS 9/1 Resident Magistrate, Serowe to Government Veterinary Officer, Palapye 22 February 1924.
- 32 The ward was the residential district to which each freeborn person was attached. These wards varied in size, with some being extremely small and consisting of only closely related families, while others were sprawling and heterogeneous. Each ward was under the control of a senior hereditary lineage, which generally ran affairs in consultation with other influential men in their group.
- 33 See B. Morton, "A Social and Economic History of a Southern African Native Reserve: Ngamiland, 1890-1966" (PhD Dissertation, Indiana University, 1996), "249-50, which lists the practices of various wards in Ngamiland.
- 34 BNA DCS 8/19 Johnny Ratshosa to Resident Magistrate, 1 September 1927.
- 35 Mathiba Moremi to Resident Commissioner, 18 September 1916.
- 36 See the lengthy discussions in BNA AC 2/4/2 Resident General Manager Tati Concessions Ltd to Resident Magistrate Palapye 13 and 17 March 1896; and AC 8/2, which describes the way in which Josephina Marman took over her incapacitated husband's huge herd in the Tati district in the 1890s.
- 37 Colonial Office Confidential Prints, 879 Series No 552 Opinion of M.W. Searle, enclosed in No. 175 High Commissioner to Chamberlain 25 October 1897. No 175 has several enclosures explaining early colonial policy on the issue.
- 38 See BNA AC North 4/1 Civil Records 1897-1903, Case 45/249 Khama vs Sefakwane; and Case 72/446/06 Court of Assistant Commissioner Francistown, Sekgoma Letsholathebe vs. Bitsang Seretse, enclosed in S. 30/3/4 Minchin to Resident Commissioner 15 April 1906.
- 39 See correspondence in BNA RC 5/19 Native Marriages: Effect on Succession 1901-11.
- 40 Marriage Proclamation of 1 April 1917, Article 19.
- 41 BNA DCL Last Will and Testament of Nca Montsioa, put into effect in 1927.
- 42 See M. Crowder, *The Flogging of Phineas MacIntosh: A Tale of Colonial Folly and Injustice, Bechuanaland, 1933* (New Haven: Yale University Press, 1988); and D. Wylie, *A Little God: The Twilight of Patriarchy in a Southern African Kingdom* (Hanover, NH: Yale University Press, 1990).
- 43 The following passage is based on Wylie, *A Little God*, ch. 2; and N. Parsons, "Shots for a Black Republic? Simon Ratshosa and Tswana Nationalism," *African Affairs* 73 (1974): 449-58. My only new information is based on two interviews: with Oratile and Simon's adopted daughter, Grace Dambe, Francistown 1994; and with Ntebogang's oldest daughter, Mmatshosa, Kanye July 1994.
- 44 BNA DCS 3/8 Statement of Ntebogang, 4 December 1925; and DCS 8/8, 1926.



- 45 It is from this point that I seek to present new information about Tshekedi and the Ratshosas.
- 46 See the 1927 correspondence in BNA DCS 8/19, and also in BNA S. 11/4, letters from Segwabe Phuu to the Ratshosas describing various attacks on their cattleposts.
- 47 See BNA S.4/1, "Last Will and Testament of Khama," and RM Williams, notes of interview with Sekgoma, n.d.
- 48 BNA S. 4/1 Nettelton to Government Secretary, Mafeking 4 March 1927.
- 49 BNA S. 6/1 Anonymous message, enclosed in Sebele II, Tshekedi Khama and Ntebogang to Resident Commissioner 20 July 1927.
- 50 See the many letters from Johnny Ratshosa to the Resident Magistrate of Serowe in BNA DCS 8/19.
- 51 Ibid, "Record of Proceedings at an Interview Granted by His Excellency the High Commissioner to Certain Bechuana Chiefs...on the 21st and 22nd November 1927."
- 52 Wylie, *A Little God*, 72, mistakenly says that Oratile instituted this action in 1926, prior to the assassination attempt.
- 53 BNA DCS 8/12 Oratile Sekgoma vs. Chief Tshekedi, Special Court Lobatse 18 June 1930. She had pressed these claims first in 1927, see DCS 8/19 Oratile Sekgoma to Resident Magistrate Serowe, 5 November 1927.
- 54 Resident Commissioner C.F. Rey had no doubts about the matter, noting that Tshekedi had "grabbed Oratile's patrimony," and had tried to intimidate her in his own presence. See *Monarch of All I Survey: Bechuanaland Diaries 1929-37*. Edited by M. Crowder and N. Parsons (Gaborone: Botswana Society, 1988), 37.
- 55 Wylie, *A Little God*, 75-6; BNA S. 261/5.
- 56 BNA S. 261/6, Judgment by the Resident Commissioner: Appeal by Baboni Morwe vs Court of Appeal, n.d. [1932].
- 57 This debate is scattered across a number of files. See BNA S. 261/5-6, S. 172/13, and DCS 45/8, passim. The greatest advocate of using European law to grant women more property was the Serowe Magistrate, G.E. Nettelton, who felt that the number of destitute unmarried women was increasing, and that one part of the solution was to allow them a greater share of their families' wealth by allowing wills, which had been outlawed. See "Legal Status of Unmarried Women," in DCS 45/8.
- 58 Administration of Estates Proclamation of 1933, article 3.
- 59 BNA DCS 45/8 "Sechuana Tribunals," [Tshekedi Khama, 1933].
- 60 See *ibid*, and S. Roberts, "Introduction," in Schapera, *A Handbook of Tswana Law and Custom*, 2.
- 61 See Wylie, *A Little God*, for her analysis of Tshekedi's commentary.
- 62 Schapera, *Handbook of Tswana Law and Custom*, 160, 230.
- 63 I. Schapera, *Tribal Innovators: Tswana Chiefs and Social Change, 1795-1948* (London: Athlone, 1970).
- 64 Schapera, *Handbook of Tswana Law and Custom*, 231.
- 65 See the huge number of transcribed interviews, research notes, and correspondence in BNA Schapera Papers
- 66 On Moanaphuti, see B. Morton, "Before Nationalism: M.R. Segolodi and the Intellectual Vacuum in Botswana, 1894-1949," (University of Natal: African Studies Seminar Series Paper, 1998).
- 67 BNA Schapera Papers PP1/5/10 M.R. Segolodi, "Bechuana Native Law and Custom," January 1934. Moanaphuti allows no provision for wives to inherit.