

SUPPORT FOR WOMEN WITH DEPENDENT CHILDREN
UNDER THE CUSTOMARY SYSTEM OF THE BAKWENA
AND THE ROMAN-DUTCH
COMMON AND STATUTORY LAW OF BOTSWANA (*)

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This paper is concerned with the interaction of customary and Roman-Dutch common and statutory law in Botswana today. It examines the question from a practical perspective, and in the context of a specific problem, that of women with dependent children seeking support. It will explore the options open to such women for obtaining support under the customary system and statutory law in theory and practice. With regard to practice, reference will be made to interviews carried out with sixty women with dependent children. It is intended to demonstrate that the women interviewed have some knowledge of the options open to them for obtaining support under both systems, that they manipulate these options and that their choice of action is dependent upon the social and economic circumstances in which they find themselves.

It is clear that both systems are widely in use and that it is not possible to identify the use of one particular system with one particular class of individuals, for example government em-

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ployees. This had first appeared to be the case with the statutory law administered by the Magistrate's court, where the majority of women observed in actual disputes were such employees, but it became clear from the interviews that the court is utilised by a much broader section of the community.

Although both systems were in use a pattern emerged of women initially approaching the customary system and only invoking the statutory system when the former proves unresponsive to their situation. The factors prompting a move away from the customary system were said by the women to be lack of family support, lack of co-operation on the part of the man involved, the location and mobility of the parties involved and failure of the customary system to provide support for unmarried women after the birth of their first child. These will be discussed in detail later in the paper. Women also encounter difficulties in using the statutory system, such as the requirement of "proof" in paternity cases as a pre-requisite for support, the time limit placed on the raising of maintenance actions by unmarried women and the delays involved in hearing such disputes due to a backlog of cases in the Magistrate's court. This paper will, however, concentrate on the problems that women encounter in their use of the customary system because it is to that system that they initially turn. The difficulties they encounter under the statutory system are difficulties encountered by women with no other choice.

Support under the Roman-Dutch or "common law" system

The Roman-Dutch common and statutory law is referred to as the "common law" system. "Common law" is defined as "any law, whether written or unwritten in force in Botswana other than customary law" (section 2 Customary Law (Application Ascertainment, Act 1969). Under the common law a woman may receive support in the form of a weekly or monthly sum of money for her first child and any subsequent children whether she is unmarried (Affiliation Proceedings Act 1970; Affiliation Amendment Act 1977) or married according to customary law or statute (Deserted Wives and Children Protection Act 1963).

If a woman is married according to common or customary law, she may in addition receive support or maintenance for herself (section 4, Deserted Wives and Children Protection Act).

In the case of an unmarried woman there is a 12-month time-limit attached to the raising of an action, running from the date of the child's birth or the date that the father ceases to support the child (section 4, Affiliation Proceedings Act). A limit is also placed on the amount that may be awarded (section 6, as amen-

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ded by the Affiliation Amendment Act 1977). In addition, an unmarried woman must provide "proof" that a man is the father of her child before support can be awarded. Her evidence must be corroborated (section 6, Affiliation Proceedings Act). As a result of these provisions an unmarried woman's use of the common law system is restricted.

Support under the common law system is administered by the Magistrate's court, which the woman may approach directly herself. No legal representation is required and she does not have to pay court fees.

Support under the customary system

Under the customary system an unmarried woman may only receive support for her first child. She is entitled to 8 head of cattle or a lump sum of money which may be paid in instalments. She is not entitled to support for any subsequent children. If she is married the Chief's court may make such order as it sees fit (the court generally awards one beast from her husband's stock).

The customary process is well documented in the work of Issac Shapera (1970), Simon Roberts (1972) and others. Briefly, the Bakwena have a hierarchical legal system which begins with the kgotla: a group of huts centred together. The kgotla is the central meeting place where important administrative, political, ritual and ceremonial events take place. It is presided over by an individual male known as the "headman".

Several kgotlas are grouped together to form a sub-ward, and several sub-wards make up a ward. The Chief's court is at the apex of the system and is the final arbiter in questions of dispute.

The system provides for mediation and negotiation. Traditionally it is considered unsuitable for a woman to enter the customary system on her own; she should be accompanied by a senior male relative, for example her maternal or paternal uncle. Her relatives negotiate with the relatives of the man concerned. If these negotiations are unsuccessful the parties will go to the kgotla (usually the man's) and from there to the sub-ward, ward, etc. until they finally reach the Chief's court. At stages before the Chief's court those administering the system can make recommendations. It is only the Chief's court that has the power to fine or attach property. The process is a lengthy one: it may take a number of years to progress from the parties' kgotla to the Chief's court.

With regard to support, there appears to be a predisposition on the part of those administering the customary system to accept a woman's claim with respect to the paternity of her first child. They do not demand corroboration or proof of the kind that is required by the Magistrate's court.

Reviewing both systems as a whole, the situation is that a woman may, if unmarried, receive 8 head of cattle for her first child or a sum of money which may be paid by instalments. She may also receive an award of maintenance from the Magistrate's court. Likewise a married woman may both claim maintenance from the Magistrate's court and use the customary system. In practice, women opt for one or the other. There is only one instance over a ten year period of a woman receiving awards from both systems. The use of both systems has increased: in 1972 there were 4 cases in the Chief's court and 50 in the Magistrate's court of unmarried woman seeking a remedy. By 1981 these numbers had increased to 62 cases in the Chief's court and 98 in the Magistrate's court.

Interviews

To explore how individuals use the two systems, 60 interviews were carried out with women who had dependent children and who had been left unsupported by a man.⁽¹⁾ These were carried out in Molepolole, the central village of the Bakwena, one of the 8 major Tswana groups in Botswana. The village is situated in a rural area approximately 60 kilometres from the capital city, Gaborone. The research was done between January and August 1982 and was part of a larger research project examining the interaction of common and customary law with regard to family dispute settlement amongst the Bakwena, the results of which were presented in a Report deposited with the National Institute of Research in Gaborone, in April 1982.

The Two Systems in Molepolole

Molepolole has 70 kgotlas at the lowest level of the customary system and 5 wards. The Chief's court at the apex of the system has 3 presiding officers who sit individually, the Chief Regent, the Deputy Chief, and the Senior Chief's Representative. The court sits between Monday and Friday and occasionally on weekends. Its decisions are subject to review by the District Commissioner and a Magistrate. The current District Commissioner is a Motswana from another tribal area. The current Magistrate is from Tanzania. The Chief's court is located five minutes' walk

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from district administration headquarters, which houses the District Commissioner's office and the Magistrate's court.

The Magistrate's court in Molepolole sits each Wednesday when the Magistrate deals with both criminal and civil cases. There are many criminal cases and they generally have priority over other cases with the result that there is a significant backlog of maintenance applications.

On a practical level the officials operating the two systems in Molepolole work together. Officials from the Chief's court regularly refer women to the Magistrate's court when the women concerned have more than one child or the man involved is from another area. Likewise the Magistrate's clerk of court will refer a woman to the customary system when he considers this appropriate, for example if all the parties are from the same area and proper parental negotiations have not taken place. The District Commissioner and the Deputy Chief regularly consult one another. This degree of co-operation is not always found in other areas of Botswana; the Government was so concerned about the lack of co-operation between Chiefs and District Commissioners in Botswana that it organised a Conference for them before the opening of Parliament in August 1982.

Findings

Of the sixty women interviewed only two appeared to lack knowledge of how the customary system operated. One was a mental defective and the other a schoolgirl. Only three women appeared to have no knowledge of the common law system administered through the Magistrate's court. Of these three one was a schoolgirl living in Molepolole and the other two lived permanently in the lands outside the village. Such knowledge as the women possessed was acquired in nearly all cases by word of mouth, through talking to relatives, friends or neighbours. One of the women acquired her information on the provisions of the Affiliation Proceedings Act from an announcement made by the MP for Kweneng District.

Although the degree of knowledge varied from individual to individual the majority of women considered both systems with reference to their situation. To give two examples:

One woman had had a first child. Her parents negotiated the appropriate number of cattle with the man's family but these had not yet been received. The girl needed support and because she was working as a government employee, far away from her family, she went

to the Magistrate's court in Molepolole. She was undecided whether to pursue the case there because she was being transferred by the government to another location and she was under pressure from her brother to drop the case. He maintained that a lumpsum of cattle would be more appropriate than a monthly allowance because the man involved was married and any award made in a Magistrate's court would take this into account when settling the level of maintenance.

Another woman went to the Magistrate's court after the birth of her first child when parental negotiations for cattle proved ineffective. A maintenance award was made but the man involved paid very irregularly. Marriage had been promised. Six years after the birth of the child, when payments had ceased and marriage had still not taken place she came to the Chief's court to free herself from the relationship with him and to receive a lump sum which would "settle the matter once and for all".

Of the 60 women interviewed:

- 14 used only customary process either at the ward or Chief's court level;
- 30 went thereafter to the Magistrate's court;
- 16 were in neither category (these women were among those located through friends or by visiting households).

It is interesting to note the reasons why 16 women had not taken their cases to court. This was not because they were unaware of the options available to them but because they did not need to utilise them or were at a different stage in the process. Of these 16 cases:

- in 4 the woman was currently receiving support;
- in 6 negotiations at parental level were under way;
- in 6 no action had been or would be undertaken: the events were in the past and there had been no action for a variety of reasons (for example because the child was a second one and no provision for support was in force at the time under common law).

Among these 16 cases, 10 therefore had the potential for future development. Of the 10 women involved:

- 6 stated that they would go to the Magistrate if nothing further happened;

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- 1 stated that she might go to the Magistrate if her uncle would take her there;
- 2 had no views as to what further action they might take;
- 1 stated that she intended to invoke customary system (but only because she believed that the Magistrate's court would reject her case if she did not try the customary system first).

It is striking that in all 60 cases some attempt was made to use the customary system, at least at the level of parental negotiation. Despite this, half the women turned to the Magistrate's court. Why? What were the difficulties?

Reasons for dissatisfaction with the customary system

The main reasons the women gave for dissatisfaction with the customary system may be categorised as access and lack of effective remedy. Under the heading of access this paper will consider lack of family support, lack of co-operation from the man, and the questions of location and mobility. Under the heading of remedy it will consider the lack of an adequate remedy to meet the needs of the women concerned and the problem of enforcement.

access

(a) lack of family support and co-operation

The customary system is heavily dependent on family involvement. It is the relatives of the individuals concerned who are responsible for arranging meetings and solving the dispute in the first instance. This question of support and co-operation has three aspects:

- does the woman raising a claim have her family's support? If so,
- do the relatives or parents of the man co-operate? and
- does the man co-operate?

Over one-third of the women encountered difficulties in operating the system at the level of family negotiations.

One woman, for example, stated: "I went along to the D.C. I thought the D.C. would deal with my case where there was no older person to represent me (in the customary system)."

(D.C. stands for District Commissioner. The women often identified the common law system and Magistrate's

court with the District Commissioner and District Administration where the court is located and so referred to going to the "D.C." in interviews.)

A woman could in theory utilise the customary system on her own, but the characteristic attitude as expressed by one kgotla is:

"Any young woman going and suing for seduction without the support of her parents means that she is an unruly daughter."

It is difficult to separate family support from all the other considerations involved in these disputes, but in those cases observed during this study where no family members were present and no adequate explanation was given for their absence, the individuals involved were found to be at fault or the case was dismissed or referred back to the ward for a hearing.

There is no power to compel attendance at meetings unless there is an order from the Chief's court. The Chief's court may be used where the man or his parents refuse to co-operate but by then the woman's parents have often given up hope and lost interest so the woman goes to the Magistrate's court instead.

One woman, for example, went to the Magistrate's court because the man's parents had urged her to do so. They said that he was "impossible" and that he would not turn up at meetings. She felt that the Magistrate's court had greater powers of compulsion than the Chief's court.

This woman's experience of the man's reluctance to be involved in the customary system was endorsed generally by members of the village in discussions in ward meetings. It is clear that there are problems regarding access to the customary system and one may argue that this is due to breakdown in family and social control. Recent studies (Kooijman, 1978; Molenaar, 1980; Kocken and Uhlenbeck, 1980) in other areas in Botswana have documented this phenomenon which they attribute to an increased dependence on a wage economy and shift away from residence in the village, which is central to the operation of the customary system, to residence in urban centres or more permanent residence in the lands. In her recent study Kooijman reaches the conclusion that "the corporate groups of the traditional structure are breaking down and ... the growth of individualism has become a significant feature of the society. In the kinship realm it is noticeable since the corporate unity of the ward, family group and lineage segment has weakened considerably" (1978: ii).

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The government noted its concern on this point in the National Development Plan (N.D.P. 5 for 1979-1985: 90) where it is stated:

"The extended family system is breaking down and as a result the social problems are increasing. The growth of services to help individuals and families cope with the problems has been slow. An overall social welfare plan is envisaged but it needs more research before formulation."

(b) location / mobility

Even if the parties involved in a dispute and their families are willing to go through the customary system they may be too far away to participate. A woman, for example, might be working in Molepolole and her parents might live in Francistown (approximately 498 kilometres from Molepolole). The man might be working in Gaborone, the capital city (approximately 60 kilometres from Molepolole) and his parents be in Ghanzi (approximately 439 kilometres from Molepolole). In such situations it is extremely difficult to bring all the parties together so that the customary process can operate.

Eleven of the women interviewed found themselves in such a situation. Of that 11:

- 7 went to the Magistrate's court (1 on the recommendation of the Chief's court);
- 4 gave up and did nothing.

It is interesting to note that over half of those using the Magistrate's court met the man concerned somewhere other than Molepolole, in another district, generally in an urban area (16 of the 30 women using the Magistrate's court met the man concerned in an urban area). In all but one case the men involved were from another area and were not Bakwena. The one exception involved a man from Molepolole who was working in Gaborone. In the majority of cases these women were working in an urban area as shop assistants or domestic servants, or were employed by the government. (Of the 16 women, 12 were working at the time they met the men, 1 was at school and 3 were visiting relatives.) In contrast, all but one of the women who did not use the Magistrate's court met the man concerned in Molepolole or the lands just outside the village. (The one exception who met the man outside Molepolole, in an urban environment, took no action at all because the man was supporting her and her child.)

It became clear from the interviews that many of the men involved in paternity cases work as government officers for bodies

such as the Department of Supplies, or the Roads or Water Works Department, or as civil servants, often teachers. These people have a high mobility: they work for a year or two in one area and then are moved elsewhere. There is a tendency for the government to send people from one area of work to another miles away. It is said by some that this is a deliberate government policy to try and break down the tribal structure in Botswana.

There has long been an element of mobility in the Bakwena society in that men traditionally go to work in the mines, but mineworkers work in the mines for relatively short periods of time. They are not subject to such long contracts without leave as a government employee. During their contract period they regularly visit the village. (2) Furthermore, mineworkers can be located by arrangement with the Mine Labour Organisation. (3) One of the women interviewed approached the Magistrate's court on the recommendation of the Mine Labour Organisation, to ensure that the man concerned would not be able to return to work in the South African mines until the matter had been settled.

remedy

Apart from problems of access, woman also face the problems, in their use of the customary system, of the absence of a remedy appropriate to their needs and of enforcement.

(a) lack of appropriate remedy

When a woman is unmarried and has two or more children by the same father or different fathers there is no provision for support in the customary system for children after the first. This is said to be the case because payment is made for her "seduction" and loss of marriage prospects; to allow support for further children would be to encourage prostitution. A woman and her children are also supposed to be supported by her family. There is not seen to be a need, or if there is, it is said to be catered for. Over one-sixth of the women interviewed stated that they went to the Magistrate's court because they had more than one child.

It is possible that the customary system will adapt to this situation. It seems generally accepted that a woman who has had two or more children by a man but is not married to him would receive no support from the kgotla. However, some kgotlas felt that they should assist such women and do what was fair in the circumstances. Although some wards said they would assist an unmarried woman with more than one child to obtain support this

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was not observed in practice. It was not the experience of the women interviewed. Two of them were immediately redirected by officials at the Chief's court to the Magistrate's court on learning that there was more than one child involved. The traditional view is supported by a ruling in the Chief's court in a case in 1980 (MO. 44/80). A man had lived with a woman and they had two children. The woman was expecting a third child and came to the court complaining that the man was neglecting her and the children. The court ruled:

"There is no law governing concubinage. Therefore this woman is to report this case to the District Commissioner for maintenance."

This view was reconfirmed in the House of Chiefs. When this research was discussed there in August 1982 Chief Seepapitso of the Bangwaketse in particular was adamant that no assistance should be given to an unmarried woman after the birth of her first child and indicated his amazement that some of the Molepolole wards might even have considered this.

(b) enforcement

The customary system affords a reconciliatory process which aims at consensus. Where there is deadlock and the individuals concerned cannot reach agreement it has no power of compulsion except at the level of the Chief's court, which is in practice reluctant to exercise it in this field. The system therefore supports the status quo. Where social censure fails and some positive action is required it is ill-equipped to provide this. Two unsupported wives, for example, went through the customary system as far as they could go, but when they found that no action was being taken they went to the Magistrate's court. In fact they may gain nothing because the Magistrate's order may not be enforced either, but they perceive the Magistrate's court as an active force. One woman commented:

"I had a feeling going through the Magistrate would make sure that he gave support and that perhaps he would make him pay for their schooling."

Another woman stated that she considered the Magistrate's court

"More competent at dealing with cases of this nature (than the customary system)."

The interpreter explained that when this woman referred to competence she was not only concerned with efficiency, but impartiality. He said that in her situation the man involved was a

powerful and well respected member of the community and that she had been afraid that his position would prejudice the outcome of her case in the customary system.

The customary system's emphasis on reconciliation can be illustrated with the following case. A woman went to the Chief's court complaining that her husband was not supporting her but was living elsewhere with a widow and using their joint property to support the widow. The husband maintained that he lived elsewhere because his wife would not obey him. During the case the Deputy Chief asked: "Do you want this court to reprimand her for the attitude she adopts towards you and leave you free of blame?" The man replied "I do not suggest so. It is for the kgotla to decide whether to reprimand both of us." When asked what she wanted, the woman who had brought the case stated: "According to my feelings I want my husband to stop being in love with the widow woman because by continuing the association the quarrels will never end between us." (Note that she has at this point dropped the emphasis on lack of support.) There had been some suggestion that the dispute might involve a possible divorce but the man said: "I am not intending to divorce her. She is my wife. What I want is that she obeys my orders and does not over-rule everything that I have done." The Court's ruling was that they should go and "live in peace and harmony".

This kind of ruling is common in disputes of this nature. The general tenor of the cases suggest that what the system is really concerned with is the restoration of harmony and a restoration of the relationship. Once that is achieved specific problems such as lack of support can be solved. An award is not generally an end in itself as it is in the Magistrate's court where the range of issues examined and the scope of investigation is narrower. Certain awards can be made within the customary system but the system does not focus on them unless the individual bringing the dispute directs attention to them.

The customary system seems to be used where the issue at stake is that of the parties' relationship with each other or the community in general. For example the woman referred to earlier in this paper who brought her case to the Chief's court after having received a maintenance award from the Magistrate's court did so not only because she was dissatisfied with the man's failure to pay maintenance but also because she wished to make it public that she was terminating her association with him. She was tired of waiting for him to implement his promise of marriage made six years earlier. She wished to take a lump sum payment and publicly declare that she was severing her relationship with him. On the other hand, it is not uncommon for a woman to go to the Magistrate's court, receive a maintenance award and carry

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on living with the father. This does not appear to happen when the customary system is used.

Conclusions

It is striking the extent to which the common law and customary systems are both integral parts of the society and used by its members. The women interviewed used both systems, particularly where several children were involved, when they use the customary system on the birth of the first child and the Magistrate's court thereafter. The two systems are used in such a way that they form part of an overall process starting with the customary system and progressing to the Magistrate's court. This integration is recognised by those administering and using the two systems. Hence the comment by one woman referred to earlier, that if nothing happened she would go to the kgotla because if she went straight to the Magistrate's court she might be referred back to the customary system for a hearing. The Chief's court does refer cases to the Magistrate's court and the Magistrate's court in turn is careful not to usurp the jurisdiction of the Chief's court or the kgotlas.

However, although the customary system is alive and utilised, it is being eroded. This erosion is not due to lack of knowledge of the customary system but to an inability to use it effectively. It is striking that in a rural area such as Molepolole, half the women interviewed went to the Magistrate's court. The factors prompting such action were said to be lack of family support, lack of co-operation on the part of the man involved, the location and mobility of the parties involved and their families and failure of the customary system to meet the needs of the women concerned.

These factors indicate an alteration or change in the traditional social structure. Such change has been documented in the studies previously referred to by Kooijman, Molenaar, Kocken and Uhlenbeck and in the Government of Botswana's National Development Plan. Dependence on a wage economy with the government as a major employer and migration from the village to urban areas or the countryside has had its effect. The role that is played by the family as a focal point within the community is changing. There may still be kgotlas and wards operating as administrative units but they do not have the same family allegiance and cohesion that they had in the past.

These developments have had an impact on the use that is made of the customary system. As the society adapts and alters there is a need for a dispute institution which is in tune with the en-

vironment in which it has to operate, and the customary system as it currently functions is failing to meet this need.

Notes

1. Those interviewed were selected by reference from the community, for example by visiting households, by reference from women who knew of other women in a similar position, or from headmen and wardheads. They included those participating in disputes at the kgotlas, wards, Chief's and Magistrate's court. They do not represent a random sample. Such a sample was impractical because:
 - (i) there is no way of calculating the total number of people using the customary system at kgotla or ward level each year;
 - (ii) it proved impossible to identify and locate individuals from records in the Chief's and Magistrate's court;
 - (iii) members of households were frequently absent and could only be interviewed as and when they were available.

The interviews were carried out with the assistance of an interpreter. They were taped as well as transcribed long-hand. The tapes were used to check the translations from an independent source.

2. Nine months is the duration of a mineworker's contract according to the government's National Development Plan 5. This may be contrasted with the duration of a government employee's contract, which is normally two years.
3. The Mine Labour Organisation is situated in Molepolole. It assists officials in the Magistrate's and Chief's court by arranging for the men to be given leave and sent home if their presence is required by the court. The men can easily be identified because detailed records are kept of all mine-workers and their precise whereabouts in South Africa.

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