

LEGAL PLURALISM IN BOTSWANA

WOMEN'S ACCESS TO LAW

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My paper deals with the topic of legal pluralism in Africa and women's access to law, in the context of research carried out in Botswana, southern Africa, over a number of years (1982-1989). This research was situated in the western region of the country known as Kweneng district, in a village, Molepolole which was estimated to be 20,000 in 1980 (see Botswana 1983), and which has grown until it was reputed in 1992 to have overtaken the Ngwato capital of Serowe as one of the largest villages in Africa.¹ Molepolole, which functions as the central village or headquarters for the Bakwena, who are one of the oldest of the Tswana *merafe* ('tribes' or 'polities'), also serves as a regional headquarters for central and local government. The research focused on family relations and in particular on sexual relationships between women and men. It examined the status of such relationships and how marital or non-marital status affected women's claims on their partners for compensation for pregnancy, maintenance and rights to property in both social and legal terms.

It is from this perspective that my paper raises issues about (1) the role of the urban setting, (2) the gendered environment within which women have to operate (whether urban or rural), and (3) the nature of legal pluralism which moves beyond a definition of pluralism in terms of 'common' or 'customary' law.

¹ In 1981 the enumerated population for the area designated Serowe/Palapye was 92,227 and for the village of Serowe itself, it was 23,661. In comparison the enumerated population for Kweneng district in 1981 was 117,127 and for the village of Molepolole itself, it was 20,565. In 1991 the enumerated population for the area designated as Serowe/Palapye was 128,431 and for Serowe itself it was 30,706, compared with a figure of 169,835 for Kweneng District and a figure of 36,928 for Molepolole itself (Republic of Botswana 1991, Table 2: 8-9).

Situating the Urban

The focus of this special issue of the *Journal of Legal Pluralism* is on the urban setting, but such a focus must derive its context from the broader domain of which it forms part. In Botswana, as in a number of other African countries, links between urban and rural areas form part of family strategies for survival for both women and men. As Kerven (1982: 544) has noted, "Tswana livelihoods are made within the minimal core of the family and the maximal universe of the southern African economy". Families depend on a combination of "crops, cattle and wages" for their existence which "are combined according to a family's class position and stage in the life cycle" (Kerven 1982: 545). Migration forms an integral part of family life and has done ever since the founding of the Bechuanaland Protectorate in 1885. This has continued into the post-independence period from 1966, but the forms have shifted towards a greater degree of internal rather than external migration, due to developments taking place within the country, as well as South African policies now geared to restricting the numbers of external migrants working in South Africa. Within this context the burgeoning urban centres such as the capital city, Gaborone, Francistown and Lobatse have provided a new focus for migration.

Such centres have proved especially attractive to women. In the past the greatest opportunities for migrant labour were at the mines, particularly on the Witwatersrand, and women were excluded from this form of employment. They compensated for this by finding work as agricultural labourers and domestics, but the numbers migrating in the past were never as high as those for men (Schapera 1947: 64). Today greater numbers of women migrate and many of them are to be found in urban settings (Kerven 1979b) because this is where they perceive that they will have the best access to paid employment.² The fact that many are disillusioned in their quest does not prevent them from congregating there. This focus on the urban environment for employment (for both men and women) is something which has caused the government of Botswana concern.³ When I first

² This is something that cropped up frequently in interviews with women over the years, and there is some statistical evidence to support their view (Kerven 1982).

³ This is for a number of reasons that have to do with the inability to meet people's expectations of employment. The numbers who seek employment cannot all be accommodated despite the growth that is taking place, and this encourages crime and participation in illicit activities. It also depletes the rural areas and detracts from their development. For greater detail on this, refer to Republic of Botswana 1985.

started working in Molepolole I was struck by the fact that those who were present were either young children, breastfeeding mothers, the elderly or government officials. Most of the able bodied adult population were conspicuous by their absence.

However this absence, due to migration and contributing towards a concentration in urban centres, only represents a stage in the lifecycle for most people. Maintaining familial ties in rural areas is crucial because they form part of the essential social and economic networks on which people depend throughout their lives. So, where they are physically located at any one time must be understood in the context of this overarching trajectory, with its integration of rural and urban domains. This is important because it informs the power base from which individuals operate, especially women. It is for this reason that I have chosen not to focus my paper on an urban setting as such, but to talk about how it features as part of a set of life strategies relating to the worlds of the peasantariat and salariat. I do this in part in response to the National Migration Survey of 1982 (Republic of Botswana 1982) which was critical of the ways in which academic disciplines (particularly economics) formulated a rural/urban dichotomy.

From the life histories over two generations of those living in Mosotho *kgotla*, which represents one social unit in the village,⁴ a certain pattern in the life cycle is evident.⁵ It is one which is supported by findings elsewhere in Botswana and which involves shifts between the village and other locations. Typically, among the older generation, this involved women helping their mother as children with domestic matters and agricultural activities at the lands which are situated at some distance from the village. Thus migration occurred during the agricultural season but it was only of a temporary nature, and during the rest of the year girls were able to attend primary school in the village. As they became adults the women married, had children and established their own households with their husband's family. Very few among this group of women had experienced formal employment of any kind during their lifetime.

For men, the pattern was somewhat different, because as boys they were sent to herd cattle at the cattle post, which was also distant from the village. They tended

⁴ For a more detailed discussion of the fieldwork and findings see Griffiths (1988).

⁵ These life histories stretch over three generations and cover data kindly given to me by Schapera from his 1937 fieldnotes on the village, as well as my own research in 1984 and 1989.

to stay there most of the year (except when they were required to assist at the lands), so many of them failed to receive the formal education that was available to their sisters. When they came of age, they went away to work as miners at the South African mines and married, leaving their wives to run the household. They remained migrants for most of their adult lives, until they reached middle age, when they returned to the village and focused their attention on livestock and agricultural activities.

In this context most families were dependent on a mix of subsistence agriculture, livestock and cash for their existence. Their environment was such that they were unable to rely on any one source for their livelihood. Agricultural conditions were poor and susceptibility to drought also decimated livestock, while the wages earned were too low to support a family. In any event, South African policies prevented workers from settling there when their contracts terminated. Existence therefore depended on families acting co-operatively and engaging in a range of activities that revolved around the lifecycle. Such activities are interdependent as those working in town, who remit cash back to the rural areas, are dependent on those family members maintaining the base to which they will return in later years. Similarly, those at home are dependent on a cash input to sustain their activities, which is usually derived from migrant labour.

This continues to be the case for many families in Botswana today, although there have been some changes in the generational profile, namely, that more women are experiencing formal employment and engaging in migrant labour than among their mother's generation. Kerven's data (1979b) suggest that the pattern of urban employment alters over time as women prepare for their return to the village. They start in full time employment, for example as domestics. Where possible, after building up a base, they graduate to self-employment in order to have more time and resources to invest in the sphere of livestock/agriculture on which they will focus in middle age. Among the younger generation of men, a higher number are now receiving some form of education and, although the majority continue to have some experience at the mines,⁶ a number are turning to other types of work. But, while employment may take another form, it continues to be intermittent in nature for both sexes, as it derives from contracts which do not provide for security of tenure.

⁶ My Mosotho *kgotla* data reveal a much greater degree of continuing employment at the South African mines, compared with other parts of Botswana. This is because Molepolole is close to the border and adjacent to the main railway that services Johannesburg. However there were signs in 1989 that young school leavers were finding that they could not get jobs at the South African mines and were unsuccessfully looking for employment elsewhere.

This interdependence among family groups, centred round subsistence agriculture, livestock and intermittent employment, gives rise to what Parson (1981) has termed the "peasantariat". They represent the majority of families in Botswana today. However, there is a small group of those who have been able to focus on other activities and to form part of an elite, referred to as the "salariat" (Parson 1981). Their focus on education (often to university level) has enabled them to acquire skilled and stable forms of employment, as bureaucrats or government civil servants, which provide access to a whole range of benefits. Examples of both these types exist in Mosotho *kgotla* through the families of Makokwe and Radipati who are related to one another.⁷

Access to Resources and the Role of Gender

How individuals are situated in terms of the various networks relating to their activities affects both their power to negotiate with others and the forms of discourse that they can employ. This is especially pertinent for women, who find that gender operates to constrain their access to, and control over, resources. Although most women have access to land, their ability to utilise it as an agricultural resource depends on their ability to raise cash to buy the necessary seedlings and other items that are necessary for its maintenance, as well as their ability to mobilise (whether through kin or by hire) the labour necessary for its cultivation. In both these respects women tend to be dependent on men, especially where they form part of the peasantariat, because of the nature of the social system and their poorer prospects of employment compared with those of men.

Within the social system, based on households which form the basis for the political structure of the *kgotla* and customary law, authority is based on age and status. Children defer to adults who acquire greater status with marriage and age. But women do not have comparable authority with that of men and this is underlined by the fact that although they may act as heads of households⁸, they can never qualify

⁷ The men Makokwe and Radipati both share the same father Koosimile who was a polygamist and had Makokwe in the first and Radipati in the third house. For more detailed information see Griffiths (1988).

⁸ Izzard (1985: 264) observes that the majority of women in Botswana will be temporary or permanent female household heads (whether married or unmarried) at some point in their lives. National Development Plan 6, for the years 1985-1991,

for the position of headman of a group of households which form a *kgotla*, the basic unit underpinning the political structure of the *morafe* ('polity' or 'tribe').⁹ At each stage of her life a women falls within the shadow of male authority. When unmarried, it is the authority of her father and her brothers; when married, it is that of her husband; and when widowed or in old age (if never married), it is that of her sons. Material and social circumstances combine to create a situation where it is hardly surprising that it is the households of married men and women that prove the most effective in agricultural production.¹⁰

The agricultural domain is closely allied to that of livestock and here again women find themselves at a disadvantage when it comes to acquiring such stock. This is due, in part, to the laws of succession that favour cattle being handed down from father to sons, referred to as estate cattle. Although daughters can and do acquire some beasts (where such cattle exist), their share is never on a par with that of their brothers, especially their eldest brother who takes over responsibility for the family group on his father's death. Women may inherit livestock from their mother, but a mother's opportunities for acquiring her own beasts tend to be limited, as these can only derive from certain sources of labour. These concern produce from their own (and not their husband's) land, which may be exchanged for livestock, or which may be used to make beer, which in turn is sold to provide the cash for such a purchase. As there is very often little surplus produce, as most of what is grown is required for home consumption and liable to perish during drought years, it is extremely hard to acquire livestock in this way. Acquiring money to purchase them is also difficult for women given the low rates of pay that many of them receive when they are fortunate enough to find employment. Even where such difficulties are overcome, women still have to contend with the reality of male control over such beasts as it is boys and men who run the cattle posts where they are kept.

notes that "women predominate among young adults and as heads of households" (Republic of Botswana 1985: 8). It also comments that "Females head a third of the households in urban areas and half in the rural areas" (Republic of Botswana 1985: 11).

⁹ In the past women have very occasionally acted as regent for the *morafe* but in these unusual circumstances they were seen to be fulfilling a male gender role.

¹⁰ My data and those of others (Kerven 1979a, 1979b) show that it is these households that have the necessary livestock to plough and can thus command the labour of other family members, or who can afford to hire whatever is necessary.

Access to wage employment is one of the most important factors affecting the social and economic position of women in Botswana today (Brown 1983; Kerven 1984: 267). This is because cash, so essential for survival, is less generally available to women for a number of reasons. In the formal sector, certain basic types of employment on which the majority of the male population rely, for example, in the mining and construction industry, are not open to women. Others, particularly those of a more professional nature, require a certain degree of education which limits their availability to both sexes.¹¹ While the minority with the necessary qualifications is now beginning to outnumber the jobs available, women in Botswana generally fall short of these qualifications compared with men, as documented elsewhere (Moore 1988: 104).

Women's lack of higher educational achievement is due to a number of factors. The high level of pregnancy among adolescents means that, once they drop out of school, they find it hard to re-enter the educational system. Lack of money to meet the costs of secondary and tertiary education is also an issue, and a key one, because of the increasing numbers of impoverished female headed households. Those who can afford the costs, on the other hand, may be unwilling to invest in education for women beyond a basic level. Whatever the reason, the kind of employment open to the majority of women is at the level of domestic service or working as barmaids or shop assistants. There is competition for such work, although it is insecure and poorly paid. In this situation women find it hard to negotiate or enforce their terms of service, even where these are laid down by law. Men also have these difficulties but they have more options with regard to potential employment.

The informal sector provides a supplemental or alternative means of raising income on which many women depend (Izzard 1982: 704). It is mainly women who work in this sector but, as studies elsewhere have shown (Moore 1988: 90), such investment in this kind of sector does not guarantee returns, and where it involves illegal activities, such as prostitution, it puts the individuals concerned at risk. Bakwena experience indicates that the returns women receive from this sector are insufficient on their own to provide for capital accumulation or personal enrichment.

Within this context women's access to resources, including the networks of which

¹¹ My own data from Mosotho *kgotla* show that women have a higher degree of education than men in the *kgotla*, but that is because a large number of the older men have no formal schooling at all.

they form part, shapes their power to negotiate in everyday life and within a legal arena. The handling of pregnancy which is an integral part of a woman's life is a fitting example of this, in which social processes provide for negotiations between the relevant families. Discussions centre round the options of marriage or compensation for pregnancy. Ramojaki from Mosotho *kgotla* speaks for many when he comments that when his daughter first became pregnant "we went to see his [the man's] family with a view to compensation or marriage". These options form part of social knowledge which includes the recognition that compensation is not applicable in the case of a second or subsequent pregnancy (Griffiths 1990-1991).

But, despite this general understanding, not all families are in a position to enter into such negotiations. So, the headman of Mosotho *kgotla*'s son, Ramaijo, has children in a relationship with a Kgalagadi woman. Her family did not initiate contact over the first pregnancy, no doubt, because of the low status that many Batswana¹² accord to Bakgalagadi who were their serfs in the past. Given their position they have little power to negotiate, especially as their status often coincides with an extremely vulnerable economic situation.¹³ Under these circumstances it is better to let the relationship take its course, whatever that might be. Similarly, Diane, who represents one of the poorest female headed households associated with the *kgotla*, has had difficulty in entering into negotiations over her five daughters' pregnancies. As one of the poorest unmarried members of the peasantariat, who has had nine children with five different fathers and is without the kind of male support that is crucial within this network, she lacks authority to negotiate.

Legal Negotiations

Where negotiations do take place outcomes vary (Griffiths 1990). However there are situations where these negotiations extend beyond the family domain into a legal arena. So it was that Teko from Mosotho *kgotla* (late 30s) raised an action for compensation in the Chief's *kgotla* in Molepolole (see Griffiths 1990 for a detailed account of this case). Both she and her immediate family form part of a network whose connections revolve round lands/cattle/mining and domestic activities which

¹² The prefix *Ba* indicates the plural within a group in Setswana, which is one of the national languages in Botswana. So when talking about the Tswana, an individual is known as a Motswana and the groups as Batswana.

¹³ For an account of such impoverished circumstances and how this affects the lifecycle among families see Motzafi (1986).

associate them with the peasantariat. Their political links are with those who run the Chief's *kgotla*. Teko's grandfather, Tshitoeng Mere, who appeared with her in the case, was a favourite of the late Chief Kgari Sechele II; he was also a member of the tribal police and sat regularly with the elders in the Chief's *kgotla*. Due to his connections he was registered as the headman of Mosotho *kgotla*, although the late Chief Bonewamang (1971-78) endorsed the claim to the position made by another man, Tshenolo.

Given this background, it is not surprising that the issue of pregnancy was pursued in the Chief's *kgotla*. Teko observed that when her partner failed to support her and the children despite several meetings, she decided to raise a case herself at the Chief's *kgotla*. This was because she was angry and desired some public recognition of wrong: "He deceived me, he told me that he was going to marry me. We were together eight years and then he stopped supporting me and the children".

However, Teko was ultimately unsuccessful in her compensation claim.¹⁴ She found herself caught between conflicting Tswana notions of propriety. Given her background and environment, the Chief's *kgotla* was the natural place for her to bring her action. Living as she does in Molepolole, and given her family's sphere of operations (she has never been formally employed or has never worked in an urban centre), it was the appropriate forum for her to make a public statement about the termination of her relationship, as well as the place for her to seek support. As Ramojaki, also allied to the peasantariat, expressed it: "We Batswana know our procedure and we are inclined to report to Kgosing (Chief's *kgotla*) even although we know we can go to the D.C.'s (Magistrate's) court". Indeed, her grandfather's relationship with those in authority was to her advantage in the second hearing, which was only displaced by the man's insistence on raising an appeal in the Magistrate's Court. However, while one set of factors predisposed her towards the *kgotla*, another set operated against her. These concerned the prevailing view that a woman is not entitled to compensation for seduction after the birth of the first child, particularly where a second partner is involved. The decision in the second hearing to grant compensation was regarded as out of line by the rest of the community and ignored on appeal.

In contrast, two of Radipati's daughters raised actions for maintenance in the Magistrate's court, in the capital city Gaborone, when they decided to take legal

¹⁴ The claim was rejected in the first hearing but referred back to the Chief's *kgotla* for a another hearing by the D.C. She was successful in the second hearing but the man appealed to the Magistrate's court and after that he died and the matter was dropped.

LEGAL PLURALISM IN BOTSWANA
Anne Griffiths

action over pregnancy. Their family history has taken a different form from that of most other members of Mosotho *kgotla*. Unlike his contemporaries, Radipati (who died in 1950) was an educated man who placed great emphasis on his children's education, which his wife Mhudi struggled to provide after his death. As a result his three daughters were educated (at a time when many women only received a nominal education) and acquired formal employment. The eldest unmarried daughter, Goitsemang (aged 52 in 1989) worked as a nurse in South Africa and then in a management capacity for a construction company in Botswana, so that she has been able to build a house in Gaborone. This is something which many people in the village aspire to but are unable to achieve. Her younger unmarried sister Olebogeng has also acquired a plot of land in Gaborone by working for the same company. Radipati's sons were also educated and two of them, most unusually for that time, went on to acquire university degrees. Through their access to education and skilled, stable employment, the family fits the kind of profile associated with the salariat. Among the younger generation a number of women are employed as teachers and court clerks and the men are similarly situated within government employ. The family's activities differ from those associated with a lands/agricultural base and they no longer plough.

When Goitsemang's sisters Salalenna and Olebogeng became pregnant, they were working in Gaborone. In both cases the fathers were not from Molepolole (as in Teko's case) but from Francistown in the north, at the other end of Botswana. In Salalenna's case (aged 50 in 1989) marriage was contemplated but after the birth of the second child she decided against it because "I felt that as a Christian I should not marry someone who drinks". On the advice of her employer, who was a European at that time, and her eldest brother David, she raised a case in the Magistrate's court, and the father was ordered to provide maintenance for the two children, which he did until 1980. In Olebogeng's case (aged 45 in 1989) marriage was never considered. Her brother David met the man several times in Gaborone and he suggested that the matter be dealt with in the Magistrate's court there, "as he was working and did not have the time to come to Molepolole". He also was ordered to provide maintenance and "made two payments but the Senior Magistrate's Clerk stole the money. He disappeared after that and could not be traced".

In both these cases it was not considered appropriate to deal with the matter in the Chief's *kgotla*. Factors influencing this decision concerned the fact that both parties were working in Gaborone (about 70 km from Molepolole) at a time when the road was not tarred. It would also have been difficult to bring all the relevant family members together in the Chief's *kgotla* in Molepolole, given the distances that were involved. In the context of the their environment it made sense for both women to take legal action in the Magistrate's court. It is interesting to note however, that in

discussions with Salalenna, she never considered that the Chief's *kgotla* was an inappropriate forum because she had more than one child.

These women illustrate the differing kinds of circumstances in which legal claims may be raised. They also depict the ways in which an individual's and family's sphere of activities shape their attitudes and their actions. But it is also true to say that people will engage in forum shopping to obtain what they want, so that a claim originally raised in the Chief's *kgotla* may at a later stage be transferred to the Magistrate's court, or the other way round (Griffiths 1984).

The Discourse of Legal Pluralism

In discussing legal action, references were made to the Chief's *kgotla* and the Magistrate's court which form part of the legal system of Botswana. They represent different forums, formally designated as part of the institutional domain associated with customary (in the case of the former) and common (in the latter) law.¹⁵ This raises the question of legal pluralism and how it is to be perceived. Earlier approaches adopted by Hooker (1975) and others favoured a 'dual systems' theory of pluralism. This endorses the concept of separate and autonomous legal systems running parallel to one another and only interacting in limited, prescribed circumstances. This type of pluralism derives from the colonial encounter, where the law of those colonised, which became classified as customary law, was accommodated as one system of law co-existing with another, separate form of legal order.

This paradigm of law is associated with a legal centralist model of law (J. Griffiths 1979; Galanter 1981) and has been greatly contested (J. Griffiths 1986; Allot and Woodman 1985; Merry 1988; Harrington and Yngvesson 1990). My own research contributes to this critique for it demonstrates (A. Griffiths 1990-91) that rules are not self-contained in the sense that they can be said to be immune from what is going on around them, particularly as they take shape from the contexts in which people seek to apply and manipulate them. They do not exist in a vacuum. Just as

¹⁵ Customary law is defined as being "in relation to any particular tribe or tribal community the customary law of that tribe or tribal community so far as it is not incompatible with the provision of any written law or contrary to morality, humanity or natural justice" [Customary Law (application and Ascertainment Act) No 51 (1969) s.2]. Common law is, in contrast, defined as "any law, whether written or unwritten, in force in Botswana, other than customary law" [1969 Act s.2].

LEGAL PLURALISM IN BOTSWANA

Anne Griffiths

legal and social rules have an interactive relationship with one another, so legal rules play off one another and cross the boundaries associated with their domain.

The clearest example of this is provided by the cases involving distribution of property on divorce, which involved the Busangs and the Seitshiro's (see Griffiths 1990-91 for a detailed exposition of these hearings). The rules that apply on divorce are grounded in the different property regimes that give rise to them; this is a separate or community of property regime under common law, and a customary division according to the rules of customary law. The differences between them are underlined through the institutional setting with which they are primarily associated, with the High Court being the forum responsible for the handling of the first two regimes and the Chief's *kgotla* for the application of customary law.

From a legal centralist perspective, and given this framework, the expectation is that a division of property will be dealt with according to the particular property regime that applies in each case, that is in terms of certain rules which are distinguished from certain other rules. In other words, that the law which operates is bounded by the property regime that is to be applied. However, the hearings demonstrate that rules do not behave in this way,¹⁶ or rather that those applying them do not confine their application of rules to the system which gave rise to them or to the institutional setting in which they are applied.

So it was that, although both cases were dealt with in the Chief's *kgotla* according to customary law, both reflected elements of 'common' law in different ways (see Griffiths 1990-91). Even where reference was made, as in the Seitshiro case, to common law and cases in the High Court, it was clear that these cases, based on a community of property regime, incorporated elements of 'customary' law. What is taking place is a process of cross-fertilisation where rules in one system are shaped by and are shaping those in another.

What is crucial to my analysis of legal pluralism is the role of discourse and how this is constructed in ways which transcend institutional boundaries. It is here that networks and the ways in which they situate individuals are of vital importance. In the Busang and Seitshiro cases this was demonstrated by the fact that one woman, Mrs Busang, was limited to a certain form of discourse, while the other, Mrs Seitshiro, was able to draw on another.

¹⁶ See Von Benda-Beckmann (1983) for a critique of the way in which legal norms are conceptualised and the characteristics that are ascribed to their relationship with human behaviour.

Mrs Busang, with her minimal education, lack of formal employment and focus on domestic activities, exemplified the position of a woman within the peasantariat. As such, she was constrained by certain factors which shaped the outcome of the dispute and which she was powerless to overcome. These ranged from marital conduct, assessed in terms of fault, to approaches to inheritance and the relative status of kin relations. Within this context she was trapped by gender, unable to overcome the hurdles surrounding the social construction of fault (where the standards applied to men and women are not the same; for a discussion, see Griffiths 1986, 1990-91), as well as women's restricted rights to property based on the concept of family inheritance.¹⁷ In addition, she was confronted with the fact that her husband was more powerfully connected in terms of kin within the village, than her own relations. He is related to the second branch of the Kwena ruling elite, descended from Motswasele II (1807-21).

Within her world these elements undermined her power to negotiate. Unlike Mrs Seitshiro, she did not have the same resources at her disposal which could be used to bolster her position or manipulate lines of argument within the dispute. As she was only educated to an elementary level she was unable to pursue a career beyond the domestic sphere, except as a cleaner. As her activities centred on domestic affairs she was unable to establish any direct financial contribution to the property except with regard to the money she acquired through knitting jerseys. This was something which the third party hearing the dispute was initially prepared to consider, although he rejected the claim on the basis that the source of her profit had derived from her husband, who had purchased the knitting machine and the wool. Her inability to talk in terms of financial contribution not only reduced the scope of her claim to the assets but also made her vulnerable to discussions of her marital conduct which opened up the whole question of fault.

In contrast, Mrs Seitshiro came from a very different background. Through her education, she was able to pursue a career as a nurse. This has given her social status, particularly in the position as matron of a hospital which she held at the time of the dispute in Molepolole in 1982. It has also taken her into full time and secure employment, guaranteeing her direct access to money. She is one of those people who fall within that privileged group of the 'salarariat'. In this position she was able to acquire assets and to point to the specific contributions that she had made with

¹⁷ The emphasis here is placed on conserving assets to hand on to the children. The father, as head of the household, is regarded as the most appropriate person to do this and thus to retain control over the property. This is especially the case with estate cattle which are handed down by a father to his sons and to which a wife may never lay claim.

LEGAL PLURALISM IN BOTSWANA

Anne Griffiths

these assets to family property. Her life experience provided her with an opportunity to develop another line of argument with respect to her property claims, one which bypassed the notion of fault which so bedeviled the Busang dispute. When asked to outline her claim to property, Mrs Seitshiro was able to talk in terms of the financial contribution that she had made to the assets in question. Indeed the whole focus of the discussion between her and her husband centred on who had provided the money and what assets had been purchased with it. By concentrating on such issues Mrs Seitshiro was able to engage her husband in a debate which centred on material factors and bypassed fault altogether. She engaged in another form of discourse to which the third party hearing the dispute was sympathetic.

Through her sphere of operations she had access to a world that lies beyond the reach of Mrs Busang. She was able to construct a status for herself that was not dependent upon where she featured in a kin network. As a result Mrs Seitshiro was awarded a substantial share of the property, while Mrs Busang received nothing at all. Nonetheless, Mrs Seitshiro was still faced with limitations on her claims due to the structure of relations that exist between family, property and inheritance.

This type of analysis which considers legal pluralism in terms of discourse, not only transcends institutional boundaries but also exposes the problems women face in the legal arena. These difficulties are related to the difficulties they face as social actors, and it is necessary to take full account of this when it comes to examining law and the legal system (Molokomme 1990-91). This is particularly important when considering claims made by common law with respect to equality and neutrality, for what shapes the power and authority of women within social life, also has an impact in the legal domain. A key element here is gender, which operates to situate women and men in different positions with regard to family life, resources, and more generally, within society. While it is true that individual capacities for power and authority vary between and among women as well as men, nonetheless gender cuts across social and economic divisions such as those embodied in the peasantariat and salariat to place women generally at a disadvantage when it comes to negotiating their status with men.

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JOURNAL OF LEGAL PLURALISM
1998 - nr. 42
