

# Gendered Narratives: Botswana Women's Perspectives on Marriage, Law and Property

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## Introduction

This article forms part of a larger research project carried out in Botswana, southern Africa between 1982-1989. This research focused on women's procreative relationships with men and their access to family law in Botswana. It examined the role that marriage plays in the social construction of such relationships and the ways in which marital or non-marital status affect the kind of claims that women pursue with respect to their male partners. Such claims, which include compensation for pregnancy, maintenance and rights to property, concern the allocation of resources among individuals and families.

The position which individuals occupy in their networks of kinship, family and community is a crucial determinant of their ability to gain access to resources, such as money and other forms of property. Such positions form part of the multiple ways in which individuals are inscribed. They have an impact on the narratives or types of discourse that individuals employ in relation to one another and on their power to negotiate with one another. In this context, an understanding of what gives rise to power in Botswana and how it operates is particularly significant for women due to the gendered environment that underpins the operation of social and legal practices.

I conducted my research in the western region of the country known as Kweneng district.<sup>2</sup> It focused on the village of Molepolole which functions as the central village or headquarters for Bakwena, one of the oldest of the *Tswana morafe* or polities. The village also serves as a regional headquarters for central and local government. It is only 70 kilometers from the capital city, Gaborone, to which it is connected by a tarmac road and by daily bus services. The population of the village, which was estimated to be 20,000 in 1980, has grown considerably over the years (Central Statistics Office, 1991, 1992).

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2. This research formed part of a long-standing link between the University of Botswana, Lesotho and Swaziland and Edinburgh University which involved Edinburgh University assisting in the creation of a law department in Botswana in 1981.

## The Household and the *Kgotla*

As with any Tswana village, the organization of Molepolole is structured through administrative units, known as wards and *kgotlas*, which derive from households. It is through households that the political structure of the *morafe* or polity maintains itself. Kwena society, like other Tswana *morafe*, revolves around a tightly organized hierarchy of co-residential administrative units. Their political community is conceived of as a hierarchy of progressively more inclusive co-residential and administrative groupings, beginning with households, and extending through *kgotlas* and family groups, to wards which represent major units of political organization. These are presided over by men. The Chief's *kgotla*, which is the most senior and powerful ward in the *morafe*, represents the apex of the administrative and political structure through which the *kgosi* ("chief") exercises his power. When I began my research in Molepolole in 1982 there were six main wards and seventy three *kgotlas*.

I worked with Mr. Masimega from the village who acted as interpreter. He was an influential person in the village, having been personal secretary to one of the late chiefs and having served on the district council and on important committees such as the Village Development Committee and the Parent Teachers Committee. He was known throughout the village as "Mr. Commonsense" and was in his 70's when I first began my research. This research examined the relationship between common and customary law, not only in formal legal terms but through people's perceptions, knowledge and use of law. It took place in 1982, 1984 and 1989, involved examining court records, attending disputes, discussions with village members and collating the life histories of members of one social unit in the village, Mosotho *kgotla*, covering two generations.

## Property and Resources

When it comes to property and resources in Botswana, Kerven (1982:544) has noted that "Tswana livelihoods are made within the minimal core of the family and the maximal universe of the southern African economy." Families depend upon 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" (Ibid.). Migration forms an integral part of family life and has 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 domestic development, as well as South African policies now geared to restricting the numbers of external migrants working in South Africa. Within this context burgeoning urban centers such as the capital city, Gaborone, Francistown and Lobatse have provided a new focus for migration.

Such centers have proved especially attractive to women. In the past the greatest opportunities for migrant labor 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 laborers and domestics, but the numbers migrating in the past were never as high as those for men (Schapera 1947). Today, greater numbers of women migrate and many of them are to be found in urban settings because this is where they perceive that they will have the best access to paid employment (Kerven 1979a, 1982). 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.<sup>3</sup> When I first started working in Molepolole I was struck by the fact that those who were present were either young children, breast-feeding mothers, the elderly or government officials. Most of the adult population were conspicuous by their absence.

However, this absence, due to migration and contributing towards a concentration in urban centers, only represents a stage in the life cycle 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 over-arching trajectory, with its integration of rural and urban domains. This is something which earlier research on households and families tended to ignore and which the National Migration Survey of 1982 was critical of in relation to the rural/urban dichotomy that many academic disciplines adhered to (especially economics) in their studies. But acknowledging these links is important because it informs the power base from which individuals operate, particularly women.

From the life histories over two generations of those living in Mosotho *kgotla*, which represents one social unit in the village,<sup>4</sup> a certain pattern in the life cycle is evident.<sup>5</sup> It is one which is supported by findings elsewhere in Botswana and which involves shifts between the village and other locations. 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 life cycle. 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 labor.

This interdependence among family groups, centered around subsistence agriculture, livestock and intermittent employment, gives rise to what Parson (1981:236-255) has termed the

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3. This is for a number of reasons that have to do with the inability to meet people's expectations of government. 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, see Central Statistics Office, *National Development Plan (NDP6) 1985-1991*.
  4. For a more detailed discussion of the fieldwork and findings, see Griffiths, "Support Among the Bakwena," 1988, pp. 289-316.
  5. These life histories stretch over three generations and cover data kindly given to me by Schapera from his 1937 field notes on the village, as well as my own research in 1984 and 1989.

peasantariat. They represent the majority of families in Botswana today. However, there are 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. 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.<sup>6</sup>

### 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 utilize 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. It also depends upon their ability to mobilize the labor necessary for its cultivation (whether through kin or by hire). 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 households,<sup>7</sup> they can never qualify for the position of headman of a group of households which form a *kgotla*, the basic unit underpinning the political structure of the *morafe*.<sup>8</sup> At each stage of her life a woman 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 the households of married men and women that prove the most effective in agricultural production as they have a greater command over the resources required for such production compared with others, such as female-headed households.<sup>9</sup>

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6. The men Makokwe and Radipati share the same father Koosimile, who was a polygamist and had Makokwe in the first and Radipati in the third house. For a more detailed account, see Griffiths, op. cit. 1988.

7. Izzard 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 (1985:258-279). The *National Development Plan* for the years 1985-1991 notes that "women predominate among young adults and as heads of households" (1985:8). It also comments that: "Females head a third of the households in urban areas and half in the rural areas" (11).

8. 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.

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 favor 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 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 labor. 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 it 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.

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). 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. Other jobs, particularly those of a more professional nature, require a certain degree of education which limits their availability to both sexes.<sup>10</sup> While the minority with the necessary qualifications are now beginning to outnumber the jobs available, women in Botswana generally fall short of these qualifications compared with men, as documented elsewhere (Moore 1988).

Women's lack of higher educational achievement is due to a number of factors. The high level of pregnancy among adolescents means that, once a young mother drops out of school she finds 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, for 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 which 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.

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<sup>9</sup> My data and that of others (see, for example, C. Kerven, 1979a, 1979b) shows that it is these households that have the necessary livestock to plow. They can thus, command the labor of other family members, or afford to hire whatever is necessary.

<sup>10</sup> My own data from Mosotho *kgotla* shows 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.

The informal sector provides a supplemental or alternative means of raising income on which many women depend (Izzard 1982). It is mainly women who work in this sector but, as studies elsewhere have shown, such investment in this kind of sector does not guarantee returns and where it involves illegal activities, such as prostitution, 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.

### Access to Credit

Steps have been taken to assist women to participate in the economic mainstream by providing access to credit through the Women's Finance House (WFH) Botswana, known as Thusang Basadi. This represents a non-government, non-profit organization which is affiliated to the Women's World Bank. The organization targets women in rural or peri-urban communities, as it is these women who are perceived as having the most difficulty in gaining access to credit. It provides training and a savings program for women who are interested in starting, or are already running, a small-scale enterprise or business. However there are legal impediments to the operation of this scheme where married women are concerned. Those women who married in community of property are not legally entitled to obtain credit from banks on an individual basis but must have the consent and support of their husbands. For the moment the WFH is ignoring the law on this issue.

### Differentially Situated Social Networks

While many women do not have marital status in Botswana, it is important to note the social contexts in which marriage occurs and the implications that this has for women, both married and unmarried. For the peasantariat, who represent a substantial proportion of the population in Botswana, marriage may still play an important role in providing access to the broader networks of supra-household management and cooperation on which they rely for their subsistence. This is the case with Makokwe's family from Mosotho *kgotla* where there has been a relatively high rate of kin marriage among members of the older generation (ranging from 50-90 years old) and whose access to land has been acquired through their wives' maternal relatives, a relatively unusual occurrence.

In contrast, among the salariat there has been a tendency to limit the recognition of kin in order to circumscribe the obligations that adhere to these relationships (Kocken and Uhlenbeck 1980). It is also among this group that women more frequently express negative views on marriage.

Membership of different networks has implications for women, and for their power to negotiate sexual relationships, not only at the level of choice regarding marital or non-marital status, but also with regard to the terms on which a procreative relationship takes place. Others elsewhere have commented on a growing tendency on the part of women to choose not to marry (Obbo 1980; Allison 1985). What are the conditions under which such options can be exercised?

Women within the peasantariat find their choices mediated through their position in relation to male networks and structures of authority which provide the mainstay for their

existence. So, for example, through male sibling support, some women find themselves with the power of choice which is not available to other women who lack access to this type of network. This gives rise to a situation where those with choices may opt not to marry, while those without access to the conditions under which such choice becomes available, still seek to marry but often in vain.

Within Mosotho *kgotla*, Olebeng, who is Makokwe's youngest child and only daughter, has had several children (who have all died) with different fathers. She has five adult brothers who have all married and had children. In her case, however, neither she nor her family have had any interest in marriage. Among women within this group she is relatively well supported by her siblings who have given her control of the natal household and who plow for her and provide her with food and cash when they can. Other women from the same background are not so fortunate. For example, Diane, who is of the same generation and roughly the same age as Olebeng, has not only been abandoned by her brothers but has had the land given to her by her mother expropriated by them. Without access to her brothers' network she has found herself in a position where she has had to rely on a series of male partners for support, in relationships such as that of *bonyatsi* (concubinage), that are definitely outside the scope of marriage. By 1989 she had nine children by five different fathers. As one of the poorest female-headed households associated with the *kgotla*, she has lacked the authority to enter into negotiations for compensation over her five adolescent daughters' pregnancies. Nonetheless she continues to express the view that "It is natural with Batswana to marry. A woman must marry."

In contrast, women associated with the salariat, who are not so reliant on these male networks, find themselves with a greater degree of power and control over the choices that are open to them. Goitsewang is just such a woman. Despite the fact that her father Radipati was Makokwe's half brother,<sup>11</sup> Radipati's family have experienced very different life trajectories. 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, Goitsewang (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 plow.

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<sup>11</sup>. As their father Koosimile was a polygamist, they shared the same father, but had different mothers. Makokwe was the son in the first house, while Radipati was his son in the third house.

Within this family group Goitsemanang has had children with two different fathers. But unlike her contemporary, Diane, her relationships had the potential for a customary marriage from which she withdrew. In the first case, because of the man's behavior, and in the second case, because her family as Christians did not want her to become a second wife in a polygamous marriage under customary law. Her perspective on marriage now is that "marriage just brings quarrels. I just want to be looked after by my children."

All three women, Olebeng, Diane and Goitsemanang fall within the same generation and age group, yet their living conditions vary considerably. Taking account of the specificity of their lives is important for government planning and policy development related to "female headed households" (Central Statistics Office 1982:11) has been the subject of great controversy surrounding the definition and basis upon which such households as a group should be the recipient of government aid (Kocken and Uhlenbeck 1980; Peters 1983; Kerven 1984).<sup>12</sup>

Under these conditions, the life histories demonstrate that women's access to resources is heavily dependent upon the type of network to which they belong. So, women within the peasantry, who operate within the matrix of domestic, agricultural and unskilled labor, find themselves heavily reliant upon the male networks and structures of authority which provide the mainstay for their existence. While their contributions in terms of labor and reproduction play an important role in sustaining such a network, they are not invested with the same degree of power and authority as are those of men. Women, associated with the salariat, however, who have stable employment and who focus less on the agricultural domain, place less reliance on the type of network that women within the peasantry most depend on and so experience a greater degree of independence from men. Not only that, but some of these women have been able to reshape the normative considerations that pertain to women's dealings with men within a familial context. This is so not only in social but also in legal contexts to which I would now like to turn.

### The Discourse of Legal Pluralism

On acquiring Independence in 1966 Botswana inherited a legal system that incorporated common and customary law.<sup>13</sup> Common law is, in contrast, defined as "any law, whether written or unwritten, in force in Botswana, other than customary law" (Republic of Botswana 1969:2). In contrast, 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" (ibid.). In applying this law, the institutional domains associated with common law are the Magistrates and High Courts. Whereas it is the *kgotla* system headed by the Chief's *kgotla* which deals with customary law.

This raises the question of legal pluralism and how it is to be perceived. Earlier approaches adopted by Hooker (1975) favored a "dual systems" theory of pluralism. This endorsed the concept of separate and autonomous legal systems running parallel to one another

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<sup>12</sup>. This is because those female-headed households where the wives are left in charge while their husbands work elsewhere as migrant laborers are among the best-resourced among the peasantry.



and only interacting in limited, prescribed circumstances. This type of pluralism derives from the colonial encounter, where the law of those colonized, which became classified as customary law, was accommodated as one system of law co-existing with another, separate form of legal order known as common law, which was to govern the colonizers and regulate colonial interests.

This paradigm of law is associated with a legal centralist model of law (Griffiths 1979, 1986; Galanter 1981) and has been greatly contested (Abel 1983; Allot and Woodman 1985; Fitzpatrick 1992; Griffiths 1986; Harrington and Yngvesson 1990; Merry 1988; Roberts 1979; Snyder 1981). My own research contributes to this critique, for it demonstrates that the normative rules of the centralist model are not self-contained in the sense that they can be said to be immune from what is going on around them. They are shaped by the contexts in which people seek to apply and manipulate them (Griffiths 1990). They do not exist in a vacuum. Just as 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 best example of this is provided by the cases involving distribution of property on divorce, which involved the Busangs and the Seitshiros.<sup>14</sup> The rules that apply to divorce are grounded in the different property regimes that give rise to them; this is either a separate or a community of property regime under common law, and a customary division according to the rules of customary law. Basically, under a community of property regime, the property of both spouses (including debts) is held in common and is divided equally among both on divorce. Under a separate property regime, however, each spouse retains individual ownership of the property that he or she brings into the marriage, subject to the High Court's power to award one or other spouse a certain capital sum and or periodical payment such as a maintenance, on divorce. The differences between common and customary law 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.

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13. From 1885 until 1996, when it acquired its independence, Botswana was known as the Bechuanaland Protectorate and was subject to British overrule. During the Protectorate, the common law was derived from the Roman-Dutch system operating in the Cape, which is now part of South Africa (Aguda 1973). This form of law had its roots in the Continental assimilation of Roman law at the time of its reception in Europe in the late medieval and early modern periods (Hahlo and Kahn 1970). However, since the Cape was a British colony at the time of the Protectorate, some academics have suggested that because of the influence of English law principles in the 1800's, the term 'Cape colonial law' is more appropriate for designating this body of law. While operative today in Botswana, Roman-Dutch law forms part of the common law together with legislation passed by the National Assembly. For a European lawyer, this provides an unusual definition of common law, one that includes statutory provisions. Such a definition, however, is used to set up and distinguish common from customary law in Botswana.

14. For a detailed exposition of these hearings, see A. Griffiths, 1986, 1990.

Given this framework, from a legal centralist perspective 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. But this type of analysis cannot be sustained in practice as the following two divorce cases demonstrate. These cases which were referred to the Chief's *kgotla*, concerned a Mr. and Mrs. Busang and a Mr. and Mrs. Seitshiro. In both cases the parties were divorced in the High Court but the matter had been referred to the Chief's *kgotla* for distribution of property. Both couples had property which included bank savings, livestock, huts, agricultural land, houses in the capital city and businesses.

These two divorce hearings demonstrate that rules do not behave as outlined above,<sup>15</sup> 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 (Griffiths 1990). 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-fertilization 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 it 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.

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) (Griffiths 1986, 1990), as well as women's restricted rights to property based on the concept of family inheritance.<sup>16</sup> In addition, she was confronted with the fact that her husband was more powerfully connected in

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<sup>15</sup> See von Benda-Beckmann (1983) for a critique of the way in which legal norms are conceptualized and the characteristics that are ascribed to their relationship with human behavior.

<sup>16</sup> 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.

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 resources at her disposal 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 centered 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, Mr. Sebele, 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 her 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, the salariat. In this position she was able to acquire assets and to point to the specific contributions that she had made with 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 centered 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 centered 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 those 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). What is key is the focus on points of connection between social and legal domains and on their mutually constitutive nature. While legal centralists find no incompatibility between identifying law in formal terms and acknowledging the social sources of its content, their focus remains firmly on the former. This is significant because the social basis upon which law operates is largely ignored. But incorporating an understanding of the social basis upon which law operates

is crucial when it comes to assessing the relationship that exists between a formal legal system and people's access to law. Understanding the nature of these multiple links or connections makes visible features that are otherwise overlooked in a legal centralist account of law. This is because the way in which the centralist paradigm defines its boundaries limits what counts as law along with the context in which law is located. So it is that approaches to law in terms of what Franz von Benda-Beckmann (1989) calls legal rather than social science remain at odds with one another in producing very different accounts of law.

But Kwena ethnography demonstrates that the social contexts within which law is embedded cannot be ignored. They are crucial to an understanding of who has access to law and under what conditions. Not only that, but they also foreground those that are excluded and the factors that give rise to their exclusion. The issue of exclusion is an important one, for in considering access to law it is insufficient to focus on the formal legal rules that govern the situation (as a centrist would do) and draw deductions from this information alone (Allot and Woodman 1985). Among Bakwena, it is clear that social considerations operate to control access to a legal hearing, so that officials may, for example, deny a person access to a legal forum if they consider that the appropriate social channels for dealing with the matter, such as family or *kgotla* consultations, have been ignored or not yet exhausted.

### Challenging Silence

Taking account of this type of consideration is important, for it highlights what would otherwise remain hidden from view under a centralist model. In such a model it is only what features in a legal forum (and not what is excluded) that is the subject of investigation. But failure to take account of such exclusions is important, for as my study demonstrates, women regularly find themselves excluded from the legal domain for a whole range of reasons many of which derive from social constraints. Such constraints arise from the gendered nature of the world in which they live. So, even where women have access to law, they may opt not to take legal action, not because they are ignorant of the law, but because other factors come into play. This is in keeping with research findings elsewhere in Africa (Hasare 1993a, 1993b). Thus, understanding what underlies the basis for action, or lack of action, is important for it presents a more accurate reflection of the role that law plays in upholding power and authority with respect to different interest groups within a community.

My study highlights the ways in which the difficulties that women face in the legal arena are related to those they face as social actors. In making explicit the connections that exist between the two, it contributes to feminist scholarship on law which reinforces the exploration of relationships between knowledge and power and between legal status and social context (Smart 1989; Petersen 1992; Pateman 1988). This is important, for as scholars elsewhere have observed of western style law, the basic tenets of legal ideology are at odds with the gendered lives of women which the legal system ignores (Fineman and Thomadsen 1991; MacKinnon 1983). When it comes to considering the issue of legal rights and the claims made by western style law with respect to equality and neutrality, what shapes the power and authority of women within social life also has an impact in the legal domain (Boyd 1989; Okin 1989). In a southern African context, where the spotlight is currently on women and their relationship with law, it is important to bear this in mind. There has been to date, a tendency to assume that common law

is superior to and more progressive than customary law when it comes to dealing with the issue of women's legal rights.<sup>17</sup> But the basis upon which this perspective is based often fails to be informed by research on the ground. Instead, it is based on assumptions about law which derive from the old or classic accounts of legal pluralism which adhere to a legal centralist paradigm of law.<sup>18</sup>

This is important because although the centralist model of law has been greatly contested and cannot be sustained in reality, its image continues to exercise power and authority in our thinking about law at an ideological level (Fitzpatrick 1992). As Channock (1989) and Woodman (1989) observe more generally in the case of family law in Africa, inadequate analyses of customary law and pluralism derived from this paradigmatic way of thinking not only continue to dominate legal narratives, but also lead to misinformed approaches to law reform. As legal institutions continue to provide the focus for such reforms, it is essential that their role should be more rigorously evaluated. It is just such a task that is currently being undertaken in South Africa, where in the light of reframing the constitution, issues of law and justice and the role of the People's courts are being reformulated. Failure to take the social underpinnings of law into account when engaging in law reform not only renders it less effective but leads to unintended consequences, as those African states that attempted to use law as a tool of social engineering in the newly independent colonies discovered (Falk Moore 1979). Such failure often produces the wrong scapegoat when it comes to assessing the role that local law plays within a development context (von Benda-Beckmann 1989).

### Reassessing Legal Pluralism

In my study I have highlighted the shortcomings of analyzing current legal practices in Botswana in terms of an old style of legal pluralism associated with legal centralism. But this is not to say that pluralism does not exist, rather that the ways in which it is perceived and located need to be reconceived. In my discussion of the differing forms of normative ordering that shape people's access to and experience of family law, I have moved beyond the confines of formal legal institutions (whether defined "common" or "customary") to take account of the other bodies and agencies which construct social relations and which underpin and regulate the family in everyday life. For it is at this level that the normative frameworks which empower individuals to pursue claims with respect to one another, or conversely, deny them that power, are created. How individuals are situated in terms of networks concerning kinship, family and community, and the features which affect their position within material and symbolic hierarchies, including whether or not they are members of the peasantry or salariat, and their gender, inscribes their ability to negotiate. A knowledge of the processes that give rise to the normative frameworks

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<sup>17</sup> So, for example, polygamy was banned in Mozambique.

<sup>18</sup> In the case of Mozambique, women opposed and indeed ignored the ban on polygamy, especially in rural areas. They argued that, due to the male death rate in the recent civil war, it was necessary to retain polygamy in order to maintain an equitable distribution of resources among women. For, in their system, those without husbands would be placed at a severe disadvantage in acquiring access to those networks which are essential for survival.

that situate individuals as actors is essential if we are to acquire an accurate and informed understanding of the ways in which such individuals encounter law and are integrated within, or set apart from, the formal legal system. In this way the study of pluralism is not just confined to the study of formal legal texts, institutions and alternative forums for dispute processing. By engaging in this form of analysis a more sophisticated account of legal process becomes possible. This is one which provides for an understanding of concurrence and difference both within and between social domains, as well as their relationship with law and the circumstances which may give rise to change. It is only in this way that we can achieve a truly integrated social perspective on law, one which gives recognition to all those voices that are currently excluded from legal discourse.

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