

INTRODUCTION

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The papers which follow reflect the contribution of the participants on the panels devoted to the socio-legal position of women at the 5th symposium of the Commission on Folk Law and Legal Pluralism, held in Zagreb, Yugoslavia, in July 1988. The papers were arranged by the symposium organizers under four themes: the socio-legal position of women, disputing and courts, legal regulations and planned development, and socio-economic development in historical perspective. In discussions following the panels and concerning this special issue of the *Journal*, it was decided that an emphasis on social change and what this means for the legal rights of women should provide the framework for the issue.

This collection of papers is an interesting and wide-ranging one which examines women's roles, rights and struggles in a variety of contexts, primarily those of folk or customary law, development and the dominant legal systems. The papers identify many contrasts and contradictions and, especially taken together, suggest a time of considerable flux and change for women.

The contradictions are perhaps most evident when comparing 'customary' and 'European' law. For example, in Canada there is considerable agitation and pressure from aboriginal groups and organizations (particularly those with political mandates) for a return to customary or traditional law as a way of dealing more effectively with a range of social control and dispute resolution problems and needs. However, some of the papers in this volume, notably the contribution of Anne Griffiths, reveal that the retention of customary law does not necessarily protect the rights of women and that economic and/or social power are the most important

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variables in both customary and dominant systems of law. Moreover, the relinquishing of a woman's legal entitlement by proceeding customarily may further reduce her ability to realize her due.

This introduction will provide an overview of the subject matter so as to make explicit some linkages between and themes developed in the articles which follow. These will be grouped under three headings: a) the socio-legal position of women; b) development and women; and c) the legal rights of women. Clearly these are not discrete categories but enjoy considerable overlap.

The Socio-Legal Position of Women

Perhaps the most poignant reminder that official statements of women's elevated and honored socio-legal position may be little more than rhetoric is provided by Adinkrah in his analysis of women's rights in Swazi society. This is perhaps also the most appropriate place to begin looking at women's roles in a variety of contexts, because rhetoric and reality are often very different particularly when a loss or readjustment in political and/or economic power for the dominant group is the issue. Adinkrah shows how the repeated claim that women have the inherent right to "influence all the major decisions in the family" (p. 12) is little more than rhetoric. In reality:

For all practical purposes she is a minor from cradle to grave. As an infant she is under the guardianship of her father and this right over her passes to her husband upon marriage. Upon divorce it reverts again to her father or the father's heirs where he is deceased. (p. 16)

The same theme emerges in Baerends' discussion of women's rights under Anufo customary law. In addition, she notes the danger of unwritten customary laws rendering women's rights invisible because of the male bias in Anufo ideology, which is reflected in rule-making. Because there is general acceptance of women having certain rights, the need to have these explicitly formulated is easily overlooked. Such lack of explicitness can lead to the loss of rights or to a situation where they are conveniently minimized.

One of the most interesting aspects of Baerends work is her description of the adaptations women make where their rights are not formalized but where broad social changes are exerting certain pressures and tensions to challenge the status quo. This point is most graphically presented in the area of arranged marriages, where

innovative ways of escaping from unwanted unions are commonplace, but where women's behaviour is generally considered irresponsible (reflecting perhaps the formal denial of women's rights because in Anufo ideology, women are not considered to be responsible enough to participate in marriage exchange). In reality, through their own ingenuity and networks, women are very much involved in marriage exchange through a variety of strategies to influence the outcome.

The customary dispute resolution system among the Anufo, the chief's court, is rarely used by women for marital conflicts because of its ingrained bias in support of men's power and authority. However, a reflection of changing Anufo society is the emergence of the state court which at least offers women the possibility of obtaining divorce or resisting a marriage arranged without consent.

Finally, Agorsah in his examination of the role of women in traditional politics reveals some of the basis for much of the contemporary situation of discrimination against women. His research on role differentiation shows that, while exceptions exist, in most African countries women were traditionally considered to have biological and emotional differences which rendered them less suitable for certain activities such as politics. And again, like Adinkrah and to a lesser extent Baerends, Agorsah's analysis shows the gap between rhetoric and reality: women are often supposed to enjoy certain power and prestige but this may be symbolic at best.

Development and Women

Von Benda-Beckmann analyses the central issue of the role of law in development and the impact of development on the socio-legal position of Indonesian women. She notes that law is a subject largely excluded from development studies, which have traditionally focussed on political, economic and social factors. In looking at the role of law, Von Benda-Beckmann considers its potential for diminishing or enhancing gender-skewing in Third World countries, noting that many of these countries were colonized and that "colonial administration was one of the first and certainly the largest development project ever launched" (p. 94).

According to Von Benda-Beckmann, there are three ways in which law may cause gender-skewing in development. At the conceptual and normative level, all societies subjugated by colonial powers had rules, concepts, propositions which directed people's activities and relationships. The question this raises in the development context is

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whether the imposition of western law has put women in a more or less favorable position. At the organizational level, gender-skewing can also be caused by the institutions that apply law, such as courts, government administratiuons, police, and traditional or religious institutions of various types. How these institutions operate as a result of development so as to enhance or distort the position of women is the critical question. It is, however, at the level of the actual use of norms, concepts, procedures and of institutions that the real story is to be found. Even if formally granted certain legal privileges, women may be treated differently in actual practice.

In looking specifically at the situation in Indonesia, Von Benda-Beckmann shows how development projects entail important legal institutions and how governing by way of projects has become an important characteristic of Indonesian provincial and local government. Her research also reveals that many development projects are based "on the implicit assumption that men are the head of the household, the provider of the family and, if there is a family enterprise, the head and owner of this enterprise" (p.106). Only when enterprises use exclusively female labour are women chosen for participation in development projects. In addition, all the information that project workers get about the needs of target populations, working and legal relationships etc. are mediated through men. In essence, according to von Benda Beckmann, brokerage in development projects is an almost exclusive male business and women are losing ground because of it.

Fiske examines women's role in development from a much narrower perspective. Her account of the case of the Carrier women's political strategies to act as power brokers in the distribution of resources from the state to the community is fascinating. She describes the contemporary situation in the 'servicing' of Canadian aboriginal reserve communities by the federal government and its effect on women's organizations as follows: First, the native community is bound to state authority by the practices of welfare colonialism, which subjects community management to the extraordinary, discretionary authority of the Department of Indian and Northern Affairs. Second, the political limitations women face are exacerbated ty the process of local-level politics. Third, while Indian politics is a parapolitical sub-system encapsulated by state authority, voluntary associations are themselves further encapsulated by the apparatus of the band council and its administration.

Through the vehicle of a voluntary association, some Carrier women have nevertheless created a special sphere of influence for themselves

in the community political arena by criticizing the ways in which funds were being distributed by the male elected council. While these criticisms were based on their traditional responsibilities as providers and care-givers, their roles expanded to those of decision-makers and distributors of resources. The primary challenge to this group came from competing women's factions and these challenges, in addition to challenges for band council leadership from their own members, threatened to divide women against women.

The contributions outlined above have raised some critical issues in the area of women and development. Not the least of these is the vulnerability of women to processes which are fundamentally economic in nature and, implicitly or explicitly, dominated by men. In the context of economic change, women are put into a position of having to struggle for security, requiring the identification and maintenance of their rights with few clearly defined parameters or powers.

Legal Rights of Women

It is perhaps significant, at least for the purposes of *JLP* and for the Commission on Folk Law and Legal Pluralism, that the majority of papers fall within the area of legal rights of women. These are arbitrary categories however, and the distinctions between development and socio-legal positions and legal rights are largely artificial. This will become clearer as we pursue the subject matter in the last section of this issue.

Steinbrich's article on the social and legal position of women among the Lyela reveals some of the connections between the topics outlined in the foregoing paragraph. Her analysis of the increasing conflict between traditional marriage customs and contemporary Lyela society, explains the genesis of the conflict in terms of the dual forces of colonization and Christianity. The impact of these forces on rural life and traditional structures has been considerable in the Lyela region in general, and has placed women in particular in a situation of real flux and potential upheaval.

In the Lyela region, women have gained a form of emancipation as a result of two factors. First, the migration of men to urban areas in search of employment; and second, the demise of the power of elders and of the 'Earth Cult' - the main pillars of traditional society - through the increasing influence of the Christian church. However, the women of the region are still without education and

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employment so only time will reveal what this emancipation really means, particularly to those women who migrate to urban areas. What the legal rights of these women will be in this restructured society will depend very much on the kinds of power they can garner in the process of adaptation.

Where rights are actually part of reform, as is the case in Peru, there is no certainty that they will be honored. Huber's description of the effects of land reform in Peru on women's inheritance shows the chasm between what is written in law and what happens in reality. The contradictions are such that it is difficult to determine the exact effects of the reform. In order to understand the outcome of the Peruvian land reform she discusses three factors: women's involvement in agriculture and other production, the ideology and methods of the bureaucracy that is responsible for implementing the legislation, and the legislation itself. In attempting a balanced assessment of the effects of land reform on the rights of women (something which has not normally been done by other writers on the subject) she concludes that the reform has had a negative effect on women in their negotiations for inheritance rights.

The articles by Griffiths, Wanitzek, and Dascalopoulos-Capetanakis provide descriptive examples of women's struggles to have their marriage rights recognized in what are essentially male-dominated settings, whether contemporary or traditional.

Griffiths' examination of the status of women in Kwena family disputes in Botswana is particularly revealing in its account of the relationship between customary and 'European' law in dispute settlement. Using two case studies, she shows that in Kwena society it makes little difference which system of norms - 'customary' or 'common law' - women invoke in connection with the division of family property in connection with marriage breakdown. If a woman is without independent economic power she will gain little or nothing.

In looking at the situation of women petitioners in the lower courts of Tanzania, Wanitzek shows how informal mediation and arbitration institutions are generally sympathetic to the traditional dominance of men. Therefore, they are unpopular with women as forums in which to claim their rights. The dilemma for women is that the state courts, which should be more reliable in providing protection to women's rights, are in fact not much better than the traditional institutions. Thus, women are reluctant to go to court because they are economically dependent on husbands and/or pessimistic about the treatment they will receive.

Dascalopoulos-Capetanakis analyses the legal and social dimensions of property rights accorded to women in conformity with the rules of customary law and local practice prevalent in two different regions in Greece in the late 19th and early 20th centuries. She finds that even though both legal principles and customary principles appeared to ensure women's rights, in actual practice the property rights a woman acquired through dowry were without much substance because she was not allowed to exercise her rights to property.

As is the case in so many of the other papers in this collection, Dascalopoulos-Capetanakis shows how women were subjected to the decisions and control of men when attempting to exercise their 'rights'. Unlike Kwena society, however, where economic independence can affect legal outcome in family disputes, it is not clear that either economic or social status protected women's rights in Greece.

The three papers just discussed are perhaps most important in pointing to the similarities in the way women's rights are treated at different times and places and in very different cultural contexts, when women use courts (whether state or customary) to effectuate their marital property rights. Although women are dependent on courts to uphold and protect their rights, what actually happens in this regard is not encouraging nor does the immediate future bode well. When there are attempts at reform, such as Molokomme describes in the case of Botswana, there is a great distance to go in making these a reality for the majority of women, particularly those living in traditional cultures and/or in developing societies.

There are other lessons to be learned from the papers in this issue with respect to those groups of women - such as aboriginal women in Canada - who look to a return to customary or traditional systems as a way of more effectively exercising their rights. It is often tempting to look to tradition as a solution to problems with the contemporary legal system but from what authors such as Griffiths and Wanitzek point out, the traditional systems may not provide the kind of protection and affirmation of rights that women are seeking.

It is appropriate that the volume should end with a discussion of family law reform: Molokomme's discussion of and recommendations for family law reform in Botswana. According to Molokomme, any law reform must reflect social reality in a constantly changing society and, perhaps most importantly, must reflect the wishes and needs of the group to which the reforms are directed. In Botswana, for example, there has been a rapid increase in the number of single

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women with children setting up their own households and law reform must take this group into account.

In Molokomme's view, deriving from her fieldwork experiences in Botswana, there are a number of requirements which should be met when drafting and implementing legislation and when disseminating information about law reform. These include research into the nature and scope of the problem, a recognition of the importance of customary law in people's lives, the proper functioning of the institutions designed to implement and enforce the legislation, adequate dissemination of information about the law, and a legal aid scheme to complement the implementation of the legislation.

While it is appropriate to conclude the issue on an optimistic note with a paper on law reform it is critical that we keep in mind that for many women in many societies, law reform is a far-off dream; the daily struggle for even the most basic recognition of rights is the reality. We hope that this special issue of the *Journal* has made a contribution to exploring that reality and that researchers will continue to investigate its various dimensions.