

DISSEMINATING FAMILY LAW REFORMS:

SOME LESSONS FROM BOTSWANA

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1. The need for dissemination of law

One of the ironies of the law is that while it everywhere presumes knowledge of its provisions, it is precisely in that area that citizens are most ignorant. Members of small, closely-knit and self-sufficient communities may require less information about the law, since it is based on their way of life and closely linked to their social reality. This is true of most traditional societies, such as those which existed prior to the colonisation of Africa. In such societies, members are socialised into occupying defined roles, and their rights and obligations ingrained into them at an early stage in their lives. The enforcement of these rights and obligations depends upon a certain pattern of living and mode of production, as well as on a certain attitude towards one's relatives and the community at large.

In many parts of the world, this kind of society is a thing of the past, and even in the countries of the so called third world, the rapid changes brought about by colonisation and urbanisation have undermined family and community cohesion. Changes in lifestyle occasioned by rural-urban migration, for example, make the enforcement of familial obligations and crisis-solution at best difficult or at

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worst, impossible. The majority of victims in this situation are women, children and the elderly, who are left in impoverished rural areas while the men go out to find work. Some of them neglect supporting their families both materially and emotionally, thus bringing much tension into family relationships.

Faced with these circumstances, many African states have responded with law reform programmes, aimed either at filling in the gaps by strengthening existing legal remedies or at introducing new ones. More ambitious programmes have sought to use law reform to effect changes in social attitudes. Used to achieve either end, law reform has proved a difficult and insufficient tool, due to a variety of reasons. In his pioneering work *The Limits of Law* (1980), Allott identifies four weaknesses of the legal system which may lead to the failure of legal reforms. These are, first of all, failures in the communication system. Second, the norms and institutions themselves may be inappropriate because of their character, expression, the way they fit with others, or simply because they are out of step with the social context. Third, law reforms may fail at the stage of application and implementation. And fourth, there may be a failure in monitoring and scrutinising them.

While these observations are applicable to most parts of the world, the problems assume larger proportions in post-colonial societies, where a multiplicity of traditional personal laws operate side by side with those received during the colonial period. Traditional personal laws are not always affected by state reform programmes, and even where they are, their relationship with the state law is not always made clear, as the state reforms are usually couched in technical language most people do not understand. This makes urgent the need to clarify and disseminate the basic options available under the various legal regimes, particularly to vulnerable groups such as women and children.

This article is meant to share a practical experience in the dissemination of family law reforms to rural communities consisting mainly of women in Botswana, and the methodological lessons that may be learnt from that experience. The first section will present a brief description of the pluralist legal setting within which the dissemination of these reforms took place. Using the law of marriage, divorce, inheritance and maintenance as illustrations, this section will discuss the options available in the dual regimes of customary law and the received Roman-Dutch law, as well as the statutory reforms introduced to fill in gaps therein. The second section will turn to the methods of disseminating the law, and evaluate their effectiveness

and limitations. Finally, the concluding section will suggest ways in which the situation may be improved, as well as indicate the methodological lessons that may be learnt from the Botswana experience, and from which future work might benefit.

2. The socio-legal setting

2.1 *The 'customary law' system*

This system is based on the traditional norms and practices of the various people who today inhabit the geographical area of Botswana. While these sometimes vary from one ethnic group to the other, they share broadly similar general principles in the area of family regulation. The traditional Tswana societies of the pre-colonial period were generally organised into hierarchical units or groups, starting with the *family*, consisting of a man, his wife or wives and their unmarried children. A group of families living in the same enclosure of huts then made up the *household*, while a collection of these genealogically-related units constituted the *family group*. Several family groups residing in a local administrative unit made up the *ward*, and the various wards made up the *village*. Each unit had a male head, who was responsible for all its members and also to the head of the next unit in the hierarchy, and finally to the chief of the *morafe*.² One of these units is often referred to as a *kgotla*, especially the ward, although the term is also employed to describe the physical place where meetings and judicial proceedings take place, which is normally located at a central place in the village.

Dispute settlement was organized along the same lines and took place at every level of the hierarchy. Kinship bonds were highly emphasised. Family members were assigned specific roles and owed each other clearly defined reciprocal obligations. Family members were expected to support one another and to cooperate in matters such as building their homes, working in the fields, taking part in the various rites of passage such as the birth of new members, mutual support, marriage

² For a more detailed treatment of the social organisation of pre-colonial Tswana societies, see Schapera (1938). The term *morafe* (plural: *merafe*), which is the indigenous term the Tswana-speaking people have always employed to describe themselves and other politically-organised groups, is used in place of the colonial label 'tribe'.

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negotiations, funeral arrangements and distribution of property following death.

In times of crisis, such as where a family member failed to fulfill his obligations, or a married couple could not get along, all adults were involved in the resolution of that crisis, under the direction of the head of the unit. Failure to resolve crises within the family were referred to the next unit in the hierarchy, and the proceedings became more 'formal' the higher the dispute went. The Chief's court was the final court of appeal, but even at that level, all adult males were entitled and expected to participate in the resolution of disputes; women were only allowed to participate as disputants or witnesses.

The norms which operated in these societies were geared more towards the group than the individual, hence traditional law has often been described as being more 'communal' in nature, especially when compared to the more individualistic orientation of contemporary Western European law (see Sanders 1981).³ In addition, the law was simple and non-technical, thus generally known and understood by those to whom it applied. Particularly in the case of norms regulating marriage and family life, law was not expressed in the formal, legalistic manner typical of 'modern' law. Law was part of a way of life that was passed from generation to generation, and was based on the cultural values and expectations of its consumers. Legal norms depended for their effectiveness on the pattern of living earlier described, where family members lived within easy reach of one another, and could easily be called upon to play their various roles in family life.

Due to the historical developments alluded to in the introduction, Tswana societies have undergone pervasive political, economic, cultural and legal changes, particularly since the 1800s. The traditional ward-based living pattern is no longer strictly adhered to; people may build their homes wherever they wish. The decline of subsistence agriculture has resulted in the migration of many able-bodied young people, mainly men, from the rural to the urban areas in search of formal jobs. These absentees can no longer play their traditional family roles on the spot, and this makes it more difficult to enforce their obligations towards their kin. The majority of those

³ This is not to suggest that the individual's interests were not recognised in traditional law. What is being emphasised here is that individuals exercised rights not only in their own interests, but particularly on behalf and in the interest of the group.

who remain in the rural areas are the elderly, children and women, although nowadays women are increasingly joining the rural-urban exodus.

These social changes have resulted, among other things, in the instability of marriages and families, and an increase in the number of 'female-headed households', which have been shown to be among the poorest in the country (Central Statistics Office 1982). The customary law system is having to grapple with the solution of new problems and is often slow to respond to the changes which are taking place at such a fast pace. The result is that traditional remedies have become less and less effective, and those who suffer most are women and children. The customary law however continues to be the system according to which the majority of rural Batswana resolve their disputes, because it costs little money and because they feel most comfortable with it.

2.2 *The common law system*

The basis of Botswana's common law is the Roman-Dutch law, which was introduced 1885, the year the territory became a British possession known as the Bechuanaland Protectorate. This legal regime was originally not intended to apply to the African population, but only to the European and other non-African residents of the Protectorate. Colonial policy was therefore to have the legal system operate along racial lines: customary law for the Africans, and the received common law for the non-Africans.

However, due to the changes that were brought about by christianity, the availability of Western education and wage employment, this policy did not last very long. To mention only one example, Africans who were converted to christianity often married in church or under the Marriage Proclamation, thus bringing themselves within the sphere of the common law. In recognition of this, the common law was eventually made available to everyone who wished to use it, irrespective of race. Colonial statutes provided Africans with mechanisms for opting out of customary law should they so wish, and to have the common law apply for example to their marriages, or to the devolution of their estates following death.

Still, colonial policy continued to be that the customary law was the system primarily applicable to Africans, especially in matters of private law, unless they opted out of it. This policy was compatible with social reality so long as the vast majority of Africans continued

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to pursue a traditional mode of life in accordance with their own laws, but it did not augur well for the future. Rapid social changes were making some areas of customary law less and less effective, to the disadvantage of vulnerable groups such as women and children.

Demand for the remedies provided by the common law increased with time, especially in the urban areas. The mechanisms provided for opting for the common law tended to be complicated and therefore out of reach for the majority of Africans, especially women. In addition, these attempts at law reform were often half-hearted, and resulted in much confusion in the law.

To take the law of marriage once again as an example, Africans who married in church or according to the Marriage Proclamation had the common law apply only to the personal consequences of their marriage; the property consequences were governed by customary law unless an ante-nuptial contract was executed. A different set of options existed for non-Africans, and it was unclear what law applied in cases where Africans and non-Africans were involved.

At independence in 1966, therefore, Botswana inherited a dual legal system in which the relationship between the two regimes was not always clear cut, and which provided complex options in family law. Furthermore, the customary system had by this time been grossly undermined by social change, whilst the common law continued to be alien, expensive, unknown and misunderstood by the majority of citizens. How did Botswana's lawmakers respond to this situation? Shortly after independence, especially in the early 1970s, various family law statutes were enacted, some of which will be discussed and assessed in the following sections.

2.3 *The legislative responses*

It would be inaccurate to describe the legislative innovations of the immediate post-independence era as a law reform programme, in the sense of a clearly thought out attempt at clarifying and making the law work better. This is because these family law statutes were mostly transplanted, often wholesale, from the United Kingdom into the Botswana legal system. This is in itself not the reason they do not amount to a law reform programme. The reason is that transplantation was done on the basis of only superficial parliamentary discussions, without serious inquiry into the suitability of the foreign legislation to local conditions.

From the point of view of legal development, the introduction of English statutes into a system that is essentially based on Roman-Dutch and customary law was bound to create confusion in some areas about the exact legal position. This situation is further compounded by the absence of clarity on the part of Parliament when transplanting these statutes, about their effect on the existing customary law and the Roman-Dutch law of the family. This is due to a lack of a clearly thought-out policy on law reform in general, which was not improved by the constitution of a Law Reform Committee in 1979. As shall be demonstrated below, the statutory options in family law are much too legalistic and complicated for those without legal training to understand. In some cases, this ignorance is also found among persons who are charged with administering these options, and who are expected to explain how the law affects people on a day to day basis.

2.3.1 *The law of marriage*

Two types of marriage are officially recognised in Botswana, marriage under customary law and under statute. The former is governed by the traditional laws and practices of the various *merafe*; the latter is regulated by Roman-Dutch law and statutory provisions. The majority of the population apparently marry in accordance with their own customary law, although there is an increasing tendency for couples to undergo ceremonies under the statute law in addition. The relationship between the two types of marriage continues to be a source of confusion among the general public, many of whom are not sufficiently familiar with the consequences of statutory marriage.

A common misconception, for example, is that a man who has previously contracted a customary marriage is free to enter a statutory one, since the customary marriage is potentially polygamous. This is quite a logical assumption if one looks at the matter from the point of view of customary law, but the *Marriage Act*⁴ makes clear that this is not permitted, and some men have in the past found themselves facing charges of bigamy as a result. In other words, many people use the statutory marriage without fully understanding its consequences; marriage officers rarely if ever explain these to marrying couples.

4 Chapter 29:01, Laws of Botswana.

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Legislative intervention has complicated the situation more in the area of *the property consequences of marriage* than anywhere else in the law of marriage. The history of the development of the common law in this respect was alluded to in the introduction: Africans marrying under statute during the colonial period had the Roman-Dutch law apply only to the personal consequences of their marriage. Customary law applied to their property unless they executed an ante-nuptial contract indicating a choice in favour of common law. The situation today remains basically the same, although cosmetic reforms were introduced by the *Married Persons Property Act* of 1970.⁵

Under Roman-Dutch law, all marriages are presumed to be in community of property, unless the parties execute an ante-nuptial contract excluding community. Where the marriage is in community, the spouses own their property jointly, but the wife is the junior partner in that her husband alone has powers of administration. The wife must obtain his consent or assistance before she may deal with the family property, unless she is buying household necessities or is a public trader. Where there is no community, the spouses own and control their property separately, unless the ante-nuptial contract does not specify this.

The unfavourable position of women married in community of property was apparently the reason why Parliament passed the *Married Persons Property Act* in 1970, "to place women in the same position as any other adult" (National Assembly 1970: 16). In its final form however, this Act did nothing of the sort. It merely reversed the common law presumption in favour of community to one in favour of marriage without community. Even then, African spouses were excluded from this new rule, and the colonial approach earlier discussed retained: customary law would apply to the property of Africans marrying by statute unless they completed a special form indicating a choice in favour of the common law.

Three forms are provided by the Act: one for non-Africans who wish to opt out of the Act and marry in community; one for Africans who wish to opt out of customary law in favour of the Act and marry out of community; and finally one for Africans who wish to opt out of the customary law, but not in favour of the Act, and marry in community.

5 Chapter 29:03, Laws of Botswana.

These procedures are cumbersome and confusing for both consumers and administrators. This came out very clearly in a trip I took in 1984 to four magisterial districts in the country. The majority of marriage officers did not explain the consequences of completing the various forms, and some were even observed administering the wrong ones.

This did not come as a surprise, in view of the complicated state of the law, and the fact that marriage officers normally have no legal training. A typical question posed (in Setswana) to prospective spouses was whether they wished to 'share their property', to which the majority of couples gave a typically puzzled 'yes'. No further explanation was normally furnished on the consequences of opting in favour of community or out of community, especially for women, who are the most disadvantaged by community (Molokomme 1984a). Unfortunately, once one has chosen a property regime under the Act, it is not possible to alter it during the marriage.

Even if women were aware of these restrictions, there appears to be a popular belief that marriages without community are less stable, and are indicative of an absence of trust between the spouses. Needless to say, this is partly due to a lack of understanding on the part of most people of the exact nature of these property regimes, which are generally unknown to customary law.

In a customary marriage, most of the property is held by the husband, or whoever is the head of the family, on behalf of the wife and children, who have rights to use such property. The wife has rights over her own personal property or whatever property she brought into the marriage. Thus the concepts of property rights in marriage are quite different in customary law and common law, but in reality, property rights in both cases normally assume importance only when the spouses are no longer in good terms, or where the marriage is dissolved. Some of the property consequences of divorce for women will be discussed in the following section.

2.3.2 *The law of divorce*

The rules governing the dissolution of marriages depend on whether the spouses were married according to customary or statute law. Customary law applies to the dissolution of a customary marriage, while the Roman-Dutch law governs the dissolution of a statutory marriage. The traditional grounds for divorce in both Roman-Dutch and customary law were based on fault, although the latter much

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earlier also recognised irretrievable breakdown of marriage as a ground for divorce.

Reforms were made in the Roman-Dutch law grounds for divorce by the *Matrimonial Causes Act* of 1973.⁶ The statute primarily changed the grounds for divorce from fault to irretrievable breakdown of marriage. A transplant from the United Kingdom, the statute has been criticised as a half-hearted exercise in law reform (Sanders 1983). This is because of the retention of adultery and malicious desertion as factors in proving marital breakdown. In addition, provisions were selectively lifted out of the English Divorce Reform Act of 1969, seemingly without sufficient regard to their suitability to the socio-legal landscape.

As a result, the statute left many gaps, especially in matters ancillary to divorce such as custody and maintenance of children, as well as the property rights of the spouses (Himsworth 1974). In practice, the judges have adopted the legalistic attitude that a statute alters the common law only when it uses specific words to that effect, and they continue to apply the Roman-Dutch law to matters ancillary to divorce. Needless to say, this does not always fit in with the concept of irretrievable breakdown, and makes for inconsistencies in the law of divorce.

Be that as it may, the Act did introduce innovations in the common law of divorce in that one need not always prove fault; a decree may be issued in cases where the spouses have lived apart for a continuous period of two years immediately preceding the action, on condition that the defendant consents to the decree being granted, and the court is convinced on the evidence that the marriage has broken down beyond repair.

Still, the Act has proved to have significant practical limitations. First of all, especially during the first five years of its operation, judges tended to adopt a conservative stance on what constitutes a marriage that has irretrievably broken down, and refused to grant decrees in what appeared to be deserving cases.

Second, the procedure for divorce remains costly and therefore beyond the reach of many estranged spouses. The assistance of a lawyer is still required, and in the absence of legal aid many cannot afford a lawyer's fees. This problem is exacerbated by the fact that

⁶ Chapter 29:07, Laws of Botswana.

only the High Court, which is located in one northern and one southern town, has jurisdiction to dissolve statutory marriages. In a country as large and sparsely populated as Botswana, travel costs add to the other expenses involved in obtaining a divorce. The Act had originally contemplated the constitution of subordinate matrimonial courts, but these have unfortunately never been constituted.

2.3.3 *The law of maintenance*

This is one area in which there has been significant legislative intervention. The relevant statutes in this respect are the *Affiliation Proceedings Act*, the *Deserted Wives and Children Protection Act* and the *Maintenance Orders Enforcement Act*.⁷ These will be dealt with in turn below.

The *Affiliation Proceedings Act*, another transplant from England, was passed in 1970 to provide for the proof of paternity, and lay down procedures for the maintenance of children born to single women. Although the intention of Parliament was to provide simple and clear procedures for single women to obtain support from the fathers of their children, this did not turn out to be the case in practice.

The Act lays down a rather rigid judicial procedure. A woman must file a written complaint on oath with a Magistrate and obtain a summons and a hearing date for her case. There is a general 12-month period within which the woman must bring a complaint, unless she can prove that the alleged father was either absent or fraudulently influenced her not to bring an action within that period. If she cannot prove this, her action will be thrown out, and in several cases involving appeals by men, the High Court has decided that the 12-month limitation is peremptory and not merely directory.⁸

This presents a serious obstacle for unmarried mothers, who may delay bringing an action to court because they have been trying to resolve the matter with the assistance of their families under

⁷ Chapters 28:02, 28:03 and 29:05 respectively, Laws of Botswana.

⁸ See the following cases: *Sichinga vs Phumetse*, 1981 Botswana Law Reports (BLR) 161; *Makwati vs Ramohago*, Civil Appeal 7/1982 (unreported); and *Mashadi vs Gabatshwane*, Civil Appeal 10/1983 (unreported).

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customary law. The legislative provisions and judicial attitudes are clearly insensitive to social reality, which is that most women first use the customary system, and only where that fails do they resort to the statute (see Griffiths 1984; Molokomme 1987).

A fundamental problem with the Affiliation Proceedings Act lies in its unclear relationship with awards made under customary law. An attempt to clarify this was made in a subsequent amendment to the Act, which provides that a magistrate may not hear an action under it if proceedings for "substantially the same relief" have been instituted in relation to the same child in a customary court, and the final decision is still pending, or has been made upon the merits. The Act does not elaborate on what is meant by "substantially the same relief" and, unfortunately, the matter has not come squarely before the courts for decision.

In the case of *Makwati vs Ramohago*,⁹ the High Court heard an appeal from a woman against the decision of a magistrate who had dismissed her claim on the basis of the above-quoted section. Appellant's parents had previously received four head of cattle for "seduction" from a customary court. Judge Hannah held that the magistrate had made a mistake by dismissing the appellant's claim without first calling for the record of the customary court "so as to satisfy himself that the relief claimed had been substantially the same". Unfortunately, the judge did not elaborate on what he understood to be the exact meaning of the phrase, and the legal position remains unclear.

This type of judicial avoidance is rather common in Botswana, and judges are often reluctant to interpret the meaning of unclear legislative provisions in a creative way, which does not make for a healthy development of the law by courts in cases before them. The matter however is crucial. An action for seduction under customary law is available to the father or guardian of an unmarried woman, and not to her, and is intended to compensate him for the reduction in the number of bridewealth cattle he would have received had his daughter not been seduced.

Traditionally, the child would have been supported by the woman's family, and would live in her parents household along with other children of the family. Today that is not always the case, with an increasing number of women with dependant children setting up their

9 See note 8 above.

own households, especially in the urban areas. Thus the child does not always benefit from support by its mother's guardian, who may have received a number of cattle for her seduction. To deny such a woman the right to seek maintenance before a magistrate seems unfair to her and to the child. At the same time, it is also unfair to expect a man to pay 'twice for the same child', as some embittered men have charged.

Some customary courts adhere to the traditional approach and only award damages for seduction in the case of a first child. This appears to be the case at the Bakwena capital in Molepolole, where the Chief's court sends women with claims for subsequent children to the Magistrate's court. Others, notably the Chief's court at Mochudi, have altered their traditional rules and award maintenance for subsequent children. This is a matter that requires clarification, as it is causing tension between the older and the younger generation, as well as between young men and women.

To come back to the Affiliation Proceedings Act itself, a second category of problems has been institutional. The shortage of magistrates and police to deliver summonses, set dates and hear cases, as well as to ensure enforcement of the orders they make, has been well documented by Brown (1984). She observes in addition that it is often difficult to track down the alleged father in order to serve him with summons, due to job mobility and overburdening of the police in areas where there are personnel shortages. It also appears that police are less eager to serve summonses under the Act than they are with criminal summonses. According to Brown, in 1982 in the capital Gaborone, 43 out of 222 cases registered failed to proceed due to summons not being served.

Enforcement appears to be the most problematic aspect of the Affiliation Proceedings Act. Although it gives orders made under it the force of a civil judgement enforceable under the rules of court, and specifically mentions the possibility of garnishee orders, magistrates appear to be reluctant to invoke these remedies. The most common method of enforcement appears to be to require the man to pay maintenance through the clerk of the court, under the Maintenance Orders Enforcement Act. Brown's research found that even where the father complies, payments are at best irregular, and on the basis of data from six courts in 1982, only 36% of the men paid money regularly for over six months.

The second piece of legislation, the *Deserted Wives and Children Protection Act*, lays down an administrative procedure by which

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married women who have been deserted may obtain maintenance for themselves and their children. Desertion is defined in the Act to include failure by the husband to provide food and other necessities, cruelty, adultery and habitual drunkenness. Several factors make this legislation difficult for most women to use.

First, women are traditionally socialised into being good wives, which means enduring maltreatment by their husbands 'for the sake of the family'. In times of crisis a good wife must report the matter to her in-laws even before she consults her own parents. To expect a deserted wife from such an environment to enlist the assistance of a total stranger such as a court official is rather unrealistic. By stepping outside her kinship network, a woman who uses legislation such as the Deserted Wives and Children Protection Act runs the risk of losing the future cooperation of her kin in other crises.

Secondly, administrators of the law tend to adopt a traditional attitude towards family problems. Especially in a culture where a man may apparently 'reasonably chastise' his wife, complaints by women about violence are not always taken seriously by administrative officers who administer the Act. Their traditional concern to promote family unity sometimes overrides their duty to administer the Act for the benefit of the victims of desertion, women and children. Thirdly and finally, the Deserted Wives and Children Protection Act is beset with enforcement problems similar to those we observed for the Affiliation Proceedings Act.

2.3.4 *The law of inheritance*

This area of the law has also experienced some legislative intervention, and attempts to further reform it are still underway. The colonial approach had been to exclude Africans from the application of the common law of inheritance, and to have the customary law apply to the devolution and administration of their estates. It was not until 1964 that the Court of Appeal for Bechuanaland, Basutoland and Swaziland established that an African had full capacity to make a will.¹⁰ This decision was incorporated into the the *Administration of Estates Proclamation*,¹¹ and today the question is settled.

10 *Frankael and Makwati vs Sechele*, 1963-66 High Commission Territories Law Reports 70 (Bechuanaland).

11 Proclamation no. 33 of 1933, as amended.

However, the vast majority of Batswana still do not write wills, and thus the rule continues to be that where an African dies intestate, customary law applies to the devolution of his property.¹²

Although customary law does possess a complete system of rules to be applied to the property of a deceased person, these were designed for a different type of society and in some respects have been overtaken by socio-economic changes. The concept of inheritance in customary law is rather different from the modern Roman-Dutch or statutory approach: customary law provides rules for a transfer of the management - not individual ownership - of a deceased person's estate to the principal heir (cf. Roberts 1971). The principal heir, who generally is the eldest male son of the deceased, holds the estate in trust for, and must maintain his mother, brothers, sisters and other relatives. At a time when kin members lived close by, such obligations could be enforced with relative ease; today that is becoming less and less the case. It has been observed that principal heirs are often irresponsible, neglecting their mothers and siblings, and treating the estate as if it were their personal property (National Assembly 1986).

Relief could have been provided by the *Succession (Rights of the Surviving Spouse and Family Provisions) Act* of 1970,¹³ which was adapted from an English statute. This Act was meant to give the surviving spouse a share in the estate of the deceased spouse, a claim s/he did not have under the common law. In addition it allows certain dependants of the deceased to obtain maintenance from his estate, should insufficient provision have been made for them. Unfortunately, this Act does not apply to estates which fall under customary law, which effectively means that the vast majority of Batswana, whose breadwinners do not write wills, cannot benefit from its innovatory provisions.

The Law Reform Committee is presently seized with the task of finding a way of correcting some of these deficiencies in the law, and it is hoped that they will bring about a more rational and effective inheritance law.

12 Section 7, Customary Law (Application and Ascertainment) Act, 1969.
13 Volume III, Laws of Botswana.

3. Communicating the law: present structures and strategies

Now that we have a general picture of the options available and their administrative institutions, let us turn to examine the manner in which these have been communicated to consumers of the law. Generally, whilst the need to communicate laws and legal options to the public has existed since the introduction of the received law, little has been done in response to this need. Like other newly independent states, the Botswana government was anxious to push economic development and the betterment of the living standards of its people. In such a situation, communicating the law becomes something of a luxury, and even where this was done, it was more to gain approval for reforms which the government was planning.

The usual method of communicating the law was, like that of Britain at the time, simple publication in the government gazette. As Seidman (1972) succinctly put it,

the rules received in Africa ... purport to do no more than make the law available to those who search for it.

Commenting on the absence of a communication infrastructure in Africa, he continues:

Whether an informal infrastructure could sufficiently inform African role occupants of new demands is beside the point, for such an infrastructure does not even exist in Africa. In the African states, official publication of the law triggers sufficient response neither in the modernising enclave nor in the traditional sector.

These words are as true for Botswana today as when they were first uttered eighteen years ago: communication structures and methods are at best weak, and at worst non-existent. The low literacy level among adults and the absence of non-governmental interest and pressure groups to disseminate information makes the problem even more serious. Through *kgotla* meetings, seminars, workshops and conferences, cabinet ministers, members of Parliament and government officials have sought to communicate government policies and laws to the people. The *kgotla*, it will be remembered, traditionally played a very important role in village political life. This continues to be the case, and the *kgotla* is the best way to reach most of the rural population. Thus government has not hesitated to use it for purposes of disseminating various types of information.

In meetings convened especially for the discussion of planned law reforms, the usual procedure is for an official to explain the changes, and to give the public time to ask questions and air their

views. This is a long-standing tradition in the *kgotla*, and one for which the Tswana political system prides itself: government by public consultation and participation, something akin to the Western concept of democracy.

This process is, however, not as democratic as it sounds. Many meetings are addressed by politicians who have clear party affiliations and whose purpose is to win the support of the public for planned reforms. This is the first stage at which the dissemination system is bound to fail, since the idea is not to inform, educate, and obtain views; rather the aim is to persuade. Thus the choice of what and how reforms are to be communicated is left in the hands of politicians, who are certainly not the best suited for this. Politicians tend to be biased in favour of a certain point of view, and will usually tell people what they want them to know, in a way that makes themselves look good. Furthermore, some may not even possess the qualifications required to adequately explain specialised areas of the law, and may in the end misinform the public.

3.1 *Parliamentary methods of dissemination:
the Law Reform Committee*

The above comments certainly apply to the activities of the Law Reform Committee, which consists of nine members of Parliament. Apart from the Attorney General, the Chairman, and one other member, none of the MPs presently on it has legal training. The committee meets and reports on an ad hoc basis, since its members work on it in addition to their parliamentary and other responsibilities. The committee may receive requests from Parliament, the Attorney General, government ministries, communities or individuals to look into a particular law or laws. So far, most if not all requests come from the government bureaucracy, and members of the public rarely initiate the law reform process.

The manner in which the Committee has operated since its constitution in 1979 is certainly not conducive to effective communication with the public. This conclusion is based on the Committee's previous reports and meetings they addressed during 1986.

A typical consultation begins with the chairman briefing the participants at a *kgotla* on the state of the law, its deficiencies and the remedy which parliament proposes. Usually, this is the first time most people hear about the details of the law, and one cannot expect them to understand it fully within the limited time available. The

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manner in which issues are presented to the public has the same weaknesses as those identified in relation to the mode adopted by politicians. During the 1986 meetings in particular, I observed that the chairman presented issues from his own point of view or the government's, and usually adopted a 'talking down' approach: by the powerful to the powerless. Such an approach is certainly not conducive to learning, and ordinary members of the public, especially women (who were traditionally not permitted to attend *kgotla* anyway) become inhibited to air their views.

The meetings of the Committee during 1986 relating especially to the citizenship law are an example in point. Following complaints by some women's groups that the law discriminated against women, Parliament requested the Committee to take another look at it in 1986. The Committee addressed various public meetings around the country, and at those which I attended, I observed that the chairman presented the citizenship issue in a manner that was far from impartial. In his introduction, he biased the listeners into accepting the "well-established Tswana tradition that descent is traced through the father and that therefore children should take their father's citizenship". He then proceeded to inform the public, in a rather cynical manner, about how some urban women wished this to be changed, so they can become heads of their families, and pass citizenship to their foreign husbands and children. No information was provided by the committee on the hardships which the law caused for the children born to Botswana female citizens who were married to alien men. Nothing about the fact that some of these children became stateless because their father was a political refugee.

This selective manner of informing the public about law reforms or other policies is, in my view, not conducive to proper dissemination. If the public is not presented with both sides of the story, that is the positive and negative effects of legal changes, there has been miscommunication. One might argue of course that it is not the primary duty of such a committee to inform and educate the public, and that their role is to gather opinion on the proposed reforms. True as that may be, it is also true that in the processes of opinion gathering, the committee has in practice taken it upon itself to explain the law to the public. As members of Parliament, the committee members command a lot of respect and authority among ordinary people, who are likely to listen to them much more than other less authoritative persons. Thus it is crucial that they communicate the law effectively and impartially, in order to avoid confusing members of the public about the exact state of the law and their status within it.

Other institutions within the bureaucracy which have attempted to communicate the law are departments of several government ministries, particularly the Social and Community Development Unit of the Ministry of Local Government and Lands. Through its local units of town and district councils, the latter department has since the early 1980's organised workshops and seminars on, among others, marriage and family life. The focus of these meetings was not to disseminate law reforms, but to share ideas and experiences about family life, social change, and especially the causes and possible solutions for family disruption.

Normally, resource persons were social workers, social welfare educators, administrators at district level, lawyers, doctors, chiefs and other eminent members of the community. The rest of the participants were normally ordinary members of the community, and proceedings tended to be rather formal, beginning with an official opening by a cabinet minister or some other top official, followed by presentations from the resource persons. Most speakers make presentations on their respective areas of specialisation, and it became common to invite a lawyer to speak about aspects of family law.

All these seminars resolved that the public required more information about family law, especially the common and statute laws. Unfortunately, there has usually been little in the way of follow-up activity to these workshops, or feed-back on what extension officers have imparted to their clients in the field. Such a workshop was usually repeated the following year, with the same participants, and little attention was paid to the usefulness of these gatherings, especially whether they benefitted ordinary members of the public whom they were meant to serve. Thus these workshops were not very effective as a method of dissemination, but they did provide a forum for the discussion of issues affecting members of the community.

3.2 *A 'women-oriented' approach to the dissemination of law*

Following the establishment of a Women's Affairs Unit in the Ministry of Home Affairs and the Women's Development Planning and Advisory Committee (WODPLAC) to deal with women's issues in 1981, a new concern and approach to disseminating the law, with women as a specific target group, took root. The Women's Affairs Unit (WAU) is charged with the responsibility of coordinating women's activities,

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dissemination of information to women, and liaising with different government departments on women-related issues.

WODPLAC consists of representatives from various government ministries and non-governmental women's organisations, and is charged with the task of supporting and strengthening the WAU in its work. Although the WAU has been seriously understaffed since its inception, they have done very well in conjunction with WODPLAC to bring women's issues to the fore. Together they have organised seminars, workshops and conferences and have identified some of the needs and general problems faced by women in Botswana. One of these was that women needed basic information about many aspects of public life, one of which was their legal position. The WAU responded to this need in 1984, and the experiences gained in the 'legal awareness' campaign will be discussed below.

A major project aimed at compiling all the laws affecting women and simplifying them in a handbook was undertaken by the present writer for the WAU in 1984. The handbook was entitled *The Woman's Guide to the Law: an outline of how the law affects every woman and her family in Botswana*. It outlines in simple language the various options available to women, mainly in the areas of marriage, divorce, and inheritance. It is published in both official languages, English and Setswana, and has an appendix showing samples of common forms and other documents women may be required to complete at some point in their lives, such as birth registration and marriage forms. The main innovation about this appendix was that most of these standard forms were not available in Setswana, which was a handicap for most women, who cannot read, write or understand English.

The *Handbook* was distributed free of charge to social workers, social welfare educators, women's organisations and other groups which work with women on a day to day basis. The idea was that these groups would then disseminate the contents of the *Handbook* to women, as well as obtain feedback from women on their day-to-day legal problems.

It appears that these institutions and officials do use the *Handbook* for the benefit of the women they deal with, particularly in the rural areas where there are few lawyers, whose fees most women cannot afford anyway. Feedback from them indicates that it is generally a simple enough guide for lay persons who can read to understand. However, the sections on adoption and inheritance are an exception to this, which is hardly surprising in view of the untidy state of the law on those matters.

Follow-up consultations with women during the years 1984-1987 showed that there were certain weaknesses in the methodology we had adopted, and that we had made assumptions which were not always valid. Some of these shortcomings and the lessons that can be learned from them are briefly summarised below.

First of all, the *Handbook* did not benefit those women who cannot read, and attempts to use the radio were not always successful. Even the few individual women who can read did not always have access to the *Handbook*, as it was distributed to a limited number of institutions, with whom few women came regularly into touch. The lesson we learnt here was that it is not sufficient to make information available only to a limited number of institutions. As a result, we made the *Handbook* available whenever there was a gathering of women, so they would have their own personal copies. Even then, those women who could read and actually had personal copies did not read it for general information, but only when they were confronted with a specific problem.

A similar observation was made concerning institutions: they only resorted to the *Handbook* it when dealing with women who had specific problems. Particularly in the case of social workers and other rural extension personnel, this is understandable in view of their heavy and varied workload. Some indicated that they were reluctant to advise women of their legal rights on the basis of the *Handbook* alone, because they lacked general information about the operation of the legal system. The general lesson learnt in this respect was that the availability of information does not in itself solve the problem of ignorance of the law; this must be followed up by other activities aimed at encouraging individuals to use their newly-acquired legal knowledge. Furthermore, it is unrealistic to entrust persons with no basic legal training the task of rendering an advisory service, because they feel inadequately prepared for this task.

In response to the problem canvassed above, several government departments and non-governmental organisations in charge of information dissemination would contact the WAU whenever they convened community workshops, with a request to provide a lawyer to elaborate on certain parts of the *Handbook*. Most lawyers have full-time jobs elsewhere and cannot easily make the time to address a workshop away from their places of work. The University of Botswana, in conjunction with the WAU, made funds available for this writer to travel to nearby districts to conduct workshops explaining specific laws to women. It is at these workshops that two

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other obstacles to dissemination of the *Handbook's* contents, and deficiencies in our methodology, surfaced.

The first hurdle we encountered was getting women to attend the workshops at all. Apart from the fact that women are normally busy with their daily tasks at home, in the fields or in formal and informal employment, another problem soon presented itself. Going to a meeting at which women's rights are being discussed is regarded by many, especially men, as an indication that a woman has trouble at home, or worse, that she is joining 'women's lib' and rebelling against tradition. Some women have confessed to not coming for these reasons, and others have actually been prevented by their husbands from attending. As a result, those who turned up at these workshops were those who in fact had problems: deserted, divorced and unmarried women with dependant children - those who had nothing to lose.

This is when the second hurdle to dissemination presents itself: the discussion is dominated by questions relating to each woman's individual experiences, although most do not specifically say so, posing only hypothetical questions. Many would make personal contact during breaks or at the end of the workshop and confess that they had in fact experienced the problem they had raised. While there is nothing wrong with this, the workshop setting is not conducive to problem-solving, as it was originally convened for educational purposes.

The few women with no specific legal problems or who had no wish to discuss them often became impatient and left. This was further exacerbated by the inevitably wide agenda at these workshops, which led to long sessions and loss of concentration. This problem proved difficult to solve, because of the interrelationship and overlap between the various areas of family law. This demonstrated that a legal awareness campaign must be complemented by the provision of legal aid schemes to the majority of Botswana's rural poor, a large percentage of whom are women.

A third hurdle, which is somewhat related to the first, is the cultural barriers which prevent women from benefitting from the information imparted to them. Many women in Botswana are socialised into perceiving and dealing with problems in a patient, private manner, first through their kinship network. As a result, married women in particular are reluctant to take advantage of the options provided by statutes such as the Deserted Wives and Children Protection Act. For some, the risks incurred in stepping outside their

kinship network are too high, in case the alternative statutory system fails them, which as we earlier observed is very likely to be the case due to problems of enforcement.

Women who live in rural areas, and who remain in the fragile subsistence economy are dependant on the cooperation of their kin-group for survival and cannot afford to undermine it by seeking assistance from what is considered an alien system. Thus it is reasonable to assume that those who do so have either given up all attempts to use the kinship network, or are somehow economically independent, having superficial connections with it which they can afford to lose.

More importantly, however, it is a fact that family cohesion and willingness to assist and cooperate with one's kin appears to have been grossly undermined by the decline of subsistence agriculture and its substitution by a wage economy. Many women indicated that their families were simply too far away, while others expressed the view that their kin were not willing to assist them at all. At the same time, institutions such as courts are poor substitutes for kin because, as we earlier observed, they are divorced from the society in which they operate, employ delatory and unrealistic procedures or are simply not available in certain areas.

Finally, the most important methodological lesson of all: When this writer was requested to compile the *Handbook*, no consultation was carried out with women themselves about the areas of law in which they required information more urgently than others. In conjunction with the Gaborone-based reference group, I myself made a list of the areas I considered most relevant and problematic. A trip around the country talking to chiefs, magistrates and judges was also undertaken, but no meetings with ordinary women were held.

This proved to have been a serious methodological omission, because during the follow-up workshops it turned out that we should have devoted much more attention to the legal position of single women with dependant children. Instead, the *Handbook* concentrates on the position of married women, which most lawyers would do, due to the fact that legally-speaking it is they who suffer many legal disabilities.

During the follow-up workshops, a large percentage of participants were single women, and it is this group that appeared to have the most problems with the law. This should not have come as a surprise because evidence abounds that the number of unmarried women with

children setting up their own households has been increasing rapidly. We should have realised that this group formed a special section of the audience we sought to address in the *Handbook*. This teaches us that in the future, any attempt to compile legal or any other information should be preceded by an analysis of the social context, the audience we intend to address, and most importantly, consultations with the consumers of our materials about their own priorities.

4. Conclusions and recommendations

It is clear from the foregoing discussion that no matter how well intended, law reform in the area of the family is only a first step on the long road towards providing remedies in a rapidly changing society. In the first place, the reforms themselves must be appropriately fashioned; clearly, the present ones are much too complicated and sometimes insensitive to the social context in which they operate. Secondly, these reforms will remain paper tigers unless they are disseminated to their consumers, and we have seen that the process of dissemination is fraught with pitfalls. Thirdly, they must be enforceable, otherwise they fail in their stated objectives. While there are no easy solutions to these problems, our experience in Botswana leads us to make the following recommendations.

1. Appropriate machinery for the study of social problems must be set up, so that policy makers are properly informed about the nature and dimensions of the problems they seek to deal with. It is only on the basis of such information that they can even begin to work out ways of dealing with family problems. An institution, preferably independent from Parliament, with persons who possess the necessary know-how and sensitivity to the social context, should be set up. Such know-how would include knowledge of both common and customary law, sociology and scientific research methods. This institution would be charged with identifying problem areas through systematic research and with briefing Parliament on what the community thinks about these problems, as well as the possible solutions to them.

2. Once the appropriate legal provisions are worked out, they must fit together with those already available, and the relationship between existing and new law must be clear. The legislature must recognise the real importance of customary law in the lives of most people, and seek to incorporate their values in planned reforms of the law. This means that legal provisions should themselves be clearly expressed and translated into Setswana and other indigenous languages, so that

the majority of the population - who cannot read English and possess no legal training - can understand them. This would go a long way towards demystifying the law and legal institutions, so that people feel at ease rather than alienated or awed by a system that is meant to serve them.

3. The institutions which administer the law must be properly staffed and managed, and enforcement mechanisms strengthened in order to give real meaning to the rights conferred on individuals. In practice, special institutions such as family courts should be constituted within the court hierarchy, to deal specifically with family problems. Such courts - to which full-time officials should be allocated - could administer social welfare-oriented legislation such as the Affiliation and Deserted Wives Act. This would avoid the relegation of civil, especially family disputes to second position in favour of criminal matters. The procedure in these courts should be informal, though without causing disadvantaged groups such as the poor, women and children to lose their legal rights. In the long run, the whole dual court system must be reassessed with a view to having a single, unified system of courts competent to apply both common and customary law.

4. Disseminating the law to the public must be given official recognition and priority, and should go beyond mere publication in the government gazette or the occasional workshop. Both governmental and non-governmental institutions should work out an on-going programme of dissemination and set up community based structures for this purpose. This could be injected into the existing non-formal and adult education programmes, and additional resources should be allocated for this purpose. Those in charge of the programme should obtain feedback on the success or failure of communication methods, which must be regularly evaluated and appraised.

5. Dissemination must be complemented by a legal aid scheme aimed at providing free services to persons who cannot afford legal fees, a significant proportion of whom are women. In other words, it is not enough to know the law, people should be able to use it effectively. Such a legal aid scheme could be administered by persons with training in both law and the social sciences, because a large number of legal problems actually have socio-economic causes. This scheme could liaise with the institution recommended under 1. above, so that there is a link between application and formulation of laws.

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6. The above recommendations can only work if the attitudes of family members, law makers, administrators, and the public in general encourage their effectiveness. Parents, teachers and others who are in charge of children and young persons should socialise them into performing their roles and responsibilities towards their kin, taking into account the changes that continue to take place in their societies. In particular, everyone must be constantly reminded of the burdens carried by women in family life, and their changing roles in today's society. Administrators of the law should be willing to enforce laws intended to assist disadvantaged members of the community such as women and children. Law makers should stop assuming that they always know what is good for the public, and should take the findings of researchers and the views of the public into account when making decisions. Admittedly, attitudes are the most difficult to change, but the social reality so starkly points to family disruption that we can perhaps afford to be optimistic about change.

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