

Kinship, Courtship, and Child Maintenance Law in Botswana

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ABSTRACT: Official statistics in Botswana suggest very high numbers of extramarital births and female-headed households. One element of family policy in Botswana is a statute allowing women to claim maintenance payments from the biological fathers of their extramarital children. Formal interviews and informal conversations with women and men in a village in Botswana indicate that women do not make use of the maintenance law for a variety of reasons. Among these is that a continuing tie to the biological father of the child would interfere with the traditional mechanisms by which that child is supported and socially positioned and with the woman's own prospects for courtship and eventual marriage to the biological father or another man. Family policies should fit within, rather than being imposed upon, the cultural framework of the people they are trying to help.

The authors gratefully acknowledge the funding and support for the research reported on in this article. Funding for fieldwork was provided to Nicholas Townsend by an NICHD postdoctoral fellowship (T32 HD07275-08) and by grants from the Andrew Mellon Foundation administered through the Department of Demography at the University of California, Berkeley, and the Population Studies and Training Center, Brown University. Funding for fieldwork was provided to Anita Garey by the Andrew Mellon Foundation administered by the Population Studies and Training Center, Brown University. Funding for analysis and writing was provided to Nicholas Townsend by a Mellon Foundation research fellowship from Brown University and to Anita Garey by a Population Council postdoctoral fellowship. Both authors thank the Population Studies and Training Center at Brown University for the material and moral support they received while in residence.

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KEY WORDS: Botswana, child support, kinship, marriage.

Introduction

Support for children, the provision of adequate resources for them to be able to grow into healthy and productive adults, is a major concern in all societies. Botswana is one of many countries in which concern for the maintenance of children has been focused on the condition of children who are being raised in female-headed households and in which family policy has been directed at the enforcement of men's financial responsibility for their biological children.¹

The Botswana law governing financial maintenance by biological fathers of children born to unmarried mothers went into effect in 1970. This law and the legal status of women in southern Africa have recently become matters of public discussion in the region, largely because of the action-oriented research and legal activism of the Women and Law in Southern Africa (WLSA) research groups in six countries.² The Affiliation Proceedings Act provides that if a woman is successful in her claim for maintenance, she will receive forty pula a month from the biological father (the equivalent of about U.S. \$16). In practice, claims for maintenance are cumbersome to initiate, and, if awarded, maintenance payments are difficult, if not impossible, to collect. The inadequacy of the current law in terms of procedures for making a claim, time limitations for claiming support, implementation, amount to be paid, duration of payments, and recourse for non-payment has been well-documented (Molokomme, 1991; WLSA, 1992). In this article, we have a different critique of Botswana's law regarding maintenance by biological fathers. We argue that by using imported and culturally inappropriate concepts of paternity, Botswana's child maintenance law runs counter to, and thereby undermines, the customary ways in which the Tswana have provided for their children. Women and children are therefore potentially worse off than they were before the introduction of a family policy law which links biological paternity with ongoing economic maintenance of children born to unmarried women.

Background

In Botswana, customary law continues to be a system of norms, expectations, and rules recognized by the state with cases heard in

the traditional courts of village headmen and chiefs. Customary law operates as a legal system parallel to the combination of Roman-Dutch common law and statutory law derived from English models which is administered by the magistrates' courts (Molokomme, 1991). Tswana customary law has been codified and recorded (Roberts, 1972; Schapera, 1938), but its application remains fluid, adaptive, and process-oriented. Most important for the argument presented here, Tswana law and custom provide the framework of norms within which the large majority of the people of Botswana think and act.

Among the Tswana, customary marriage is an arrangement between families; marriages tie families progressively closer through ceremony, negotiation, exchange, and obligation (Comaroff & Comaroff, 1981; Schapera, 1950, 1971). Marriage is a process rather than a single event, and it does not necessarily involve the establishment of a separate household or even coresidence of husband and wife. A primary function of marriage, however, is to provide a social position for children. A Tswana man can claim his wife's children as his legitimate heirs only after he has made a payment of bridewealth cattle (*bogadi*) to her family, something he may wait to do until the children are grown or not do at all.³

There is no provision in the traditional culture or in tribal law for men directly to support their biological children born outside marriage (Molokomme, 1991). The customary pattern is that if a young woman becomes pregnant, the man she names as father is under an obligation to initiate marriage arrangements or to pay compensation in the form of cattle to the woman's parents. The one-time payment concludes his and his family's obligation. The child's social position and family membership remain with the mother's family and lineage, and the cattle paid by the father provide both symbolic and material guarantees of the child's rights.

Fieldwork and Method

This article is based on data gathered during 11 months of fieldwork in Botswana during 1993 and 1994. Fieldwork was concentrated on a village of 5,500 people about 40 kilometers west of the capital city of Gaborone. The village has primary and junior secondary schools, a clinic, several shops, and piped water to 18 communal faucets. There is no telephone or electric service, though power lines were being extended to the schools and other public sites in 1994. In 1991, the village was linked to the capital by tarred road, making access to urban employment, services, and supplies much easier. The villagers

maintain cattle and flocks of goats, but crops from arable farming have been minimal recently because of drought. Economically, the community has depended for decades on income from migrant labor. At an earlier period this was almost exclusively migrant labor of men in the mines of South Africa, but since independence in 1966 the rapid growth of the capital has provided employment opportunities in Botswana for many men and women from the village.

The findings presented in this article are derived from two separate, but related and concurrent, research projects. The first research project is a study of the connections men have to families, households, and children. In-depth interviews and household surveys were conducted with the men in each of 115 *malwapa* (households) in two wards (kin-based neighborhoods) of the village; men who were absent from the village were interviewed in their current place of residence or when they returned to or visited the village. The second research project is a study of the connections between patterns of shared child care and support, women's labor force participation, and levels of fertility. Interviews were conducted with 72 mothers, 48 of whom were randomly selected using village records. Education, fertility, employment, and residence histories were collected on these women, their spouses and children, and other household members.

Setswana and English are both official languages of Botswana, but Setswana is spoken in the village. Although the authors spoke some Setswana and many of the villagers spoke some English, interviews were conducted in Setswana with the assistance of a local interpreter. In addition to formal interviews and household surveys, the authors lived in the village of study, participated in daily life, observed the community and interpersonal interactions, and asked questions in the context of unstructured conversations. Ethnographic data collection relies on open-ended questions and unstructured interactions between researchers and subjects. In addition to detailed records of conversations and other interactions, the data produced consist of accounts of the social context of those conversations and interactions. Statements made in group discussions differ in form and content from those made in one-to-one interviews. Understanding of the data produced by ethnographic research relies on analysis of the significance of what people say as well as on counts of the frequency with which they say it.

Women's Reasons for Not Seeking Support Payments

In structured interviews with village women ($n = 72$), we asked mothers who were not married or not in the process of being married ($n = 24$) whether they received any material support from the biological father or fathers of their children. All of the women reported that unless there were plans to marry, they received no support from the biological father. The women we spoke to knew that a maintenance law existed, even if they were unclear about its details. When we asked why the biological father was not supporting his children or

why the woman had not filed a claim for maintenance, the answers we received illustrated four themes: (a) fear of retaliation, (b) irrelevance of the question, (c) attempts to placate the interviewer, and (d) disadvantageous implications for the future. Although we are distinguishing between these themes, they are interwoven in women's responses and do not separate into neat and mutually exclusive categories. For analytical clarity, we will discuss each of these themes in turn. Based on the responses of these women, formal interviews with village men, informal conversations with both men and women in the village, and our observation of Tswana life, we argue that most of the responses indicated the inappropriateness, in their eyes, of the model of maintenance by the biological father.

Fear of Retaliation

Women feared retaliation in two forms: (a) violence from the biological father against the mother, and (b) witchcraft by the biological father's family against the woman's family (i.e., against the woman, her children, and her kinship group). Arrangements for marriage and claims regarding out-of-wedlock births are issues traditionally handled between the families of the woman and the man involved. The procedural requirement that the woman herself must initiate a legal claim for maintenance transgresses Tswana norms at a number of points and isolates the individual woman, rendering her more vulnerable.

Although we have identified "fear of retaliation" as a separate theme, responses of this type might also be instances of the irrelevance of the question to the subject (because it violates norms) or attempts to placate the interviewer (by providing what is seen as an acceptable answer). Although only one of the women interviewed directly stated her fear of violence from the biological father as a reason for not filing a claim, such fears have been reported for other areas of Botswana (WLSA, 1992, p. 160), and women may indeed be subject to some form of retaliation if they do try to invoke this law. Based on our interviews, however, we think that other reasons come into play before considerations of the fear of retaliation and account for the low number of claims.

Irrelevance of the Question

Among the Tswana, biological paternity alone does not give a child his or her social position, and support for a child is connected to social

position and location within a kin group. Therefore, asking a mother to explain why a biological father, who is not also the social father, does not support his (biological) child is to ask a question that makes no sense. For comparison, it is similar to asking a white middle-class North American woman why her brother is not paying for her daughter's wedding. The answer, "I don't know," conveys the message, "I don't know why you're asking me this question," rather than "I don't know why he's not paying." Although the subject might attempt to answer, the question itself appears to come from left field.

Some women interpreted the question as "why didn't he marry you?" Several women responded that they did not know why the biological fathers of their children had not married them or reported that the biological fathers were already married or had married other women instead of them. This interpretation of the question makes sense in Tswana terms because the social father has financial responsibility for his social children. The question, "Why doesn't he help support his biological child," was out of context in terms of the subjects' experience and norms.

That the question is out of their social context does not mean that village women are not aware of the context from which the question is being asked. Riedmann (1993, pp. 79-80) reports that nonresponse rates on the Changing African Family-Nigeria studies (CAFN) increased when interviewers asked questions in which non-Yoruba values were embedded. Riedmann's analysis of the CAFN interview data is that refusal to answer was not because subjects did not understand the question but was, rather, a form of resistance to questions deemed inappropriate.

Attempts to Placate the Interviewer

The women we interviewed were well aware that we were asking questions based on norms from outside Tswana culture, and some women answered our questions about maintenance in ways that appear to have been attempts to placate the interviewer by giving answers that would make sense in the interviewer's terms. Responses such as "I'm going to make a claim next week" or "I don't know where he is" are meant to indicate a woman's willingness to use the legal process to gain maintenance even though she has not done so. No unmarried mother we interviewed reported receiving support from a biological father of her children unless there was an arrangement or plan for marriage, and no woman reported having filed a claim under the maintenance law.

Attempts to answer questions that reflect norms and values from outside the culture by placating the interviewer are forms of resistance to what the Tswana would call "English" (meaning both "white" and "outside") values.

Disadvantageous Implications for the Future

The first three themes were the most common in the responses to questions asked during formal interviews. What people said during more informal situations and what became apparent from the authors' general knowledge of Tswana cultural patterns, however, render these responses understandable as forms of resistance to outside values rather than for the content of the response. In informal discussions about marriage, courtship, the social place of children, and support for children, villagers explained the consequences for a woman and her children should she make a claim for maintenance against the biological father of her child or should she receive ongoing support from a man who was not her husband or intended husband.

Implications for marriage to the biological father. The normal pattern in Botswana, both historically and currently, is that first children are born to unmarried women. Sometimes a woman and the biological father of her child are already in a relationship that is intended to lead to marriage. This relationship may be a formal and formally recognized one, in which marriage arrangements have already been made between the families of the man and woman. Or it may be a relationship of "intention to marry" in which formal arrangements between the families have not yet occurred but are expected to take place at a later time. Women and men will refer to this situation as "intended" and, as in the case of marriages that have been arranged but have not yet occurred, both women and men may refer to their partner respectively as their "husband" or "wife."

Both kinds of relationships, intention to marry and arrangement to marry, are points along a continuum in the Tswana process of marriage. Women in the process of marriage are embedded in the normative pattern of childbearing and marriage, in which a man's responsibility for the support of children is divided between his family of origin and his family of marriage depending on his own position along a marriage continuum. For example, a man who is in a relationship of "intention to marry" may be expected to bring gifts or contributions to both his intended wife and his biological child, but he is not yet in the life-cycle position in which he is expected to provide full support. In

order to move along the marriage continuum, he is expected to be contributing to his own family of origin so that, at a future point, his family of origin will contribute to the *bogadi* (bridewealth) he needs before he can marry, claim his biological children, and establish his own household. His future father-in-law, the maternal grandfather of his biological child, is the man in the life-cycle position to support his own children and his daughter's children until such time as his daughter marries and establishes her own household. Indeed, until a man pays bridewealth (whether in the form of the six cows of *bogadi* or the one cow of *serufo*), his biological children belong to the lineage of the mother's father.

There are two points we want to make about the processual nature of marriage in regard to the maintenance law. First, to ask questions about why the biological father of a woman's child is not supporting the child or paying toward his or her support is a question from outside Tswana norms of childbearing and marriage. The question, which from a Euro-American perspective implies that the biological father is being irresponsible, is, in Tswana terms, questioning their norms of male responsibility.⁴ The maintenance law, forged not from traditional Tswana law but from English statutes, superimposes this Western lens on the issue of male responsibility and support for children. The young biological father is seen as irresponsible; the older maternal grandfather is seen as assuming a responsibility that should not be his. The second point is that implementing the maintenance law in situations in which marriages are intended or arranged would be tantamount to undermining the Tswana process of marriage and would serve no one's interests, including those of mother and child. But this fact is also crucial to understanding why the maintenance law is not implemented in cases in which marriage of the mother to the biological father is neither intended nor arranged.

The advocates of the current maintenance law might argue that it was never intended to be used in cases in which marriage was already in process. It is very difficult, however, to tell whether intention will actually lead to arrangement and then to marriage. Although most of the women in the village were married and had followed this pattern, about 30% of the mothers who were interviewed were not in any marriage-process relationship. Many of these women said that they had been in or thought they had been in a relationship of intention with the biological father of their child or children but that he had left them when he migrated out of the village or married another woman. Hoping at the time that they were following a normative pat-

tern of intention, arrangement, and marriage, none of these women would have wanted to jeopardize the relationship or the delicate marriage negotiations between the two families by filing a claim for maintenance. Filing a claim for maintenance might have ended a relationship that they anticipated was leading to marriage.

One way of handling the dissolution of intention would be for the woman to file a claim for maintenance when it became clear that the biological father of her child was not going to marry her. This solution, however, contains two problems, one legal and one cultural. The maintenance law stipulates that a claim must be filed within a year after the birth of the child. Because the illusion of intention to marry may persist for more than a year, a woman is left with no legal recourse if she waits until it is clear that the man has no intention of marrying her. The study of maintenance law and practice by the Women and Law in Southern Africa Research Project reported cases in which women complained that men continued to lead a woman on, bringing small presents to her and to the baby and making promises of marriage and support until the legal period for filing a claim had passed (WLSA, 1992, p. 102). That study, however, also reports that most people were ignorant of the time limitation for making a claim (WLSA, 1992, p. 155). It is our impression that for women living in the village, where men may migrate out to jobs in South Africa or in other parts of Botswana, the issue is more likely to be one of absent men whose intentions are not clear than of men who are consciously conspiring to abandon women and outwit the maintenance law.

A solution to the legal problem is to eliminate the restriction of time in which a claim must be filed, and we would endorse the WLSA recommendation to this effect (WLSA, 1992, p. 188). A woman would then be able to file a claim when it became clear to her that the man was not going to follow through on an intention to marry. In addition to solving the legal obstacle to filing claims, the transgression of norms is shifted from the mother to the biological father. Instead of a woman who steps outside the norms of processual marriage, thereby leaving herself vulnerable to both retaliation and abandonment, eliminating the restriction on the period in which a claim can be filed would enable a woman to file a claim when the man steps outside the norms of processual marriage.

But this improvement in the law would not address the more fundamental and interrelated issues of (a) the meaning, in Tswana culture, of ongoing financial support from a man to a woman, and (b) the way the social location of the child is tied to concepts of social father-

hood. Both of these issues are related to the prospects for a woman of marrying a man other than the biological father of her child.

Implications for marriage to a man other than the biological father. Many men, including fathers of adult daughters and potential husbands as well as biological fathers, said that financial support from a man to a woman indicated a sexual relationship between them and that, even if no relationship actually existed, people would assume that there was one. No man would want to court or marry a woman who was still in a relationship with the father of her children, in spite of the benefit of the added income. A woman receiving maintenance payments from the biological father of her children would be disadvantaged in her chances of marrying anyone else.

Tswana customary law, however, does address situations in which the biological father of a child does not intend to marry the mother of that child. Unlike the maintenance law, with its focus on the individual woman, man, and child, the customary law is embedded in families and kinship groups. The issue is not one of paternal responsibility but one of the transgression and realigning of traditional norms. The man has transgressed norms by not beginning the process of marriage either before or in response to the birth of a child. Under customary law, the woman's family may be awarded a payment of cattle from the father and his family. This payment has the threefold function of punishing the man, of compensating the woman's family for potential loss of *bogadi*, and of providing material support of the child. Because the payment is in the form of cattle, which are a permanent and productive asset, a central element of the traditional economy, and of enormous symbolic importance, it is considered by some as providing long-term support.

The point of this description of the customary law pertaining to children born outside of the intention to marry is not to suggest that the customary law works to provide adequately for children or that it solves the problems that this situation raises for women. We include it to make the point that, in Tswana culture, biological paternity is not an ongoing relationship unless it is coupled with social paternity. Men are held to be responsible for transgressing norms and negatively affecting a woman's chances for marriage but not for the continued support of their biological children. Such ongoing responsibility would call into question both the relationship of the man and woman and the social place of the child.

Implications for the social place of the child. The traditional economy and lineage politics provide material backing for the high value placed on fertility. In the village, where every unmarried woman lives in her parents' compound, every child is born into a defined social position. If the mother remains unmarried, the child is incorporated into the lineage of his or her mother's father and acquires ritual, political, jural, and economic rights and responsibilities through membership in that lineage.

Within Tswana marriage, the payment of *bogadi* signifies that the children born to a couple will belong to the husband's lineage. If a woman has borne children before marriage, the payment of *bogadi* moves those children into the lineage of the man she marries. This is the case whether the woman marries the man who is the biological father of her children or whether she marries another man. If she marries a man who is not the biological father of her children, the norm is that the payment of *bogadi* moves those children into the husband's lineage by a process of adoption unless the woman has been married before, in which case the children are part of the woman's previous husband's lineage. The point of this in relation to the maintenance law is that a woman brings her children with her into a marriage, or, to put it another way, a man brings his wife and her children into his lineage.

Each person can belong to only one lineage at a time; women change lineages at marriage, and children may change lineages if their mother marries after their birth, but a child cannot simultaneously belong to the lineage of his or her biological father and to the lineage of a social father (the husband of the mother). Ongoing financial support confuses this separation of relationships and the pattern of reciprocal rights and responsibilities linked to them.

Conclusion

According to the 1981 census, only 41% of women in their twenties and 53% of women aged 25 to 29 have ever been married (Botswana Government 1983, Table 24). Yet 83.4% of women in their twenties and 88% of women aged 25 to 29 have borne at least one child (Botswana Government 1983, Table 23). In 1981, three-quarters of all households were rural. Forty-eight percent of rural households and 56% of rural households with a household head less than age 45 were

headed by women (Botswana Government 1983, Table 39). Female-headed households generally have less access than male-headed households to both male labor and family labor (Fortmann, 1981) and to cattle (Kossoudji & Mueller, 1983), the resources needed for subsistence agriculture. Female household heads are also less likely than male heads to have income from employment or self-employment—56% of female household heads are “economically non-active” (Botswana Government 1983, Table 38).

These figures, which incorporate an imported set of definitions (Awusabo-Asare, 1988; Riedmann, 1993), distort the complex reality of family life in Botswana. In particular, they do not take into account either the processual nature of traditional Tswana marriage (Comaroff & Comaroff, 1981; Schapera, 1950) or the multiple residences of most Tswana and the connections between residential households (Kerven, 1982, 1984; Peters, 1983; Townsend & Garey, 1994).

Tswana marriage is not a single event establishing a new union and a new household and preceding the birth of children. Of the women interviewed, only a handful, all of whom were in unusual or anomalous social positions, had been married before the birth of their first child. None of these women had established a new household with her husband before the birth of at least one child. Indeed, for the married women who were interviewed who had established households of their own, the average time between first birth and setting up that household was twelve years. In this situation, extramarital fertility has a very different meaning and social significance than it would in a traditional Western context.

Similarly, although the residential household is enshrined in the methodology of censuses and social surveys, it is a category that frequently distorts the social reality of non-Western societies (Bruce & Lloyd, 1992). In Botswana, the customary pattern is for each “household” to have three residences—in the village, at the agricultural lands, and at the cattle-grazing areas. Each residence would be occupied, at different seasons, by different groups of household members. This pattern persists and is now complicated by the residential requirements for education and wage labor. Men, and young men in particular, are very likely to be away from the village at the cattle posts or at work in the towns. Whole households still move from the village to the lands at the start of the rainy season in November, but children frequently stay in the village with relatives during the school week. The result of these sex- and age-specific movements is that at any given time many residential units are only partial social units,

and the cross-sectional snapshot of a survey observation catches many fragmentary and temporary arrangements.

We make these points about the norms and customs of Tswana society because it is our argument that the same imposed framework of analytic categories and behavioral expectations is operating in data collection and in policy design. The ideas about social life that drive the collection of data on illegitimate births and female-headed households as though these terms meant the same in all societies are also included in family policies which assume that the appropriate remedy is always to extract financial support from the biological fathers of children whose mothers are not married. We suggest that both data collection and policy should be sensitive to the enormous variation in cultural practices.

We do not mean to argue that there are no children or women in Botswana who are inadequately supported, but we do argue that inappropriate descriptions of the social situation in the country mean that these children and women are not adequately identified and that policies therefore cannot be designed to target them precisely. We also are not suggesting that the customary patterns of Tswana society are without problems. Like all societies, they incorporate relations of privilege and inequality and a particular pattern of gender relations. What we do assert is that the women of rural Botswana continue to live within the normative framework of Tswana law and custom, and that they will not take advantage of policies, no matter how well intentioned, if those policies expect them to behave in ways that they themselves consider to be inappropriate.

Notes

1. Botswana, a landlocked nation with an area of 582,000 square kilometers (about the size of Kenya or Texas) has a population of about one and one-third million (Botswana Government, 1991). Botswana is notable for, among other things, stable democratic government, rapid growth in per capita GNP, high levels of education and health, and evidence of one of the first declines in fertility rates in sub-Saharan Africa.
2. WLSA research groups operate in Botswana, Lesotho, Mozambique, Swaziland, Zambia, and Zimbabwe. These groups conducted comparative research on child maintenance beginning in 1988. Beginning in 1992, they turned their attention increasingly to women's property rights. Property rights, citizenship laws, reproductive rights, maternity benefits, teenage pregnancy, and violence against women are among the areas

- identified as priorities for research and action by WLSA Botswana (WLSA, 1992).
3. The meanings and functions of bridewealth and of African marriage are complicated, varied, and have changed over time (Kuper, 1982; see the essays in Comaroff, 1980, & Krige & Comaroff, 1981). In different villages, and according to different villagers, the number of cattle, the timing of the payment, and whether payment was essential all vary. In the particular community of our study, payment of the six cattle of *bogadi* is not needed for the children of a marriage to be considered members of the father's lineage, but payment of the single *serufo* cow is required.
 4. We have chosen to use the terms "Euro-American" or "Western" to refer to the cultural values and social practices of societies whose dominant cultures originated in Europe because these terms are more familiar to a North American audience. From the southern African perspective, these values are more accurately, and usually, referred to as "northern."

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