

# Broadening the Legal Academy, the Study of Customary Law: The Case for Social-Scientific and Anthropological Perspectives



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## Abstract

This article explores the need for a more broadly based understanding of law, especially in the context of undertaking research in customary law. It examines the limitations of doctrinal legal scholarship involving a "black letter" approach to law, and discusses why more social-scientific and anthropological approaches are crucial for understanding what customary law entails. In doing so, it highlights the specific conditions under which people, especially women, have access to resources and how this shapes their power to negotiate with one another in daily life, as well as, in a legal forum. The article argues that such a perspective is not simply necessary to comprehend customary law, but should be applied more generally. This is in order to pursue an understanding of law in all its dimensions from negotiations in daily life, to alternative dispute forums and courts, in order to analyse and address the inequalities that arise in order to promote a more inclusive, non-discriminatory environment. Such a perspective is important in an age where law has a more global reach, extending beyond state boundaries and where what is local comes together with transnational, national and regional forces to provide an understanding of how external interventions become embodied with a diverse and localised set of meanings and practices, especially in an African context, that give rise to the uneven and varying effects of globalisation.

## Keywords

Customary law; disputes; law in everyday life; social-scientific / anthropological perspectives; local law; legal pluralism; globalisation.

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## **1 Establishing Law at the University of Botswana: discovering customary law**

I first realised the limitations of my legal training when I accompanied my colleague at the Faculty of Law in Edinburgh, Sandy McCall Smith, to Botswana in the early 1980's to help set up the law department of what was then the University of Botswana, Lesotho and Swaziland (UBLS), now the University of Botswana. This came about because the government of Botswana was unhappy with the quota system that limited the number of students from Botswana who could go to study law in Swaziland. This led to the Botswana government instructing the university that it had four months to set up its own law programme from scratch. A delegation from the university were visiting Edinburgh to meet with UBLS students who were undergoing two years of legal training in Edinburgh out of their five years of legal training, which in Africa was located in Swaziland. The visiting delegation from Botswana appealed to Edinburgh for assistance and Sandy McCall Smith offered his services and asked me to help by drawing up course materials for the new programme, particularly in family law, for new staff members who would be overloaded by the demands of the newly established legal curriculum that had to be up and running within a very short space of time.

At first I was reluctant to accept the invitation to go to Botswana because of my lack of knowledge and expertise in civil law, which is related to Roman-Dutch and Cape Colonial law, and which has had an impact on case law in Botswana. However, Sandy managed to persuade me that this was not a problem because with my legal training I had transferable skills. All I had to do was consult the appropriate legal sources, namely statutes and cases, and apply them to the creation of courses that in the case of family law would cover marriage, divorce, maintenance, custody and inheritance.

When I arrived in Botswana I was introduced to Doreen Khama, who had been one of the first law students from Botswana to come to Edinburgh for training and who was now qualified and back in Botswana practising as partner in the first all-female law firm in the country. She was showing me round the capital city, Gaborone, when I spied a group of people sitting out in the open air under a tree talking animatedly. I was intrigued and asked Doreen what they were doing. She explained that this was a customary court that was dealing with disputes. She stopped the car and took me over to introduce me to the presiding officer, who halted proceedings and prevailed on Doreen to make representations to the government to provide

better resources to customary courts.<sup>1</sup> It appeared that the case this court was dealing with involved a family dispute and I realised that if I was to compile a comprehensive family law course for law students in Botswana I would have to include customary law in the syllabus.

## 2 Limitations of my formal legal training

I was then faced, as a "black letter" lawyer, with getting to grips with customary law. This posed problems for me, given my conventional legal training centred on law-as-text that employs a rigorous exposition of doctrinal analysis embodied in legislation and judicial decision-making. How then was I to approach the study of customary law? Given my training I immediately went to the university library to browse among the legal texts there, but to my amazement, there were no relevant written texts or authoritative sources available to guide my study. This was not surprising because of the nature of the subject that is predicated upon unwritten, oral transmission.<sup>2</sup> Searching the library more generally, I came across anthropological texts, the most germane of which was Issac Schapera's *A Handbook of Tswana Law and Custom* that was published in 1938. While this provided a very useful starting point it was written when Botswana was still the Bechuanaland Protectorate (1885-1966) under British indirect rule, which it remained until it gained its independence as a state in 1966. It was therefore somewhat outdated and did not address the relationship between customary law and other forms of state law, referred to as common law,<sup>3</sup> all of which have an impact on family life, affecting the constitution of marriage and its dissolution, the affiliation and support of children, and the distribution of property on divorce or death. I quickly realised that I would have to carry out my own research to acquire this information. This posed a dilemma for me, for the skills I had acquired in law school did not equip me for this. I had to move beyond the formal sources of law, such as the legislation and cases

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<sup>1</sup> At that time the President of the country was Sir Seretse Khama, whose nephew, Impoeng, was married to Doreen.

<sup>2</sup> Where customary law does appear in written form, in reported cases, this is referred to as "lawyers' customary law", a term coined by Woodman 1977 *U Ghana LJ* 115.

<sup>3</sup> In its legal system Botswana recognises both customary and common law. Customary law is defined as being "in relation to any particular tribe or tribal community so far as it is not incompatible with the provision of any written law or contrary to morality, humanity or natural justice" under s 2 of the *Customary Law (Application and Ascertainment) Act* 51 of 1969. Conversely, under s 2 of that Act, Common law is defined as "any law, whether written or unwritten, in force in Botswana, other than customary law".

that I had been trained to consult as a lawyer. It meant adopting a different methodological approach along with acquiring a new set of skills.

### **3 Broadening my horizons: adopting new methodological approaches to law**

I was going to have to conduct field research<sup>4</sup> on the ground among those who were the custodians of customary law, acquiring narratives from persons viewed as experts in the field rather than resorting to texts from books. When I returned to Edinburgh I applied for research leave and I consulted extensively with colleagues, primarily in social policy and social anthropology, who had the necessary expertise in conducting empirical research and in applying the appropriate methodologies associated with socio-legal and anthropological approaches to data collection. Before returning to Botswana I had to determine what methods I would need to employ in researching customary law, known as *mekgwe le melao ya Setswana*,<sup>5</sup> given its oral, unwritten nature. The first task was to determine who the experts were who needed to be consulted, and this involved discussions with the office of the Commissioner of Customary Courts that was in existence in Botswana at that time. It was agreed that I would work among Bakwena,<sup>6</sup> a Tswana polity (glossed as "tribe"), on whom little research had been conducted and who had not featured in Schapera's *Handbook* that I had come across in the UB library. I would be located in the village of Molepolole, the central village of the polity, as well as the regional administrative centre for Kweneng district, where local government institutions such as the District Council and the District Commissioner's office and Magistrate's court were situated. The village that lies close to the railway line with South Africa is only seventy kilometres by road from Gaborone, the capital city, and many people now commute daily from Molepolole to work in the city. As I did not speak Setswana, one of the official languages in Botswana (the other being English), I needed to work with an interpreter, and I was put in touch with Mr SG Masimega, who had

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<sup>4</sup> This research was initially funded (1982) by the SSRC (now ESRC), the Carnegie Trust and the Commonwealth Foundation and later (1981 and 1989) by the British Academy and Women and Development, Commonwealth Secretariat, the Leverhulme Trust (2009-2010), and the British Academy's International Partnership and Mobility Scheme (2015-2017). The International Research Centre on Work and the Human Lifecycle in Global History (Re Work), Humboldt University, Berlin also generously supported my research by making me a Senior Research Fellow (2010-2011), thus enabling me to analyse my data.

<sup>5</sup> Often glossed as "Tswana law and custom".

<sup>6</sup> In Setswana, one of the official languages, the prefix "Ba" is the plural modifier of a noun designating a singular person as a "Mokwena", while "Bakwena" are the plural persons who make up the Kwena polity.

been Tribal Secretary to Chief Kgari Sechele II (1931-1966), who served as a district councillor, and who served on key committees over the years including the village development committee, the Parent Teachers Association, the Agricultural Show Committee and the Independence Celebration Day Committee, that this year (2016) will celebrate fifty years of independence. Such was Mr Masimega's engagement in village affairs that he was known locally as "Mr Commonsense". He was in his 70's when I began my field research in 1982 and we worked together for many years before he died in 1996.<sup>7</sup> He helped many researchers in Botswana over the years and without his invaluable assistance my research would never have got off the ground. Years later, when local people had got used to seeing us walking up and down the village, they commented "there goes the old man with his shadow".

#### **4 Getting to grips with customary law: challenges and methods**

It was Mr Masimega's role to introduce me to the village and explain what my job was about before I could begin my study. I needed to meet all the key officials in Tribal Administration who administered customary law. At that time they were the Chief Regent, Mr Mac Sechele, the Senior Chief's Representative, Mr K Sebele, and the Deputy Chief, Mr Kgosiensho. Given the size of Molepolole, which was estimated to have a population of around 20,000 in the 1980 Census,<sup>8</sup> my introduction to local people was carried out through meetings in the six wards that make up the administrative structure of the Kwena polity, that are derived from many households grouped together under several *dikgotla*.<sup>9</sup> After this had been accomplished, and I had met with local headmen and ward heads who were in charge of the

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<sup>7</sup> My subsequent research assistants, for whose help and support I am extremely grateful, include Phidelia Dintwe, Phenyio Thebe, Kawina Power, Boinelo Baakile and Goitseone Molatlhegi.

<sup>8</sup> Government of Botswana *Population and Housing Census 1981* 7. The village has grown, with the population being most recently estimated at 63,128 according to the Government of Botswana *Population and Housing Census 1981* para 2.4.

<sup>9</sup> A *kgotla* is the assembly center (both the physical location and the body of members) of a group of households presided over by a male headman or ward head; in the past, but no longer, all household heads were related through the male line. It forms part of the organisation of Tswana society that revolves around the construction of a *morafe* or polity. Several *kgotla* grouped together are known as *dikgotla*, that represent a tightly organised hierarchy of progressively more inclusive administrative groupings, beginning with the households that make up a *kgotla* and extending through wards, which are the major units of political legal organisation of the *morafe* as a whole. At the time I began my research in 1981 there were six main wards, Maunatlala, Mokgalo, Ratshosa, Notledibe, Borakalalo and Kgosing, which is at the apex of the system and where the Chief's *kgotla* is located.

system, I was able to commence my research by interviewing them and their constituents at the various *dikgotla*, where both women and men were present.

## 5 Interviews

It was these extensive interviews that provided the foundation for my understanding of customary law as it was operating in a contemporary context. Given my focus on family law, discussions centred on the kind of problems that they had to deal with among families. The overwhelming refrain from *dikgotla* and wards were "women being left with children to support". I learned that this "causes us a headache" because "we have to find out if the parties are married or not". This led to discussions of what gave rise to a customary marriage, how parties who were married got divorced, and how unmarried women with children were treated under customary law.<sup>10</sup> This also included discussion on how property was distributed on divorce or death.

## 6 Disputes and participant observation

It was necessary to place these narratives in context, and this was done through attending family disputes at the various wards, especially at the Chief's ward, Kgosing, where the Chief's *kgotla* is located. This meant engaging in participant observation, observing the setting in which disputes were heard, who was present, who participated in the dispute and what the outcome was. These observations were extremely important, for although written transcripts were recorded in Setswana these contained only the bare minimum of information. For example, the questions put to the person raising the dispute (known as the complainant) were not recorded; only the answers were documents. Thus a full picture of what occurred could not be acquired without attending the dispute in person. However, as these proceedings tended to follow a set pattern, especially in the context of unmarried women seeking financial support for children, Mr Masimega and I soon became adept at supplying the questions that were germane to the proceedings so that we were able to supplement the findings in the written records.

Attendance at these disputes not only provided a more comprehensive picture of what was taking place on the ground but also enabled us to observe the dynamics of the power relations at work, in particular, who had

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<sup>10</sup> For details see Griffiths *In the Shadow of Marriage*.

the power to speak and how their contributions were received, as well as to observe who was ignored or rendered silent in *kgotla* deliberations. This was especially pertinent with regard to the gendered nature of family relations and the ways in which the testimony of women and men or husbands and wives was perceived. For the parties could not be represented by lawyers who have no rights of audience in the customary courts, where proceedings adopt a different form from that of the Magistrates' or High Court with their rules of evidence and procedure and strict adherence to protocols. Instead, proceedings in the Chief's *kgotla* adopt a more direct character, with the third party hearing the dispute, the Presiding Officer, calling on the complainant to state his or her claim. When the complainant has done so, s/he is questioned by the Presiding Officer and by any members of the community who are present in the *kgotla*. The other party to the proceedings is then called on to respond, and is similarly questioned at the end of his or her presentation. There is then a general discussion in which *kgotla* members make observations and put forward their opinions on how the matter should be dealt with. Finally, the Presiding Officer gives his decision. This procedure was followed all the way up the system, from the local *kgotla* to the Chief's *kgotla*, and its reliance on oral narratives is in keeping with a well-established Tswana cultural tradition.

What became visible in this process was the way in which gender had an impact on how a case was handled. For example, where the case in question involved a woman seeking divorce and a distribution of marital property, it was clear through the questions that were put to the spouses that women had a higher burden of proof to meet with regard to property rights. This was because before a woman could even begin to make a claim on property she had to establish that she had fulfilled the requirement of being a "good" wife. Thus she had to displace the burden of fault in relation to her conduct in ways that men were never called upon to address. A man leaving his wife for another woman was not perceived as being a "bad" husband, but a woman leaving home without her husband's consent (that was often prompted by his behaviour towards her) was viewed in a negative light, and she had to displace a perception of misconduct on her part before she could even begin to make any kind of claim on marital property.<sup>11</sup> The different standards that were applied to marital behaviour and the impact that they had on the adjudication of disputes became visible through participant observation that provided an important dimension that might

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<sup>11</sup> Griffiths *In the Shadow of Marriage* 158-182.

otherwise have been lost through just centring the research on the translation of court records.

With regard to unmarried women, under the Kwena customary system they could claim damages for seduction only on the birth of their first child. This was a well-established rule. However, in many cases where a woman had more than one child with a man this may have occurred because she and her family believed that they were in the process of negotiating a customary marriage, while the man and his family rejected this interpretation of the relationship claiming that it was simply a question of concubinage. The uncertain position in which women find themselves in these circumstances, due to the flexible nature of what constitutes a customary marriage as it is debated in the *kgotla*, places them and their family at a disadvantage when it comes to making claims for support on the fathers of their children.<sup>12</sup>

Attendance at disputes not only provided a more comprehensive understanding of what was at stake in terms of the arguments and strategies employed by the parties, but also allowed for the data derived from the general interviews I was conducting to be corroborated or set aside. Further interviews with court personnel, *kgotla* members and parties to disputes enabled any queries or questions to be further investigated. Following up on these disputes over the years led to an extended case study that provided a more longitudinal perspective than a one-time snapshot of what took place in a *kgotla* on a particular day. It also highlighted the extent to which these *kgotla* decisions were or were not in fact implemented on the ground, with all the consequences that this entailed.

## **7 Moving beyond disputes: daily life and the collation of life histories**

Valuable as this data proved to be, it was not complete, for the focus on disputes and conflict did not provide sufficient information on the extent to which these conflicts represented departures from or endorsed the norms of negotiation in everyday life. In order to contextualise my data on disputes, I set about supplementing it by carrying out a genealogical survey of Mosotho *kgotla* that forms part of Basimane ward, which is a subward to Kgosing, that is located just a few minutes' walk from the Chief's *kgotla*. This survey was focused on people's life histories, especially with regard to marriage, support for children and the distribution of property, as well as data on education and formal or informal employment. This formed part of

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<sup>12</sup> Griffiths *In the Shadow of Marriage* 106-133.



my second period of fieldwork in 1984, and it involved repeated interviews with individuals, families and households over a number of months, which was used to check and cross-check the collected data. Prior to my return in 1984, I was introduced to Issac Schapera who, it appeared, had taken detailed notes on Bakwena (including genealogies) but which he had not had the time to publish in his 1938 *Handbook*. Armed with this material, which he generously gave to me, Mr Masimega and I were able to work back from people living in Mosotho *kgotla* in 1984 to the founding of the *kgotla* in 1937, when Molepolole village was established in the location it occupies today. In working backwards to Schapera's data (which it turned out Mr Masimega had actually collected for him in the 1930's) we were able to acquire oral life histories over two to three generations.<sup>13</sup> In later years this information for two families, the Radipati's and Makokwe's, who were descended from a common male ancestor, was further extended to cover five generations.<sup>14</sup>

These oral life histories, perceived of initially as a means for providing a background against which my study of disputes could be contextualised, became more central to my analysis over time, as I came to appreciate the role they played in shaping the contexts in which people structure and pursue claims in respect of one another in everyday life. They formed the core of my book *In the Shadow of Marriage: Gender and Justice in an African Community* published by the University of Chicago Press in 1997. These histories document continuities and difference among individuals, families and households over time, and the role that gender occupies across a landscape of pre-colonial, colonial and postcolonial dimensions. What these genealogical histories illuminated were the different dynamics that connective threads to the past embody, creating varying access to and control over resources (including law). They reveal disparities between the sexes and among individuals, highlighting the ways in which families' and households' experiences of social networks reflect diverging patterns of human, social and economic capital that promote or hinder processes of accumulation and control over the years. What emerges are the uneven ways in which resources are apportioned that are not simply produced through local conditions but connect to wider processes of political, economic and social distribution that derive from more global influences.<sup>15</sup> These concrete effects have implications for the ways in which upward

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<sup>13</sup> Griffiths *In the Shadow of Marriage*.

<sup>14</sup> Griffiths 2013 *Int J L C* 213; Griffiths 2014 *J Legal Plur* 37.

<sup>15</sup> See Griffiths "Engaging with the Global" 112. Also see Griffiths *Land, Space and Place* 23-24.

mobility becomes open to some individuals and families, while constraining others in ways that perpetuate social stratification and inequality that are hard to overcome. Understanding what gives rise to them provides for a more informed consideration of what constitutes vulnerability and of the circumstances that create unequal access to resources that frames the basis upon which differing life trajectories come into being.

This important data was supplemented by archival research, enhancing its historical aspects along with a ten-year survey of court records from the Chief's *kgotla*, and the Magistrate's and High Court. This was in order to attain my original goal of ascertaining how customary law intersects with other forms of law in the family sphere in Botswana.<sup>16</sup> To this end I also analysed legislation and case law, carried out interviews with magistrates and judges and other court personnel, such as court clerks, and attended family disputes in these forums. Scrutinising the data as a whole, it became clear that the gendered dimensions of social life had an impact on both customary and common law in ways that rendered them mutually constitutive rather than separate or "dual" systems of law, as envisaged by Hooker<sup>17</sup> (1975) in his depiction of plural legal systems under the rubric of legal pluralism, for the norms and values that underpin daily social life also work their way into legal arenas regardless of their jurisdictional constituency. This recognition of interconnectedness has become even more apparent in my current research on land carried out in Kweneng Land Board in Molepolole (2009-2010), that revealed changing attitudes towards gender relations in social and legal spheres that have brought about transformations in women's access to and control over land.<sup>18</sup> The factors that give rise to this transformation include enhanced education as well as better access to informal and formal sector employment and legal reform that have enabled some women to be more proactive in land transactions. Such transformations also include shifts in the customary law of inheritance, where some women are acquiring access to property that would not have been available to them in the past, due to a re-evaluation of their role within the family and a greater recognition of their contributions, including care-giving activities.<sup>19</sup>

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<sup>16</sup> This meant taking account of both customary and common law, which form part of the laws of Botswana. See fn 3.

<sup>17</sup> Hooker *Legal Pluralism* 1, 14 and 356.

<sup>18</sup> See Griffiths "Managing Expectations"; Griffiths 2012 *Acta Juridica* 65.

<sup>19</sup> Griffiths "Families, Identity and Belonging" 328.

## 8 Social-scientific/anthropological methods and the study of customary law

These observations on customary law derive from a methodological approach to the study of law that included embracing what was for me a new set of techniques involving interviews, participant observation, extended case studies of dispute, archival research, and the collation of family genealogies derived from oral life histories. In other words, they involve research tools associated with a social-scientific or anthropological perspective on law. My engagement with extended periods of field work over the years has produced research that is ethnographic in character, being focused on local, specific and rounded micro studies that detail people's perceptions and concrete experiences in law in everyday life. My acquiring social actors' perspectives in this way marked a shift away from viewing law from a "top down" to a "bottom up" approach. This is important because such a perspective highlights the relationship between law and power and documents how law operates in relation to other bodies and agencies that construct social relations. Thus it underpins a "decolonization of the legal academy" in both north and south, for it reveals what otherwise remains invisible in terms of more traditional, doctrinal legal scholarship that pursues a more narrowly framed remit. This methodological technique associated with social-scientific approaches to research also reflects an ethnographic approach based on fieldwork that, as Moore<sup>20</sup> observes, "represents the key method of social anthropology". Such an ethnographic approach is one that is absent from most lawyers' analysis of law. Yet it is important because anthropological perspectives have made a major contribution to the study of law by challenging Western notions of what constitutes a legal domain and by extending the concept of law beyond rule-based formulation to incorporate "law as process".<sup>21</sup> In adopting actor-oriented perspectives that interrogate who is "inside" and "outside" law,<sup>22</sup> these approaches have highlighted the frontiers of legality.<sup>23</sup> By highlighting the ways in which race, class and gender impact on social actors' relationships with law, another perspective becomes visible, one that is often ignored in conventional legal discourse.

In addition, this type of approach highlights the specific conditions under which people have access to resources and how this shapes their power to

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<sup>20</sup> Moore *Anthropology and Africa* 1.

<sup>21</sup> Moore *Law as Process*.

<sup>22</sup> Harris *Inside and Outside Law*.

<sup>23</sup> De Sousa Santos *Toward a New Common Sense*.

negotiate with one another in daily life as well as in a legal forum. Contextualising law in relation to a broader set of institutions and agencies makes new horizons come into view. These include the conditions that facilitate or impede access to legal forms, along with the factors that underpin the power and authority of narratives in social and legal settings that empower some individuals while silencing others. In exploring these dimensions, attention is drawn to other options or alternative strategies that may exist for those who are excluded, silenced, or prevented from seeking redress from the formal legal system. The value of this information is that it may be used to flesh out more abstract understandings of law and provide an opportunity for analysing the conditions under which change or transformation may be brought about.

In the case of my own research I have applied these social-scientific and anthropological approaches to the study of law, together with more conventional tools of legal analysis involving legislation, case law and court records. This was done in order to provide a more holistic and comprehensive approach to the study of law in Botswana. Clearly this broader approach was crucial to acquiring knowledge and understanding of the oral, unwritten customary law that operates in daily life that could not be acquired through the use of the more traditional tools of doctrinal legal scholarship. It is not that customary law was totally ignored under doctrinal legal scholarship. Thus Woodman,<sup>24</sup> cited earlier, had already noted that judicially recognised rules of customary law set down in recorded cases "in some instances do not correspond to behaviour outside courts" and that there is a divergence between "judicial customary law" and "practised customary law" that provides the focus for "lawyers' customary law" that represents the former and "sociologists' customary law" that represents the latter approach. These different perceptions and approaches to customary law reflect the different disciplines and methodological approaches that derive from juridical and social-scientific approaches to law, which have had a particular impact on the way in which customary has been perceived and approached in South Africa, see Himonga and Diallo in this special issue. They continue to influence debates on legal pluralism in terms of what Griffiths<sup>25</sup> has identified as two different approaches to the subject, one that represents the classic, juristic or weak form of legal pluralism, (that he associates with a lawyer's view of law), the other representing a form of strong, deep, or new form of legal pluralism (that he associates with a social science view of law). The former underpins a representation of different

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<sup>24</sup> Woodman 1977 *U Ghana LJ* 115.

<sup>25</sup> Griffiths 1986 *J Legal Plur* 1.

legal orders within the nation-state, while the latter engages with a more far-reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity. What is at issue here is the degree of centrality that is accorded to state law. In the case of the former it defines the conditions under which legal pluralism is said to exist, while in the case of the latter this centrality may be displaced by a recognition that state law may be only one of a number of elements that in fact give rise to a situation of legal pluralism.<sup>26</sup> These different approaches have important consequences for defining which regulatory norms are to be accorded the recognition, authority and legitimacy of law, an ongoing debate in the context of what constitutes customary law in Africa.

In the early 1980's, when scholars were (re)discovering customary law, academics such as Fitzpatrick;<sup>27</sup> Chanock;<sup>28</sup> Snyder;<sup>29</sup> and Abel<sup>30</sup> were of the view that what is termed customary law belongs to a particular period in history; that it is, in fact, the product of such people's encounters with colonialism and therefore an artefact of that encounter. There are debates over the extent to which this kind of law was simply the product of colonial overrule, or whether any traces of its precolonial past were carried forward, with scholars such as Roberts<sup>31</sup> and Wylie<sup>32</sup> arguing for some recognition of African customary law as having some links with its precolonial past. Whatever its origins are, however, it is clear that customary law is the product of long interaction between the colonisers and the colonized.<sup>33</sup> As my Bakwena research demonstrates, interactions between customary and common law are among the ongoing processes of negotiation in a postcolonial state that inform the social world in which people live and the legal worlds they encounter. From this perspective, rather than arguing about the purity of customary law in terms of its historical pedigree, it is more important to take account of the sources that give rise to it and the ways in which it is operating at the moment.

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<sup>26</sup> For a more detailed discussion see Griffiths "Legal Pluralism" 289; Griffiths "Reviewing Legal Pluralism" 269.

<sup>27</sup> Fitzpatrick 1984 *J Afr L* 20.

<sup>28</sup> Chanock 1978 *Afr L Stud* 80.

<sup>29</sup> Snyder 1981 *J Legal Plur* 49.

<sup>30</sup> Abel 1984 *J Afr L* 19.

<sup>31</sup> Roberts 1984 *J Afr L* 1.

<sup>32</sup> Wylie *A Little God* 101.

<sup>33</sup> Moore "History and Redefinition of Custom" 277.

## **9 Broadening the legal academy: applying these methods more generally to Law**

My discussion of methodology and of social-scientific and anthropological perspectives has until now been grounded in the study of customary law. However, I would argue that the contextual analysis of the type I engage in is one that should be applied to the study of law more generally. This is because it provides for a more informed understanding of the specific circumstances in which people have access to resources (including genealogical and other networks) and how this shapes their power to negotiate with one another in daily life, as well as in a legal forum. This is important, for as Bakwena life histories demonstrate, it is at the level of daily life that the power and authority to negotiate with others has the greatest impact on individuals' and families' lives. For they reveal how parties formulate claims in respect of one another in the everyday world of familial relationships and property relations. Such negotiations and their discourses amount to law (in conventional terms) when they are located within particular institutional settings (eg courts). But the power to shape such discourses is not confined to or solely derived from these legal settings, because it is generated within a broader arena. It carries authority beyond such settings into the operational heart of daily life. Thus law becomes contextualised in terms of other bodies and agencies that construct social relations, such as families, households, economic institutions and political institutions. Getting to grips with power relations that inform networks within which individuals, families and households operate is essential to an understanding of the challenges, including the legal challenges, which face the building of a nation in South Africa based on democratic social values, social justice and fundamental human rights.

What this perspective makes visible, that more conventional methodological approaches ignore, are the factors that empower or constrain parties in their daily negotiations with one another; in other words, the conditions under which parties may successfully pursue claims or be silenced before they ever encounter a legal forum. This is pertinent not only to the study of customary law but is of more general significance, as it has long been established that taking disputes or cases as a starting point for studying law is problematic.

## 10 The general limitations of studying disputes

Felstiner, Abel and Sarat,<sup>34</sup> for example, have drawn attention to the need to study "the much neglected topic of the emergence and transformation of disputes" to reveal the ways in which "experiences become grievances, grievances become disputes and [the ways in which] disputes take various shapes". In their seminal article on "The Emergence and Transformation of Dispute: Naming, Blaming, Claiming" they explore how people "respond to the experience of injustice and conflict"<sup>35</sup> within an American context. In another part of the world, Genn<sup>36</sup> and Genn and Paterson<sup>37</sup> have explored *Paths to Justice: What People in Scotland Do and Think about Going to Law* in England and Wales and Scotland. Based on empirical studies they document the strategies of those involved in "potentially justiciable events" that include the kind of problems that could give rise to legal actions in the civil courts. Their findings reveal that very limited use is made of formal legal proceedings to resolve these problems. This is not surprising, although much of a lawyer's formal training involves acquiring expertise in analysing case law from the upper echelons of courts in the justice system, for in practice very few disputes end up being formally litigated in courts.

It is important to bear this in mind, for what remains invisible where disputes provide the sole focus for legal analysis are the factors that inhibit parties from pursuing a grievance through to a dispute or court case. As a detailed analysis of Bakwena life histories demonstrates, what plays a critical role in these decisions is access to resources and the role such resources play in shaping people's lives. As the histories of the Makokwes and Radipatis over generations clearly indicate, unequal access to resources gives rise to different forms of power which impact upon individuals' and families' abilities to negotiate with one another in various ways. These forms of power not only differ on the basis of status or gender but also vary between members of the same gender and among generations, clearly articulating the ways in which class, ethnicity and gender have an impact on parties' access to and use of the legal system, including customary law. Thus it is essential to pursue an understanding of law in all its dimensions, from negotiations in daily life to alternative dispute forums and courts, in order to be able to comprehend and address the inequalities that arise and to promote a more inclusive, non-discriminatory environment within communities for present

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<sup>34</sup> Felstiner, Abel and Sarat 1980-81 *Law Soc Rev* 632.

<sup>35</sup> Felstiner, Abel and Sarat 1980-81 *Law Soc Rev* 632.

<sup>36</sup> Genn *Paths to Justice*.

<sup>37</sup> Genn and Paterson *Paths to Justice Scotland*.

and future generations, that will contribute to the emergence of a more peaceful and prosperous nation. Such an objective reflects a global aim of the UN's sustainable development goals that form part of its 2030 Agenda for Sustainable Development, and that was adopted by world leaders in September 2015 and came into force on January 1<sup>st</sup> 2016.<sup>38</sup>

What social-scientific and anthropological approaches to law reveal are the limitations and constraints that may inhibit social actors from formally engaging with law. Acquiring an understanding of how differential power relations are constructed is central to providing a vehicle for analysing the conditions under which power and its discourses may alter or be transformed over time. Having access to this type of data was central to providing me with an understanding of how attitudes towards gender had shifted over time, providing women in Botswana today with greater access to and control over land.<sup>39</sup> In addition, my focus on everyday life also provided me with an important counterpoint to disputes by revealing the norms and values that are at work in regulating families' lives in the normal course of affairs where there is no conflict.

It has long been recognised by legal anthropologists and social scientists that there is a need to study "trouble-less" as well as "troubled" cases (Llewellyn and Hoebel;<sup>40</sup> Holleman;<sup>41</sup> Roberts<sup>42</sup>). What this approach highlights, which is often missing from conventional legal analysis, are the contexts in which parties may reach agreement or consensus on how matters should be handled. In my more recent research (2009-2010) this dimensions provided important data on the contexts in which negotiations among family members can lead to voluntary agreements being reached over property that may differ from those that should be reached according to formal legal norms and projected legal standards. This was especially pertinent with regard to rights to the inheritance and transmission of land. Thus, understanding what factors give rise to consensus is as important as understanding what factors lead to conflict, if a more comprehensive view of law and the way in which it operates is to be obtained.

It is clear that methodology plays a crucial role in the analysis of law. Making explicit the terms of reference upon which legal research is performed is

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<sup>38</sup> The 2030 Agenda and Sustainable Development Goals can be found at UN Date Unknown <http://www.un.org/sustainabledevelopment/development-agenda/>.

<sup>39</sup> Griffiths "Managing Expectations" 221; Griffiths 2012 *Acta Juridica* 65.

<sup>40</sup> Llewellyn and Hoebel *The Cheyenne Way*.

<sup>41</sup> Holleman 1973 *Law Soc Rev* 585.

<sup>42</sup> Roberts *Order and Dispute*.



critical, for the sources and theoretical frameworks that are employed in shaping the analysis determine what the scholar "sees" that depends on the standpoint that is adopted. In other words, what is rendered visible, or alternatively, what remains invisible, excluded from view. This has implications for how law is perceived. Adopting a social-scientific or anthropological approach to the study of law highlights the flexible nature of customary law as "living law". It undermines any view of customary law as being static or ossified in time. It contradicts any perspective that would see it as belonging to the past, forming part of a by-gone era that is at one with colonialism. It also tracks the processual nature of law, highlighting the ways in which law may be differentially experienced according to the multiple intersections of class, gender, or ethnicity of those social actors who engage with it.

## **11 Engaging with the global dimensions of law: a view from the local**

Such a depiction of customary law highlights the relational aspect of law within the state. Yet the methodological perspective upon which it is based is one that is highly pertinent to studying law beyond the confines of the state. For it is well established that under the current conditions of globalisation<sup>43</sup> law is highly mobile. Thus this perspective also allows for a de-centring of state law, by recognising "the possible existence of normative orders with quite distinct foundations of legitimacy beyond the state as well as within national states".<sup>44</sup> This is in keeping with anthropological studies of law that have highlighted that "state law is not the only source of power"<sup>45</sup> and that have challenged its claims to being universal across time and space, its monopoly over the recognition, legitimacy and validity of what constitutes law, and its assertions as to integrity, coherence and uniformity. These ideological assertions have long been subject to contestation,<sup>46</sup> especially by those who engage with legal

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<sup>43</sup> See Von Benda-Beckmann, Von Benda-Beckmann and Griffiths *Mobile People, Mobile Law*.

<sup>44</sup> Von Benda-Beckmann, Von Benda-Beckmann and Griffiths *Mobile People, Mobile Law* 4.

<sup>45</sup> Von Benda-Beckmann, Von Benda-Beckmann and Griffiths *Mobile People, Mobile Law* 14.

<sup>46</sup> Comaroff and Roberts *Rules and Processes*; Fitzpatrick *Mythology of Modern Law*; Sarat and Kearns *Law in Everyday Life*; De Sousa Santos *Toward a New Legal Common Sense*.

pluralism of the strong, deep or new type that reflects the social-scientific perspective on law referred to earlier.<sup>47</sup>

For in recognising law's mobility, it is clear that it cuts across local, regional and national boundaries, engendering more transnational forms and ordering<sup>48</sup> that are exemplified by regulatory regimes such as international human rights, or global development goals that have access to justice as a key component, as is the case with the 2030 Global Agenda for Sustainable Development (and was formerly the case under the previous Millennium Development Goals). This approach has come about because it has now been recognised that strategies for poverty reduction are not just about addressing material deprivation but also include the need to counteract the powerlessness that stems from a lack of access to justice.

As far back as 2008 the UN Report of the Commission on the Empowerment of the Poor acknowledged access to justice and the role of law as one of the four pillars of poverty reduction.<sup>49</sup> It is also embodied in Goal 16 of the current 2030 Agenda, because law forms part of a broader remit that incorporates human development discourse, in recognition of the important role that social and cultural considerations play along with economic and environmental factors. Thus sustainable development in the context of access to justice along with poverty reduction (Goal 1, Sustainable Development Goal (SDG), gender equality (Goal 5, SDG), and social equality (Goal 10, SDG) must go beyond an understanding of law that is based only on a formal, doctrinal perspective, to incorporate knowledge of "traditional", "customary" or "informal" legal systems, especially in an African context. This view is premised on a global recognition that the majority of people in the world resort to "informal" rather than "formal" justice<sup>50</sup> and that it is among this predominantly poor population that women and children who are vulnerable are disproportionately represented.<sup>51</sup>

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<sup>47</sup> Griffiths 1986 *J Legal Plur* 1; Merry 1988 *Law Soc Rev* 867; Griffiths "Legal Pluralism" 289; Griffiths "Reviewing Legal Pluralism" 269.

<sup>48</sup> Von Benda-Beckmann, Von Benda-Beckmann and Griffiths *Mobile People, Mobile Law*; Von Benda-Beckmann, Von Benda-Beckmann and Griffiths *Power of Law in a Transnational World*; Von Benda-Beckmann, Von Benda-Beckmann and Griffiths *Spatializing Law*; Hellum, Ali and Griffiths *From Transnational Relations to Transnational Laws*.

<sup>49</sup> UN 2008 <https://www.un.org/ruleoflaw/blog/document/making-the-law-work-for-everyone-vol-1-report-of-the-commission-on-legal-empowerment-of-the-poor/>.

<sup>50</sup> Piron 2005 <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2309.pdf>.

<sup>51</sup> Ruzvidzo and Tiagha "Gender Development Index" 22.

Taking on board these considerations requires an understanding of the legal repertoire from which social actors can draw in constructing discourses of legitimacy that may be used to promote and justify multiple forms of intervention action and policy-making in many different arenas. It also requires a reappraisal of the relationship that exists between local, national, regional and transnational spheres of action where law embodies a complex constellation of relations that operate at a number of levels. In these processes, understanding what happens at the local level is important for deciphering how transnational forces and their impact shape and are shaped by local and national actors in particular contexts. This is in order to acquire critical insight into viewing the global from below that is crucial to acquiring an understanding of how "external" interventions become embedded with a diverse and localised set of meanings and practices that give rise to the uneven and varying effects of globalization, development, and all this entails. It lies at the heart of comprehending what it means to talk in terms of international and worldwide standards that are adopted by institutions and agencies that build their programmes and policy initiatives around concepts such as access to justice, transparency, accountability and good governance. For such an approach exposes how these abstract concepts become operationalised in relation to assorted populations and specific communities across the globe, making visible the concrete conditions under which people do or do not have access to legal forums and the terms upon which they can engage with law.

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## List of Abbreviations

Afr L Stud	African Law Studies
Int J L C	International Journal of Law in Context
J Afr L	Journal of African Law
J Legal Plur	Journal of Legal Pluralism and Unofficial Law
Law Soc Rev	Law and Society Review
U Ghana LJ	University of Ghana Law Journal
UBLS	University of Botswana, Lesotho and Swaziland
UN	United Nations