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Principles of Tswana Customary Law:

A Sociology Perspective

J. Comaroff and S. Roberts. *Rules and Process: The Cultural Logic of Dispute Settlement in An African Context*. University of Chicago Press, 1981. 293 pp. US dlr. 27.56

Introduction

This article discusses a recent study of legal disputes among Barolong and Bakgatla. As the authors point out, the features of legal proceedings which they recorded may not necessarily obtain in other Tswana tribes. I should also add that the analysis which I present is not necessarily consistent with that of Comaroff and Roberts.

Firstly, I should say what I mean by 'customary law'. By this term I mean the legal principles followed in customary courts in dealing with disputes which lead to litigation. It may be equally important, however, to state what I do not include in the term 'customary law' and what, therefore, I wish to distinguish it from:

1. I am not primarily concerned with legal history. The history of Tswana customary law has been well documented by Schapera and others.¹ Rather am I concerned with customary law since about the time of Botswana's independence. Indeed, this very concern with contemporary customary law should re-emphasise for us that the history of customary law has not ended. Some of the readers of this paper may even at some time in the future be faced with the task of changing customary law. Before sensible changes can be made, however, it is necessary to understand customary law as it operates at present. This article attempts to make a contribution to such understanding.

2. A second important distinction is between customary law and traditional norms. In order to bring out this distinction, I would like to present an analogy.

Following the calling of university lecturer I am governed by traditional norms. For example, in lecturing, it is my duty to avoid dogma and to encourage students to adopt an attitude of scepticism towards writers who assert their theories authoritatively rather than on the basis of empirical data. Now, if the University of Botswana considers that I am not performing my proper duties then it might set up a Committee of Enquiry. In the course of the Committee's deliberations evidence might be adduced that I had been lecturing dogmatically. Committee members might expatiate on the intellectually crippling effects of dogmatic lecturers. Such argument might be very persuasive but, I would suggest, even in this tail end of the twentieth century, a breach of the traditional norm against dogmatic teaching might not in itself lead to my dismissal.

Let me now use this analogy to press home the distinction between traditional norms and customary law by turning to the subject of traditional Tswana marriage. The traditional norms governing the establishment of a proper matrimonial relationship are well known, but they may be worth rehearsing:

The process starts with negotiations - patlo - between the relatives of the man and the relatives of the woman. If patlo has proceeded smoothly it is concluded by the

donation of a gift - dilo tsa patlo - from the relatives of the man to the relatives of the woman. The acceptance of the gift entitles the couple to sleep together at her homestead - go ralala. Eventually, the woman is brought to the homestead of the man. In times past, there would be an oral ritual to initiate this transition: the man's relatives would request the woman's for a 'segametse', a 'drawer of water', but this formality has fallen out of fashion. Finally, relatives of the man pay bogadi cattle to the relatives of the woman. The donation of bogadi often takes place in instalments over a long period and may continue till a daughter of the union is preparing for marriage. Payments of bogadi entitle a husband to exclusive sexual rights over his wife and, therefore, make the children of the union legitimate.

So much for the traditional norms governing Tswana marriage. But what about Tswana customary law concerning marriage? The following case should illustrate the distinction.²

The case was brought at the instance of Madubu on the grounds that she had been neglected by her husband, Molefe, who had married her almost twenty years previously. Molefe argued in court that there had never been a marriage. Any conversations which had taken place between his relatives and hers had never amounted to any kind of marriage negotiation and, therefore, there had certainly been no dilo tsa patlo. For much of the period of the relationship he had not brought her to his homestead but had cohabited with her at his cattle post. Moreover, he had never so much as whispered the notion of a promise of bogadi.

This rhetoric failed to be persuasive, for it seems to have made no impression on the chief's final decision, which he summed up as follows:

Molefe and Madubu, I have listened to your case attentively. Molefe, you stole Madubu and lived with her for eight years. You point out (that in) the beginning your father was not keen on Madubu but ultimately accepted her as your wife. I gather from your relatives that Madubu is known to be your wife. Motshabe, your sister, Segonyane, your younger brother, Sefako Pilane, your father's nephew, and Mmamohutsiwa, your father's wife, all speak of this. For those reasons there is no doubt in my mind that Madubu is your wife.³

The distinction between traditional norms and customary law is well emphasised in Comaroff and Robert's comments on the case:

.... had the actors themselves shared a narrow jural view of validity, Molefe must have won the case, for despite Madubu's lone protestations to the contrary, it was agreed that patlo negotiations had not been completed and that the promise of bogadi had not been made. As we have repeatedly stressed, however, the adjudication of validity does not depend on legalistic deduction, and the intrinsic jural weight of the individual elements is always limited. It is thus significant that the chief paid no attention to the occurrence or absence of ceremonial formalities in the course of delivering his judgement; even though Madubu had been "stolen," her acceptance by Molefe's kinsmen and members of the Masiana kgotla was sufficient ground for construing her relationship with Molefe as a marriage.⁴

The distinction between traditional norms and customary law having thus been made, it now becomes possible to list some generalisations about the main characteristics of customary law.

Principles of Customary Law

1. Firstly, customary law is expected to conform to morality as understood by ordinary folk. It seems that in customary courts one will not find the kind of statement sometimes heard in non-customary courts, whereby a judge might say something like, 'My judgement is based on the law, even though I consider the law to be totally wrong'. The following two points may highlight our first principle:

i. In customary law, circumstances significantly alter cases. Thus, it seems evident from the circumstances surrounding the case of *Madubu v. Molefe* that the latter might have won his case - and questions about patlo, bogadi and other traditional norms might have been of considerable importance - if:

- a. the relationship between Molefe and Madubu had lasted only about twenty days instead of twenty years, or;
- b. if Madubu had been having a sexual relationship with another man, or;
- c. if - and perhaps most significant of all - Molefe was not neglecting Madubu because of a sexual relationship which he was having with another woman. I say 'most significant' because the relationship with this other woman, although of short duration, had features conforming to traditional norms, for example, bogadi had been paid for her.⁵ The court, however, reached its decision on the basis of a wider morality than any that might merely encompass a set of traditional norms abstracted from the particular circumstances in which they are, or are not, adhered to.

ii. In arguing that customary law is expected to conform to prevailing morality, it might be useful to contrast customary law with non-customary law once again. Recently, the Law Reform Committee declared that it regarded present marriage statutes as having undesirable consequences in certain respects. In accordance with the Committee's recommendations, the Government framed a Bill for the reform of Botswana's marriage laws. In Botswana, as elsewhere, marriages are not statutorily accepted as such unless authorised by the state or the church. As interested parties, therefore, on 12 June 1982, a number of churches convened a symposium, at which I was invited to speak, at the Assemblies of God church, as a contribution to discussion of the proposed legislation. One of my fellow speakers, Dr A. Merriweather, a highly respected physician, Christian and former parliamentarian, argued, as a representative of missionary religion, that the legislation would encourage polygamy. Many church leaders at the meeting agreed with Merriweather's interpretation.

It now seems likely that the proposed legislation will be shelved until after the next general election at the earliest. In the meantime, many judgements may be handed down which will be contrary to the wishes of the elected representatives of the people. As Sam Weller, in Dickens's *Pickwick Papers*, pointed out, 'The law is an ass', which, in turn, reminds me of the Portuguese saying, 'so um burro não muda': only a donkey does not move. But in the case of *Madubu v. Molefe* donkeys moved very quickly. The chief ordered Molefe to give Madubu almost half his donkeys and other livestock.⁶

2. The norms on which customary law is based are often mutually contradictory. This generalisation is illustrated in many cases, of which the following is but one:⁷

Mosu's first wife bore him a daughter, Matshabi. He then brought another woman to his homestead, together with her son, Segolo, begotten by another man. Mosu looked after Segolo as his son, but he made no attempt to legitimise the relationship

retrospectively, as sometimes happens, by paying bogadi for his mother. As years went by Mosu handed over beasts to Segolo according to the Tswana precept whereby one is expected to pass on one's property to the next generation (tshwaiso) before death.

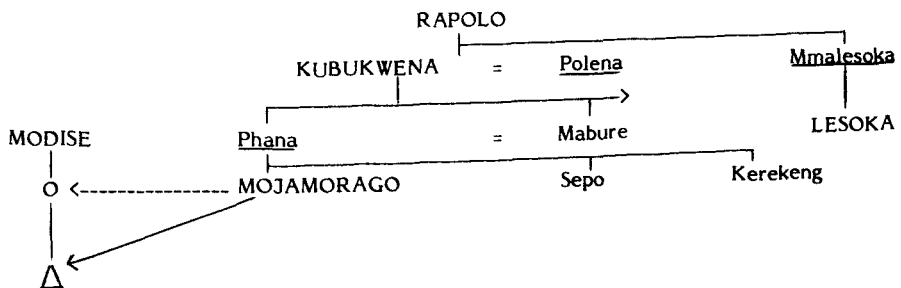
When Mosu died unallocated property (boswa) remained. Matshabi and her children then appropriated all the (boswa). Segolo then took the matter to the chief. The court was then faced with two contradictory traditional norms. According to one norm, Segolo's illegitimacy ruled out Segolo's inheritance rights. According to another norm, tshwaiso is an earnest of boswa, and Segolo had been receiving tshwaiso. The chief regarded the tshwaiso norm as taking precedence over the bogadi norm and ordered Matshabi to hand over ten beasts to Segolo as his rightful boswa.

An important point to make here is that traditional norms which are mutually contradictory in one set of circumstances do not necessarily lose their force in another set of circumstances. To take an analogy, cycling involves at least two opposing forces: the friction of the road against the tyres and the pressure exerted on the pedals. Indeed, the greater the pressure on the pedals the greater the friction on the tyres. Such opposing forces, however, do not usually prevent cyclists from arriving at work on time.

3. Citizens who try to use different traditional norms to their own advantage risk finding themselves trapped in their own machinations when matters come before customary courts. This danger is exemplified in the following case, illustrated in Figure 1⁸

When Mabure married, Lesoka received bogadi for her. He also received a compensation fee when Sepo was impregnated. As a beneficiary of these transactions Lesoka was treating Kubukwena's issue as his children. When, however, Mojamorago impregnated the daughter of Modise, Lesoka refused to pay a compensation fee, for he promised that Mojamorago would eventually marry Modise's daughter. When, however, Mojamorago failed to do so, Modise took Lesoka to the kgotla. In the course of the kgotla discussions, the case seemed to be going against Lesoka. As it did so, Lesoka became more emphatic about denying that Mojamorago was his son. He could not do so, however, without implying that he had an alternative relationship to Mojamorago

FIGURE 1



Key: UPPERCASE - MALE
 Lowercase - female
Underlined - deceased
 —> - additional siblings
 <— - paternity
 <--- - impregnation
 Δ, O - living male, female

LESOKA AND SOME OF HIS KIN

as his malome (mother's brother) - which by genealogy and classificatory kinship he indeed was - with the material responsibilities which might be expected by all who could rightfully claim to be his sisters' children. Unfortunately, this strategy had the possibility of a significant gain in, but also a far too risky loss of, moral status. Conflicts between father and son, brother and brother, and father's brother and brother's son are common and even expectable. But conflict between a malome and a setlogolo (sister's son) is uncommon and regarded as perverse. When such a conflict was once brought before a Rolong chief he indignantly declared that such a suit was contrary to the laws of nature.⁹ In the present case, Linchwe II did not even deign to mention explicitly Lesoka's claim to malome status. He said to Lesoka, 'You had made schemes by which you can disclaim liability on behalf of Mojamorago on the ground that he is not your son. Clearly, the evidence that has been adduced from this kgotla is consistent with one fact, that Mojamorago is your son because you took bogadi cattle paid for his sister. You also took the cattle paid for the seduction of his younger sister ... Lesoka, this kgotla finds against you'.¹⁰

4. Customary courts are frequently concerned primarily with restoring or dissolving social relationships, and only concerned secondarily with deciding who is right and who is wrong. The following is one of many examples.¹¹

Maokofi married Nkidi and they had four children. During one of Moakofi's absences, Nkidi was impregnated by another man. It was then alleged that the man responsible was a close relative of Moakofi. Nkidi vigorously denied this, claiming that the man was a childhood sweetheart. The court ordered that Nkidi be sent back to her own relatives together with her fifth child.

This case may be contrasted with many others, in which a repudiated wife is allowed to remain within the vicinity of her husband's homestead and to be supported by her children.¹² That Nkidi had broken a norm was not in dispute. But that the lover was a close relative of the husband made her continued presence near the marital home intolerable.

That the court crystallised the fact that the marriage had irreparably broken down also enables us to bring out a very important contrast with the outcome of the case of Molefe and Madubu discussed earlier. Madubu was jurally raised to the status of a wife, with all the rights attending that status, notwithstanding the fact that there had been no patlo, no bogadi, etc. All of Molefe's relatives accepted her as a wife, and the court considered such acknowledgement a firm basis for Molefe to re-establish proper conduct towards her as a wife. No other woman Molefe might be having a sexual relationship with was to be allowed to stand in the way of Madubu's wifely rights. In the case of Molefe and Madubu, the court restored a social relationship which was in danger of breaking down. In the case of Moakofi and Nkidi, the court dissolved a relationship which could not be allowed to continue.

5. In customary law courts, changes in law result in changes in custom. Ranko died, leaving two daughters by one wife and two sons and two daughters by a second wife and a boswa of thirty cattle.¹³ The senior son proceeded to distribute the cattle, reserving an extra portion for himself, in accordance with tradition. Two daughters objected and the matter was brought before the chief, who forthwith apportioned five cattle to each of the six children.

When this decision was made there were murmurings of discontent among Bakgatla. It is possible that the discontent was stifled, however, by the fact that Linchwe II had recently apportioned his late (classificatory) brother's estate in a similar manner. In 1973, however - ten years later - informants told Roberts that equal apportionment of

boswa among heirs was an established norm. I am reminded here of the Jewish jurisprudential maxim, 'Minhag kedin hoo' (an established custom is to be treated as law.) Among Batswana the converse also seems to be the case: a law is to be regarded as established custom. It appears that the molao (law) of equal apportionment of boswa has become a mokgwa (custom) of the Bakgatla-bagaKgafela.

Processes in Customary Courts

Till this point, I have used case material from Comaroff and Roberts's book to present some of the main principles which any student of customary law, or any law reformer, might need to take into account. My analysis is not that of Comaroff and Roberts, and may even be quite different from one which they would have presented if their objective had been the same as my own. For I would assert that, in spite of the title of their book, they are concerned less with 'rules' than with 'processes'. The sociologist, however, must be concerned with both of these concepts and with their interrelationships. I shall conclude, therefore, by presenting the thought-provoking judicial processes which Comaroff and Roberts discerned in their records of court cases. Comparing the transcripts of different court cases they describe four levels of juridical preoccupation, which one may label as a) cases in which there is little, or no, case to answer; b) cases; c) case histories and d) life histories.

Comaroff and Roberts's classification ultimately derives from such observations as:

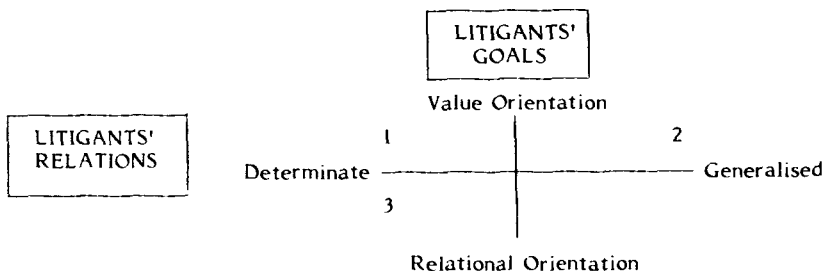
a conflict over a household utensil may be treated with the utmost seriousness by a Tswana chief's kgotla, while one concerned with a large family herd may be solved with little difficulty by informal negotiation or mediation. Neither the gravity of the dispute nor intensity with which it is fought is thus necessarily determined by the material value of the object or right in question.¹⁴

To elucidate this paradox, Comaroff and Roberts draw our attention to indications that disputes can vary along two dimensions: litigants' goals and litigants' relationships. Along the dimension of goals variation can stretch from litigious concern with a narrow and specific dispute, called by Comaroff and Roberts a 'value orientation', to litigious concern with offended status, called by Comaroff and Roberts a 'relational orientation'. Along the dimension of litigants' relationships variation can stretch from those which are narrow and specific, called by Comaroff and Roberts 'determinate', to those which are 'generalised', in which the parties concerned may be related on the maternal side as well as the paternal; related by marriage as well as by blood; related by neighbourhood as well as by kinship; related by property ties as well as through co-residence; etc.

Comaroff and Roberts's two dimensions enable them to present their analysis in the form of a four-celled diagram, Figure 2.¹⁵ They claim that as one moves from cells 1→ 2→ 3→ 4 the following characteristics develop:

i. There is an increase in procedural flexibility. Cell 1 involves straightforward and well-established norms. For example, X is informed that his cattle fifty kilometres away have tramped on Y's crops. A decision is made in X's own (rather than the chief's) kgotla to send a bag of sorghum to Y. Cases in cell 4, by contrast, tend to be protracted. Litigants and their supporters invoke a wide variety of traditional norms in order to defend their position.

FIGURE 2



TYPES OF JURIDICAL PROCESS

ii. There is an increase in the involvement of third parties. For example, one side may insist on the dispute being taken to the chief and may put pressure on the ward headman and other notables to support them in their dispute.

iii. There is an increase in concentration on the 'prior history' of the relationships between the litigants and a decrease in concentration on 'circumstantial factors', the latter being regarded as 'symptomatic' of longstanding problems in social relationships rather than a strict cause of the ostensible dispute being brought before the court.

iv. There is an increase in the number of charges and counter-charges between the litigants in the course of *kgotla* debate. A dispute over land rights may pass on to discussion of failure to reach settlement because of obscene abuse which had taken place between litigants, which in turn may turn attention to the circumstances in which obscene insults had been exchanged, such as the detention of one party's wandering goats by the other, and so on. Moreover, the final settlement may be framed quite differently from the initial terms of reference, for instance, a suit by a wife for proper maintenance from her husband may finally result in her divorce, albeit with a substantial alimony.

In this article, I have been able to touch on five law cases only. Readers who wish thoroughly to examine the validity of Comaroff and Roberts's overall thesis may wish to peruse the twenty other cases recorded in a book whose contents I regard as having very great import for the maintenance of the legal rights of citizens of Botswana.

Footnotes

1. E.g., 'The Work of Tribal Courts in the Bechuanaland Protectorate' African Studies, vol.II (1943), pp.27-40; A Handbook of Tswana Law and Custom, Frank Cass & Co., London, 1955; Tribal Innovators: Tswana Chiefs and Social Change 1795-1940, Athlone Press, London 1970.
2. Case 9 in Comaroff and Roberts, op.cit., pp.140-151, corresponding to Case 51 of 1961 held at the Kgatla chief's kgotla.
3. Ibid., pp.148-9.
4. Ibid., p.150.
5. Ibid., p.142.
6. Ibid., p.149.
7. Case 24, Ibid., pp.202-4, corresponding to Case 9 of 1964 at the Kgatla chief's kgotla.
8. Case 25, Ibid., pp.204-215 corresponding to Case 75 of 1965 at the Kgatla chief's kgotla. Figure 1 is taken from Ibid., p.205.
9. Ibid., p.219.
10. Ibid., p.209.
11. The dispute to be discussed is Case 13, Ibid., pp.162-5, corresponding to Case 24 of 1965 and Case 25 of 1966 at the Kgatla chief's kgotla.
12. E.g., Case 15, Ibid., pp. 165-7.
13. Case 19, Ibid., pp.181-4. corresponding to Case 51 of 1963 at the Kgatla chief's kgotla.
14. Ibid., p.114.
15. Ibid., p.116.

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