Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism

Anne Hellum

ANNE GRIFFITHS. *In the Shadow of Marriage: Gender and Justice in an African Community*. Chicago: University of Chicago Press, 1997. Pp. 326.

SUSAN E. HIRSCH. *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court*. Chicago: University of Chicago Press, 1998. Pp. 360.

To comply with international human rights standards, many African governments are gradually replacing their gender-specific and family-based customary and religious laws with new legislation molded on an individualistic, equal-status ideal. Judicial reforms and legal outreach programs that set out to make the new law accessible to local communities have been launched. In practice, there are still great gaps between human rights ideals like the principle of gender equality and self-determination and the local norms that govern women's everyday lives. The condition in which Bakwena women in Botswana and Muslim women in Kenya rely on more than formal law is the main theme in recent books by Susan Hirsch and Anne Griffiths. Showing how women are relying on a combination of individual rights and family-based entitlements for their day-to-day survival, these books demonstrate the complex and uneven process whereby state law molded on human rights ideals originating in the West is making its mark on local customs and practices. With its departure point in these microlevel

Anne Hellum is doctor of law and associate professor of law, Institute of Women's Law, University of Oslo, Oslo, Norway.

© 2000 American Bar Foundation.
0897-6546/00/2502-635$01.00

studies of actions taken by individual women in disputes concerning pregnancy, marriage, and divorce, this essay raises some broader issues concerning gender, human rights, and legal pluralism in Africa.

THE WIDER LEGAL AND POLITICAL CONTEXT: GENDER, HUMAN RIGHTS, AND PLURAL SYSTEMS OF LAW IN POSTCOLONIAL AFRICA

A characteristic feature of the legal systems of most former European colonies in Africa and Asia is the plurality of customary and religious laws that coexist with the received European law. The dual legal systems, in which different laws applied to different races, were the cornerstone of apartheid. Upon independence, the new African governments set out on law reform programs that aimed at aimed at greater race, class, and gender equality. Whether it would be best to create a unified system applicable to all groups or to continue with a plural system of laws that accommodate the customary and religious laws of the different ethnic populations has been a recurrent dilemma. The tense relationship between values and principles such as religious freedom, the protection of African custom and culture, and gender equality is today reflected in the constitutions of many African states (Banda 1998).

With the UN Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW, or the Women's Convention) and the Beijing Platform of Action, the gender issue has moved to center stage in the debate about the future of African customary laws and plural systems of laws. The CEDAW, which has been ratified by more than 150 nation states, has laid the foundation for an international women's law of human rights that transcends national, religious, and customary laws. It sets out to ensure the right of every woman to health (art. 12), education (art. 10), work (art. 11), political participation (arts. 7-8), credit facilities (art. 13), and to marry, found a family, and divorce (art. 16) on an equal basis with men. To address the legal, social, and economic structures at the root of women's weak position in law and society, the convention requires the states to undertake constitutional, legislative, and socioeconomic reform aiming at the elimination of discrimination against women in the private as well as in the public sphere. Since the written version of African customary laws, which is a part of the colonial legal heritage, often falls short of the international norms of human rights embodying women's equal rights in the family, nations are under obligation to abolish or modify those customary laws and practices.

On the formal level, uniform systems of marriage and family laws are today gradually replacing the dual colonial legal systems in which imported Western law applied to the colonizers, while customary and religious laws

applied to the indigenous population (Armstrong and Ncube 1987; Stewart and Armstrong 1990; Eekelar and Nhlapo 1998). To comply with their human rights obligations and facilitate economic development, many African governments have felt a need to abolish customary family and marriage laws.[1] In keeping with the dominant liberal law and modernization theory, it is often assumed that it would enhance economic development if the extended family could be changed so as to free individuals from the demands of the larger family unit (Hydén 1983, 148). On the other hand, there is the desire to preserve the extended family and to mold the new social, economic, and legal order of the new nation state on African values and traditions. In many countries a number of the discriminatory customary rules that were created by the colonial courts have been upheld.

The contentious relationship between gender equality, custom, and culture is reflected in varying legislative and judicial strategies that have been pursued by the different postcolonial African states as a means of reconciling greater equality with the protection of custom and culture. Botswana has, with certain modifications, kept a dualistic system of laws with a corresponding set of customary and general law courts. The Kenyan constitution embodies the principle of gender equality but at the same time protects the customary laws of the different ethnic groups and Hindu and Islamic law. Through statutes and directives, the postcolonial Kenyan government has, however, broken the hegemony of Muslim legal principles. For example, the Kadi's Courts Bill of 1967 demands that kadis follow secular principles that stand in opposition to Islamic law of evidence, such as determination of facts on the basis of the credibility of the evidence rather than the gender and number of witnesses. The strategy of the Frelimo government in Mozambique was to introduce the equality principle through constitutional reform combined with popular tribunals staffed by lay judges elected by the local community.[2] The aim of the government was to develop a concept of justice and equality that merged the best of African custom, socialist principles, and human rights principles through popular participation. A similar strategy was adopted by the Ugandan government.[3] The Zimbabwean government pursued a strategy of piecemeal legislative reform specifying women's equal rights in the area of personal and family law combined with a unified court system and gradual professionalization of the judges. Until 1996 it was the Legal Age of Majority Act that embedded the principle of nondiscrimination. In 1996 the Zimbabwean government amended the constitution (amendment 14) to include a prohibition against

1. For an overview of the international and national initiatives taken in the 1950s, see Allott 1965.

2. For a description of the new legal system, which was based on the idea of popular law, see Sachs and Welch 1990.

3. Jennifer Okumu Wengi's dissertation (1995) describes and analyzes problems as presented by women before resistance courts in urban and rural areas in Uganda.

sex discrimination. There is, however, a tense relationship between legislation based on the equal status ideal and article 23, which places the area of customary and family law outside the scope of the prohibition against sex discrimination. Underlying this provision is the assumption that African norms and values are incompatible with the norms and values applying in the West.

The social, cultural, economic, and legal differences between and within the countries that have ratified the Women's Convention have made its implementation problematic (Nhlapo 1989; Armstrong et al.1993; Oloka-Onyango and Tamale 1995; Hellum 1999). Part of the problem is that customary norms sometimes operate to women's disadvantage but other times do not. The Women and Law in Southern Africa Research Trust's (WLSA) regional research programs on maintenance, inheritance, and family forms in Botswana, Mozambique, Swaziland, Lesotho, Zambia, and Zimbabwe show great variations as to the relationship between women's human rights, legislated law, state court customary law, and local customs and practices (Armstrong 1992; Ncube and Stewart 1995).

In order to know whether, to what extent, and under what conditions women benefit from the current internationally initiated efforts to establish in Africa uniform laws that are neutral with regard to gender, there is a great need for microlevel studies assessing the efficacy of law reform in improving the position of different groups of women in different contexts and settings.

FROM DE JURE EQUALITY AND DE FACTO DISCRIMINATION TO GENDER AS A PROCESS OF INTERSECTING LEGAL ORDERS

The regulation of women's position by more than one body of norms has given rise to different theories about the relationship between gender and legal change. Within feminist legal scholarship there has been a shift from centralist legal theory exploring the relationship between de jure equality and de facto discrimination to studies that explore the norms that surround gender relationships as a process of a plurality of intersecting and interacting normative orders.

Until recently, the dominant focus of research in Western, African, and Asian countries has been on the gap between basic human rights ideals like justice and self-determination and women's actual situations (Dahl 1987; Maboreke 1990; Ali 1997). In addressing the normative "confrontation" that was assumed to take place in this gap, feminist legal scholarship has often pointed to the prevailing patriarchal values, norms, and customs as the root cause of the widespread de facto discrimination against women (Dahl 1987; Pateman 1988; Shaheed 1997; Ali 1997b). In introducing the

rationale for women's law in Africa, Mary Maboreke for example states that it is "by and large, the socio-economic realities of our countries and the patriarchal ideology pervading our societies which very often prevent the translation of abstract rights into real, substantive rights" (Maboreke 1990, 7).

More recent studies have gone beyond the de jure equality-de facto discrimination dichotomy to examine how law itself, in terms of legal texts, creates gender boundaries and categories (Stewart 1993, 241; Smart 1991, 9, and 1995; Naffine and Owens 1997). From this perspective, the British scholar Carol Smart has argued that law should be analyzed as a process of producing fixed gender identities rather than as the application of gender-neutral law to previously gendered subjects. Analysis of how legal texts define concepts like marriage is seen as the first step in dissolving boundaries between law and other aspects of society and facilitating creative thinking about the power that law exercises in women's lives.

Rather than focusing on the outcome of the legal process in terms of legal texts, more empirically oriented scholars have insisted on seeing legal discourse as a social practice and turned their attention to the multiple contexts of the legal text.[4] Authors within this mold, including Griffiths and Hirsch in the books under discussion, have gone beyond textual analysis in order to pay attention to how norms and considerations regulating male and female behavior and access to resources is negotiated in the intersection between a wide variety of formal and informal norms in different contexts and settings. They have seen law as a process where facts, behavior, and norms are closely interwoven (Molokomme 1991; WLSA Zimbabwe 1994; Petersen 1996; Mehdi and Shaheed 1997, Bentzon et al. 1998; Hellum 1999). Thus, they have turned their attention toward the rule-generating and rule-upholding processes taking place through human interaction in different social groups, organizations, and institutions. Within this body of feminist legal scholarship, the anthropological concept of legal pluralism—with its focus on rule-upholding and rule-generating entities other than the judiciary and the legislature—has been used to focus on the different contexts and settings where the norms and values that inform gender relations and position of women are negotiated (Moore 1978; Griffiths 1986).[5]

---

4. In his review of Carol Smart's book *Law, Crime and Sexuality: Essays in Feminism*, Danny Lacombe attempts to demonstrate how Smart's analysis of how law produces women by creating gender boundaries reproduces a picture of law as a determining force (Lacombe 1997). To understand changing law and gender relations, he argues, empirical studies are needed that map out the relations and interactions among the various actors and institutions who have different stakes in the game.

5. Toward this end, Sally Falk Moore's concept of the semi-autonomous social field that draws a boundary around social entities that are characterized by an ability to generate rules and enforce rules within or between a recognizable group of people, the actors, has proved a useful analytical tool (Moore 1978, Bentzon et al. 1998).

By exploring how gender relations influence or are influenced when legal action is taken in an environment where a plurality of national and local norms are at work, Susan Hirsch and Anne Griffiths add fresh perspectives to both gender studies and the existing anthropological scholarship about legal pluralism. Their microlevel studies of the courses of action taken by individual Bakwena women in Botswana and Muslim Swahili women on the Kenyan east coast constitute important contributions to an empirically grounded understanding of the options and limits for women as subjects of legal pluralism. Hirsch describes and analyzes how Muslim women in a Swahili community in Kenya negotiate their position in the postcolonial setting where imported Western law, customary law, religious law, and social norms concerning male and female speech intersect and interact. In line with recent developments within the growing body of Muslim feminist scholarship, Hirsch's study effectively challenges the dominant perception of Muslim law as a coherent and consistent body of religious principles that are independent of time and place.[6] By showing how some women successfully transcend the gender boundaries that are embedded in local and religious norms, Hirsch highlights the transformative potential of legal pluralism. Griffiths's book, which examines conflicts concerning reproduction, marriage, and property among the Bakwena in Botswana, highlights how the difficulties women face in relation to both common and customary law are related to the difficulties they face as social actors (p. 37). Her comparative analysis of the two systems shows how power, in terms of gendered networks of economic and social resources, systematically work to women's disadvantage.

Regardless of their different views on the options and limits of legal pluralism, the two books demonstrate the importance of fieldwork as a method of describing and understanding the process of changing law and gender relations. By using qualitative methods—court observations, participation in daily life, and life histories based on in-depth interviews—Griffiths and Hirsch are able to deal with issues such as the social and cultural problems women have in accessing courts and as actors in court. They highlight problems that statistical analysis of women's increased use of courts in postcolonial Africa have overlooked (Cutshall 1991).

Through microlevel studies, both books provide insight into how women think and act and the factors and forces that affect their choice of

6. In Pakistan, women's organizations, like Shirkat Gah's Legal Outreach Programme, have given attention to the interface between culture, custom, and law in order to work out strategies for change (Shaheed 1997, 47). How a combination of empirical investigations and normative research could result in developing gender-oriented legal studies and in reforming the legal situation of women in Pakistan has been pointed out by Rubya Mehdi (Mehdi 1997, 24). Insight into the dynamic relationship between religious, secular, and social norms constitutes the backdrop of Ali's argument that a human rights discourse exists within a pluralistic Islamic tradition that has a wide degree of commonalty with the international human rights discourse (Ali 1997, 261).

dispute-processing fora and strategies. Both of the studies contribute to the development of a dynamic actor approach that facilitates analysis of women as subjects in the process of law. Their approach goes beyond the "gap" approach and the textual analysis of how gender is constructed in law—both of which have tended to exclude women's actions. The methodological insights of the two books are thus of general significance. Legal pluralism in a sociolegal sense is an aspect of all complex modern nation states where legislated norms coexist and interact with a wide range of social, moral, and religious norms and customs.[7] In all parts of the world, people's private autonomy and contractual capacity form the backbone of the evolvement of law, be it Islamic law, British or U.S. common law, or African customary law.

Nonetheless, while recognizing the plurality of coexisting norms more readily than legal scholarship, the anthropological framework that both Hirsch and Griffiths lean on fails to go beyond description and analysis. All the same, their analyses of how legal discourse poses problems for women outside and inside courts constitutes food for thought for international and national law and policymakers dealing with the implementation of women's human rights.[8] Furthermore, analysis of the law in action is a precondition for doctrinal analysis and legal reform aiming at refashioning general, customary or Islamic law.

The situation in which women rely on more than one body of law has drawn the attention to the need for more complex and multifaceted strategies of gender and legal change than those pointed out within the centralist notion of law (WLSA 1990; Shaheed 1997; Tsanga 1997; Woodman 1997; Hellum 1999).[9] An example of a fruitful partnership between empirical studies of legal pluralism and legal activism is the Women and Law in Southern Africa Research Project (WLSA), the practical objective of

7. In his article about legal pluralism, John Griffiths distinguishes between strong and weak legal pluralism (Griffiths 1986, 1). He uses the term *strong legal pluralism* about the presence in a social field of more than one legal order. He uses the term *legal pluralism in the weak sense* to refer to a situation where the official legal system recognizes more than one legal order.

8. How women's weak position in law and society calls for research combining description, analysis, and action is emphasized by a number of authors (Dahl 1987; WLSA 1990; Mehdi 1997).

9. With the aim of improving the position of women as social and legal actors, a series of action-oriented research programs have in recent years been set up in Africa and Asia. With a view to women's mixed identities, loyalties, and affiliations in terms of individual citizenship and membership in a family group, the need to address all bodies of norms that are at work, not only state law, is emphasized. Some of these projects are combining knowledge about the constraints women face as individual actors with research and collective action. Taking cognizance of the importance of the relationships in which women are embedded, networking has come to play a crucial role in programs aimed at enhancing women's access to law. Shirkat Gah's Women's Law and Status Programme in Pakistan, for example, combines legal literacy, research, consciousness raising, networking, and support at the individual as well as the collective level.

which is to improve the position of women in law and society. The empirical research carried out by WLSA has on a number of occasions been used as a basis for law reform or reinterpretation of customary law by showing how people's actual customs and practices give women a stronger position than the official customary law, which is based on precedents from the colonial courts.[10] Thus, a recurrent question with regard to women's position under customary law is, What is and should be the legal status of the different normative fragments found by empirical studies of family practices, local court practices, and appeal court practices (see Stewart 1998; WLSA Botswana 1994; Bentzon et al. 1998)?

In my view, these current trends demonstrate the need to move beyond both the anthropological approach to legal pluralism, which seems satisfied with description and analysis, and the centralist notion of law, that has tended to exclude the norms generated through human interaction in daily life. An alternative is to move toward an integrated sociolegal scholarship that combines descriptive and normative analysis.

ADDRESSING THE LIMITS: POWER AND RESOURCES AMONG THE BAKWENA

Anne Griffiths, who approaches gender as a structure that underlies the social, economic, and legal sphere, draws attention to the limits of legal pluralism. Griffiths's work is based on an ethnographic study carried out among the Bakwena in the Moshotho kgotla in Molepolole in Botswana between 1982 and 1989. Relying on life histories (from interviews done in 1982) and follow-up studies in 1984 and 1989, Griffiths places disputes emanating from procreative relationships in the context of the social process in which marriage and kinship are negotiated. Her case material encompasses both cases that find an amicable settlement in everyday life and cases that are dealt with in the kgotla or the high court. Her narratives give a detailed account of negotiations and disputes concerning pregnancy, marriage, dissolution of marriage, and division of property. The longitudinal perspective provided by these life histories forms the basis for the analysis of law in the context of which women structure and pursue claims concerning maintenance and property or, alternatively, refrain from doing so.

Griffiths finds that Bakwena women and their families are well aware of the different options that exist under customary and general law. What

10. Empirical research shows that the customary law applied by the lower state courts sometimes is more responsive toward women's changing status in society than the law applied by the higher courts and the legislative body. The research on inheritance undertaken by the Zimbabwean WLSA team in 1994 showed that the community courts' pragmatic and flexible interpretation of the widow's position under customary law gradually was accommodating the equality principle (WLSA Zimbabwe 1994).

path they pursue is dependent on their negotiating power, which in turn depends on access to social and economic resources. In this context Griffiths argues that the formal division between customary and common law as distinct and separate systems of law has little if any bearing on the way pregnancy, marriage, divorce, or division of property is dealt with among the Bakwena. Women and their families rely on a mixture of the two. Insight into court practice shows that this is also the case with the decisions that are reached by both traditional chiefs and magistrates. For example, some chiefs are aware of women's right to maintenance for their children under statutory law and thus of the view that customary compensation money should be paid to the child's mother rather than her parents (p. 110). In critiquing the centralist notion of customary and common law as distinct and separate legal orders, Griffiths leans on the anthropological approach to legal pluralism which see the two as intersecting and interacting (Moore 1978; Griffiths 1986; Merry 1988).

It is Griffiths's analysis of the gendered outcome of negotiations informed by a plurality of legal orders that contributes to the expansion of existing knowledge about legal pluralism. By analyzing the different sets of coexisting norms from women's perspectives, Griffiths points out that both customary and common law pose problems for women in their struggle for resources to maintain themselves and their children. A major problem is that by linking access to economic resources such as child maintenance and property to the institution of marriage, both customary and common law defines women's entitlements through male relationships. Women who don't conform to this patriarchal norm, such as single, cohabiting, and divorced mothers, are thus placed in a disadvantageous position.

Underlying Griffiths's study is the assumption that access to law in the final analysis is determined by social power relations. By combining a woman-centered and relational approach, she uncovers how the social networks women are embedded in influence their access to and use of law. The case of the daughter of an elderly widow, who had no sons and was living at a subsistence level, unable to hire someone to plow for lack of money and with no livestock, demonstrates the lack of power to negotiate or take court action among many rural female-headed households. By situating the discourses concerning maintenance and property that take place in the family, the kgotla, or in the high court in the social processes that shape men's and women's lives, Griffiths convincingly demonstrates the links between discursive power and social power in terms of access to resources.

Above all, Griffiths's study is a powerful critique of the law and social engineering view that assumes that society is directly susceptible to legal control. Griffiths emphasizes how the structural constraints deriving from the sexual division of labor as well as men's and women's differential access to employment and other resources are reproduced and reinforced at the

level of legal discourse. From this perspective the regulatory structure that determines the position of women is neither common nor customary law but the gendered, economic, and social differentiation in society. This challenges the picture of law as class and gender neutral, thus challenging the prevalent belief in legal blueprints for change.

What then is the alternative? Rather than suggesting legal or practical solutions Anne Griffiths concludes that "The challenge lies in reorienting the way in which the well-established sources and tools of formal law are contextualized so that they cannot be used to support or reinforce a centralist account of law" (p. 240). The strength of this model is that it places law in its social context in order to uncover existing inequities. Its weakness is that, in its attempt not to ascribe too much power to law, it tends to avoid analysis of law's capacity to regulate the social order. In my view, a dynamic understanding of the complex process of changing law and gender relations calls for a framework that sees law neither as an entirely autonomous entity nor as a mere reflection of gendered social and economic structures.

Giddens's concept of structuration is an analytical framework that would be helpful in furthering a dynamic understanding of the process of changing law and gender relations. Structuration theory is based on the assumption that structure is both enabling and constraining and does not totally determine the actor's behavior (Giddens 1984, 5"–34). It assumes that individuals and groups respond with knowledge to the changing legal, social, and economic situation they have to cope with. Women's actions and social and legal structures are in a constant flux as new social and legal knowledge changes the women's and their community's perceptions of the relationship between themselves and others.[11] Such a perspective would, in my view, have brought about a more nuanced understanding than Griffiths's model of the process whereby customary law gradually is adapting to the changing position of women in law and society.

SOME OPTIONS: THE USE OF LAW AS CONTESTATION AMONG SWAHILI MUSLIMS

Hirsch focuses on how Muslim women actively use legal processes to transform the religious and local norms that underlie their disadvantaged position in a Swahili community in postcolonial Kenya. On the basis of court records, court observations, and participation in the daily life in the village, Hirsch describes and analyzes domestic disputes that are brought by Swahili men and women before the Malindi Kadi's Court in a Swahili village on the Kenyan east coast. These are cases concerning dissolution of

11. How actor-structure analysis can be combined in studies of gender and legal pluralism is addressed in Hellum 1995, 17, and in Bentzon et al. 1998.

marriage, maintenance, return of property, and restitution of conjugal rights. In spite of local and religious conventions that tell women to suffer in silence, the majority of the marital conflicts that are handled by the local kadi's court are initiated and won by women. The process whereby some individual Muslim women's resistance against patriarchal norms is silenced while other succeed in transforming the perception of womanhood in the process of disputing is the main theme in Hirsch's analysis. Underlying her approach to disputing are two assumptions. First, it is in relation to discourse that people are constituted and constitute themselves as gendered subjects. Second, gendered positions are constituted through discourse in specific contexts that are characterized by cultural and institutional conventions for producing speech.

As background to her insight into Swahili culture and custom in general and the management of family and marriage conflicts in particular, Hirsch describes the gender-specific local norms that guide the relationship between talk about conflicts and proper social behavior. At the core of Swahili cultural understanding of language and conflict is, according to Hirsch, *heshima*. *Heshima* guides people to minimize discussions of conflict in order to hide matters. In line with *heshima*, women are, according to Hirsch, counseled to handle domestic problems through silence and men through legal speech (p. 93). The images of the pronouncing husband and the persevering wife, which privileges husbands to control the resolution of marital conflict, links the gendered prescriptions concerning talk to Islamic law.

Insight into discourses of marital disputing outside and inside courts shows that the norms connecting women to silence and passivity and men to legal action are by no means are absolute. According to Hirsch, it is only over time that women frame their problems as one involving rights. It is only when other options and solutions have failed that women resort to court action. How women who complain in court stand in violation of appropriate speech and yet at the same time appear as compliant wives is fleshed out through detailed analysis of the meticulously recorded court proceedings. While men in their way of talking about conflict appear as initiators, women appear as responders. While men who appear in court refer to rules, women tell stories. Yet, by telling stories about domestic conflicts women challenge the image of the persevering wife and the pronouncing husband. Women's contradictory experiences demonstrate both continuity and change in the norms and prescriptions that guide gender relations.

Hirsch's analysis of how gender as a subject position is created in a process where women frame their claims within a combination of statutory, religious, and social norms constitutes a fruitful combination of textual and sociolegal analysis. Women's ability to cross the prescribed gender boundaries is ascribed by Hirsch to the fact that there is no hegemonic discourse in the kadi's court; men and women who speak in court are gendered, legal,and

linguistic subjects all at once. Seeing legal and linguistic norms as a part of social life, she deconstructs and demystifies law's power while at the same placing women's practices within the process of law. This approach offers a more nuanced and dynamic understanding of the process of changing law and gender relations than studies that focus on the application of law to previously gendered subjects. It also avoids what I see as the pitfall of studies that, by focusing on legal texts, have tended to exclude women's practices and life experiences from their analysis and thereby contributed to uphold the centralist myth of law's power.

By linking the study of disputes to sociolinguistics and gender theory, Hirsch furthers existing understanding of the process of interaction between the individual actors in court (Moore 1978, Comaroff and Roberts 1981). By paying attention to the connection between the different social fora where norms pertaining to male and female speech and behavior are negotiated, she furthers Sally Falk Moore's approach to law as a process of intersecting and interacting semi-autonomous social fields. Although the discourse taking place in court to a large extent is informed by the informal norms concerning male and female speech, as the decisions favoring women accumulate, it also gives rise to a process where state law comes to play a part in the cultural construction of women's identity and resistance toward patriarchy.

By focusing on the overlapping and interrelated discourses at different levels of law, Hirsch moves beyond the sterile debate as to whether official law or the plurality of normative orders existing in different social fields is the appropriate focus of study. Rather than focusing on the conflict between state law and folk law, Hirsch is concerned with law used as contestation. In line with more recent anthropological scholarship about law and globalization, her work demonstrates how the postcolonial era differs from the earlier era of colonialism and imperialism as far as the polarity of official and unofficial law is concerned (Greenhouse 1998; Merry 1997; Preis 1996).

GENDER, LAW, AND POWER IN POSTCOLONIAL COURTS: EXTERNAL OR INTERNAL PERSPECTIVES?

The Women's Convention (§2(c)) requires that nation states establish national tribunals and other public institutions competent to adjudicate complaints of discrimination. As a result, new court structures aiming at an integration of the legislated, customary, and religious laws have been introduced in a number of African countries. Zimbabwe combined piecemeal legal reform with a unified court system through the creation of local

community courts staffed by semiprofessional judges.[12] Botswana has, as already mentioned, with certain modifications, kept up a dualistic system of laws with a corresponding set of customary and general law courts. The customary courts are staffed by traditional authorities, while the general law courts are staffed by professional judges. In Kenya the Kadi's Courts Bill of 1967 demands that kadis follow secular principles that stand in opposition to Islamic law of evidence. The appellate court for kadi's court decisions, the Kenyan High Court, has on a series of occasions overturned kadi's court cases on grounds of secular law in cases concerning a wife's property rights upon divorce. The mainstay of the Frelimo government in Mozambique was to introduce the equality principle through constitutional reform combined with popular tribunals manned by lay judges elected by the local community. A similar strategy was adopted by Uganda through the introduction of National Resistance Courts that were staffed by elected judges (Okumu Wengi 1995).

In order to arrive at a grounded theory concerning the role played by different types of courts in the enhancement of equality, empirical studies that pay attention to the implementation of different legislative and judicial reforms in different social and geographic contexts are needed. The strength of Griffiths's and Hirsch's studies is that, by focusing on the gendered distribution of resources and discourses that take place outside the court, they produce a contextual understanding of women's access to and choice of dispute resolution options. The weakness is that internal factors that also may have a bearing on the outcome, such as the procedural framework of the court or personal characteristics like the education, age, religion, and gender of the judges, tend to get overlooked.

Rather than locating the law centrally, in formal norms and institutions, Griffiths's account of law emphasizes how power and the discourses that it gives rise to inside and outside courts are socially rather than legally constructed. From her perspective, the boundaries that women encounter with regard to law are not so much the institutional forums or the designation of law as customary and common, but rather the social forces that influence their access to resources. The contradictory outcomes of the court cases concerning division of matrimonial property between divorcing spouses that are decided by the chief's court are in her view better understood by dispute-processing analysis linking litigants to networks with gendered attributes rather than by treating them as the products of different chiefs applying their own perceptions of customary law (p. 209). But although the social and economic resources of the parties to the cases

12. Cutshall's study (1991) provides a statistical analysis of the types of complaints, the gender of the litigants, enforcement of judgments, and appeals of community court judgments based on a sample of 18 community courts in 1981 and 1983. It shows that the number of female litigants is increasing but does not address the outcome of the cases.

undoubtedly is important, there are other influencing factors. Further insight into differences between and within different types of courts and judges would, in my view, have contributed to a more nuanced understanding of women's access to law and justice.

Like Griffiths, Hirsch places legal processes rather than legal rules and legal institutions at the center of her analysis. Her framework captures the way the male and female parties as well as the kadis take their gendered understandings about speech with them when they enter law courts. Although the speech in court reaffirms the men's authority, the majority of the cases are won by the women. Hirsch is mainly interested in the way the plurality of discourses empower women to go public about domestic conflicts and transcend the gender boundaries embedded in local norms about male and female speech. As a lawyer I am curious though as to why women, in spite of the strong influence of the gendered norms concerning male and female speech, win the majority of cases. To understand the factors that influence the legal outcome, information about how the kadis are recruited, educated, remunerated, and controlled as a part of the official court system seems relevant. Also, an examination of appellate cases would have shown whether and to what extent the kadi's interpretation and application of the law is influenced by the surrounding state legal system.

A complete understanding of women's access to justice calls for an exploration of both legal and extralegal factors. The significance of the procedural framework in relation to women's access to justice is demonstrated in Jennifer Okumu Wengi's study of how the gender identities of women as plaintiffs, audience, witnesses and judges influences the outcome of the dispute resolution process in urban and rural National Resistance Courts in Uganda (Okumu Wengi 1995).Wengi's study, which is based on a combination of court records and court observations combined with interviews with parties and judges, analyzes problems as presented by women before resistance courts in urban and rural areas in Uganda, focusing on women's roles as plaintiffs, judges, and audience. This study shows how broad criteria for participation may work to the advantage of women by giving room for support from women in the neighborhood and in the family.

An interesting observation as regards the role of the gender and age of the judges is found in Aase Gundersen and Nina Berg's study of a popular court outside Maputo in Mozambique (Berg and Gundersen 1991, 266). This study, which is based on court observations and interviews with the parties and the judges, shows how the elected lay judges merged customs, socialist values, constitutional principles of gender equality, and practical considerations in their exercise of the "good sense and justice" guideline embodied in the Law on Judicial Organization (Gundersen 1992). The study shows considerable variation in outcome. Interestingly, it was often the female judges, who were middle-aged members of the women's wing of

Frelimo, who would criticize women who failed to perform their domestic duties. As such, women acted as the upholders of patriarchal customs and practices.

It is often assumed that the higher courts, with professional judges, are more progressive than lower courts staffed with lay judges or traditional chiefs. A series of studies on child custody, maintenance, and inheritance have compared the practice of the supreme court with the practices of the community court in Zimbabwe. The findings so far provide a fragmented and complex picture. Mary Maboreke's study of child custody in Zimbabwe, which was undertaken in 1985 and 1986, shows a marked difference between the supreme court's and the community court's consideration of what would be in the best interest of the child (Maboreke 1987). While a vide range of factors were considered by the higher courts, the community courts tended to decide the cases on the basis of the customary rule that linked child custody to payment of bride price. Alice Armstrong's study, undertaken eight years later, shows that individualistic and egalitarian values gradually are making their mark on community court practice (Armstrong 1994). More recent research shows that the "local law" created by the lower state courts sometimes is more responsive toward women's changing status in society than the law applied by the higher courts and the legislative body. The inheritance research undertaken by the Zimbabwean WLSA team in 1994 showed that the community courts' pragmatic and flexible interpretation of the widow's position under customary law gradually was accommodating the equality principle, while the supreme court has continued to uphold the discriminatory rules that were applied in the colonial state courts(WLSA Zimbabwe 1994).[13]

HUMAN RIGHTS, GENDER, AND LEGAL PLURALISM: CHALLENGING THE DICHOTOMIES

There is, as we have seen, considerable disagreement as to the efficacy of imported Western law in improving the position of women in law and society. On the one hand, according to the universalist position, women's human rights as independent individuals should be the same regardless of time and place. On the other hand, according to the cultural relativist position (in its extreme form), human rights in Africa are irrelevant because both men and women see themselves as group members rather than as independent individuals. What the two positions have in common is their

13. Two recent supreme court cases have been heavily criticized for their stale and static approach to customary law: *Murisa v. Murisa* (SC 41/92) and *Magaya v. Magaya* (SC 210 198).

outlook on customary law and Western-style law as conflicting and separate legal orders.

Neither Griffiths nor Hirsch addresses the ongoing debate about women's human rights and legal pluralism in Africa in a direct fashion. Yet, their studies of women's disputing strategies certainly contribute to an empirically grounded understanding of the working of internationally initiated law reform in the context of local communities that also have their own norms and values. Along with other empirical studies of the position of women in law and society, both Griffiths's and Hirsch's studies question some of the assumptions concerning gender and legal change that underlay the universalist and the relativist approaches.

Assuming that the root causes of women's oppression in different parts of the world are the same, authors within the universalist mould assume that women have a common interest in changing the patriarchal structures that underlie the legal systems of the world. On the basis of cross-cultural comparisons between the role of women in different cultures and societies, many social scientists, particularly anthropologists, have argued that female subordination is a universal phenomenon (Rosaldo and Lamphere 1974; Ortner 1974). A number of studies of the position of women in law and society have in a similar vein seen law as a reflection of male values and interests (Dahl 1987; MacKinnon 1987). To change women's subordinate position, feminist jurisprudence has developed generalized assumptions about women's common needs and values.

> Considerations of justice in women's law start by identifying the needs and wants of women *in general*, and particularly opinions about what is just. Out of this matrix of needs and opinions we may develop a series of hypotheses about values on the basis of which we wish to study and examine the law. We then allow the individual legal rules and sets of rules to confront these values and the principles derived from these values. This provides a foundation for new hypotheses about the compatibility or incompatibility of the legal rules and the derived principles, which are then tested, on the basis of our own experiences and women's presumed needs, wants and notions of justice. (Dahl 1987, 90)

Taking cognizance of the Eurocentric character of human rights instruments like the Women's Convention, African human rights scholars like Oloka-Onyango and Sylvia Tamale have emphasized the need to acknowledge commonalties across cultures.: "Without losing focus on the differences, we maintain that a united front is essential for any social movement." In line with the legal scholar Abdullahi An-Na'im, they assert that the universality of human rights "should therefore be sought and achieved through sustained intra-cultural and cross-cultural dialogue, rather than as

an abstract, culturally neutral proposition which it can never be" (1995, 713).

Regardless of the existing cultural and legal diversity, women's human rights scholars within this mold have held that the consideration of violations of the nondiscrimination principle must, like other human rights violations, be determined in the light of uniformly held international standards (Cook 1994, 234-35). As regards the tense relationship between the principle of gender equality and the protection of custom and culture within the African Charter of Human Rights, a number of scholars have argued that the charter should be interpreted in light of the progressive development of women's human rights embedded in the Women's Convention (Ankumah 1996, 57). As such, the universalist feminist position is closely related to centralist legal theory, which is the dominant position in Western legal science. Within this tradition, the problem of difference between international, national, and customary law is resolved on the basis of the idea of the existence of overriding norms and values. In line with a monist perception of law, coherence and harmony between different norms and values is ensured through the establishment of a hierarchy of sources.

Griffiths's study clearly demonstrates one of the main weaknesses of the universalist approach, namely its failure to take the complex and differentiated social and economic context of law into account. Along with other studies, Griffiths's shows that the increasingly individualistic and egalitarian marriage and family laws have different consequences for different groups of women. She describes how women from what she terms the *salariate* can much more easily challenge established gendered paradigms as to property rights than can women from what she terms the *peasantariat*. She shows how the kgotla in several instances invokes the general law in its division of property with reference to the specific contributions women have made through paid work and cash contributions, while women from the *peasantariat* are seen as having done merely what is expected from them. The research that was undertaken by the WLSA project showed that it was the urban, middle-aged, middle-class women who are in a position to take advantage of the maintenance legislation (WLSA Botswana 1992, WLSA Zimbabwe 1992). My own study of management of procreative problems among people from the patrilineal Shona-speaking population in Zimbabwe shows that Christian elite women from the urban upper classes are in a better position than poor rural women with regard to make use of the increasingly individualistic, fertility-neutral, and egalitarian marriage laws (Hellum 1999).

Assuming that every society, law, and culture is a unique and incomparable unit that should be understood in its own right, cultural relativists reject the existence of overriding values and principles. Cultural relativism was initially a theory that questioned the Eurocentric notions of civilization

and progress that placed the Western world, with its economic and legal systems, at the top of the evolutionary ladder (Renteln 1990, 61-87). The conception of the ethnic or social group as a unique and incomparable unit has often implied that women's quest for equality and self-determination has been overlooked or occupied a marginal and inferior position. The reason is that the family or the ethnic group has been seen as an entity made up of members who are assumed to have common interests, values, and goals.

Griffiths and Hirsch challenge this harmonious and unitarian picture of gender relations and customary law. As such they stand on the shoulders of post-structuralist scholarship who show how the characterization of ethnic communities as harmonious, unified and incomparable overlook the disruptive growth of individualism and gender conflict that has come about with the money economy, urbanization, and labor migration. A number of recent studies show how African women, through their quest for better living conditions, make use of state law and seek alliances that cross membership of family, ethnicity and class (Rwezaura 1990, 17; Parpart 1988: 134; Schmidt 1992; Ncube 1987; Armstrong 1992; Hellum 1999).

By documenting how women are contesting and transforming asymmetric power relations in terms of gendered prescriptions about speech, behavior, and distribution of resources, all these studies show that internationally initiated law reform gradually is taking root in local African communities. What all these studies demonstrate is the shortcoming of simplistic and one-dimensional dichotomies, such as Western versus African, traditional versus modern, folk law versus state law and universalism versus cultural relativism. Insight into women's different and complex needs implies rejecting both the universalist and the relativist theories that assume harmonious and balanced societies based on complementary gender roles. A deeper understanding of gender, human rights, and legal pluralism calls for "grounded theories" that, like Griffiths's and Hirsch's analyses, are based on empirical studies of how the norms surrounding gender relations are constituted in specific situations and processes and how this leads to a complex and uneven process of change.

REFERENCES

Ali, Shaheen Sardar. 1997a. The Conceptual Foundations of Human Rights: A Comparative Perspective. *European Public Law* 3 (2): 261–82.

———. 1997b. A Critical Review of Family Laws in Pakistan: A Women's Perspective. In Mehdi and Shaheed 1997.

Allott, Anthony. 1965. Towards the Unification of Laws in Africa. *International and Comparative Law Quarterly* 14:366–89.

Ankumah, Evelyn. 1996. *The African Commission on Human and Peoples' Rights: Practice and Procedures.* Hague: Martinus Nijhoff.

Armstrong, Alice. 1992. *Struggling over Scarce Resources: Women and Maintenance in Southern Africa.* Harare: University of Zimbabwe Publications.

———. 1994. School and Sadza: Custody and the Best Interest of the Child in Zimbabwe. *International Journal of Law and the Family* 8:151–90.

Armstrong, Alice, and Welshman Ncube, eds. 1987. *Women and Law in Southern Africa.* Harare: Zimbabwe Publishing House.

Armstrong, Alice, Chaloka Beyani, Tshuma Himonga, Janet Kabeberi-Macharia, Ataliah Molokomme, Welshman Ncube, Thandabantu Nhlapo, Barth Rwezaura, and Julie Stewart. 1993. Uncovering Reality: Excavating Women's Rights in African Family Law. *International Journal of Law and Family* 7:314–69.

Banda, Farida. 1998. Meaningless Gestures? African Nations and the Convention on All Forms of Discrimination against Women. In Eekelar and Nhlapo 1998.

Bentzon, Agnete Weis, Anne Hellum, Julie Stewart, Welshman Ncube, and Torben Agersnap. 1998. *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law.* Oslo: TANO Aschehoug; Harare, Zimbabwe: Mond Books.

Berg, Nina, and Aase Gundersen. 1991. Legal Reforms in Mozambique: Equality and Emancipation through Popular Justice? In *Gender and Change in Developing Countries*, ed. Kristi Anne Stølen and Mariken Vaa. Oslo: Norwegian University Press.

Comaroff, John, and Simon Roberts. 1981. *Rules and Processes.The Cultural Logic of Dispute in an African Context.* Chicago: University of Chicago Press.

Cook, Rebecca. 1994. *Human Rights of Women: National and International Perspectives.* Philadelphia: University of Pennsylvania Press.

Cutshall, Charles. 1991. *Justice for the People. Community Courts and Legal Transformation in Zimbabwe.* Harare: University of Zimbabwe Publications.

Dahl, Tove Stang. 1987. *Women's Law: An Introduction to Feminist Jurisprudence.* Oslo: Norwegian University Press.

Eekelar, John, and Thandabantu Nhlapo, eds. 1998. *The Changing Family: Family Forms and Family Law.* Oxford, England: Hart Publishing.

Giddens, Anthony. 1984. *The Constitution of Society: Outline of the Theory of Structuration.* Cambridge, England: Polity Press.

Greenhouse, Carol. 1998. Legal Pluralism and Cultural Difference: What Is the Difference? A Response to Professor Woodman. *Journal of Legal Pluralism* 24:61–73.

Griffiths, John. 1986. What Is Legal Pluralism? *Journal of Legal Pluralism* 24:1–55.

Gundersen, Aase. 1992. Popular Justice in Mozambique. Between State Law and Folk Law. *Social and Legal Studies* 1–2:257–82.

Hellum, Anne. 1995. Actor Perspectives on Gender and Legal Pluralism in Africa. In *Legal Polycentricity: Consequences of Pluralism in Law*, ed. Hanne Petersen and Henrik Zahle. Aldershot, England: Dartmouth.

———. 1999. *Women's Human Rights and Legal Pluralism in Africa:. Mixed Norms and Identities in Infertility Management in Zimbabwe.* Oslo: TANO Aschehoug; Harare, Zimbabwe: Mond Books.

Hydén, Goran. 1983. *No Shortcut to Progress: African Development Management in Perspective.* London: Heinemann.

Lacombe, Danny. 1997. Review of *Law, Crime and Sexuality*, by Carol Smart. *Social and Legal Studies* 6 (1): 145–48.

Maboreke, Mary. 1987. The Love of a Mother: Problems of Custody in Zimbabwe. In Armstrong and Ncube 1987.

———. 1990. Introducing Women's Law. In Stewart and Armstrong 1990.

MacKinnon, Catharine. 1987. *Feminism Unmodified.* Cambridge, Mass.: Harvard University Press.

Mehdi, Rubya. 1997. Introducing Women's Law in the Legal Education in Pakistan. In Mehdi and Shaheed 1997.

Mehdi, Rubya, and Farida Shaheed, eds. 1997. *Women's Law in Legal Education and Practice in Pakistan: North South Cooperation*. Copenhagen, Denmark: New Social Science Monographs.

Merry, Sally E. 1988. Legal Pluralism. *Law and Society Review* 22:869-96.

———. 1997. Legal Pluralism and Transnational Culture: The Ka Ho'okolokonui Kanaka Maoli Tribunal, Hawai'i, 1993. In *Human Rights, Culture and Context: Anthropological Perspectives*, ed. Richard A. Wilson. London: Pluto Press.

Molokomme, Ataliah. 1991. Children of the Fence: The Maintenance of Extra-Marital Children under Law and Practice in Botswana. *African Studies Centre Research Reports* 1991/46. Leiden, The Netherlands: African Studies Research Centre.

Moore, Sally Falk. 1978. *Law as Process*. London: Routledge and Kegan Paul.

Naffine, Ngaire, and Rosemary Owens. 1997. *Sexing the Subject of Law*. Sydney, Australia: Sweet and Maxwell.

Ncube, Welshman. 1987. Underprivilege and Unequality: The Matrimonial Property Rights of Women in Zimbabwe. In Armstrong and Ncube 1987.

Ncube, Welshman, and Julie Stewart. 1995. *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa*. Harare, Zimbabwe: Women and Law in Southern Africa Research Project.

Nhlapo, Tandabantu. 1989. International Protection of Human Rights and the Family: African Variations on a Common Theme. *International Journal of Law and the Family* 3:1–20.

Okumu Wengi, Jennifer. 1995. Women's Legal Position in the Resistance Committee Courts in Uganda: A Study of Access and Participation. Ph.D. diss. University of Zimbabwe.

Oloka-Onyango and Sylvia Tamale. 1995. The Personal Is Political, or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism. *Human Rights Quarterly* 17:691–731.

Ortner, Sherry. 1974. Is Female to Male as Nature to Culture? In Rosaldo and Lamphere 1974.

Parpart, Jane. 1988. Sexuality and Power on the Zambian Copperbelt: 1926-1964. In *Patriarchy and Class in Africa*, ed. S. Sticher and Jane Parpart. Boulder, Colo.: Westview Press.

Pateman, Carol. 1988. *The Sexual Contract*. Oxford, England: Polity Press.

Petersen, Hanne. 1996. *Home Knitted Law: Norms and Values in Gendered Rule-Making*. Aldershot, England: Dartmouth.

Preis, Ann-Belinda S. 1996. Human Rights as Cultural Practice: An Anthropological Critique. *Human Rights Quarterly* 18 (2): 286–315.

Renteln, A. D. 1990. *International Human Rights: Universalism versus Relativism*. London: Sage Publications.

Rosaldo, Michelle, and Louise Lamphere eds. 1974. *Women, Culture and Society*. Stanford, Calif.: Stanford University Press.

Rwezaura, Barth. 1990. Researching on the Law of the Family in Tanzania: Some Reflections on Method, Theory and Limits of Law as a Tool for Social Change. In WLSA 1990.

Sachs, Albie, and Gita H. Welch. 1990. *Liberating the Law: Creating Popular Justice in Mozambique*. London: Zed Books.

Schmidt, Elisabeth. 1992. *Peasants, Traders and Wives: Shona Women in the History of Zimbabwe, 1870–1939*. Harare, Zimbabwe: Baobab Books.

Shaheed, Farida. 1997. The Interface of Culture, Customs and Law—Implications for Women and Activism. In Mehdi and Shaheed 1997.
Smart, Carol. 1991. The Woman of Legal Discourse. Inaugural lecture, University of Utrecht.
———. 1995. *Law, Crime and Sexuality: Essasys in Feminism*. London: Sage.
Stewart, Ann. 1993. The Dilemmas of Law in Women's Development. In *Law and Crisis in the Third World*, ed. Sammy Adelman and Abdul Paliwala. African Discourse Series, 4. Munich: Hans Zell Publishers.
Stewart, Julie. 1998. Why I Can't Teach Customary Law. In Eekelar and Nhlapo 1998.
Stewart, Julie, and Alice Armstrong eds. 1990. *The Legal Situation of Women in Southern Africa*. Harare: University of Zimbabwe Publications.
Tsanga, Amy. 1998. Taking the Law to the People: The Experience of Zimbabwe. Ph.D. diss. University of Zimbabwe.
Women and Law in Southern Africa [WLSA]. 1990. Perspectives on Research Methodology. Women and Law in Southern Africa Research Project Working Paper no. 2. Harare, Zimbabwe: WLSA Research Trust.
Women and Law in Southern Africa [WLSA]. Botswana. 1992. *Maintenance in Botswana*. Gabarone, Botswana: WLSA Trust.
Women and Law in Southern Africa [WLSA]. Botswana. 1994. *Inheritance in Botswana*. Gabarone, Botswana: WLSA Trust.
Women and Law in Southern Africa [WLSA]. Zimbabwe. 1992. *Maintenance in Zimbabwe*. Harare, Zimbabwe: WLSA Trust.
Women and Law in Southern Africa [WLSA]. Zimbabwe. 1994. *Inheritance in Zimbabwe*. Harare: WLSA Trust.
Woodman, Gordon, R. 1997. Progress through Complexity: Options for the Subjects of Legal Pluralism. In Mehdi and Shaheed 1997.