Women as Subjects in the Process of Law: The Use of Empirical Sources in Women's Law

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Introduction

Gender perspectives and women's perspectives are moving center stage in international law and development studies. Today we find a great number of social, cultural and legal studies which, within different theoretical frameworks, pay attention to gender as a factor which influences the social, political and legal development or address gender as an outcome of social, political and legal change.

This paper distinguishes between two different types of knowledge about gender and legal change which are linked to different theories of investigation. These are the epistemologies of "women and law" and "women in law".[1] It is the "women in law" approach, with its emphasis on the exploration of the legal gateways from women's lived realities to the body of law, which constitutes the main center of attention.[2] Examples from African and Scandinavian women's

[1]The distinction is elaborated in the articel "Legal Advice as Research Method: The Case of Women's Law in Norway and Its Relevance for the Women and Law in Southern Africa Research Project", Anne Hellum, in Perspectives on Research Methodology, Women and Law in Southern Africa Research Project Working Paper No.2, Harare 1990.
[2]My teaching and research experience within the area of women's law in Scandinavian and African women's law forms the background for this article. I have since 1987 been attached to the Regional Women's Law Programme at the University of Zimbabwe which started out as a NORAD funded diploma course at the University of Oslo.

law research illustrate the ongoing effort of building a sociological jurisprudence where women, by means of an extensive use of empirical sources, are included as subjects in the process of law.

"Women and Law"

Research on "women and law" imposes women's perspectives on current law and critisises the power that lay in the law that already exist. Carol Smart, who is the author of "Feminism and the Power of Law" is one of the major proponents of this approach. It constitutes the theoretical backdrop of the post graduate course on gender, law and development which is taught at the School of Law in Warwick (Stewart, 1993).

Feminist legal scholars within this framework are arguing for non-engagement with law "...because the power it wields over women is considered to be too substantial" (Stewart, 1993: 220). It is an approach which is deeply sceptical of of the value of legal rights at a period of time when governments as a result of the work of international organisations are committing themselves to promote women's rights as human rights. The sceptisism is grounded on research which exposes the limitations of the highly individualised liberal rights framework in African context. The problems which are associated with transposing Western concepts of maintenance, marriage, divorce and family into wholly different contexts where women in different social and econmic contexts have different legal needs has been addressed by the research of the Women and Law in Southern Africa Research Project (Armstrong et.al., 1990; Armstrong et. al., 1995).

As an alternative to the liberal Western feminist jurisprudence which takes its departure point in the legal standards which are provided by international and national law there is a search of analytical tools available to enable constructive explorations of the differences of women at the global, national and local level. In order to explore the dilemmeas raised by law in women's development it is suggested that feminist legal scholarship should turn its attention towards the way in which the law creates gendered boundaries and categories and the impact that this has on the position of the women (Stewart, 1993:241). From this perspective law is analysed as a process of producing fixed gender identities rather than simply as the application of law to previously gendered subjects, so that the key question is how gender works in law and law works to produce gender (Smart, 1991:9). It is argued that

understanding the ways in which the legal concepts of marriage or family control women is 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.

The departure point for the suggested framework of analysis is not the women and their experiences but woman as "...a gendered subject position which legal discourse brings into being". The main objective of investigation is the legal text. It is is an outsider perspective which focuses on the power of legal discourse. Emphasis is on the legal discourse itself as a social practice. It is a deconstructive approach which leaves much to be desired as far as the possibility of reconstructing law in the light of women's diverse lifesituations and needs are concerned.

"Women in Law"

Research on "women in law" seeks to describe and analyse existing norms, concepts and legal systematizations from women's perspectives in order to create new norms, concepts and fields of law suited to the women's life course (Dahl, 1987). It is premised on the view that legal values and principles are grounded from below. As emphasised by Anna Christensen, the epistemological foundation of women' law is found in a legal science which is premised on the view that norms are nothing unless applied to reality and application of norms presupposes knowledge about the norm and reality (Christensen, 1988:28-29, 35).

The "women in law" position has occupied a central place in both Scandinavian and Southern African women's law studies. In both contexts women's law has been defined as a legal discipline which aims at describing, analysing and improving the position of women in law and society (Dahl, 1987; Maboreke, 1990). At the essentially practical and activist level the aim is to come up with legal interpretations or legal recommendations which brings law on par with the female lifesituations. There is in both contexts a shift from the unifying feminist perspective which is described in Tove Stang Dahl's "Introduction to Feminist Jurisprudence" towards a framework which bespeaks existing differences between women in terms of age, race and class.

In order to include the actions and voices of different groups of women in their legal discourses researchers in both parts of

the world have included a wider range of empirical sources than what is done in conventional legal research.[3]

In addition to conventional legal sources which are case law in terms of appeal court cases, statutes, subsidiary legislation and legal theories in terms of textbooks and articles, the practices in fora where arrangements which directly affect the position of women are made, are examined. Examples of such fora are the family, the work-place, the church community, the traditional healer, the local courts and administrative agencies.

As a consequence of this methodological expansion theoretical frameworks and empirical methods have been borrowed from the social sciences. At the theoretical level Sally Falk Moore's concept of the semi-autonomous social field has for example given substantive content to the methodological principle of taking women as starting point (Falk Moore, 1978). It has expanded the field of legal inquiry by turning the attention towards the rule-upholding and rule-generating human activities which take place in fora which range from the family to the workplace and the traditional healer. The strength of this framework is that it transcends the dichotomous divisions of law and society and of traditional and modern law. It is a framework which facitlitates further analysis of how the internally generated norms are constantly fused with knowledge of the content of legislation or judicial decision or needs that arise out of changing economic and social life conditions. In women's law it is not the coexistance of different normative structures in a social field as such which constitutes the main center of attention but the gendered outcome of the interplay.

A Scandinavian study that has drawn inspiration from this framework is Hanne Petersen's doctoral thesis "Informal Law in Women's Workplace: A theoretical and Empirical Analysis". Petersen conducted in-depth interviews with workers in two female-dominated workplaces in Copenhagen in order to explore how the expectations which derived from their family obligations on the one hand and the obligations which were embodied in the contract with the employer on the other hand interacted (Petersen, 1991). The inheritance research which was undertaken by the Women and Law in Southern Africa Research

[3] For an overview of differences and similarities between African women's law research see Chapter 4 Theoretical Perspectives in Women's Law in the forthcoming textbook about the use of empirical methods in women's law reserach in Southern and Eastern Africa by Agnete Weis Bentzon, Anne Hellum, Julie Stewart, Welshman Ncube and Torben Agersnap, Women's Law: Pursuing Grounded Theory.

Project explored how the position of widows was constituted in a wide range of forums ranging from the practice of the supreme court to the determinations of family councils and housing agencies.

The concept of the semi-autonomous social field is above all a tool of demarcation. It directs the researcher's intial assumptions as to what are the social fields which have the capacity to uphold or generate rules to concrete sites of fieldwork. As the process of data collection and analysis proceeds it may be necessary to adjust the initial assumptions as to who the interested actors are and what the relevant rule-upholding or rule-generating social entities are. The reason is that most women belong to a number of social collectivities which may give rise to different moral expectations. To focus on the women and the coinciding or conflicting norms and expectations which arise out of the different relationships in which they are embedded is one way of coming to grips with the phenomenon of intersecting collective belongings in terms of overlapping semi-autonomous social fields.

From Reality to Law - Different Gateways

The anthropological theory of legal pluralism and the "women and law" approach constitute descriptive theories which position themselves outside the law. The "women in law" approach constitutes a normative theory which sees itself as a part of the legal process itself. Its overall project is to contribute to the creation of a more inclusive and dynamic jurisprudence. In order to contribute to the creation of new norms and concepts that are responsive to the female lifesituations there is a search for interpretative frameworks which allow women to participate as subjects in the process of creating new law.

As far as the gateways from reality to law are concerned there are differences between the Scandinavian and the African women's law traditions depending on the character of the official legal system and the dominant legal argumentation cultures therein.

From Precedent to Use Oriented Customary law: the African Case

In the context of African plural legal systems where customary law is recognised as a part of the official body of law a use-oriented as opposed to a precedent-oriented conceptualisation of

customary law is in the making (WLSA, 1994). In my view, this is an approach which represents a fruitful methodological middle-ground between the precedence oriented centralist approach to customary law and the descriptive anthropological theory of legal pluralism.

The main concern of the precedent oriented customary law approach, which is associated with legal positivism, is with the customary law which is applied in the official courts. Both authors of legal textbooks and judges in the higher courts have tended to rely heavily on appeal court cases in their description and application of African customary laws. In Zimbabwe the reported cases from the the Native Court of Appeal of Southern Rhodesia are still applied by the Superior Court of Zimbabwe in cases which are decided under customary law, provided that the principles that are embodied this case law not been overruled by legislation (Ncube, 1989). The critique of the precedence oriented conceptualisation of customary law is that it by and large failed to respond to the way in which women in contemporary society are renegotiating their positions in local practice.

A recurrent question for the "women in law" researcher is concerned with the status of the different normative fragments which are found in family practices, local court practices and appeal court practices. It transcends from an analysis of legal pluralism in terms of co-existing normative structures in a social field to an analysis of the status of the different semi-autonomous social fields as sources of customary law along with other sources of customary law. The aim is to establish whether old norms concerning the position of women still are valid, whether old norms are dying out and whether new norms are emerging.[4] The question of validity is seen as situation specific. It is based on data which add the dimension of time and space to observations in specific sites of fieldwork which indicate that new norms are emerging or that old norms are dying. In order to demarcate fields where the emerging pattern is the dominant one it is necessary to turn the attention towards the normative overlap between different norm-generating forums in different social contexts and in different time periods. By paying attention to both stability and change the use and process oriented custo-mary law approach is a theoretical position which mediates between what in the anthropology of law has

[4] See Chapter 12 Interpretation of Empirical Data, in the forthcoming textbook about Empirical Methods in Women' s Law Studies in Southern and Eastern Africa by Bentzon, Hellum, Stewart, Ncube and Agersnap.

been conceived of as the rule oriented versus the process oriented customary law approach (Comaroff & Roberts, 1981).

Customs in the Context of Policy Considerations: the Scandinavian Case

In the context of Scandinavian women's law studies, which operate in the context of ostensibly unified legal systems, women centred policy considerations and legal standards which are rooted in knowledge about people's customs and practices are some of the avenues which has been explored out of the desire to bridge the gap between women's problems, practices and values on the one hand and the body of law on the other. The main sources of law today are statutes, judicial decisions, administrative practices, policy considerations and customs and public opinion. According to contemporary jurisprudence custom can to some extent be an independent source of law. Its weight will depend on the time factor and the quality factor; how the practice has been going on and whether the practice is seen as a good solution (Eckhoff, 1993).

In earlier Norwegian jurisprudence one operated with two sources of law: law and custom. In practice the content of these was very broad as a wide range of sources and arguments were fashioned in order to fit this conceptual framework (Malt, 1992). When one spoke of custom one did, however, have in mind the law created by the people. The special interest in these customs originated from the historical school of law with Savigny. According to this theory, the customs themselves were consi-dered to be the fundamental source of law. The task of juris-prudence was to draw the dividing line between customs that had become law and other practices in society. For a custom to enjoy the status of law it had to :

1) be uniformly practice
2) be practiced over a long period of time
3) practiced under the belief that it was legally binding

In contemporary legal reasoning custom has, as already mentioned, been assigned an inferior position. In women's law studies custom has, however, been used as a source of what people believe the law should be. It has been fashioned in order to fit into other argumentative gateways which mediate between reality and law, namely policy considerations. Policy considerations are, according to Tove Stang Dahl, the values

that are accorded special weight in women's law (Dahl, 1987: 83-96) . These values or ideals, which have been given content on the basis of empirical knowledge about female life situations and female values, are like John Rawl's theory of justice, based on the view that overall values and principles, such as justice, can be grounded from below. These considerations have multiple interpretative functions; ranging from considerations that are given weight in the interpretation/reinterpretation of law to critique of existing law to indicators of reforms.

A Common Heritage: the Living Law

Regardless of the above sketched differences as far as the legal context is concerned women's law scholars in both parts of the world have turned their attention towards legal theories which regard human interaction in terms of normative practice as the core of jurisprudence. As process oriented schools of jurisprudence Scandinavian and African women's law are legal disciplines that stand on the shoulders of the sociological school of jurisprudence which is associated with Ehrlich's living law. Ehrlich's main work "Fundamental Principles of the Sociology of Law" from 1913 contains a basic critique of the assumption that common law or customary law only arises from juristic law or from state law (Ehrlich, 1962:493). It maintains that the main objective of legal science, regardless whether the aim is description and interpretation of statutory law, common law or customary law, is an investigation of "the living law".

According to Ehrlich the "living law" is "the law which dominates life itself even though it has not been posited in legal propositions". It is concerned with "the concrete usages, the relations of domination, the legal relations, the contracts, the articles of association, the disposition by last will and testament, yield the rules according to which they regulate their conduct." (Ehrlich, 1962: 501). A main concern of Ehrlich's sociological jurisprudence is to bridge the gap between evolved positive law and living law. In order to prevent law from slipping out of its social context it is suggested that legal science should pay attention to the legal traffic which take place through harmonious human interaction in various walks of life:

> "Only a tiny bit of real life is brought before the courts and other tribunals; and much is excluded from litigation either on principle or as a matter of fact. Moreover the legal relation which is being litigated shows distorted features

which are quite different from, and foreign to, the same relation when it is in repose. Who would judge our family life or the life of our societies by the law-suits that arises in the families or in the societies?" (Ehrlich, 1962: 495)

The African Context: Trouble and Trouble-less Cases

The inclusion of the normative interaction which takes place in the context of everyday life implies an extension of the empirical investigation of customary laws from trouble-cases to trouble-less cases. To use the trouble-less case as a check on the trouble-case has, in my view, proved fruitful in women's law studies in Southern Africa. It takes women's capacity to create relationships and unions which is embodied in their private autonomy as individuals or groups as its departure point. By paying attention to the very norms which are created through human interaction in daily life women appear as subjects of law rather than as objects of law which more than often has been the case with descriptions and analysis of customary law which take the trouble-cases which reach the higher courts as its departure point.

As far as the inclusion of the trouble-less case material in the study of African customary laws the work of the legal anthropologist J.F. Holleman should be mentioned. In the essay "Trouble-cases and Trouble-less Cases in the Study of Customary Law and Legal Reform" Holleman, in line with Ehrlich, maintained that in the study of the substantive law and its practice, and in a field of the law in which litigation is rare, a fieldworker relying mainly on a case-method focused upon the actual trouble-case that are decided by the official courts may get a skewed idea of what the actual practices are (Holleman, 1973: 599). He critiques the trouble-case approach which is advocated in by Hoebel and Llewellyn's work "The Cheyenne Way" (Hoebel and Llewellyn, 1941). This classical work outlines a theory of investigation of law in societies which lack fora which are specifically legal in a western sense. In order to identify the norms which the society invests with binding authority they suggest that the main attention is devoted to trouble-cases. Because the trouble-case provide insight into the socially sanctioned norms the authors maintain that they represent the main road into the norms which the society under study vest with binding authority. The merits of the trouble-case is, according to Hoebel and Llewellyn that it affords

material which : "...can be *known* to be more than merely what "is done" in general living, or merely what men *say* ought to be done in general living." (Quoted from Hoebel and Llewellyn, 1987: 28).

Under circumstances where problems find their solution at the out-of-court level Holleman maintains that "...it is the trouble-less cases of normal practice that usually constitute the normative frame of reference by which the trouble-cases themselves are judged." (Holleman, 1973:594). According to Holleman a wide and varied field of observable practices offers an abundance of trouble-less cases which nevertheless falls within the sphere of social or legal control. He concludes that it is the common trouble-less cases of normal practice that usually constitute the normative frame of reference by which the ideal norms of state-law and the trouble-cases themselves are judged: "The trouble-less case then becomes a necessary check on the trouble-case, rather than the other way round." (Holleman, 1973: 599).

Firstly, such an approach is fruitful in that it has the capacity to fill in the legal voids wherein women have been situated as a result of the trouble-case approach which has been dominant in the precedent oriented customary law. This point is for example illustrated by Holleman's observations concerning women's property rights under Zulu law. The following are extracts from his field notes. The headman he was interviewing maintained that the goat which passed in front of them belonged to the wife of one of the men in the compound:

A: "It is her goat, but she is (like) the child of her husband. That is why she cannot sell without asking him."
Q: "Does this mean that the goat really belongs to the husband?"
A: "So it is. The husband is the unmnini (owner) of the woman, the woman is the umnini of the goat, therefore it is really the husband who is the umnini of the goat...It is because he agrees to her making pots that she found the money to buy the goat. So it is really through his amandly (power, authority) that she has this goat."
Q: "If he is the real owner, could he sell the goat?"
A: "He could sell it if he wants to."
Q: "Without asking his wife?"
A: "She is his child, he need not ask her."
Q: "So this is the true law of the Zulu, that a husband is the owner of property like a goat which his wife has earned with

her own labour, and that he can sell this property without asking her?"
A "Indeed, the law of the Zulu."
Q: "Could you tell about any examples of this having happened?"
A: "Of a man selling his wife's property without consulting her? Never! He would not be like a rogue stealing from his wife."
Q: "But you all agreed that he could do so under Zulu law."
The headman thoughtfully took a pinch of snuff before he replied. "You do not understand", he explained patiently. "You asked about the law of the Zulu and we told you the truth. But it is also like this, that a man who l ikes to live peacefully with his wife knows that he should always discuss such matters with her."

Secondly, the trouble-less case approach may build a bridge between the discrepancy between the norms which guide gender relationships in the private sphere and the norms which guide gender relationships in the public sphere of representation:

The inheritance research which was undertaken by the Zimbabwean WLSA team relied heavily on the trouble-less cases which were decided by rural and urban community courts in terms of Section 69 of the Administration of Estates Act (WLSA Zimbabwe, 1994:226-227). Interviews with the presiding officers coupled with the researcher's observations showed that the appointment of heir in most cases was based on an agreement between the relatives and themselves. The presiding officers merely endorsed the decision which had been taken by the family council. The trouble-less case material suggested that the Supreme Court's ruling from 1991 that customary law does not recognise a widow's right to inherit was out of tune with the practices of the community courts and the family councils.[5]

Gender Conflict and the Trouble-less Case

Trouble-less cases have commonly been referred to as cases that find their solution through amicable agreements. Most problems find their solution through the interaction which takes place between, spouses, relatives, friends and work mates in the process of everyday life. Amicable solutions are also reached in courts and in informal dispute resolution agencies.

[5] Murisa v Murisa S-41-91

From a gender perspective it is not as easy as that. By turning the attention towards gender conflict as a factor which under the circumstances may break up the normative unity of the family or the ethnic group, women's law adds a dynamic element to the study of customary law. It goes beyond the structure-functionalist kinship tradition, which informed the customary law studies of the 1950' and the 1960's, and which, like J. F.Holleman's Shona Customary law, by and large were premised in the assumption that the very structure and function of the kinship system was to strike a balance between seperated male and female spheres of equal worth.

A wide range of women's studies and gender studies shows that men and women who belong to the same family group, religious group or ethnic group often have different interests and viewpoints as far as the definition of the customary male and female codes of conducts are concerned (Stølen, 1991; Dwyer and Bruce, 1988; Sticher & Parpart, 1988). The solutions that people adopt in order to solve their problems are often a result of internal power struggles between men and women, young and old who advance their individual interests in terms of strategic manipulations with custom. A number of historical studies of changing law and gender relations are illustrative of the way in which African male elders and male European administrators in the colonial period manipulated with custom on order keep African women in place (Chanock, 1985; Parpart, 1988). Such studies constitutes the empirical backdrop of the general critique which has been raised against approaches which are based on a simplistic perception of custom and culture as a site of shared norms and ideas (Falk Moore, 1994). The application of a gender perspective on customary law offers insights which go beyond the static and coherent picture of custom and culture which was created by the structure-functionalist school of anthropology of law which by and large overlooked the none-conforming and the contested.

As far as data collection is concerned the women's law approach takes cognisance of both the consensual and the contentious elements and the power relations that are involved in the process of problem and dispute resolution. To come to grips with the different male and female voices is an important task. With its emphasis on the agreed and the contested - the conforming and the non-conforming - women's law research places itself in the centre of socio-legal transformations in terms of dying and emergent customs .

As far as the interpretation of the consensual and contentious elements in the trouble-less case material it is concerned the

distinction between moral habits and other habits is crucial. This task should not exclusively be based on externally imposed criteria of justice and morality such as the repugnancy tests which was exercised by the European male judges who manned the colonial courts. A core task for a use oriented customary law jurisprudence is to probe into the basis for the distinction between moral habits and other habits on the basis of the values of the community under investigation.

The Swedish legal scholar Anna Christensen emphasises that moral norms are "...designed to develop and maintain such relations between people which makes it possible to live and work together in the long run. Morals supersede the narrow and short-sighted calculation..."(Christensen, 1995:237). A similar line of investigation was pursued by the Zimbabwean WLSA team in their analysis of the position of widows under customary law. They concluded that to safeguard the widow and the dependants of the deceased was a basic principle of the customary law which was practised on the ground. It was found that the families themselves along with many problem and dispute resolution agencies distinguished between determinations which safeguarded the well-being of the deseaced's family as opposed to individualistic and short-sighted determinations. They found that this basic moral value, which in the agricultural kinship community had found its expression through the custom which by the European colonisers were termed widow inheritance, today was being translated into the practices of modern institutions like housing agencies (WLSA Zimbabwe, 1994).

The Scandinavian Context: Custom Revisited

As already mentioned Scandinavian women's law studies have mainly used custom as a source of describing and analysing the relationship between the law in the books and the law in action - with particular reference to the relationship between the gender neutral law and the gender specific reality. Furthermore, it has built bridges between empirical knowledge about the out-of-court practices where the position of women is determined practices and legal policy considerations.

The research project "Money Management and Joint Property in Marriage", which I carried out with Marianne Fastvold in 1983 and 1984, illustrates the use of custom as a source in Scandinavian women's law research (Fastvold & Hellum, 1988).

Because money and property management between married spouses rarely gave raise to conflicts which were dealt with by the courts we decided to turn our attention towards trouble-less cases. Trough an investigation where we combined dissemination of legal information with unstructured in-depth interviews we collected a case material which provided qualitative insight into what we conceptualised as "private practice in marriage".

This case material was utilised in order to illustrate the relationship between the law in the books and the law in practice with particular reference to section 1 in the Act Relating to the Property Relationship between the spouses which regulated the mutual duty to support. Under the heading agreements and arrangements in practice the case material was organised in three categories:

- **arrangements more advantageous than provided for by the law,** these were the cases where the spouses had a joint and not a separate economy.
- **arrangements that coincide with the law;** these were cases where the spouses had separate economy but where the one who was taking care of the home-making, that was the wife, got monthly contributions from the wage-earning spouse, that was the husband.
- **arrangements that were less advantageous than that provided by the law,** that was cases where the husbands contributions to the household and the upbringing of the children were less than required by the law.

Furthermore, the case material served as a source of policy considerations which aimed at bringing the needs and values of the women concerned to bear on the debate about legal reform. In the light of the women's quest for dignity, which was associated with not having to ask their husband for money, we suggested that the new marriage law should be based on joint control or income shared between the spouses.

We did not consider what we termed as private practice in marriage as a source of the interpretation of substantive law. Looking back on our interpretative strategy in the light of my African research experience I think our research might have carried greater scientific weight if it the different fragments of evidence had been interpreted within a customary framework. Our own observation that large groups of the population regarded joint money and property management as the basic principle was for example supported by a public opinion poll which showed that 90% of the population thought that the

joint property should be the main principle. Anthropological investigations also indicated that joint management of money and property was widespread. When I many years later worked as a deputy judge in Northern Norway I also discovered that the principle of joint property usually constituted the normative backdrop of cases where amicable agreements concerning division of matrimonial property at divorce was reached in divorce cases.[6]

If I was to carry out a follow-up research today I would choose a research design which could develop the argument of custom and practice along situational lines further. Both similarities and differences between women from different social groups in terms of fishing communities, farming communities and urban communities would be focused. Careful attention would be paid to the practices of women from the older and the younger generations with particular reference to the differences between the well educated upcoming career women and women who were part-time workers. A situational conceptualisation of practice would lay the foundation for the formulation of a legal framework which could respond to women's different life situations, needs and values.

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