Review Essay

Remaking Law: Gender, Ethnography, and Legal Discourse

Anne Griffiths

Susan F. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court.* Chicago: University of Chicago Press, 1998. xix + 360 pages. $48.00 cloth; $19.00 paper.

In her book Susan Hirsch explores how Swahili Muslim women in the Kenyan coastal cities of Mombasa and Malindi pursue marital disputes in local Kadhi's (Islamic) courts. Focusing in particular on the Malindi Kadhi's court, Hirsch highlights how Muslim women actively use legal processes to transform the religious and local norms that underlie their disadvantaged position in this Swahili community in postcolonial Kenya. In her microlevel study, based on empirical work featuring court records, court observations, and participation in everyday life in the community, the author offers a nuanced analysis highlighting the ways in which women are both constrained and empowered in this setting where customary law, religious law, Western law, and social norms concerning male and female speech intersect and interact. Although constraints derived from local and religious norms operate to urge compliance with social convention that projects women as persevering wives who should suffer in silence in relation to their pronouncing husbands, some women are, nonetheless, able to negotiate these stereotypes to circumvent male power. Hirsch's study details the process whereby some Muslim women who resist patriarchal norms are silenced while others succeed in transforming the perception of womanhood to their advantage in their disputes with their husbands.

Indeed, Hirsch's observation is that despite problems in the past, the majority of marital conflicts handled by the local Kadhi's court are initiated and won by women. Integral to her analysis is the way in which women and men in these communi-

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ties in East Africa are constituted as gendered subjects, which is not to be treated as a given, derived from a hegemonic form of discourse, but which is created through the use of language that draws on institutional and cultural conventions for producing speech, thus giving rise to differing forms of discourse in specific contexts. This practice allows for gender to be "made, remade, and transformed in fundamental ways through legal institutions and the discourses of disputing" (p. 3). Engaging language at the level of sociolinguistic theory, Hirsch convincingly demonstrates that it is not merely the vehicle through which legal power operates, but it also constitutes legal power itself, being at once the cause and effect of linguistic interactions taking place on a daily basis in Kadhi's courts. Although her study centers on local courts, Hirsch's detailed and careful analysis of the ways in which men and women negotiate their legal claims contributes to a broader set of debates concerning the representation of knowledge and its relationship with gender, ethnography, and law.

Gender and Legal Discourse: An Ethnographic Perspective

Feminist scholars (Lacey 1992; Smart 1989, 1992, 1995; MacKinnon 1983, 1987; Fineman 1983, 1991; White 1991; Minow 1986) have long been critical of mainstream legal discourse because it fails to take adequate, if any, account of women's voices, practices, and experiences in its analysis of law. Such a discourse, which centers on law-as-text—through a rigorous exposition of doctrinal analysis founded on a specific set of sources and institutions—upholds an image of law that sets it apart from social life. It promotes an image of autonomy that is used to maintain law's power and authority over social relations in general, thereby sustaining a notion of hierarchy while maintaining an image of neutrality and equality within its own domain. This image of law has been contested by feminists, among others,[1] because it refuses to acknowledge the gendered world in which women and men live, a world in which the reality of power and authority—acquired through a coalescence of economic, social, political, and ideological factors—undercuts the prescribed status of individual equality and neutrality accorded by law. The value of Hirsch's study is that it marks a move away from those theorists who analyze women's relationships with law at an abstract level (Mackinnon 1987; Smart 1995) in which the focus has been on law's power to construct the category "woman." Valuable and important as this work has been in challenging dominant legal discourse on its own terms, it is in danger of producing a "woman of legal dis-

[1] For an exposition and critique of this approach see Fitzpatrick (1992); Snyder (1981); Galanter (1981); Griffiths (1986); Merry (1988); Sarat & Kearns (1995); Petersen & Zahle (1995).

course" (Smart 1992) who is "'discursively unidimensional': Constituted as she is by [legal] discourse, she has neither experience nor agency: she has neither breath nor breadth" (Gavigan, quoted in Boyd 1999:373). Hirsch re-embodies discourse in the language, practices, and experiences of real women, thus avoiding "essentialising concepts of experience" (Ebert 1996:3) and reducing law to a "tool which eternally reinforces the prison walls of patriarchy" (Lacombe 1998:158).

Hirsch's perspective, stemming from an ethnographic approach to her subject matter, is important because it challenges feminist scholarship that underpins an image of Muslim women as "the silenced others of Western women" (Hirsch p. 2), victims of a cultural regime, embedded in Islam, in which such women are relegated to a subordinate role in their relationships with Muslim men. Hirsch details gender-specific local norms that guide the relationship between talk about conflicts and about proper social behavior through a discussion of *heshima,* which she claims is at the core of Swahili cultural understandings of language and conflict that promotes the image of the pronouncing husband and the persevering wife. Her analysis documents the complex ways in which some Kenyan women who complain in court stand in violation of appropriate speech and still appear as compliant wives. These women, by using narrative in the form of stories about domestic conflicts, seek to confront this image. Through a detailed presentation of court proceedings, Hirsch traces the sometimes contradictory experiences of these Kenyan women and highlights the continuity and change in the norms and prescriptions that guide gender relations and that allow for their transformation.

Hirsch's analysis is in keeping with other studies (Abu-Lughod 1993, 1998a, 1998b; Ong 1995:159–94; Starr 1992:89–115) that portray Muslim women as active agents who negotiate their universe. In her study of the Ottoman Empire and the Turkish state, Starr (1992:96–98) records how rural women in the Bodrum region turned to the law for protection or to enhance their status by pursuing divorce actions in state secular courts and how these courts became "more responsive to women's new role" (p. 98) over time. In her work on Malay Muslims, Ong (1995:177–82) documents that middle-class, educated women have tended to embrace Islamic resurgence and have come to negotiate, in their words and bodily presentations, the changing meanings of resurgent Islam in Malaysian nationalism. When it comes to the Awlad 'Ali Bedouin of Egypt's western desert, Abu-Lughod (1993) observes how basic day-to-day socializing oriented around same-sex groups provides women freedom from the surveillance of men and the space to express "vibrant irreverence and resistance to the control of men in their separate sphere" (1998a:260). This type of analysis is not confined to the

study of Muslim women but extends to research on women and gender issues more generally (see Abwunza 1999; Baerends 1990–91; Griffiths 1997; Hellum 1999; Molokomme 1991).

An important feature of these studies of Muslim women is that they challenge the representation of Islam and Islamic law as a monolithic entity. Any generalization about Islamic culture must "be tempered by context" (Calloway & Creevey 1994:43), but there is also a need to recognize that "Islamic law lends itself to a variety of interpretations [that] not only have far reaching implications for women's human rights in Islam" (Ali 2000:3) but that also confront the views of Western feminists who believe "that progress of women in non-western cultures can only be achieved by giving up their native culture."[2] As Ali observes (2000:6), such an approach underestimates "the skills of Muslim women in negotiating the existing inequalities and gender hierarchies within their cultural milieu." One of the objectives of her work *Gender and Human Rights in Islam and International Law* (2000:6) is to dispel "the notions held by many 'Western' feminists regarding the oppressive conditions of Muslim women world-wide and their supposed inability to negotiate gender inequalities in their respective societies."

Recolonization?—Bridging Divides

The views of these Western feminists have been labeled a form of "colonial feminism" (Ahmed 1992) because their essentializing tendencies have much in common with forms of colonial discourse (Abu-Lughod 1998b:14). Such scholars provide examples of Said's Orientalism (1978) in that they represent a view of the world in which Western beliefs, values, and laws are used as a touchstone for framing and interpreting knowledge about other societies and judging them accordingly. Concerning the representation of knowledge, Said has argued for a reframing of world history as a global phenomenon, with the recognition that the division between West and East, and the representations of each, must be understood in the context of a historical encounter broadly labeled imperialism. Within this framework, social universes are depicted and analyzed in terms of binary oppositions, representing the "self" or the "other" of Western theory by labels such as East/West, colonizer/colonized, and colonial/postcolonial. Although some scholars using postcolonial theory as an analytic tool have sought to destabilize these constructs, others, such as Darian-Smith, have pointed out that Said, for example, tends to see the discourses of the East as always subject to negotiation through the discourses of the more-powerful West,

[2] For examples of such feminists, Ali (2000:6) refers to the discussion in Fernea (1995).

instead of attending to the "transgressive potentiality of mutual dependency between Europe and its Others" (Darian-Smith 1996:293).

The danger of this pervasive tendency has manifested itself in contemporary discussions surrounding human rights discourse, which has been of particular interest to feminist (as well as other) scholars. This discourse is animated by a fundamental tension between the desire to establish universal rights, on one hand, and, on the other, the awareness of cultural differences, which seems to negate the possibility of finding common ground on which to base such rights. In the ongoing debate, scholars are predisposed to making participants choose between universalism and cultural relativism (An-Na'im 1990; Renteln 1990).

One area that has provoked discussion among feminists concerns the Convention on Elimination of All Forms of Discrimination Against Women, passed by the General Assembly of the United Nations in 1979. The Convention, with its focus on equality and rights, has come in for criticism from African scholars in family and women's law, who have drawn attention to its Eurocentric character. For example, Armstrong et al. (1993) and Rwezaura et al. (1995) point out that, as an instrument for social and legal change, the Convention is premised on a mixture of law and modernization theory and liberal Western feminist jurisprudence. But this type of jurisprudence, though undermining conventional legal scholarship of the kind associated with legal centralism (because of its failure to integrate gender into its analysis of law), has come under attack for failing to take adequate account of the voices, views, and needs of women of color (Lam 1994; Ilumoka 1994:320; Nesiah 1993; hooks 1989; Oloka-Onyango & Tamale 1995:720). Indeed, it has been accused of engaging in gender essentialism by treating white women's experience as the standard that applies to all women, in other words, for making one assumed cultural set of standards universal, or rather, appropriating the power of one particular standpoint to speak for all.

Thus formulated, the debate is in danger of polarization in terms of universalist or relativist perspectives that adhere to notions of "sameness" or "difference" not only with respect to the treatment of women in relation to men but also with respect to the treatment of one another. To overcome this impasse, a number of feminists (Brems 1997:158; Oloka-Onyango & Tamale 1995; Moore 1993; Bentzon et al. 1998; Charlesworth 1994:63; Young 1994) are working toward a form of dialogue that can accommodate the diversity of women's experiences while acknowledging that there may also be experiences that they share in common. This process requires a type of knowledge that goes beyond the abstract propositions that form part of Western-style law, knowledge grounded in the specific contexts of women's

and men's lives. To acquire such knowledge, concrete data for analysis both within and across cultures are required. For this reason, ethnographic work of the type undertaken by Hirsch and others is important because it contributes to an empirically grounded understanding of law reform internationally initiated in the context of local communities that also have their own norms and values. Such an approach represents a more anthropological perspective on the study of law by centering analysis on the specific, concrete, lived experiences that inform women's and men's lives.

Ethnography and the Representation of Knowledge: Multiple Voices

Ethnography provides a counterpoint to analyses of law that are based on abstract theory, but it also has been subject to critiques about its claims to knowledge and representation. Clifford and Marcus (1986) have challenged the ways in which male anthropologists have constructed anthropological texts to establish "ethnographic authority." Part of the difficulty, as observed by Moore (1994:1), lies in the fact that even though "the key method of social anthropology remains firsthand contact through fieldwork," "the anthropologist cannot but be intensely and constantly conscious of the larger world that surrounds the field site" (1994:2). Attempts to deal with this dilemma, in terms of an interpretive and reflexive anthropology that has explored how the production of knowledge and representation can involve "the native" in a dialogical and multivocal process (Clifford & Marcus 1986; Clifford 1988), have also been subject to criticism on the grounds that "the specific destination and form of reception of that representation is usually not addressed, or is assumed to be the same as that of the anthropologist" (Yang 1996:107).

It has been noted that "if cultural others are to be contrasted with us to make a critical point they must be portrayed realistically and in the round, sharing modern conditions that we experience also" (Marcus & Fischer 1989:162). But this approach has its critics on the basis that its message "is that western interest in cultural others acts only as a foil to the West, as a strategy of defamiliarization and (western) cultural critique of western societies" (Ong 1996:61). However, such cultural critiques offer few suggestions "as to how anthropological knowledge may be reformulated in a transnational, post-colonial world" (Ong 1996:61).

Questions have also been raised about who has the authority to speak for whom in this representation of knowledge. Thus some scholars, such as Amadiume (1987:10), have been critical of the ways in which Western women have appropriated the voices of Third World women. This concern with legitimacy and

appropriation has also been an issue for postmodern feminists who consider that women's everyday lived experiences are essential to feminist strategizing in and around law while they grapple with the need to move away from grand theory. They are ambivalent about using the concept of "women" with respect to a whole category or class of persons, because any claim to knowledge on their part will be viewed as totalizing or essentialist if applied beyond those women's own specific circumstances (Fegan 1999). Such concerns stem from a critique of feminist essentialism and universalism that is grounded in a perception of the modernist project (Higgins 1995:1538–39). Yet it is possible to recognize the differences of race, class, religion, ethnicity, and nationality experienced by women (Moore 1993), while recognizing that they may also have experiences in common. In recognizing commonalities of both experience and difference, scholars need not fall into an essentialist perspective based on a universalist, foundationalist approach to knowledge. Similarly, recording and analyzing women's experiences need not amount to appropriating their voices or their knowledge, provided scholars make clear that they are speaking *about* women and not *for* them. In this way feminist scholars seek to impose neither a unity nor a falsely universalizing voice.

Reconceiving the Local and the Global

Whatever the failings of an ethnographic perspective, Moore (1994:80) has cautioned that it is a "huge polemic leap from recognizing the existence of an important blind spot to arguing that there is a total incapacity to see." Required is yet another way of conceiving the relationship between the local and the global, one that moves beyond an "ossified notion of culture and the binaries that it underwrites" (Abu-Lughod 1998b:17).[3] In this process it is necessary to examine how knowledge works in different places and how it gets transformed, and to explore the complex ways in which "local forms of knowledge and organization are constantly being reworked in interaction with changing external conditions" (Long 1996:50) so that the knowledge produced is simultaneously both local and global, but not universal (Moore 1996:10).

Hirsch's study contributes to this reformulation of the local and global relationship by showing that Kadhi's courts have developed in response to historical, economic, religious, and national processes. Thus these courts, positioned within "multiple webs of power" (Hirsch, p. 115) in contemporary Kenya, have become a forum that is sympathetic to women's claims. She dem-

[3] For an example of a move away from these polarities in human rights talk, see Cowan et al. (2001).

onstrates the ways in which local customs and practices intersect with, respond to, and are shaped by a state law that is mainly derived from Western-style law. This mutually constitutive process dispels any notion of Islam and Islamic law as a coherent and consistent body of religious principles that is independent of time and place. Her account of how women work with and around the concept of *heshima* is valuable because it goes beyond merely recording women's postures of submission to patriarchy as persevering wives to documenting how women use cultural prescriptions and rules about male power in Swahili life to gain power over them and to promote their own interests. Hirsch examines both the structure of patriarchy and the ideology that underpins it by describing the ways in which speech is produced in Kahdi's courts, thus providing a more dynamic account of social relations between women and men, one that allows for contextual change over time.

Lacking in Hirsch's analysis, however, is an account of who the actors are who perform before these courts. What types of men and women opt to come before these courts and for what reasons? How do they stand in relation to others in their community in terms of social hierarchy—are they well-educated, employed, of a higher or lower social status—and how does this impact upon their ability to speak? Hirsch's focus on the features that are common to women's speech and courtroom strategies, in contrast to those of men, tends to neglect the issue of difference and the ways in which this difference may impact women's and men's success or failure in pursuing their claims in these courts. Hirsch notes that "women win cases in part because kadhis are in conflict with other men for authority" (Hirsch, p. 129), but it would be useful to know the type of situations in which this outcome occurs and under what circumstances. In part, this lack of information is a result of the author's focus on the case as a unit of study. This focus is necessary for the in-depth sociolinguistic analysis that Hirsch engages in; however, it does mean that the kind of information that emerges from an extended case study is missing. Such knowledge would strengthen the analysis and would help to position our understanding of the success or failure of cases that take place in the Khadi's courts, in the light of ongoing social relations, or the rupture of social relations, outside the court. It would also provide a perspective on language that would sharpen our understanding of the ways in which discourse in the courts is in line with or differs from discourse in everyday life.

Remaking Law: Legal Pluralism, Language, and Legal Consciousness

In these discussions surrounding the negotiation of gender and domestic conflict, the study of law is central. As Channock (1985:4), among others, has noted, law was the cutting edge of colonialism in its attempt to control and govern its colonial subjects while bringing about their transformation and that of the societies in which they lived. In analyzing law in postcolonial states,[4] it is "necessary to reconnect the present with the precolonial and colonial past" (Chabal 1996:51) in a way that will "break down the barriers between postcolonial Africa and its past" (Ranger 1996:273) so that there is the recognition that modern law is itself "a creature of colonialism, developed during an era of mercantilism and imperial expansion and shaped by those conditions (Merry 2000:19). Analyzing law from this perspective is important because it requires scholars to reappraise their approach to legal pluralism.[5]

As Merry observes (1988:869), legal pluralism "is a central theme in the reconceptualization of the law/society relation." It has come to embrace two perspectives, one centered around the concept of "juristic" pluralism, which focuses on the different bodies of law that form part of the state legal system (Griffiths 1986:8), the other embodying a "social science" perspective on legal pluralism "as an empirical state of affairs in society (the coexistence within a social group of legal orders that do not belong to a single system)" (Griffiths 1986:5). On one hand, an example of the former is provided by Hooker's (1975) work, which documents parallel legal regimes that are all dependent on the state legal system for their validity, e.g., customary and Islamic law. On the other hand, Moore's (1973) work documents how multiple systems of ordering coexist within a semiautonomous social field that "can generate rules and customs and symbols internally, but . . . that is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded" (Moore 1973:720).

These visions of law have important consequences for framing our understanding of how law works and how women and men find themselves situated with respect to its uses in everyday

[4] "Postcolonial" has a number of meanings. It can be used descriptively to denote the contemporary state of former colonial societies in Africa and Asia. It can also be used analytically to refer to postcolonial theory that not only "has penetrated the inner sanctum of the first world . . . arousing, inciting and affiliating with the subordinated others in the first world" (Prakash 1990:403) but that also privileges "particular methods and problematics so as to subvert the self-confident rationality of imperial science" (Ranger 1996:271).

[5] There has been much debate surrounding the concept of legal pluralism and what it entails; see, e.g., the work of Griffiths (1986); Merry (1988); Benda-Beckmann (1988); Tamanaha (1993); Greenhouse (1998); Woodman (1998) and Roberts (1998).

life, a subject that Hirsch discusses at length in her book. The first approach is one that is based on a notion of culture that is bounded and static, in which law is defined in terms of the colonial "self," in terms of Western-style law (with all the values associated with that construct), while it is juxtaposed to law associated with the "other" of colonization, e.g., customary or Islamic law (that has other cultural values associated with it). Yet earlier discussion has shown how inadequate and positively misleading these accounts of identity have been. Nonetheless, Woodman (1998:22) notes that in analyzing legal pluralism, "it seems clear that still today the tenets of legal centralism are accepted by the majority of legal theorists." For this reason, when formulating "new directions in legal anthropology," Starr and Collier (1989:9) decline to talk of law in terms of legal pluralism because of the enduring power of this paradigm to co-opt analyses of law. However, other perspectives on legal pluralism are viable. Moore's approach, which is ethnographically grounded, is in keeping with a view of culture as practice, embedded in local contexts and the multiple realities of everyday life (Bourdieu 1977; Comaroff & Comaroff 1991; Sahlins 1976; Strathern 1980), which allows scholars to acknowledge heterogeneity in the social and legal practices shaping people's worlds and their relationship with rights.

It is the latter approach that Hirsch draws on in framing her analysis of Kadhi's courts and the ways in which women and men construct themselves as gendered speakers. Her work is thus in tune with more recent anthropological scholarship that is attentive to "the ways the conceptual and practical boundaries of legal recognition and legal jurisdictions draw on and contribute to repertoires of signs by which cultural identity is recognized and contested in the broader social landscape within and beyond law" (Greenhouse 1998:63).

Part of the process of exploring the broader dynamics of cultural production and personal experience has involved examining the role of state law in the cultural construction of identities and as an institutional site of resistance (Lazarus-Black 1994; Lazarus-Black & Hirsch 1994). The importance of this perspective is that it undercuts analyses of legal pluralism that map differences in legal orders (whether as official or unofficial law) in terms of state formulations of identity that are constructed around ethnic or racial groups. Refusing to attribute a form of cultural identity to law and, instead, examining the processes by which law comes to be a sign of cultural identity results in the emergence of an image of law that may be "controlling without ordinarily being determinative, variant but not necessarily in ways that are homologous with cultural variation" (Greenhouse 1998:66).

Anthropological treatments of law have focused on the cultural significance of law and on the intimate link between legal

conceptions and the surrounding cultural fabric that promotes understanding of law. Such an approach foregrounds the importance of discourse and the ways in which meaning is produced in courts and other legal arenas. Language is central to the construction of discourse (Conley & O'Barr 1998) and of legal consciousness (Merry 2000:17) that is not only confined to court officials or legal practitioners but also provides "ordinary citizens with a potent social discourse that they [may] use in a variety of settings to explain and comment on their everyday experience" (Greenhouse et al. 1994:2). Thus, local practices come to define what law is and to shape legal consciousness (Ewick & Silbey 1998). Hirsch's depiction of Kenyan women and men who speak in court as gendered, legal, and linguistic subjects demonstrates the power of language not only in terms of sociolinguistic theory but also as a form of social discourse that draws on a plurality of legal norms culled from statutory and religious sources. Thus law forms part of culture (Rosen 1989, 1999) rather than being abstracted from it in the ways depicted by mainstream legal discourse, discussed earlier. The ways in which social and legal meanings become integrated through language in a process of ongoing negotiations between the parties points to moments of transformation or change, which, as Hirsch demonstrates, operates to the benefit of some, but not all, women.

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