



Gender, Justice, *and* *the* Problem *of* Culture

FROM CUSTOMARY LAW TO
HUMAN RIGHTS IN TANZANIA

Dorothy L. Hodgson



Gender, Justice, *and* *the* Problem *of* Culture

*From Customary Law
to Human Rights in Tanzania*



Dorothy L. Hodgson

INDIANA UNIVERSITY PRESS
Bloomington & Indianapolis

This book is a publication of

Indiana University Press
Office of Scholarly Publishing
Herman B Wells Library 350
1320 East 10th Street
Bloomington, Indiana 47405 USA

iupress.indiana.edu

© 2017 by Dorothy L. Hodgson

All rights reserved

No part of this book may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying and recording, or by any information storage and retrieval system, without permission in writing from the publisher. The Association of American University Presses' Resolution on Permissions constitutes the only exception to this prohibition.

The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48–1992.

Manufactured in United States of America

Library of Congress Cataloging-in-Publication Data

Names: Hodgson, Dorothy Louise, author.

Title: Gender, justice, and the problem of culture : from customary law to human rights in Tanzania / Dorothy L. Hodgson.

Description: Bloomington : Indiana University Press, 2017. | Includes bibliographical references and index.

Identifiers: LCCN 2016039569 (print) | LCCN 2016039937 (ebook) | ISBN 9780253025203 (cloth : alk. paper) | ISBN 9780253025357 (pbk. : alk. paper) | ISBN 9780253025470 (e-book)

Subjects: LCSH: Customary law—Social aspects—Tanzania. | Women's rights—Tanzania. | Women, Maasai—Legal status, laws, etc.—Tanzania. | Maasai (African people)—Tanzania—Social conditions. | Women, Maasai—Tanzania—Social conditions. | Non-governmental organizations—Political aspects.

Classification: LCC KTT46.7 .H63 2017 (print) | LCC KTT46.7 (ebook) | DDC 342.67808/78—dc23

LC record available at <https://lccn.loc.gov/2016039569>

For Luke, with love

Acknowledgments

AS ALWAYS, I AM MOST grateful to the many Tanzanians who have let me into their lives, if only for a short time, to listen and learn from their experiences, ideas, and perspectives. And since in many ways this book is a culmination of my more than thirty years of ethnographic and historical research with Maasai men and women (since the early days of my work with the Arusha Catholic Diocese's community development team in the mid-1980s to my last visit in January 2011), I have many, many people to thank. Some material is drawn from my years of comparative, longitudinal research with residents of Emairete, Embopong', and Mti Mmoja in the 1990s and 2000s, including return visits during my research stay in 2005–2006. I also use experiences and evidence from my studies of several Maasai NGOs. The leadership and staff of the Maasai Women's Development Organisation (MWEDO) and Pastoralist Women's Council (PWC) welcomed me into their meetings, workshops, programs, and debates. I thank Ndinini Kimesera Sikar (MWEDO) and Maanda Ngoitiko (PWC) for their leadership and vision. Other key interlocutors in Tanzania for this project include Marjorie Mbilinyi, Saning'o Milliary, Alais Morindat, Esupat Ngulupa, the late Moringe Parkipuny, and Edward Porokwa. I am indebted to the Tanzanian Commission on Science and Technology for permission to undertake this research, and to Professor Simeon Mesaki for serving as my local research contact. Morani Poyoni worked as my research assistant for much of that time, but Esupat Ngulupa accompanied me on my return survey of communities in Monduli and Longido districts in 2005 and 2006.

Many of the ideas I explore in this book were developed, challenged, and strengthened from an array of initiatives and opportunities. As director of the Institute for Research on Women (IRW), I facilitated a year-long weekly seminar on “The Culture of Rights/The Rights of Culture” for faculty members, advanced graduate students, postdoctoral fellows, and visiting scholars (2008–2009). With the assistance of Beth Hutchison (then associate director of the IRW) and Marlene Importico (officer manager), I led a three-day symposium on the topic in the spring of 2009. I subsequently edited a book, *Gender and Culture at the Limit of Rights* that collected the best papers from the seminar and symposium. A few years later, in 2012, I organized an interdisciplinary workshop at Rutgers on “Gender Justice in Africa: Historical and Contemporary Perspectives” that brought together senior and junior scholars and activists. That same year, I served as a research director (with Pamela Scully) of an SSRC Dissertation Proposal Development Fellowship Workshop on the topic of “Gender Justice in the Era of Human Rights.”

Throughout this period as first director of IRW and then chair of the Department of Anthropology, I used every lecture and conference invitation to cultivate this project. I have presented aspects of this work at numerous conferences, workshops, and universities, including, among others, the University of Cambridge, the University of Cologne, the University of Copenhagen, the University of Dar es Salaam, Depauw University, Emory University, the University of Florida, Florida International University, Hamilton College, Harvard University, Michigan State University, the University of Minnesota, the National University of Mongolia, the College of New Jersey, Notre Dame University, Université Paris-1 Panthéon Sorbonne, Rice University, Rochester Institute of Technology, Smith College, the University of Texas-Austin, the University of Washington, and various annual meetings of the American Anthropological Association, African Studies Association, European Conference on African Studies, and Berkshire Conference on the History of Women, Genders and Sexualities. I am deeply grateful to colleagues and audiences at all of these venues for their questions, comments, and criticism.

I am indebted to numerous institutions for funding key phases of research and writing. Much of the book’s evidence draws on a year of research that I conducted in Tanzania in 2005–2006, with the support of a John Simon Guggenheim Memorial Foundation Fellowship, a Fulbright-Hays Faculty Research Abroad Award, and an American Council of Learned Societies

Fellowship. During 2006–2007, a Faculty Fellowship from the National Endowment of the Humanities and Competitive Fellowship Leave award from Rutgers University enabled me to analyze my data, write a draft of my earlier book, *Being Maasai, Becoming Indigenous* (Hodgson 2011a), and prepare notes for this book. After almost five years of developing pieces of the book, including a return research trip to Tanzania in 2011 and three challenging years serving as chair of my department, I had the extraordinary luxury of spending a month at the Rockefeller Foundation's Bellagio Center in Italy during the summer of 2013. During this magical time in the Villa Serbelloni, in the midst of ancient tapestries, fabulous colleagues, delicious food, stunning vistas, and peaceful, uninterrupted work time, I wrote a rough outline of the book (based on numerous presentations and short papers), clarified the overall arguments, and drafted the introduction and two chapters. I am grateful to Andres Barba, Jacob Bertrand, Carmen Caceres, Daniel Esser, Elena Gabre-Madhin, Santosh Mehrotra, Mahdev Mohan, Vinita Ramani, and C. Dale Young for their intellectual fellowship and fun. With the support of a second Faculty Fellowship from the National Endowment for the Humanities, I spent the following academic year (2013–2014) conducting additional archival and documentary research and drafting the remaining chapters. My progress on this book was interrupted by two other major writing projects, but I finally completed the revisions and submitted the manuscript to the press in the summer of 2015.

Priya Lal and Brett Shadle provided thoughtful reader's reports that helped to clarify and strengthen the book's arguments, evidence, and accessibility. Many friends, students, and colleagues read portions of the manuscript or contributed ideas and insights to the overall argument and project. They include Lila Abu-Lughod, Ousseina Alidou, Srimati Basu, Mona Bhan, Abena Busia, Emily Burrill, Barbara Cooper, Clifton Crais, Elliot Fratkin, Ben Gardner, Daniel Goldstein, Carol Greenhouse, Marla Jaksch, Jessica Johnson, Omotayo Jolaosho, Temma Kaplan, Corinne Kratz, Benjamin Lawrance, Salma Maoulidi, Sally Engle Merry, Sheryl McCurdy, Marit Østebø, Richard Roberts, Zakia Salime, Pamela Scully, Aili Mari Tripp, Judith Van Allen, and Richard Waller.

Almost twenty years ago, I had the good fortune to meet Dee Mortensen, my now longtime editor at Indiana University Press. As we bring this fourth book to completion, I am grateful yet again for Dee's support, encouragement, and critical advice.

And finally, I am thankful for the love, laughter, and labor of my family. My husband, Rick Schroeder, is my partner in life in every meaning of that term. Through the challenges of leadership, surviving the whims of academia, raising a teenager, and the many other ups and downs we have encountered in our more than twenty years together, Rick has been my foundation, guide, mentor, ally, confidant, best friend, and more. As I complete this book, our son Luke readies himself to graduate from high school and leap into the excitement and awe of college and beyond. I am curious to see the pathways he chooses as he draws on his many talents, strengths, and accomplishments as a scholar, musician, athlete, and, most importantly for me, kind, empathetic, thoughtful, caring, feminist young man. I suspect he will work making this world a more just place for those on the margins, and so I dedicate this book about justice to him.

* * *

I am grateful to the following publishers for permission to draw on previously published material for this book.

Sections of chapter 2 are derived in part from an article, “My Daughter . . . Belongs to the Government Now’: Marriage, Maasai and the Tanzanian State,” which was originally published in 1996 in *The Canadian Journal of African Studies* 30, no. 1: 106–23, copyright Taylor & Francis, available online: <http://www.tandfonline.com/doi/abs/10.1080/00083968.1996.10804410>.

Sections of chapter 3 are drawn from a chapter, “These Are not Our Priorities’: Maasai Women, Human Rights and the Problem and Culture,” published in *Gender and Culture at the Limit of Rights*, a book I edited for the University of Pennsylvania Press in 2011. Small portions are also reproduced from “Women’s Rights as Human Rights: Women in Law and Development in Africa (WILDAF),” *Africa Today* 49, no. 2 (Summer 2002).

Gender, Justice,
and the Problem of Culture

Contents

Acknowledgments ix

Introduction: Gender, Justice, and the Problem of Culture 1

1

Creating "Law": Colonial Rule, Native Courts, and the
Codification of Customary Law 19

2

Debating Marriage: National Law and the Culture
of Postcolonial Rule 61

3

Criminalizing Culture: Human Rights, NGOs, and the Politics
of Anti-FGM Campaigns 97

4

Demanding Justice: Collective Action, Moral Authority,
and Female Forms of Power 133

Conclusion: Gender Justice, Collective Action, and the Limits
of Legal Interventions 157

Bibliography 165

Index 179



Introduction

Gender, Justice, and the Problem of Culture

IN JULY 1985, I HAD the pleasure and privilege of attending the Non-Governmental Organization (NGO) Forum that accompanied the United Nations Decade Conference on Women in Nairobi, Kenya. Before that event, I had seriously considered becoming a lawyer, but two years of work as a paralegal convinced me to pursue other dreams. And so I quit my job, bought a three-month air ticket to East Africa, and started on a journey that would change my life forever and lead me, ultimately, to a career in anthropology. A key moment in that journey was my experience at the NGO Forum. I was a young white American woman who had long been a feminist activist in the United States. From personal circumstances, I was sensitive to class issues, and I had been deeply influenced by such notable black authors as Maya Angelou, Ntozake Shange, and Angela Davis. But I had never encountered the range of global activists and ideas as those I did at the NGO Forum. The discussions I shared in shook my world, challenging my comfortably held ideas about women, feminism, and the possibilities and perils of “global sisterhood.”

One event in particular still resonates with me today. At a crowded workshop on “Custom, Law and Ethnicity,” I listened to participants share reports from all over the Global South about the “evils” of various “customs,” the implementation (or not) of national laws to eradicate them, and

the effectiveness (or not) of these state-based legal initiatives. During the discussion, a group of older white American feminists started berating the African women present about why what they called “female genital mutilation” (FGM) could still exist in contemporary Africa. Their paternalism (a kind word) and self-righteousness shocked me. Several African women stood up to explain that FGM was a concern for them but not a priority. The American women interrupted, again lambasting them for not doing more. As a rapt member of the audience, I listened intently to the increasingly angry debate. Several African women felt so cornered and angered by the Americans that they defended the practice of female circumcision as a sign of African “culture.” The discussion ended when a young Kenyan woman stood up, demanded that the Americans focus on their own problems, accused them of being racist and imperialist, and stomped out of the tent, followed by most of the other African members of the audience. Race, class, and power were no longer ideas to be contemplated in literary texts but were now pulsating veins of emotion and outrage.

In many ways, this book is the product of my efforts, after more than thirty years of research, teaching, and learning, to address the questions raised by that encounter: Why did the American feminists feel so empowered to berate their African “sisters”? How and why had FGM become the focus of their obsessions as a marker of the “oppression” of African women? If FGM was not a priority for these African women, what issues mattered instead? How did this moment speak to larger debates about gender, justice, and the politics of “culture”?

A few years later, building on discussions at the NGO Forum and other sites, Charlotte Bunch and others argued for the need to restructure “human rights” to recognize and support “women’s rights.” Since that time, “women’s rights are human rights” has become a global mantra, bolstered by a vast network of feminist activists, organizations, and even certain states (Bunch 1990). As a result, women (and men) around the world have re-framed their often long-standing demands and needs in the (seemingly) more powerful language of rights in order to expand the visibility and recognition of their issues in local, national, and global arenas and to demand accountability from states to ensure and enforce their legal rights (Merry 2006; Hodgson 2003). As the dominant model for making claims against individuals and collectivities (primarily states) in the contemporary world, rights-based frameworks have had significant success in advancing the

claims of women and men for political representation and legal protections (Peters and Wolper 1995). Yet some scholars question whether “rights”—which presume an individual, secular, gendered subject; which overlook the structural contexts and causes of injustice; and which primarily rely on state-run legal mechanisms for implementation and enforcement—can ever be a truly emancipatory strategy, especially for women (Cornwall and Molyneux 2008; Hodgson 2011b). Their critiques raise broader questions about how the dynamics of gender, culture, and power inform the rhetoric and realities of how justice is envisioned and experienced (Mohanty 1991, 2003; Narayan 1997; Abu Lughod 2013; Shachar 2001). Moreover, the intense focus on rights-based approaches has obscured other gendered modes of seeking justice that have historically functioned and continue to function alongside rights-based approaches. In African countries, for example, many societies like Maasai have a long history of women invoking their power and authority as mothers to collectively denounce and challenge injustice, whether from incestuous men, meddling colonial officers, or corrupt state officials (Van Allen 1972; Steady 2006). Collective protest and other “extra-legal” justice regimes are predicated on distinct ideas of personhood, agency, morality, culture, and gendered power, and they employ different mechanisms for implementing and enforcing outcomes (Boddy 2008; Griffiths 1997).

The concerns with the narrow reach of rights and the existence of multiple, overlapping legal regimes and other approaches to justice raise important questions, including: How and why have legal institutions premised on the “rights” of individuals become the dominant mode for framing and seeking justice? What are the limitations and strengths of an approach that privileges the formal legal system over customary justice mechanisms in resolving, for example, claims within communities and against the state? Which claims get translated into rights, whose rights are protected, and which rights become the priorities for advocacy and funding? Are certain modes of justice better able to address the structural contexts and causes of injustice? How are ideas about gender, culture, and social inequality expressed and contested in these different legal regimes?

To address these questions, *Gender, Justice, and the Problem of Culture: From Customary Law to Human Rights in Tanzania* compares indigenous law, customary law, colonial legal institutions, national law, “women’s human rights,” collective protest, and other approaches to identifying and rectifying various forms of injustice through a case study of Maasai pastoralists

in Tanzania. Drawing on historical and ethnographic evidence, this book analyzes the gendered assumptions, experiences, and consequences of these overlapping legal regimes for Maasai ideas and practices, in which women and the (primarily female-identified) Maasai divinity Eng'ai were historically significant. It examines relations between and among Maasai men and women and relations between Maasai communities, colonial and postcolonial state authorities, and, eventually, nongovernmental organizations (NGOs).

In contrast to broad histories of the origins of human rights, this book uses the Maasai case to examine the historical emergence and dominance of rights-based legal institutions and ideas in Tanzania—from the colonial period to the contemporary era—as a specific form of justice that reflects particular conceptions of gender, culture, power, and social change. The book documents how the legacies of certain colonial policies and practices informed national and international legal initiatives, which have in turn shaped contemporary Maasai expressions and experiences of justice and obscured alternative female modes of seeking justice, such as collective protest.

Specifically, the book analyzes three key aspects of the emergence and dominance of rights-based approaches to justice. First, the book traces assumptions and debates about the relationship between “law” and “culture,” from early efforts to regulate social and cultural practices like marriage in “customary” law, to recent initiatives by transnational and Tanzanian feminists to criminalize cultural practices like FGM.¹ How and why has “culture” come to be viewed as not just a “problem,” but as inherently oppressive to women? Why is “culture” invoked in debates about women’s rights but not in other discourses of rights, such as the right to clean water? Why have some activists been obsessed with using law as a tool to regulate and sometimes criminalize certain cultural and social practices—especially those like marriage, “adultery,” and FGM—that are central to the intimate lives of families and households? What are the cultural (and thus moral) assumptions of these supposedly “natural” and “universal” forms of justice and rights? Following Lila Abu-Lughod, I seek to analyze the “social life of rights,” “track[ing] carefully, across multiple terrains, the way both practices and talk of rights organize social and political fields, producing organizations, projects, and forms of governing as much as being produced by them” (2011, 118).

Second, the study examines how ideas about gender, class, “race,” and ethnicity have shaped these debates and related interventions. A recurring trope in both colonial and contemporary debates about law and rights is that of the inherent vulnerability and oppression of rural, illiterate African women (and thus the inherent repressive, patriarchal tendencies of rural African men) (e.g., Scully 2011). Such tropes have been used to justify interventions into the lives of these African men and women by outsiders—whether British officers, Euro-American feminists or Tanzanian feminists—in the name of “justice” and “rights.” How does the creation and implementation of these laws and legal institutions affect these forms of social difference and inequality?

Finally, both of these issues speak to larger questions of power and politics: When, where, why, and by whom is law used to try to force desired social changes? How does this drive to legislate morality and social change deflect attention from the political-economic issues that may be of more concern to the everyday lives of the people being targeted? What are the consequences of efforts by first British colonial officers and now human rights activists to channel the resolution of disputes and political claims through formal, state-based legal systems, especially when state policies and practices are often the source of oppression and injustice? Who decides which rights are priorities for advocacy and protection?

To summarize, my purpose in this book is threefold: first, to complicate static ideas of “culture” and “custom” as they have been perpetuated through legal discourses that have tried to codify, demonize, and sometimes criminalize certain cultural practices like marriage and FGM; second, to challenge enduring paternalistic (and often racist and classist) portrayals of illiterate, rural women as somehow lacking the capacity to understand or act on their situation, a stereotype that has been intensified with the emergence and dominance of rights-based approaches; and, finally, to explore how certain legal ideas and practices are used as political tools to regulate (and at times forcibly change) some of the most intimate aspects of people’s lives in the name of “justice.”

A BRIEF HISTORY OF JUSTICE, LAW, AND RIGHTS IN AFRICA

By tracing the continuities and changes in the practices of law and justice from the late precolonial period to the present, grounded in the lived experiences of everyday people, I seek to complicate often abstract debates about

the contours and content of “justice.” As Amartya Sen (2009), among others, has recently argued, “justice” is a notoriously polyvalent term; legal theorists, political philosophers, and others have long debated its meanings. But, as I discuss in this book, these deliberations about the “idea” of justice tend to echo colonial invocations of “natural justice,” projecting Euro-American ideas of due process, individual rights, and “impartial” legal principles as universal ideals with little attention to alternative paradigms, much less to how the realities of power, gender, and culture have historically produced those very ideals (Hodgson 2011b; Hunt 2007). However “natural” or “universal” they may seem, prevailing ideas about “law,” “rights,” and “justice” do not exist outside of history or culture, but are themselves historical and cultural products that reflect dominant cultural assumptions and ideals at specific times and in particular contexts (e.g., Clarke and Goodale 2010). In other words, “rights”—whether legal, human, women’s, or indigenous—have become the dominant mode for thinking about justice in Africa and the rest of the contemporary world *because* of certain historical processes and events, including colonialism, nationalism, military conflicts such as World War I and World War II, humanitarian crises like the Holocaust, and liberal and now neoliberal economic policies and projects.

In this book I present some of this history, from the early colonial period to the present, through the prism of the Maasai case. To do so, I draw on the work of numerous scholars of Africa (and elsewhere) who have explored the relationships among law, culture, power, and gender in specific historical periods. I use the term “legal regime” to name and distinguish each of the key periods to help distill the constellation of factors that characterize and shape the dominant approaches to and experiences of “law” in that time. Embedding these discussions of law in the relevant historical period is intended to support and facilitate my analysis of continuities and changes through time and to emphasize the relevance of political-economic context and translocal connections to the production of legal norms and institutions. My intention is not, however, to reify these regimes as self-contained systems or to imply that they represent some linear, modernist narrative of “progress.” To the contrary, I situate my analysis in the Maasai case to show how the regimes have developed, changed, coexisted, and mutually influenced and contradicted one another.

Anthropologists and others have tried to describe fundamental processes and principles of “African law” as practiced in *indigenous legal regimes*, in-

cluding dispute-resolution practices, legal procedures, and ideas of justice and jurisprudence (Gluckman 1955, 1965; Bohannon 1957; Kuper and Kuper 1965). For some African societies, “law” (like “religion”) was not a separate domain but was integrally connected with spiritual ideas and practices and social norms of respect and authority. As Jan Vansina (1965) argued many years ago, these were societies in which “social norms” were themselves “legal norms” and thus not distinguished or named as a separate realm of “law.” Nonetheless, anthropologists used the terms “law” and “legal” as analytic categories to describe these aspects of social life. In other societies, especially in West Africa, “legal functions” were more distinct, with, for example, clearly designated bodies to hear and decide disputes (Forde 1965). Although some earlier scholars tried to use law as one factor in categorizing societies on social evolutionary scales that ranked them from “primitive” to “civilized” (e.g., Morgan 1877), anthropologists made important contributions to the study of indigenous legal regimes. They described alternative principles and procedures for resolving grievances (from ordeals to elders councils) (e.g., Schapera 1938), presented diverse concepts of justice (e.g., Bohannon 1957; Gluckman 1955, 1965), and recognized the centrality of expressions of power to the exercise of legal authority (e.g., Gulliver 1963). Few scholars, however, considered the gendered aspects of these ideas and practices or acknowledged that these regimes were not fixed, homogenous, ahistorical “primitive” or “traditional” “systems,” but were dynamic, contested, historical products. In most cases these “indigenous” regimes had already been transformed in response to migration, conflict, conquest, and colonialism. In fact, many of these early studies, like Isaac Schapera’s *Handbook on Tswana Law and Custom* (1938), were produced to assist colonial officials eager to learn about “indigenous” legal systems so as to better codify and regulate their use.

Historians and legal scholars have built on this work to thoughtfully analyze key aspects of *colonial legal regimes*, especially as they were imposed on and transformed pre-existing indigenous legal regimes in Africa. John Comaroff’s evocative term “lawfare” captures the idea of colonial legal interventions as a “mode of warfare,” that is, “the effort to conquer and control indigenous peoples by the coercive use of legal means” (2001, 306). But as Kristin Mann and Richard Roberts argued years ago, the power dynamics of colonial legal regimes were perhaps not as one-sided as the term “lawfare” might suggest: “During the colonial period, law formed an area in