



Remembering Sally Engle Merry: Her scholarship and her legacy

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Abstract

This article reviews the scholarship and legacy of Sally Engle Merry who died on 8th September, 2020. It focuses on a number of research fields and themes that are central to her work and collaborative engagement with other scholars, primarily across the disciplines of anthropology, law, sociology and socio-legal studies. These research domains include neighbourhood justice and mediation, law and colonialism, human rights and transnational governance, gender violence, the quantification of knowledge globally, and the relationship between law, society and power.

Key words

Sally Engle Merry; anthropology of law; interdisciplinary collaboration; ethnography; human rights and gender violence; quantitative knowledge

Resumen

Este artículo revisa la contribución académica y el legado de Sally Engle Merry, que falleció el 8 de septiembre de 2020. Nos centramos en una serie de campos y temas de investigación que son centrales en su trabajo y en su colaboración comprometida con otros investigadores, sobre todo en las áreas de la antropología, el derecho, la sociedad y los estudios socio-jurídicos. Esos dominios investigativos incluyen la justicia y la mediación vecinales, el derecho y el colonialismo, los derechos humanos y la gobernanza transnacional, la violencia de género, la cuantificación global del conocimiento y la relación entre derecho, sociedad y poder.

Palabras clave

Sally Engle Merry; antropología del derecho; colaboración interdisciplinar; etnografía; derechos humanos y violencia de género; conocimiento cuantitativo

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1. Introduction

Sally Engle Merry was born on the 1st December 1944 and died on the 8th September 2020. Educated at Wellesley College (Bachelor of Arts, 1966), Yale University (MA, 1967) and Brandeis University (PhD, 1968) her academic career spanned many decades. During this time, she initiated many innovative research projects, engaging in interdisciplinary work with colleagues from a whole range of disciplines. This produced 15 books and special issues that she authored, edited, or co-edited, and 150 articles, book chapters and review essays. This prodigious body of work involved research on neighbourhood justice, law and colonialism, human rights, gender violence and the relationship between law, society and power. It is not possible to do justice to the full range of her scholarship in this article that will focus on a number of research fields and themes central to her work and collaborative engagement with other scholars, primarily across the fields of law, anthropology, sociology and socio-legal studies.

2. Law in Everyday Life: Legal Consciousness and Alternative Dispute Resolution

Her book *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* (1990) was written at a time when academic attention had turned to the study of disputes, not just in the global South, where it had previously been located as scholars explored non-western mechanisms of handling conflict. Bringing their insights back home, many of these scholars began to examine how disputes were handled in their own societies in the global North.¹ Merry's study explored the circumstances under which ordinary Americans bring family and neighbourhood problems to court, seeking justice or revenge. She made visible the ways in which litigants dealt with local disputes in settings that encounter law at its boundaries, that is, in the corridors of large city court houses, in the offices of court clerks, and in the church parlours, used by mediation programmes. Her detailed insights are the product of an anthropological, methodological perspective based on ethnography, an approach that she pursued and developed throughout her career.

What was highly innovative about this research was the way in which she addressed people's ideas of moral judgment and notions of justice in and out of court that underpinned their "legal consciousness". This went beyond the general studies of the handling of conflict in dispute forums prevalent at the time. In doing so, she highlighted the paradox of legal entitlement that arose out of working-class Americans feeling entitled to use law to resolve their problems, yet at the same time experiencing a loss of control over themselves and in the handling of their conflicts when they made use of this entitlement.

Building on this work, where Merry had found that many of her subjects had experienced some form of mediation, she then turned to exploring the possibility of

¹ This included, for example, the work of Rick Abel, a lawyer, who carried out work in Kenya but turned to looking at a comparative theory of dispute institutions (1978) and the politics of informal justice across the global north and south (1982). It also included the work of Laura Nader, an anthropologist, who carried out fieldwork among the Zapotec in Mexico (1965) and who went on to develop the Berkeley Law Project (Nader and Todd 1978) that looked at disputes in law in ten societies including, New Guinea, Zambia, Ghana, Lebanon, Ecuador, the US, Scandinavia, Germany, Sardinia, Mexico, Turkey and Australia.

popular justice in her edited collection with Neal Milner, entitled *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (1993). This was at a time when the focus of research had shifted away from formal courts to alternative dispute resolution (ADR) and its implications. While based on specific case studies of the San Francisco Community Boards, the book explored a much broader canvass. This was one that addressed questions about what popular justice – taken generally to mean popular sovereignty, direct governance, and control by the people – had to offer as an alternative to the violence and coercion of state law. It raised questions about the extent to which democracy and empowerment could be achieved in the midst of a society ordered by state law, highlighting the problems and possibility of alternative forms of justice. These questions are still highly relevant today given the extent to which mediation has proliferated and been incorporated into all walks of life.

3. Power as a Discourse: Colonial Relations between the US and Hawai'i

These studies raise questions about power, where it is located and how it operates. Merry directly addressed this in her book *Colonizing Hawai'i: The Cultural Power of Law* (2000). Based on an historical ethnography, Merry points to the emerging history of imperial American law, a step towards comprehending institutional changes in a shift towards more expansive claims about the authority of state law and the subordinate status of “other” law. This was similar to developments taking place elsewhere that instituted global patterns of colonial legal change. This was an aspect that had hitherto been ignored as there was not, at that time, a singular work that dealt with the imposition of U.S. law on colonial territories. In doing so, Merry explored Hawaiian legal culture in the context of transnational influences. She carefully documented how U.S. judges constructed their own powers to deal with local matters that brought into being notions of indigeneity, gender, class and care, that had not previously formed part of Hawaiian legal culture.

In exploring the social history of law in Hawai'i, Merry drew extensively on the theories of Foucault and Gramsci in using their ideas on hegemonic discourse, as a lens through which to examine western law as a colonial tool. These approaches to discourse, detailing Hawai'i's entanglement with colonialism shows that this was no “simple” colonial dynamic of the imposition of law by a dominant power and the subordination of an indigenous group. Instead, the legal culture contained a matrix of changing status distinctions and featured a strategic advantage for local residents over newcomers. As Merry's analysis of case records from Hilo shows, Hawaiians, although still discriminated against by Anglos, were considered insiders compared to immigrant workers who bore the brunt of prosecution for labour violations and other petty offences.

Merry documents how at the confluence of the Pacific whaling and trade routes, the islands drew both an international population of seamen and merchants, and increasingly a multinational workforce made up of Hawaiians and immigrants from Portugal, Puerto Rico, China and Japan. In analysing the period leading up to formal annexation, Merry disrupts the narrative of modern Hawaiian history proceeding from dramatic first contact to formal annexations. Instead, she demonstrates how Hawaiian elites were prepared to accept westernising legal changes prior to annexation in an attempt to salvage autonomy by adopting the trappings of a Western nation-state. For

they viewed acquiescing in the westernisation of legal institutions as a means of preserving Hawaiian law and culture from further erosion.

Years later, Merry planned to return to Hawai'i to pursue a new research project on the nature of encounters between early Pacific explorers and indigenous women during the eighteenth and nineteenth centuries. Sadly, this was not to be as she died before she could undertake this new research.

4. Engaging with Human Rights: Transnational Dimensions of Governance

In addressing questions of power, Merry explicitly turned her attention to the transnational dimensions of law in her book *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006). Her willingness to engage with human rights signalled a significant shift from earlier anthropologists' reluctance to deal with human rights because they viewed them as an attempt to impose a universal franchise on all societies, regardless of their local specificities and culture (Engle 2001). This resulted in early debates on the subject becoming polarised in terms of pitting the "local" against "universal" notions of rights that created an unproductive stalemate. In exploring human rights, through the lens of violence against women, questions about culture and law became reassessed through her study of how local cultures appropriate and enact international human rights law. This large-scale study, that explored the global working of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) between 1993-2005, tracked the ways in which transnational norms are received, interpreted and deployed at the local level. It documented the processes through which human rights are made, in terms of the creation of both specific, substantive norms, and the institutionally anchored structures that monitor state compliance or conformity with these transnational norms.

As an observer of UN diplomatic missions, as well as of the workings of grass roots feminist organisations in several countries, Merry offers an insider's perspective on how human rights law holds authorities accountable for their actions, while at the same time, reinforcing and expanding state power. Her study embodied a novel form of "de-territorialised" ethnography created by Merry out of attendance at meetings and conferences generated in international forums outside of particular countries, and by a close reading of the written texts that these gatherings were constantly in the process of producing and reproducing. It also embraced the study of grass roots social programmes in China, Fiji, India, Hong Kong, and the United States. What is novel about Merry's methodological approach here is that it acknowledges that the practice of human rights has no singular foundation so that its perspective can only be fragmented and partial. As a result, the ethnographic approach that it embraces represents only a part of the human rights system as a whole, which in itself "is neither coherent nor fully graspable" (Merry 2006, 29). Her findings are important because they call into question the way in which "culture" in these settings takes on an essentialised or reductionist interpretation that assumes that it is a homogenous entity, one that is resistant to transformation or change. She notes that this understanding is especially prevalent in the legal analysis of culture as it is deployed in human rights jurisprudence. This leads Merry to observe critically, that by reifying or demonising culture, human rights proponents have failed to make use of a potentially viable tool in the pursuit of development.

What emerges from Merry's research is the fact that if this essentialist approach is rejected, human rights law can be effective on the ground if it goes through a process of "vernacularisation". She argues that human rights law must be framed in local terms in order to be accepted and effective in altering the existing social order. For this to happen she puts forward a number of propositions. Firstly, that international and global institutions can have a role to play in building transnational consensus, provided they recognise their own institutional and cultural bias. Secondly, that transnational norms can be compatible with diverse social settings provided they are first translated in local, familiar terms, through mediators and intermediaries, who facilitate processes for embedding human rights consciousness at the grass roots level. How successful this is in practice is open to question. However, Merry's work provides an important foundation for demonstrating how the meaning and significance of international human rights norms are constantly in a process of translation, one that includes the modification of the content of the norms themselves. Such an approach allows for a better understanding of what processes of transformation entail that are not simply the product of hierarchical, top down, power relations.

Following on from this research, Merry edited a collection of ethnographies with Mark Goodale in *The Practice of Human Rights: Tracking Law Between the Global and the Local* (2007). This collection moves beyond a normative analysis of the production of international human rights. It ranges far and wide, highlighting the many different settings in which human rights come into play. These range from Bolivia, indigenous Colombia, to the sex trade and transnational legal spaces created by groups in Burma. Organised into four themes, violence, power, vulnerability and ambivalence, the contributions carefully document how human rights direct, block and create new methods of seeking justice, independence or security. They reveal the complex motivations behind different groups deployment of human rights. They also highlight the ways in which human rights have come to define groups of people and categories of knowledge, while also reflecting the challenges that actors present to these definitions in their own contextual settings. Taken together, the contributions demonstrate the mobilisation of human rights by and against state power, from a perspective that perceives of human rights, not as a given, but as a process that renders "human rights into social knowledge that shapes social action" (Merry and Goodale 2007, 8).

5. The Production of Knowledge: Global Applicability

Moving further into processes of inscription, Merry went on to expand on Strathern's engagement with *Audit Culture: Anthropological Studies on Accountability* (2000). Noting the dramatic increase in the use of quantitative knowledge for governing social life, Merry turned her attention to the use of indicators as a means of governing distribution of resources, especially in the context of achieving international development goals. She noted that in this process indicators "are a technology of not only knowledge production but also about governance "for they are used to manufacture "evidence-based" policy feeding into "results-based management" (Merry 2011, S84). The importance of these measurement techniques is that they not only generate a form of expertise and knowledge production but also represent a form of governance. This is one "that employs policy arrangements that emerge outside the administrative system of a single nation-state but which nevertheless have a comparative impact on globally or regionally

designated set of recipients” (Bernstorff 2004, 251). They engage with governmentality that reflects an approach suggesting “that power exists beyond the state and that the centres and levels of governmental power, like its techniques and objectives, are multiple and differentiated” (Morison 2003, 162–163).

As Merry observes, these mechanisms “create an aura of objective truth” that conceals “their political and theoretical origins and underlying theories of social change and activism” (Merry 2011, S84). For what is clear is that the process of creating this measurement is mainly located in the hands of technical experts who come from the global North and who exercise power to define and shape the way the world is understood through their power to produce “knowledge”. Pursuing questions about the ways in which indicators and quantitative knowledge are produced to create a world of representation and certainty, Merry co-edited three books that brought the work of a wide range of scholars together in examining the ways in which indicators are created and used and the kind of effects they produce.

The first book, *Governance by Indicators: Global Power through Classification and Rankings* (2012) was co-edited with Kevin Davis, Angelina Fisher and Benedict Kingsbury. It grew out of a project conducted by the Institute for International Law and Justice (ILLJ) at New York University that was linked to the ILLJ’s major study on global regulatory governance and administrative law. It spans wide ranging issues connected to technologies of governance and the mechanisms they employ in fields as diverse as military action, legal advertising campaigns, and educational programmes. The importance of this scholarship, that opened up new avenues for research in the domains of international law and politics, comparative law and public and private regulation, was acknowledged in that it was the first book to be published in Oxford University Press’s Law and Global Governance series.

The second book, *The Quiet Power of Indicators: Measuring Governance, Corruption and the Rule of Law* (Merry, Davis and Kingsbury 2015) was co-edited with Kevin Davis and Benedict Kingsbury. This volume also represents a collaboration over serial years, involving multiple workshops on the topic. It begins by examining the most prominent governance indicators that are at work, their origins, and how they are deployed. It then moves on to focus on county-specific case studies, providing a detailed and contextual analysis of the use of indicators and their consequences in these particular settings. Finally, the volume addresses the salient findings shared among the authors that allows for a critical approach to the production of indicators with the aim of enhancing their utility as technologies of governance and development. This is important, because the volume as a whole argues that the governmental shifts to quantitative knowledge is having subtle but powerful effects on the way in which the world is perceived and acted upon. It is necessary to understand what this entails for it provides a radical redefinition of the relations between democracy and the market that mark a transformation in the definitions of liberty and governance.

This perspective is elaborated on in the third book, *The World of Indicators: The Making of Governmental Knowledge through Quantification* (Merry, Rottenburg *et al.* 2015), co-edited with Richard Rottenburg, Sung-Joon Park and Johanna Mugler. It highlights the proliferating spaces and diverse contexts in which quantitative knowledge is used for governing life in the twenty-first century. Rottenburg and Merry (2015, 3) note that

the goal of this collection is to consider the production of numeric knowledge as such with the assumption that it constitutes a practice, that cuts across most domains of social life. What are the particularities, opportunities and constraints of this form of knowledge? How is it limited or enhanced by the availability of what kinds of data or the use of what kinds of expertise? Are their systemic inequalities and misrecognitions in the production of global quantitative knowledge?

In exploring these questions, the book attends to the administrative infrastructures that collect and process data and to the larger institutional set ups of which they are part. What comes to light are the effects of differences in the narrative, visual and numerical presentations of knowledge that are deployed to catch the attentions of diverse audiences and public spectators. In making visible the subtle processes of transformation in contemporary processes of globalization, the books raises questions about “the kind of evidentiary practices that are accepted as accurate and reliable to inform public reasoning and political decision making” (Merry, Rottenburg *et al.* 2015, 5).

The final publication that I want to address is Merry’s *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (2016). Using data collected over a number of years from meetings with UN members and US and Indian officials, Merry offers an analysis of three different attempts to “measure the unmeasurable”. These take the form of the UN measurement of violence against women, the US annual trafficking in persons report, and the UN office for the High Commissioner for human rights development of indicators of human rights. In dealing with these dimensions Merry observes that each one is based on a particular theoretical perspective that contains within it the assumed solution to the problem being measured. Their approaches raise questions about the extent to which the measurement of complex social phenomena, such as human rights compliance, gender violence and sex trafficking, can be reinterpreted through statistical comparison. To what extent can the finding from one form of measurement be equated with the findings of another?

This problem of commensuration is compounded by practices of aggregation. As Merry demonstrates, in trying to analyse complex phenomena through simplified indicators the result is often one that strips them of any substantive content, rendering the results more abstract so that they become removed from the phenomena that is being measured. For example, in dealing with trafficking, what emerges is a composite indicator, one that conflates the aspects of prosecution, protection, prevention and participation all of which form components of a strategy that has been formed to deal with this phenomenon. As a result, what purports to be “evidence-based” governance is anything but, for as Merry (2016, 21) observes “those who created indicators aspire to measure the world but in practice create the world they are measuring”. They exercise power because these measurements are used to make policy through the creation of agendas that decide what issues are important enough to be measured and what issues can be ignored. Thus, the political power of judging and evaluating is transformed into a technical issue of measurement and counting by the diligent work of experts” (Merry 2011, S86). In seeking to rectify the system Merry argues for access to good, qualitative data that examines the processes through which indicators are brought into being. This she maintains would go some way to providing a better understanding of the accessibility and reliability of data that feeds into indicators and of the difficulties that arise in creating standardised measures among countries with widely varying conditions. Such

knowledge is crucial because, as Merry makes clear, this informal system has become much more important today than international law in ensuring global governance.

6. Merry's Outreach and Legacy

During her long and illustrious career Merry taught for 30 years at Wellesley College before moving to New York University in 2005 where she became the Silver Professor of Anthropology and a Faculty Co-Director of the Centre for Human Rights and Global Justice at the New York University School of Law where she remained until her death. The quality of her work throughout this time was recognised by the number of fellowships, distinguished lectures, institutional affiliations and honorary posts that she held both nationally and internationally, (too numerous to mention here). It also brought her a number of awards including, the James Willard Hunt prize for *Colonizing Hawai'i* from the Law and Society Association (2002); the Harry J. Kalven Jr. prize for scholarly contributions to socio-legal scholarship from the Law and Society Association (2007); the J.I. Stanley prize for *Human Rights and Gender Violence* from the School of Advanced Research (2010); an honorary doctorate from McGill School of Law (2013); and the Franz Boas Prize for exemplary service to Anthropology from the American Anthropological Association (2019).

Her legacy lives on, not just through her scholarship but through the number of scholars that she mentored at all levels in their academic careers over the years, from undergraduate to postgraduate and to academics at an early stage in their profession. An esteemed colleague, she also worked tirelessly to promote and develop the institutional infrastructure both within and beyond the anthropology of law. She did this through the committees that she chaired, the numerous panels and conferences that she sponsored, and other organisational roles that she took on in the American Anthropological Association, along with her presidencies of the Association for Political and Legal Anthropology, American Ethnological Society, and the Law and Society Association. Her contributions to scholarly life, in all of their manifestations, will be sorely missed.

References

- Abel, R.L., 1973. A Comparative Theory of Dispute Institutions in Society. *Law & Society Review*, 22(5), 869–896.
- Abel, R.L., ed., 1982. *The Politics of Informal Justice: The American Experience* (Vol. 1). *The Politics of Informal Justice: Comparative Studies* (Vol. 2). New York: Academic Press.
- Bernstorff, J. von, 2004. The Structural Limitation of Network Governance: ICAN as a case in point. In: C. Joerges, I.J. Sand and G. Teubner, eds., *Transnational Governance and Constitutionalism*, 257–281. Oxford: Hart.
- Engle, K., 2001. From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999. *Human Rights Quarterly* [online], 23(3), 536–559. Available from: <https://muse.jhu.edu/article/13785> [Access 1 October 2021].
- Merry, S.E., 1990. *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans*. University of Chicago Press.

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- Merry, S.E., 2000. *Colonizing Hawai'i: The Cultural Power of Law*. Princeton University Press.
- Merry, S.E., 2006. *Human Rights and Gender Violence: Translating International Law into Local Justice*. University of Chicago Press.
- Merry, S.E., 2011. Measuring the World: Indicators, Human Rights and Global Governance. *Current Anthropology* [online], 52(S3), S85–S95. Available from: <https://doi.org/10.1086/657241> [Access 1 October 2021].
- Merry, S.E., 2016. *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking*. University of Chicago Press.
- Merry, S.E., and Goodale, M., eds., 2007. *The Practice of Human Rights: Tracking Law between the Global and the Local*. Cambridge University Press.
- Merry, S.E., and Milner, N., eds., 1993. *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*. Ann Arbor: University of Michigan Press.
- Merry, S.E., Davis, K., and Kingsbury, B., eds., 2015. *The Quiet Power of Indicators: Measuring Governance, Corruption and the Rule of Law*. Cambridge University Press.
- Merry, S.E., et al., eds. 2012. *Governance by Indicators: Global Power through Classification and Rankings*. Oxford University Press.
- Merry, S.E., Rottenburg, R., et al., eds., 2015. *The World of Indicators: The Making of Governmental Knowledge through Quantification*. Cambridge University Press.
- Morison, J., 2003. Modernising Government and the E-Government Revolution: Technologies of Government and Technologies of Democracy. In: N. Bamforth and P. Leyland, eds., *Public Law in a Multilayered Constitution*. Oxford: Hart, 157–188.
- Nader, L., 1965. Choices in Legal Procedure: Shia Moslem and Mexican Zapotec. *American Anthropologist* [online], 67(2), 394–399. Available from: <https://doi.org/10.1525/aa.1965.67.2.02a00060> [Access 1 October 2021].
- Nader, L., and Todd, H.F. Jr., eds., 1978. *The Disputing Process - Law in Ten Societies*. New York: Columbia University Press.
- Strathern, M., ed., 2000. *Audit Cultures: Anthropological Studies in Accountability*. London: Routledge.