Oñati Socio-Legal Series (ISSN: 2079-5971)
Oñati International Institute for the Sociology of Law
Avenida Universidad, 8 – Apdo. 28
20560 Oñati – Gipuzkoa – Spain
Tel. (+34) 943 783064 / opo@iisj.net / https://opo.iisj.net

Introduction. Gender in Customary and Indigenous Law and Proceedings

OÑATI SOCIO-LEGAL SERIES VOLUME 15, ISSUE 6 (2025), 1884-1896: GENDER IN CUSTOMARY AND INDIGENOUS LAW AND PROCEEDINGS
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL.2534
RECEIVED 19 NOVEMBER 2025, ACCEPTED 24 NOVEMBER 2025, VERSION OF RECORD PUBLISHED 1 DECEMBER 2025

ULRIKE SCHULTZ*
MARIA RITA BARTOLOMEI*
SARA ARAÚJO*

Abstract

This special issue marks the first publication of a long-term international project on gender in customary and indigenous law and proceedings. Emerging from observations of the silence around customary law and differing perceptions of gender inequality in sub-Sahara African legal academia, the project brings together comparative socio-legal research from Africa, Europe and beyond. The contributions examine how colonial legacies, legal pluralism and globalisation shape gendered experiences in areas such as inheritance, land rights, marriage, judicial training, and access to justice. Highlighting women's agency within plural legal systems, the issue provides new theoretical and empirical insights into the intersections of gender, customary law, and state law.

Key words

Gender; customary law; legal pluralism

Resumen

Este número especial marca la primera publicación de un proyecto internacional a largo plazo sobre el género en el derecho y los procedimientos consuetudinarios e indígenas. A partir de las observaciones sobre el silencio en torno al derecho consuetudinario y las diferentes percepciones de la desigualdad de género en el ámbito

* Ulrike Schultz. Senior Academic at FernUniversität Hagen. Email: ulrike.schultz@fernuni-hagen.de
* Maria Rita Bartolomei. PhD, Legal anthropologist and sociologist. Counselor. ASN 2018/2020 - SC 14/C3, Fascia 2. Adjunct professor University of Messina, Italy. Contact details: Via Toscanini 45, 63066 Grottammare AP. Email: mariaritabartolomei61@gmail.com / mabartolomei@unime.it / mariaritabartolomei@pec.it
* Sara Alexandre Domingues Araújo, University of Maia. Email: saraujo@umaia.pt , ORCID: https://orcid.org/0000-0003-1914-4074

académico jurídico del África subsahariana, el proyecto reúne investigaciones sociojurídicas comparativas de África, Europa y otros lugares. Las contribuciones examinan cómo el legado colonial, el pluralismo jurídico y la globalización configuran las experiencias de género en ámbitos como la herencia, los derechos sobre la tierra, el matrimonio, la formación judicial y el acceso a la justicia. Destacando la capacidad de acción de las mujeres dentro de los sistemas jurídicos plurales, el número ofrece nuevas perspectivas teóricas y empíricas sobre las intersecciones entre género, derecho consuetudinario y derecho estatal.

Palabras clave

Género; derecho consuetudinario; pluralismo jurídico

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1. Introduction

This issue of *Onati Socio-Legal Series* marks the first publication in a long-term international project on Gender in Customary and Indigenous Law and Proceedings.

Every project has its own story, and this is especially true for international and comparative socio-legal undertakings, which are complex both in planning and in execution.

The idea for this project emerged during my work on the *Gender and Careers in the Legal Academy* project (Schultz *et al.* 2021), specifically while editing the contributions on sub-Saharan African states. It was striking that customary law was not mentioned at all. I had expected it to play a significant role in legal education — not only as background knowledge but also as a topic for critical reflection. It was equally noteworthy that authors from these countries reported far fewer gender-specific disadvantages in academia than colleagues elsewhere.

This combination — the silence about customary law and the different perceptions of gender inequality — prompted me to pursue the subject further, even though I am not a specialist in legal pluralism, non-state law, or postcolonial studies. My own research in the sociology of law has focused mainly on the legal professions, particularly on women in law, and on gender issues in law. Yet, these themes naturally intersect with the study of customary and indigenous law. Having originally trained in comparative law, I have always been fascinated by the ways in which law reflects and shapes social and political life in different parts of the world. The contributions to this special issue illustrate these interconnections in striking and diverse ways.

The opportunity to bring together colleagues interested in this topic arose while we were preparing for the Global Meeting on Sociology of Law in Lisbon in 2022. Projects of this kind depend crucially on personal encounters, and Lisbon provided the ideal setting.

Since 1991, these international congresses, primarily organised by the American Law and Society Association (LSA), have taken place every five years. Since the Budapest meeting in 2001, the American Science Foundation has supported the participation of scholars from so-called *B and C countries* — that is, emerging and developing countries, particularly from the Global South, as classified by the World Bank.

To access this funding, researchers form International Research Collaboratives (IRCs), which may later evolve into Collaborative Research Networks (CRNs) for longer-term cooperation. I submitted an application for an IRC on *Gender in Customary and Indigenous Law and Proceedings*, and travel funding was approved for eight colleagues — an acknowledgment of the project's importance to international socio-legal research. Several other colleagues were able to participate online.

We eventually organised four panels comprising thirteen papers. Three panels focused on Africa (Southern Cameroons, Tanzania, South Africa, Ethiopia), Asia (Indonesia, India), and the Middle East and Europe, and one addressed South American perspectives.

The Lisbon meeting was preceded by a conference of the RCSL Legal Profession Group in Coimbra, organised by Sara Araújo, which featured two panels with six papers on our topic — including case studies from Mozambique, Zambia, and Egypt, and discussions

of key theoretical perspectives such as legal pluralism, epistemologies of the Global South, and coloniality.

The enthusiasm at both meetings was remarkable. The debates revealed both diversity and convergence in perspectives on how women experience disadvantage within customary and indigenous legal systems — especially in family and inheritance law — and to what extent these assessments are influenced by human rights concepts shaped in the Global North.

Our colleagues from South America later decided to publish their own volume on gender and indigenous law in their region. Consequently, the present OSLS issue does not include those papers.

After the meetings came the demanding phase of writing, revising, reviewing, and the technical preparation of the manuscripts. This process involved intense exchanges with authors — an exciting and inspiring process. Altogether, it took almost three years to complete this special issue, which is not unusual for international comparative work of this scope.[1]

Of the papers collected here, seven are based on presentations from Lisbon and Coimbra, while others were added subsequently. As is often the case in gender-focused research, most of the contributors are women, with only one male author.

The procedure once again highlighted a continuing structural issue: women scholars often face greater time constraints due to their "double shift" between professional and family responsibilities, on top of increasing academic pressures to teach, publish, and secure funding.

I would like to express my deep appreciation to all authors for their commitment and perseverance under often difficult circumstances. Unfortunately, some nearly completed papers had to be left out to meet the 2025 publication deadline. These will appear later as individual contributions in *OSLS*. We are sincerely grateful to the IISL for making this special issue possible. *Oñati Socio-Legal Series* is an ideal venue for such work: its open-access policy ensures that the research is freely available worldwide from the moment of publication.

Our special thanks go to Leire Kortabarria, whose professional support and patience were invaluable throughout the process.

A particular challenge — and one reason for the delayed release — was the limited number of potential reviewers. The intersection of *gender* and *customary law* is still a relatively small academic field, leaving only a limited pool of potential referees.

We therefore take this opportunity to encourage colleagues to act as reviewers, to support publications that not only contribute essential knowledge but also help scholars, especially younger ones, advance in their careers.

This issue now focuses primarily on Africa, with Patrícia Mendes's paper examining the situation of the Roma in Portugal — our only purely European case — and Letizia

[1] Comp. also Schultz and Shaw 2003, 2013; Abel *et al.* 2018, 2022.

Mancini's contribution exploring how cultural dynamics originating in Africa can be transmitted and transformed in European contexts.

We are proud to have taken this first step in a truly global project. Our hope is that more scholars — especially young researchers — will be inspired to continue the work, through conferences and further publications,[2] contributing to a more comprehensive understanding of how gender and indigenous and customary law interact across societies, a field that remains profoundly under-researched.

When I began my work in the sociology of law, it was extremely difficult to include colleagues from the Global South in research projects. Thanks to modern communication technologies, exchange and collaboration have intensified, allowing us to learn more from one another, to engage in collective theory-building, and ultimately improve the "legal product" in our respective countries to better serve people's needs. This applies above all to women, who — not only in the Global South but in many parts of the world — remain a vulnerable group still striving for legal equality and gender justice.

Ulrike Schultz

2. Overview

Legal pluralism is a key feature of traditional African legal systems. Colonial regimes dealt with traditional legal pluralism made up of extremely different normative principles and rules linked to ancestral myths and supernatural beliefs and, therefore, difficult to understand and often secretly preserved in the collective memory of chiefs and "elders". Unwritten and passed on orally from generation to generation, they emanated from the practices and customs of people and encompassed constant patterns of behaviour within a particular social community or ethnic group, established by long-standing use and considered in the same way as binding law. The colonial powers sought to standardise the different normative traditions through their rational classification by means of judicial precedents. In order to make traditional practices clearer, more precise and easier to enforce, a sort of drafting of African customs thus began, using forms of interpretation and "domestication" which, by applying Western legal categories and concepts, inevitably emptied them of their value, meaning and effectiveness (Tamanaha 2008, pp. 383-384). Despite the label "customary laws", they were in fact neither customs nor traditions at all, but rather selective interpretations or even inventions brought about by colonial powers together with sophisticated local elites who created customary laws in order to promote their own interests or agendas. The colonial administration also created a judicial system characterised by the juxtaposition of colonial courts and so-called "native courts" which enforced customary law (Mommsen and De Moor 1992, Benton 2002). The adoption of such jurisdictional dualism and the creation or recognition of informal or "customary" courts run by local leaders, whilst appearing to guarantee the respect of indigenous rights, represents one of the main mechanisms of legal acculturation.

After independence, the new ruling elites continued the process of suppressing indigenous law through the introduction of Western-style state law and state courts.

[2] In Schultz *et al.*, forthcoming 2026, numerous entries address aspects of legal pluralism, (post-)colonialism, and customary and indigenous law.

Despite this strong process of legal acculturation indigenous and customary law persist and African states continue to deal with the simultaneous application of different systems of law, namely those of European origin, Islamic law and the multiple varieties of African customary laws and a variety of bodies of rules and practices generated by local communities and old chieftainship (traditional or living customary laws). This plurality of regulatory systems endures. Therefore, customary laws continue to regulate the behaviour of social actors and the lives of many people, especially women. Customary laws and practices, in fact, are rooted in kinship relationships and are particularly concerned with women's status and roles.

For these reasons, as can be clearly understood from the previous description of the project, this special issue attempts to discuss a variety of gender-focused research. It integrates different key theoretical perspectives such as legal pluralism, epistemologies of the Global South, coloniality, globalisation and its consequences on the role of law, gender and law and so forth. Adopting customary law – and its relationship with both state law and unofficial or living customary law – as a topic for critical reflections, our international comparative work aims to illustrate the abovementioned interconnections in striking and diverse ways. Therefore, it collects various contributions from different scholars in the field which offer a relevant overview of the different impact which customary law can have on gender, including the narrative of gender-specific disadvantages as well as the different perceptions of gender inequalities.

If it is true that customary law is often considered incompatible with human rights and the guarantees acquired by women, a thorough analysis of how globalisation influences the gendered understanding and application of local norms cannot ignore women's agency in navigating plural legal systems. That is, their ability to reshape and influence the content and processes of interaction between state law and customary law, as well as between official customary law and living customary law.

The volume opens with a relevant critical understanding of legal pluralism by **Sara Araújo** which simultaneously introduces and summarises the themes addressed throughout the study**.** Although legal pluralism is not a recent area of research, different approaches to this topic have transformed the concept into a highly versatile tool for examining, understanding and learning from global diversity, and thus an extremely useful paradigm for understanding the current legal situation of many postcolonial states. The article revisits the conceptual legacy of legal pluralism through feminist and decolonial horizons and offers a critical reading of the main approaches which have shaped the field. From the colonial regulation of "customary law" to the managerial pluralism of global governance, plurality has often functioned as a technology of administration rather than a space of horizontal plurality where multiple systems, norms, or institutions operate side by side on the same level. The contribution also engages with the influence of informal justice studies, extracting critical insights and questions from intense debates about the policies and practices of informal justice. Furthermore, the author advances an epistemological reconceptualisation of legal pluralism, with feminist subjectivity emerging as the capacity to inhabit contradiction and transform discomfort into a method of acquiring knowledge. Decolonising legal pluralism entails both decolonisation and de-patriarchalisation, i.e. a refusal of epistemic comfort and an invitation to reimagine justice beyond the boundaries of modern legality.

In the *second chapter*, **Martha Gayoye** points out that African customary law does not correspond to indigenous norms. Rather, it is an "invention" which took shape during the colonial period and was further developed by postcolonial states to facilitate the capitalist interests of the colonial masters and to preserve the traditional benefits of local male elders in terms of ownership and control of land, women's labour and sexuality. The paper focuses on the gender implications of African customary law, particularly male primogeniture, under which the eldest child—traditionally the eldest son—inherits the entire estate or the principal share of it. It further examines the application of "repugnancy clauses" which allow courts to recognize law only insofar as it is not "repugnant to natural justice, equity, and good conscience" in seven former British colonies in Southern, Eastern and Western Africa under common law influence: Zimbabwe, South Africa, Kenya, Uganda, Tanzania, Ghana and Nigeria. The various cases discussed show how African women have suffered multiple forms of oppression in a dual process of racial inferiorisation and gender subordination which have excluded them from both the colonial and postcolonial public spheres. Since the principles underlying fundamental human rights have not been fully incorporated into all legal systems and, since only a small percentage of Africans rely on the formal legal system, while customary law continues to govern the lives of much of the population, it is important to examine the historical gender implications of customary law and its evolution within the new constitutional orders. This is particularly relevant in light of the judicial reforms that have taken place over the last two decades.

In the *third chapter*, **Aderonke Adegbite** addresses the pertinent issue of gender and sexuality in African indigenous legal traditions and judicial systems. Her study focuses specifically on Ifa jurisprudence, a legal-spiritual system practiced primarily by the Yoruba people of West Africa. Rooted in a profound belief in the interconnectedness of all elements of existence, Ifa jurisprudence offers a holistic view of gender relations, emphasising balance, complementarity and harmony. Conversely, colonial and Western legal frameworks often adopt restrictive, rigid, and criminalising views of gender and sexuality, thus fostering the fragmentation of sexual identities and sexual competition. The author suggests that this particular set of beliefs, lifestyles and conflict resolution practices could be considered as an alternative to enhance the promotion of gender equality and justice in both traditional and modern contexts.

Examining the training of judges is an interesting issue to consider how knowledge has been produced, disseminated and retained in judicial education systems and, therefore, how gender equality is adequately addressed. To this end, in the *fourth chapter*, **Maureen Owor-Mapp** invites us to reflect on how the socio-legal construction of gender equality, as it is rooted in a universal Western standard, can paradoxically perpetuate cultural stereotypes and prejudices, especially because, since colonial times, judges have been trained in a Western cultural and legal language that has progressively erased African histories, beliefs and ways of life. In other words, any kind of discussion and learning about local traditions and their epistemological and philosophical presuppositions have been discouraged. Furthermore, modern judicial education tends to overlook important issues such as women´s preference for customary rules and forms of justice and, in particular, their ability to navigate multiple legal systems and make use of the rules that best serve their needs. Using the example of developments in Uganda, where we are witnessing the progressive inclusion of alternative dispute-resolution methods, the

author emphasises the importance of cultural awareness for adopting a pluralistic educational model grounded in epistemological diversity and an andragogical approach to teaching gender equality.

The Marriage Act of 2014 was enacted in Kenya to harmonise all existing marriage laws in the country into a single law. It provides that all marriages in Kenya have equal legal status, and requires that all marriages, including those conducted under customary law, must be registered. Such registration is considered as conclusive proof of the existence of a marriage. In the *fifth chapter*, **Agnes Meroka-Mutua** examines precisely this topic and analyses the treatment of customary marriages in Kenyan law across three distinct periods: the colonial era, the post-independence period and contemporary Kenya. She argues that while customary marriages were considered inferior during both the colonial and post-independence periods, the Marriage Act had the effect of elevating customary marriages placing them on equal footing with marriages under other systems. The chapter also evaluates the status of married women under customary law and highlights that the Marriage Act has led to greater protection of married women's rights in contemporary Kenya. Notably, the author adopts an African feminist theoretical framework to explore how judicial interpretations of customary marriage affect women's rights. This African feminist perspective allows for an analysis grounded in the concrete lived experiences of African women and recognises that inequality and discrimination often arise from the intersection and interaction of multiple legal systems. Consequently, the discrimination experienced by women married under customary law is not viewed as stemming solely from customary norms, but rather from the way customary law interacts with formal law.

In the *sixth chapter* **João Pedroso, Elisa Samuel Boerekamp, Carlos Fernandes and Virgílio Pinto Augusto** address the changes in customary law and state law in southern Mozambique. Their article begins by explaining the context of the national project *Norms and Practices of local populations in Conflict Resolution and Access to Law and Justice*, launched in 2021 and aimed at studying 31 districts of that country. Proposed by João Pedroso and coordinated by him and Elisa Boerekamp, this socio-legal study has as its main objective the understanding of the norms and practices used by Mozambicans in a context of legal pluralism characterised by widespread tensions between customary and state laws. It was a very long and complex project. Consequently, the paper presents only the results of the research carried out in the Chókwè district, a predominantly rural area where "the local models of social reproduction are very strong and even the predominance of local languages can become a barrier between the people and the state". In this context, the research focused on three core areas that reveal fundamental tensions between customary and state laws in a setting of legal pluralism: the persistent social practice of *lobolo* which conflicts with the family law applied by the State; the continued practice of "social marriage" between an adult and a child despite its prohibition under state law; and the "lack of care" for children by absent male parents which causes tensions between community practices and state family law, and often prompts women to seek access to the district court, as an alternative to family or community dispute-resolution mechanism. The study aims to identify norms and practices operating in the social space of the family, highlighting the tensions between customary law and state law. It also seeks to identify the principal actors involved in these conflicts, mapping their demands and their interactions; and also, to indicate the

various paths of hybridisation between customary law and state law that emerged from the fieldwork.

In the *seventh chapter*, **Mirabelle Chi Epse Okezie** examines the important issue of conflicts in Southern Cameroon between human rights - especially the principles of gender equality and non-discrimination enshrined in the Constitution and national legislation - and customary laws and its practices which persist, especially in rural areas, and remain largely patriarchal, particularly in matters of inheritance and succession. To address these conflicts, state courts apply the so-called repugnancy clause, also discussed in Martha Gayoye´s chapter, which allows them to declare discriminatory customary norms inapplicable when they violate written law or human rights principles. However, these judicial decisions have limited social impact, since customary norms, even if declared inapplicable, often continue to be applied informally without any consequences. The author emphasises that recourse to state courts has not resolved the conflict but has instead accentuated the divergence between legal doctrine and customary practice. Consequently, she suggests that a more proactive governmental approach is needed to overcome the deeply rooted gender discrimination and support the effective implementation of judicial decisions. Moreover, rather than relying solely on the repugnancy test, courts should explicitly invoke human rights standards in their reasoning, given their enforceability under Cameroonian law.

By presenting individual experiences and different viewpoints, adopting an anthropological perspective and a wide range of qualitative methodologies, in the *eighth chapter* **Maria Rita Bartolomei** offers an overview of the interesting, controversial and complex issue of gender inequalities in access to land in a context of legal pluralism. In Zambia various forms of personal law, traditional practices and hybrid regulatory systems of a customary nature resulting from an interaction of different legal orders coexist. Although most land laws are gender-neutral, gaps persist in both the principles and practices of these laws, and customary rather than statutory norms tend to dominate in practice, thereby undermining women's land rights. The paper deals with the rejection clause – in other African legal systems called repugnancy clause – which is a also rule stating that customary law will not be applied by courts if it is incompatible with written law, the Constitution, or fundamental principles, and the constitutional treatment of customary laws, as well as the distinction between official and living customary laws. However, the case study focuses primarily on the legal and cultural activities carried out by "Women and Law in Southern Africa – Zambia (WLSA Zambia)", an NGO based in Lusaka that has long engaged in a strenuous but often successful struggle against discrimination, inequality and gender-based violence. Its members advocate for remedial legal reforms, develop citizens' legal awareness and support women in their efforts to reform the inheritance system, family laws and to secure land rights. Notably, thanks to their efforts, women's land rights are increasingly recognized as a human-rights issue; women are gaining greater roles in development, politics, law and the third sector and women's growing entry into the legal profession is inlfuencing both legal scholarship and jurisprudence.

In the *ninth chapter*, **Letizia Mancini** discusses the serious and alarming phenomenon of trafficking of young women and children for sexual exploitation. It can be considered a contemporary form of slavery, with particularly serious implications in contexts

characterised by significant structural inequalities and disadvantages, such as limited access to economic resources, restricted educational opportunities, and a lack of awareness of human rights. Several studies carried out by anthropologists, sociologists and legal practitioners involved in the defence of women seeking international protection have highlighted the link between migration, socio-economic dynamics and cultural aspects. With specific reference to migration from Nigeria to Europe, her contribution aims to capture the complexity of this relationship, going beyond a common narrative that portrays Nigerian women as 'exotic', 'other', vulnerable and victims of magical rituals. Drawing on research conducted in Nigeria and various European countries, as well as on the experiences of legal professionals assisting women asylum seekers, she shows that a very large number of women involved in sex work in European countries are victims of trafficking. In these cases, speaking of freedom or choice in the migration process is impossible. Even in cases where women migrate with awareness of the work they will undertake in Europe, the scope for freedom, when it exists at all, is extremely limited.

In the *tenth chapter*, **Patricia Jerónimo** addresses the impact of Roma customary law on Portuguese court practice. Although Roma law is not officially recognised, it is often invoked by Roma litigants in disputes before Portuguese courts, particularly in cases involving child marriage and early school drop-out of Roma girls. Unfortunately, Roma women and girls continue to encounter significant obstaclesto the full enjoyment of their human rights in areas such as education, employment, health, participation in public and political life. This situation of legal and social inequality is mainly due to the combined effects of institutional racism fuelled by historical discrimination (also known as anti-Gypsyism) and the sexism intrinsic to their ethnic norms. Roma are Portugal's most visible ethnic minority and occupy a unique position in Portuguese courts' cultural diversity jurisprudence, as their "cultural defenses" are most often brought before the courts, and are also the ones which courts are most likely to directly address in their reasoning, either to reject or recognise their relevance to the adjudication of cases at hand. Drawing on the results of socio-legal research conducted between 2018 and 2022, Patricia Jerónimo´s chapter analyses how Roma law and its norms on gender roles are reflected and contested in judicial practice. It examines the reasoning underlying selected court decisions and incorporates the views of judges and prosecutors interviewed for the project. Although the content of Roma law is still largely unknown to outsiders and, apparently, vary significantly across different Roma communities, there is little doubt about the persistence of its overarching patriarchal principles and the gender discrimination associated with practices such as early marriages and the recurrant early school drop-out of Roma girls.

As we all know, in any situation of legal pluralism, tensions arise between the co-existing normative systems. In our work, the focus is on the clashes arising from the contrast between Western-derived and traditional, non-Western normative systems. These clashes between customary laws and official, state legal systems are among the most dynamic aspects of current legal pluralism in Africa. Since the intersection of gender and customary law is still a relatively poorly researched academic field, we have attempted to contribute to this, by offering various insights. However, we believe further research and theory on gender, customary law, and its processes is necessary for a more nuanced

understanding of the gendered effects of the interaction between customary law and state law.

Maria Rita Bartolomei

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