KEY CONTRIBUTIONS

- Emphasizes the complex historical origins and contemporary factors that shape the development of PLOs.
- Discusses the contested nature of culture and human rights and stresses the complex nature of the relationship between cultural diversity and the law.
- Calls for giving special attention to people on the margins of state and non-state law and recognition of cultural differences in law.
- Identifies challenges related to incorporation of non-state law within state law and recognition of cultural differences in law.
- Identifies challenges to and possibilities of employing existing human rights standards with respect to PLOs.
- Outlines the human rights impact of PLOs in general while pointing to the specific concerns in the area of family law.
- Offers guidance on a human rights based approach to justice reform in the context of legal plurality.
- Proposes principles and a framework to guide human rights practitioners and policy-makers.
- Outlines a possible human rights approach to assess PLOs or evaluate proposals to recognise plurality, in general, or recognition of non-state laws, in particular.
- Identifies areas ripe for further research and analysis.

"Comprehensive, very substantive and well written ... the study closes an important gap in literature [and] also provides useful ideas and inspiration for development practitioners working in the field of legal reform."

—Juliane Osterhaus, Project Director “Realising Human Rights in Development Cooperation”, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH

WHEN LEGAL WORLDS OVERLAP

HUMAN RIGHTS, STATE AND NON-STATE LAW

CONTEXTUAL OVERVIEW

Plural state and non-state legal orders (plural legal orders or PLOs) arise when diverse legal orders are “superimposed, inter-penetrated and mixed”, leading to a specific dispute or subject being governed by multiple norms, laws, or forums co-existing within a particular jurisdiction or country. Examples include family laws based on religion, customary justice practices, or alternative dispute resolution mechanisms. PLOs involve considerable economic and political interests as well as struggles over resources and identity and are often the result of multiple and interrelated histories and policies.

FRAMEWORK TO ASSESS POLICIES/DEMANDS FOR PLURAL LEGAL ORDERS

POLICIES/DEMands TO PRESERVE, REFORM OR INTRODUCE PLOs

1. How clear is the basis for the demand for plurality?
2. Who is advocating for plurality and what are their motivations and interests?
3. How internally coherent is the policy or demand?
4. To what extent does the policy or demand advance human rights nationally?
5. Does the wider national context strengthen or weaken the case for the policy or demand?
6. What impact will the policy or demand have on intra- and inter-group rights?

EXISTING OR PROPOSED PLOs (SUBSTANTIVE/PROCEDURAL/INSTITUTIONAL NATURE)

1. Is the process adopted for developing the content and structure of the PLO inclusive?
2. Are there sufficient institutional capacities and resources for effective functioning?
3. Do the norms and substance of the laws in the PLO reflect human rights concerns?
4. Are there adequate procedural safeguards and institutional review mechanisms?
5. Are the ex-ante and ex post human rights safeguards envisaged adequate?
6. What is the extent to which human rights protections are guaranteed more broadly?

(This framework can also be adapted to assess demands for recognition of non-state legal orders.)

RESEARCH SUMMARY


The project involved six researchers, four supporting papers, three expert meetings (bringing together thirty experts from different backgrounds) and a public consultation and review.

The report is freely available for download from the ICHRPI website at www.ichrp.org. A supplementary CD-ROM containing a compilation of research material is included with print versions of the report.
**Justice Sector Reform Projects**

1. Base projects on sound research and scholarship.
2. Examine non-state legal orders (NSLOs) on evidentiary merits, neither romanticising nor demonising them.
3. Adhere to human rights standards (especially those of full gender equality and due process protections).
4. Make local participation real and meaningful.
5. Effectively monitor and evaluate projects.
6. Encourage mutual learning on the basis of experience, avoiding conflicting objectives with greater coordination between donors and other actors.

**Recognising Non-state Legal Orders (Customary or Religious)**

1. Avoid categorical or all-purpose definitions of norms and practices.
2. Adopt a flexible approach that allows communities to develop and adapt norms to new realities.
3. Position recognition within a broader framework that protects civil, political, social and economic rights of all members of the community.
4. Address internal community tensions and external pressures when addressing processes of recognition.
5. Avoid establishing different, conflicting systems of law that generate inequities and inefficiencies.
6. Define elements that determine effective PLO function (i.e., normative content, jurisdiction, authority, the adjudicatory process and enforcement).
7. Assess the politics of culture and cultural production, including observed cultural practices of NSLOs.
8. Acknowledge and address the motivations and power dynamics involving NSLOs.
9. Monitor the process for outcomes, including unintended consequences (e.g., erosion of NSLO legitimacy following recognition by a non-credible state).

**A Human Rights Approach to Plural Legal Orders: Some Key Principles**

**Affirm the prohibition on discrimination** and the inadmissibility of a cultural defense with regard to gender violence. Distinguish aspects of culture that are discriminatory from those that are not.

**Focus on outcomes** rather than on whether one right trumps another. When rights appear to conflict, ask which outcomes will minimise the extent to which any of the rights in question must be compromised.

**Promote inter- and intra-group equality** as central to justice in a multicultural context; it entails social recognition, economic distribution and political participation.

**Acknowledge that people are bearers of both rights and culture.** Transcend the apparent problem of ‘balancing’ rights and fragmentation of identity by (a) adopting an inter-sectional approach to identity; (b) seeing culture, custom, tradition and religion as changing and internally contested; and (c) viewing rights-holders simultaneously as individuals and members of many collectives.

**Analyse power relations** underlying the content, structure and human rights impact of PLOs. Start from the perspective of those most vulnerable to inter- and intra-group discrimination.

**Ensure evidence-based assessments** of the benefits and disadvantages of state and non-state legal orders.

**Clarify moral and political preferences** underlying decisions about how best to promote and protect human rights in the context of PLOs.

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**About the ICHR**

The International Council on Human Rights Policy is an independent institution committed to applied research, reflection and forward thinking on matters of international human rights policy. It identifies issues that impede efforts to protect and promote human rights and proposes approaches and strategies that will advance that purpose.

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**Areas for Further Research and Development**

- The meaning and practical application of due diligence in the context of PLOs, including NSLOs.
- Due process standards for civil disputes, including a set of guiding principles for arbitration and quasi-judicial mechanisms.
- Standards that govern disputes about the recognition of inter-country marriage, divorce, adoption and related matters.
- The impact of recognition of NSLOs (especially indigenous people’s legal orders) on human rights including, identifying and strengthening best practices through national and international comparative research.
- Greater cooperation between international and national human rights bodies and organizations to develop standards that coherently and inclusively address women’s rights, family law, minority ethnic and religious rights, indigenous people’s rights, sexual orientation, etc.

For further information about this report, contact Vijay Nagaraj, nagaraj@ichrp.org. You may also visit our website at www.ichrp.org.

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