When Legal Worlds Overlap
Human Rights, State
and Non-State Law

Summary
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The International Council on Human Rights Policy (ICHRP) was established in Geneva in 1998 to conduct applied research into current human rights issues. Its research is designed to be of practical relevance to policy-makers in international and regional organisations, in governments and inter-governmental agencies, and in voluntary organisations of all kinds. The Council is independent, international in its membership, and participatory in its approach. It is registered as a non-profit foundation under Swiss law.

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INTRODUCTION

The report summarised here highlights human rights impacts and policy dilemmas associated with plural state and non-state laws, such as family laws based on religion, customary justice practices and alternative dispute resolution (ADR) mechanisms.

‘Plural legal orders’ (PLOs) arise when diverse legal orders are “superimposed, inter-penetrated, and mixed”1 with the result that a specific dispute or subject is governed by multiple norms, laws or forums that co-exist within a particular jurisdiction or country.

PLOs are rooted in complex historical and policy contexts and engage important political interests as well as struggles over resources and identity. States in particular, especially former colonial states, have an interest in gaining greater control and legitimacy by recognising, preserving or creating ‘local’, ‘traditional’ or ‘customary’ laws and legal systems.

Other factors associated with the emergence of PLOs include: history of colonial rule; conflict and post-conflict reconstruction; the imposition or import of legal concepts; identity politics, including religious and ethnic fundamentalism; multiculturalist policies that invoke ‘community’ as a means of governing their (often migrant) minorities; and the influence of economic actors and policies, including privatisation and market-oriented reforms.

Non-state legal orders (NSLOs) are norms or institutions – often viewed as having the force of law by those subject to them – that claim to draw their moral authority from contemporary or traditional culture or customs or religious beliefs and practices rather than from the political authority of the state. In some cases NSLOs flourish because the formal state legal order is alien, irrelevant or absent (sometimes following a state’s deliberate withdrawal). NSLOs may also draw their legitimacy from resistance to the state’s legal order or from reforms that strengthen the informal justice sector.
KEY FINDINGS I

HUMAN RIGHTS STANDARDS AND PLURAL LEGAL ORDERS

Issues in standard setting

Because PLOs touch on several areas of human rights – rights of minorities, indigenous peoples and women, non-discrimination, administration of justice, fair trial, equal treatment before the law, etc. – human rights standards relevant to PLOs are found in numerous international, regional and domestic human rights instruments and mechanisms.

The UN Human Rights Committee (HRC, General Comment 32) recognises the existence of legal plurality insofar as Article 14 of the ICCPR (on the right to fair trial) applies “where a State, in its legal order, recognises courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks”. A 2006 UN General Assembly Resolution called on states “to ensure that their political and legal systems reflect the multicultural diversity within their societies...”.

The UN Declaration on the Rights of Indigenous Peoples (2007) recognises the right of indigenous peoples to “promote, develop and maintain their institutional structures and their [...] juridical systems or customs, in accordance with international human rights”. This amplifies similar provisions in the International Labour Organization Convention 169 (1989).

According to the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples “in many countries a monist conception of national law prevents the adequate recognition of plural legal traditions and leads to the subordination of customary legal systems to one official legal norm...legal pluralism appears to be a constructive way of dealing with diverse legal systems based on different cultural values”.

On the other hand, the Committee on the Convention on the Prevention of All Forms of Discrimination Against Women (CEDAW) considers that “the co-existence of multiple legal systems, with customary and religious laws governing personal status and private life and prevailing over positive law and even constitutional provisions of equality, remains a source of great concern.”

This indeterminacy, which reflects a more general fragmentation of international law, creates significant policy challenges.

One flawed response is to ‘balance rights’. In practice, efforts to reconcile competing rights claims tend to pit one set of rights against others, because human rights law provides little guidance on how competing claims can be resolved. The “balancing” argument has been exploited by some governments to favour cultural claims or religious freedoms over gender equality.

Another flawed response (see, for example, HRC General Comment 32) would limit the jurisdiction of customary law or religious courts to ‘minor’ criminal and
civil matters. The problem with limited jurisdiction is that such matters (typically areas of family law, such as desertion by the husband, divorce, maintenance, inheritance, etc.) often have serious human rights consequences.

Both the above approaches undercut the indivisibility of human rights.

In general, recommendations of human rights bodies regarding customary or religious laws often call on states rather imprecisely to harmonise, balance or apply such laws in accordance with international human rights law but fail to spell out how this should be done practically. This imprecision reflects not just the difficulty of speaking about culture. It is also a reaction to the way some states appeal to ‘culture’ or ‘religion’ to advance political preferences that marginalise or suppress human rights.

**Human rights impacts of plural legal orders**

PLOs are not necessarily harmful; however, they may, owing to their structure, precipitate negative human rights outcomes. Whenever an identity-based regime applies different standards to different issues or groups of people, it subordinates rights to identity, which implies discrimination and inequality before the law.

Confusions over jurisdiction and the application of laws, common in PLOs across the world, lead to abuses of jurisdiction and power and undermining of rights. These can lower due process and procedural standards and limit access to justice. This is especially true of ADRs and NSLOs.

Provision of separate legal orders for minorities can isolate them from the general development of standards and institutions; and, because important political interests come to be vested in them, over time such regimes are likely to become difficult to reform.

PLOs often create economic and political opportunities that powerful elites can exploit, reinforcing socio-economic inequalities. Where a state’s recognition of PLOs elevates the status or power of traditional authority figures (chiefs, etc.), this may limit rather than foster the emergence of an active civil society.

PLOs strongly influence family and personal status law (marriage and divorce, custody and guardianship, adoption, inheritance and succession). This has very significant human rights implications that are under-recognised. Human rights actors have given little attention to family law, though control over it (and by extension over women’s rights) is crucial to the power of state and non-state actors. Family law appears largely exempt from “globally shared legal frameworks based on cross-cultural foundations”.

PLOs around the world have a negative and disproportionate impact on women and their rights, while also affecting rights of men and children. With regard to family law, they often restrict or influence the enjoyment of a range of rights, including the right to marry and found a family, the right to freedom of belief, and religious freedom. In general, the involvement of PLOs in family law tends to accentuate difference and exclusion.
KEY FINDINGS II

LAW, CULTURE AND HUMAN RIGHTS

Law enables rule of law via administrative and judicial procedures but also “rule by law by creating social reality and meanings which are considered self-evident”. While recognising its power, it is important to guard against a propensity to use law for everything. Not all issues that present themselves as legal have a legal solution; many merit broader responses rather than more law.

Nor do cultural differences always produce a plurality of legal orders: the relationship between culture and law is not straightforward. To understand the deep diversity within cultures and culturally-determined legal orders, and the link between cultural difference and law, one must distinguish social location from identity and from values.

People are bearers of both culture and rights: acceptance of one does not imply rejection of the other. Both are contested terrains, subject to constant shifts and negotiation. A constructive approach considers culture, not as a “... barrier to human rights mobilization but as a context that defines relationships and meanings and constructs possibilities of action”.

Demands that law should reflect cultural diversity are premised on the principle of universal equality but (paradoxically) require recognition of what is not universally shared. By contrast, indigenous peoples’ claims based on the right to self-determination are ontologically different and have distinct socio-historical origins.

When the law recognises cultural differences, it is likely to ossify what is dynamic and fluid and to privilege certain voices and interpretations over others. Because of this, the relationships between human rights, law and culture are not only complex but deeply political.

When they are brought together uncritically, the effect is too often to mask inter- and intra-group injustices or create false distinctions between public and private identities – in the way that some religious fundamentalist groups invoke human rights law, especially minority rights, to advance conservative norms.
KEY FINDINGS III

NON-STATE LEGAL ORDERS AND RECOGNITION

Distinctions between state legal orders and NSLOs are rarely sharp. They are often mutually constitutive, have entwined interests, and seek to appropriate one another’s legitimacy. This can make it harder for human rights advocates to determine the responsibilities of different actors.

At the same time, they do not completely subsume one another because in most cases state law ultimately determines “the terms through which non-state actors introduce their laws into state practice”.10

Overemphasising the state/non-state relationship can mask the internal plurality and contestation within each legal order.

Public opinion does not always want NSLOs to be recognised or incorporated in the official judicial system. Where NSLOs are popular, it may reflect social or economic compulsions and constraints rather than a normative preference or their inherent legitimacy (relative to state legal orders).

While NSLOs do not necessarily undermine human rights, they are very likely to replicate normative and institutional power imbalances in the community.11 The human rights impact of NSLOs is rarely positive within jurisdictions that include strong religion-based family law regimes, especially in states that, in addition, lack a neutral civil law system.

Where NSLO reforms have had positive human rights outcomes, they have tended to: adopt multi-pronged approaches that increase the knowledge and confidence of key actors in using a range of legal orders; strengthen group access to rights by changing elite attitudes and empowering the disadvantaged; and challenge structural discrimination through community participation.

The roles of human rights NGOs and the state are crucial. The state’s function as the guarantor of rights is central and especially significant when an NSLO becomes integrated within a state legal order as a result of recognition, incorporation or decentralisation.

Claims based on custom do not always imply a retreat into the past and may legitimate contemporary or future political demands. Nor are ‘non-state’ and ‘traditional’ synonyms. Appeals to tradition often express “claims of specific political groups to a new organization of political and economic power, new norms of inclusion and exclusion, and new bases of legitimacy of state power”.12 Those on society’s margins are at the margin of every legal system (state and non-state alike), and every legal system is vulnerable to manipulation by the well-connected, well-informed and well-off.13
RECOMMENDATIONS

RECOGNISING NON-STATE LEGAL ORDERS

- Avoid categorical or all-purpose definitions of customary laws and practices. Adopt a flexible approach that allows communities to develop and adapt norms to new realities.

- If recognising customary law, position recognition in a broader framework that protects the civil, political, social and economic rights of all members of the community.

- Ensure that processes of recognition address internal tensions within the community as well as external influences.

- Do not establish different, possibly conflicting systems of law that generate inequities and inefficiencies.

- Define clearly the elements that determine whether a PLO functions effectively: normative content; jurisdiction; authority; the adjudicatory process; and enforcement of decisions.

- If recognising an NSLO, assess the politics of culture and cultural production as well as externally-observed cultural practices; acknowledge and address the motivations and power dynamics at play.

- Monitor the process for outcomes, including unintended ones (for example, the erosion of legitimacy an NSLO may suffer following recognition by a state that lacks credibility).

JUSTICE SECTOR REFORM PROJECTS

In addition to the Guiding Principles and the Framework outlined below, those engaged in justice reform projects, donors in particular, should ensure that:

- Projects are based on sound research and scholarship.

- NSLOs are examined on merit, on the basis of evidence, and neither romanticised nor demonised.

- Human rights standards, in particular full equality and due process protections, are adhered to.

- Local participation is real and meaningful.

- Projects are effectively monitored and evaluated.

- Donors and other actors coordinating their work encourage mutual learning on the basis of experience and avoid conflicting objectives.
A HUMAN RIGHTS APPROACH TO PLURAL LEGAL ORDERS: SOME GUIDING PRINCIPLES

- Notwithstanding some limitations, international human rights standards offer useful tools for policy and advocacy, especially when advocates are able to translate universal standards meaningfully into local context.

- Consistently affirm the prohibition on discrimination and the inadmissibility of a cultural defence with regard to gender violence; distinguish aspects of culture that are discriminatory from those that are not.

- When apparent conflicts of rights occur, focus less on whether one right trumps other rights. Focus on outcomes: ask which outcomes will minimise the extent to which any of the rights in question must be compromised.15

- Recognise that the duty to accommodate and support minority cultures is not absolute and that justice in a multicultural context is about inter- and intra-group equality with respect to social recognition, economic distribution and political participation.16

- Recognise 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) contextualising the analysis and viewing rights-holders simultaneously as individuals and members of many collectives.

- Analyse the content, structure and human rights impact of PLOs in terms of power relations, taking into account historical as well as current social, economic and political factors. Start from the perspective of those who are most vulnerable to inter- and intra-group discrimination and seek to redress this.

- Ensure that benefits and disadvantages of state and non-state legal orders are supported by quantitative and qualitative empirical evidence.

- Decisions about how best to promote and protect human rights where PLOs exist engage moral and political preferences. All those involved, including human rights advocates or donors, should be transparent about their own preferences.
Framework for a Human Rights Assessment of Plural Legal Orders

The full report provides a framework designed to assist human rights advocates to assess PLOs, evaluate proposals to establish or recognise plurality, or assess NSLO demands for recognition.

The framework lists questions that assist analysis of different dimensions. Every question identifies a potential problem, the responses to which will require advocates to take specific steps, shaped by their understanding of the political context as well as the range of options that are available for reform or redress. The objective is not to generate simple categories of ‘good’ or ‘bad’ responses, or ‘good’ and ‘bad’ plural legal orders, but to encourage all concerned actors to consider a broad range of possibilities when they seek to protect human rights in the context of PLOs.

Policies and demands to preserve, reform or introduce PLOs may be assessed in terms of six dimensions:

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

The substantive, procedural or institutional nature of an existing or proposed PLO may also be assessed from six dimensions:

- Is the process adopted for developing the content and structure of the PLO inclusive?
- Are there sufficient institutional capacities and resources for effective functioning?
- Do the norms and substance of the laws in the PLO reflect human rights concerns?
- Are there adequate procedural safeguards and institutional review mechanisms?
- Are the ex-ante and ex-post human rights safeguards envisaged adequate?
- What is the extent to which human rights protections are guaranteed more broadly?
FURTHER DEVELOPMENT OF HUMAN RIGHTS STANDARDS

The report suggests that further research and analysis is needed into the following:

- The meaning and practical application of due diligence in the context of PLOs, including NSLOs.

- Due process standards for civil disputes (in the context of arbitration and quasi-judicial mechanisms). It may be useful to elaborate a set of guiding principles, on the model of those developed for non-judicial mechanisms such as truth and reconciliation commissions.

- Standards that govern disputes about the recognition of inter-country marriage, divorce, adoption and related matters.

- The impact that recognition of NSLOs (especially indigenous people’s legal orders) has on human rights. It is vital to strengthen best practices at national level. Comparative research in this area would also help to shape and inform the further development of international standards.

- The coherence of national and international standards relevant to PLOs. International and national human rights bodies and organisations should cooperate to develop standards that coherently and inclusively address women’s rights, minority ethnic and religious rights, indigenous peoples’ rights, sexual orientation, etc. A dialogue on family law between women’s rights and mainstream human rights organisations is also needed.
THE RESEARCH PROCESS

The report summarised here was published in 2009 under the title *When Legal Worlds Overlap: Human Rights, State and Non-State Law*.

As a first step, the Council drafted a concept note, based on preliminary research by ICHRP, which was discussed at an expert meeting held in January 2008. The research team then prepared an Approach Paper, which, following further consultation, led to finalisation of the Project Design.

In addition to a wide-ranging survey of literature from academic and non-academic sources, two background papers were prepared as part of the initial research. Subsequently, the ICHRP commissioned two additional papers. The first was a comparative study of legal pluralism with respect to indigenous peoples’ rights in the area of adoption and membership in Australia, Canada, New Zealand and the United States of America; the second was a comparative assessment of personal status laws in Egypt, India and Israel.

Two research workshops in late 2008 provided further opportunities to develop the research. They brought together experts from different regions and included legal anthropologists, sociologists, international human rights lawyers, human rights activists in local and international organisations, development consultants and political scientists.

The report draws from, and refers to, a large body of published and unpublished work, both academic and non-academic, as well as to the experiences and insights of activists and advocates. Much of this literature is field-based research by scholars, activists and policy analysts. Wherever permitted, the Council brought this information together in a CD-ROM that was published simultaneously and is distributed together with printed copies of the report.

A range of experts from different regions and disciplines commented on a first draft of the report, which benefited greatly from their feedback and suggestions. The draft was also made publicly available on the website of the ICHRP for comment and review.
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NOTES


10 This is especially true with respect to women’s rights and participation.


12 This affords “the dominant indigenous elites of Africa a choice in both the forum and location of the justice process…[It is] possible, for instance, for a powerful man to implausibly accept marital equality (under civil law) and reject gender equality (pleading customary law)”. Odinkalu, Chidi Anselm. “Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa.” In The World Bank Legal Review, Volume 2: Law, Equity, and Development, edited by Caroline Mary Sage and Michael Woolcock. The World Bank/Martinus Nijhoff, 2006, pp. 157–158.

13 ALRC.


16 Report, pp.149–156.
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This report highlights human rights impacts and dilemmas associated with plural state and non-state laws, such as family laws based on religion, customary justice practices and Alternative Dispute Resolution mechanisms. Drawing on examples of such plural legal orders from around the world, it proposes principles and a framework to guide human rights practitioners and policy-makers. The report also identifies challenges related to incorporation of non-state law in state law, recognition of cultural differences in law, and justice sector reform. Emphasising the contested nature of culture, especially when dealing with gender equality, religious freedom and indigenous peoples’ rights, it calls for evidence-based assessments of plural legal orders that give special attention to people on the margins of state and non-state law, and equality between and within communities.

“An excellent statement … [the] treatment is objective and balanced, and it definitely challenges the human rights community not only to take stock, but also to take action.”
Rodolfo Stavenhagen
Former UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people

“Excellent … most interesting and instructive.”
Abdullahi A. An-Na’im
Charles Howard Candler Professor of Law, School of Law, Emory University

“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

“This report presents a compelling case that human rights practitioners cannot afford to ignore plural legal orders as a site of intervention.”
Imrana Jalal
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