

BOOK REVIEW

Human Rights *as* Legal Pluralism¹

International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law*. Geneva: ICHRP. 2009. xi + 176 pp.

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Practitioners working in human rights, development and many other fields of societal change are taking an increasing interest in ‘non-state law’. This Report from the International Council on Human Rights Policy is therefore timely and provides a useful *tour d’horizon* for those new to the area.

The Report’s focus is not without controversy, as increasing practitioner interest in non-state law is met with consternation by many. Some human rights advocates see a shift in attention away from the state as tantamount to letting primary duty bearers ‘off the hook’. This, they claim, is compounded by efforts that elevate the status of non-state systems manifesting the key human rights abuses (e.g., against women, due process, individual freedoms) that advocates are trying to overcome. To its credit, the Report consciously seeks to address these issues and quell controversy by adopting an even-handed manner. It starts by tackling thorny definitional questions and presumptions head-on, delves into a case study on family laws, assesses the conduct of justice sector reform in the context of human rights and plural orders and closes by providing a framework for human rights advocacy and policy.

Focus on non-state justice systems has not always been driven for the ‘right’ reasons, which has important implications. For development practitioners, a shift to non-state law has been pushed in large part by an assumption (not always well

¹ The views expressed in this paper are the authors’ alone and should not be attributed to the World Bank, its executive directors or the countries they represent.

founded) that classic justice sector reform - the type that focuses on legislation, institutions and actors in the state justice sector - has been mostly unsuccessful. Basing a shift of practice on such reasoning has the tendency to drive a complete change in focus (from state to non-state) rather than a widening of the lens (pluralism). This has potentially troublesome consequences as it overlooks the interplay of different justice systems, as well as the important role of justice and human rights in other sectors (e.g. education, health, infrastructure, land and natural resource management).

What's in the Report

The explicit purpose of the Report is to provide 'tools' for human rights actors to evaluate the impact of a particular plural legal order on both access to justice and human rights. It is written for human rights advocates and policy makers, assuming an audience who largely don't contest the worth or primacy of such endeavors.

The Report consciously sets out to counter some of the heated rhetoric that permeates the legal pluralism debate, and to a large extent achieves this. It opens by rebutting popular generalizations about non-state legal orders, and clearly makes one of the easiest rebuttals of 'non-state skeptics' by stating that "virtually every criticism leveled at non-state orders for failing to match the characteristics of an 'ideal' justice system has also been leveled against formal state legal systems..." (145). It could, however, have gone a step further to ask whether the assumption of an 'ideal' justice system is part of the problem. Whose ideal? How do ideal systems come about and how do we get from here to there? And how might human rights advocates themselves contribute to the construction of such an assumption and any problems that flow from it?

The Report then continues with an examination of the human rights impact of legal pluralism, focusing on issues of discrimination and inequality in law, freedom of religion and belief, jurisdictional confusion, impunity and lack of accountability, access to justice, protection of minority rights, socio-economic inequalities, and politics. It further explores three key areas of policy change – the recognition of non-state legal orders; the recognition of cultural particularities in law; and justice sector reform. One of the major strengths of the Report is that it doesn't shrink from acknowledging the complexity of the issues at hand. In unraveling the variegated relationships between plural legal orders, it recognizes throughout its

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analysis that issues in this area are not straightforward and no simple solutions exist. The Report is also clear about the lack of watertight analytical boundaries, as well as the dynamism of processes involved and indeed the limitations of law when it comes to addressing issues of justice and human rights. It is to be commended for its emphasis on in-depth understanding of the local context to guide the design of reform efforts – but it does beg the question of what to do when the local context sits uncomfortably with human rights norms.

Admirably, the Report does not confine itself to academic discourse, but takes an extra step to offer practical tools to human rights practitioners, concluding with guiding principles and a framework of questions to assist them in evaluating the human rights impact of existing or proposed plural legal orders. While the framework covers the breadth and depth of human rights concerns, the reader is left wondering about its utility. It might have been more compelling to illustrate the results of an empirical testing of the framework, which would also have served to demonstrate the Report's proclaimed commitment to context-based solutions.

The Report's recognition that "plural legal orders exist in every part of the world" is important as it avoids stigmatizing pluralism as a 'poor country problem'. And it backs this up with a wealth of examples from north and south, east and west, high and low consumption countries. However, for these reviewers it left us if anything wanting fewer examples and a lengthier in-depth exploration of a select few. As the Report itself states, it is the complex, unique and dynamic relationships in *specific* contexts that influence outcomes, so it could have been of benefit to delve into some of these in a piece such as this.

A Look from Within

One of the most common and unfortunate misunderstandings today involves the notion that the Declaration [UNDHR] was meant to impose a single model of right conduct rather than provide a common standard that can be brought to life in different cultures in a legitimate variety of ways (Glendon 2002).

A look from within the pantheon of human rights and the practice of development suggests, we'd contend, the adoption of a broad conceptual understanding of legal pluralism. In three main ways, the Report embraces what we would characterize as

a narrower approach.

Firstly, perhaps understandably given the report's primary target audience (rights advocates) human rights are framed as separate from or above other systems of regulation in a particular context. In our view, a drawing of human rights *as* a strand of pluralism more accurately reflects the conception and impact of rights in the contexts where we work. This respect for inter-subjectivity ultimately offers a better possibility for the shaping of behaviors that respect human rights norms. What is needed is a look at plurality from the inside, not from the outside.

An analysis grounded in legal pluralism can be instructive to human rights advocates because 'pluralism' fosters an interrogation of the different actors at play in a particular context, and the 'legal' aspect encourages us to see the way in which law, regulations, rules and norms are used to frame and legitimate 'truth-making' claims of various actors. We believe that if such an approach is to be truly revealing, it should start (but not necessarily end) with a view that each of the claim makers is equal and legitimate - as this puts one in the shoes of the claim-makers themselves. Legal pluralism can thus serve human rights advocates well, as it helps them to understand the perspective of those who see the world otherwise - and, we contend, it is from this point that you are most likely to be able to effect change. Rule systems (human rights being one of them) are only meaningful if they are socially embedded and seen as legitimate by all actors. Even though respect for political, economic and social rights could be introduced with human-rights based approaches to reform, real change is unlikely to occur without a broader understanding and engagement with the underlying social norms and dynamics that establish and legitimize appropriate behavior. Such an approach, however, is not easy for human rights advocates, as one of the most powerful tools in their arsenal is the claim (if not backed up by law) that human rights norms are somehow qualitatively 'different' and 'more special' than others.

Nevertheless, the Report itself provides a foothold for such a view, by offering insights into pluralism *within* human rights. This is evidenced in human rights texts by limitations and opt out clauses, and in judicial terms such as 'margin of appreciation', the 'subsidiarity principle' and 'exhaustion of domestic remedies'. This lens on the pluralism within human rights permits a more humble engagement with the reality of pluralism (both within and without) and opens spaces for iterative courses of reform responding to locally specific capacity and needs.

Secondly, in considering the implications of 'non-state law' for human rights, the

Report has a tendency to focus on 'traditional' 'customary' and 'religious' systems, rather than other regulatory orders (such as those driven by global capital, development agencies and neo-patrimonial structures) that in many contexts have an even greater impact upon citizen's rights. For example, multinational resource extraction companies introduce rules of engagement and benefit sharing mechanisms that have significant impact on citizens' rights, not to mention their influence upon state actions and regulation. Development agencies themselves are the source of non-state regulation around projects that regularly have significant rights implications.

Thirdly, the report conflates purported problems within non-state orders with the challenges of pluralism itself. While the authors contend that "plural legal orders are neither intrinsically good nor bad for human rights" (147), they proceed to unearth cases in which *non-state* legal orders are problematic for human rights. This is disconcerting for a number of reasons, but the one we wish to focus on here is a not uncommon conflation of 'non-state legal orders', or even worse 'non-human rights compliant customary and religious systems' with 'pluralism'. That certain non-state orders may be contiguous with breaches of human rights is merely a sub-set of the issues at hand when multiple legal orders interact. Legal pluralism is the condition of having multiple, contrasting, conflicting, overlapping and intermingling regulatory orders within a given context. The question around which the Report could usefully have been framed is what it is about these contexts of pluralism that make approaching human rights more exigent or troublesome. And an adjoining question could be - in what circumstances do plural legal contexts *promote* human rights - as there are plenty of examples of strong, unitary and hierarchical systems that have abused citizen's rights. Rather than focusing on legal pluralism as only a problem that needs to be solved, the opportunity aspect should also be considered. If the dominant rules system under which one lives is inaccessible, costly and unfair, it may be highly beneficial for the realization of human rights to have other options available.

The Importance of Process v. Form

In contrast to the dominant view, it can be argued that protecting human rights in the context of legal pluralism is less of a technical issue awaiting the advice of human rights experts than a *process* that could be managed in less or more equitable ways. One of the main challenges associated with human rights

approaches to reform is their focus on a pre-determined ideal that is articulated in its *form*, instead of being perceived as a *process* of social transformation. Rather than starting from a perfect human rights model from which deviations are being considered, it might be more useful to start with “what actually is” (as disarrayed as it may be). This requires a commitment to in-depth understanding of local perceptions of justice and human rights and ongoing dialogue and negotiation between conflicting perceptions. Since the legitimacy of the human rights rules and norms at the local level depends on them being developed through a process of equitable contestation (‘good struggles’), their form is largely unknowable *ex ante*. It would therefore help human rights practitioners to approach the reform with a mindset less concerned with what the end-state of this process will look like and avoid jumping to an idealized human rights order (Sage, Menzies and Woolcock 2009). In this sense, it may be useful to focus on ‘interim’ and ‘hybrid’ approaches to furthering the rights, interests and aspirations of the marginalized rather than on technical approaches that seek to make plural legal orders compatible with an ‘ideal’ human rights order (Adler, et al 2009).

Human rights are often much more meaningful when linked to everyday livelihood issues (e.g. access to land for food security, access to education, access to health) and this is why a focus on process which is developed, understood and appropriated from within is key. Rather than introducing human rights from above, internal principles of equity and fairness could be identified and used as a basis for dialogue and social change in the context of strong customary authority. To this end, the role of intermediaries in translating human rights into local terms and using local stories to give life and power to global human rights movements is crucial (Merry 2006).

This is particularly relevant in tackling issues of gender discrimination within customary systems. In such cases, taking measures to enforce formal laws of non-discrimination might exacerbate the marginalization and social exclusion of women. Instead, innovative solutions that can transform local practices from within should be found. A powerful example by the Kenya National Human Rights Commission in challenging discriminatory inheritance practices illustrates that a process of negotiation and dialogue with local power structures can yield positive outcomes (Chopra 2007). The Commission’s project facilitated a debate among Luo elders about the community’s values with respect to women. Facilitators challenged elders who held the traditional belief that ‘Luo culture protects women’, by confronting them with cases in which women had been relegated to extreme poverty through denial of their right to inherit. They were also confronted

with the effects of discriminatory practices on the spread of HIV. It became clear to the local leaders that because of new social threats, Luo inheritance rules required a different implementation from that of the past. Instead of widows being inherited by their brothers-in-law upon their husbands' death, the elders agreed to install the widows as legal trustees of the communal land. This allowed women to remain on their land and protect it for future generations without having to marry their brothers-in-law. However, the land would remain within the lineage of the husband. This approach allowed for the traditional patrilineal principles of land management to be preserved, while at the same time offering greater protection to women's land rights.

The ultimate success of this project in transforming local gender perspectives lies in the promotion of socially embedded dialogue through which competing interests and aspirations were reconciled. Rather than focusing on the replication of universal gender equality standards, it adopted an interim 'solution' which enabled greater realization of women's inheritance rights.

Conclusion

Most development practitioners and human rights advocates can't but help engage with non-state legal orders given the contexts in which they work. To do this effectively, it is useful for practitioners to start from the perspective of 'legal pluralism'— that is a view that takes into account all relevant ordering systems and the ways in which they interplay. From such a perspective it quickly becomes apparent that non-state justice systems are merely one strand of this plural context, with the rules governing international capital and development projects, as well as human rights themselves, all having an important impact on the fulfillment of rights and the realization of development goals. It is also useful for human rights advocates to understand human rights as a *process*, which permits a more faithful engagement with the reality of legally plural contexts and allows the charting of iterative courses for greater protection of human rights within locally specific capacity and needs. *When Legal Worlds Overlap: Human Rights, State and Non-State Law* provides a wealth of data to inform such practice with a wide range of country and thematic examples from across the globe.

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