

# THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

Research Project on Plural Legal Orders and Human Rights

## An Approach Paper

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The primary purpose of this paper is to outline in some detail the problems and questions the project is trying to grapple with. In doing so it draws extensively on a small meeting of experts convened in Geneva in late February 2008 and other literature and sources. This version of the paper is intended to plot the problem and indicate some of the questions the project will engage with. It will be deepened further over the next few months and discussed and reviewed at two workshops in October.

We know that normative principles travel in pairs, at the global as at every other level. Rights conflict. Principles conflict. The most revered texts in the human rights canon are vague and open to interpretation. As a result, it is unlikely that any articulation of a global normative consensus will escape being perceived by those who disagree – and people *will* disagree – as partial, subjective, selective. These are the wages of speaking universally in a plural world.

David Kennedy<sup>1</sup>

## 1. PURPOSE AND INTRODUCTION

### 1.1. Purpose

1. The primary purpose of this project is to enable key human rights actors to identify approach, understand, assess and intervene effectively in the context of plural legal orders in ways that uphold human rights principles and values. The secondary purpose of this project is to develop a tool to strengthen and enhance research and policy within and beyond the organisations. ‘Human rights actors’ includes those who influence policy within human rights organizations and also those who influence human rights policies within governmental, inter-governmental and other bodies, including donor agencies.
2. This project assumes significance for the ICHRP because many of the questions and debates inherent in this area have significant human rights implications and involve critical policy dimensions especially in the areas of access to justice, equality and non-discrimination.
3. At same time these questions are also complex and span a wide range of contexts. These include, for instance, debates around the reflection of ‘difference’ and ‘diversity’ in legal regimes; the relationship between cultural diversity, collective identity and individual rights; and, what have been variously termed non-state legal orders, informal justice mechanisms, community/local justice systems, or traditional authorities, and their social penetration, links to political authority and significant human rights consequences.

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<sup>1</sup> “One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream”, David Kennedy, delivered at the International Law Association, British Branch, University College London and School of Oriental and African Studies, 4 March 2006.

4. Translating universal standards into local practices has for long been an important concern for the human rights community. An increasing number of legal reform and access to justice initiatives are also increasingly engaged with plurality in general, and ‘non-state legal orders’ in particular. In addition, some of these debates and questions have assumed a different character and importance in the context of the growing imprint of fundamentalist politics on so many aspects of state practice and social relations generally.

## 1.2. Introduction: A Formulation of the Problem

### Problem 1

5. Over the past few decades, the idea of human rights has gradually emerged as a pre-eminent force in shaping personal, social and political conduct. There has been a considerable expansion in the use of human rights standards and language across the world. Increasing swathes of human experience and behaviour have come under the sway of the ideas of justice embedded within the human rights framework. However, it is a truism that Human Rights is only one among the many languages of ethical conduct that form the collective inheritance of human cultures across the world.
6. Discourses rooted in culture, custom, tradition and religion exercise considerable power in shaping, regulating and ordering personal, social and political conduct in all societies. They do so primarily through bodies of rules and mechanisms to interpret and enforce these rules. They are dynamic and evolving, and to the extent that they play a crucial role, in many contexts, in shaping social conduct and ideas of *right* and *wrong*, justice and morality; and become the basis on which conflicts and disputes may be resolved, they are normative orders.<sup>2</sup>
7. There are however several claims that the ideas of justice embodied in Human Rights and other normative orders are not always harmonious and in fact in many contexts they are at odds and in conflict with each other. Therefore even while the language of human rights is gaining universal currency there are arguments and claims that its values run counter to those in certain other normative orders.

### Problem 2

8. The state is at the heart of the regulative and enforcement machinery that is responsible for realizing the promise of justice inherent in human rights. Thus, despite the important role of inter-governmental as well as civil society organizations, the state continues to be the most important actor in both the making of human rights law as well its enforcement through legal instruments and institutions.
9. Despite the pivotal role of the state system in enforcing human rights there are several other normative authorities active in the sphere of regulating personal, social and political conduct. Many of them command an adjudicative authority over many aspects of peoples’ lives, and when they convene and enforce orders contrary to human rights values and standards, it poses an additional challenge to enforcing human rights.
10. Indeed in very many contexts the lines between the state and other normative authorities are actually blurred. It may also well be argued that no state system exists in a normative vacuum as such and is invariably influenced to varying degrees by the wider cultural context. In many contexts these influences may be strong enough to affect the state’s ability and/or willingness to

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<sup>2</sup> Normative order is used here in its most general sense, to refer to a system of norms and/or rules of conduct and allied interpretive/enforcing authorities/institutions, generally accepted, voluntarily or otherwise, by people within a specific geographic, cultural, religious or identity context.

actually enforce human rights standards. On the other hand, the state may also be unwilling, for many political reasons, to enforce human rights standards that may be viewed as contrary to those of other normative orders.

Human rights occupy a world where, on the one hand, the claim to being a universal language of justice is challenged by other normative orders, whose imagination of justice maybe different. Similarly, on the other hand, the nation-state (and indeed any other actor) that desires enforcement of human rights has to contend with a wide range of authorities – institutions, figures and regulative bodies who preside over these normative orders – who command social legitimacy and power. Broadly speaking the current project aims to map the varied difficulties and possibilities for realizing human rights in the context of the dual challenge emanating from multiple normative orders, namely, the conceptual-philosophical, on the one, and the regulative-enforcement, on the other.

### 1.3. A Formulation of the Starting Points

11. It is important to stress that the purpose of this document is not to discuss all the issues relevant to this project at length or in great analytical depth. The intention of this document is, firstly, to essentially outline what the project is seeking to do and how. Secondly, it indicates the broad directions of the approach to the problem. This document adopts a ‘flag-point to and move on’ approach (rather than discuss in detail as the final report will do) to some of the key issues and debates that will need to be traversed in the course of this enquiry.
12. The sections that follow discuss some of the challenges and possibilities by seeking to flesh out some of the substantive issues with respect to the two challenges outlined above. It begins with unpacking some of the key elements of the regulatory-enforcement challenge and then proceeds to assess some important elements of the conceptual-philosophical challenge. A separate assessment of two key elements of the wider political context and a section on the actual focus and methodology follow.
13. When normative orders are able to shape and regulate personal, social and political conduct, and include adjudicative mechanisms and authorities to enforce them, people within that context, at least, accord to these normative orders the status of law, akin to that accorded to the positive law formally enacted by a state. In this sense, therefore this project is concerned with only those normative orders, which are widely recognized as law or being *law-like* (as opposed to any normative order). Indeed, in virtually all contexts formally enacted state law is itself substantially engaged with, infiltrated by and built upon the incorporation or recognition of various elements, to different degrees, of such normative orders and authorities. Such contexts for the purposes of this project, will be described as one characterized by *plural legal orders*.
14. From the point of view of the present enquiry it is perhaps best to understand plural legal orders as a situation in which there is “an intersection of different legal orders”<sup>3</sup> creating a context in which diverse legal spaces are “superimposed, interpenetrated, and mixed”<sup>4</sup>. Implicit in this definition is an understanding of law in terms of its function rather than form. David Kennedy describes how such plurality is actually experienced: “when we approach the legal order sociologically – when we find what the law *is* by observing what the law *does*.”<sup>5</sup> Clearly, there are limitations to this approach, as there would be to any other (given the intractable nature of this

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3 de Sousa Santos 1989: 297-298 in Baudouin Dupret, Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specifications, European Journal of Legal Studies, Issue I, April 2007 p. 9.

4 Ibid. p. 9.

5 Kennedy 2006.

debate), but apart from reflecting an eminently respectable scientific pedigree<sup>6</sup> it also fits best with the overall aim of this project, which is to understand how competing ideas of what the law should *do* actually affect human rights. A plural legal order<sup>7</sup> here is more a descriptive lens, one that describes a “state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs”<sup>8</sup>, rather than an analytical category *per se*.<sup>9</sup>

## 2. UNPACKING KEY ELEMENTS OF THE REGULATORY-ENFORCEMENT CHALLENGE

15. This section outlines the issues that will be considered by the project in understanding the regulatory-enforcement challenge in the context of the overlapping and intermixing of legal orders. It does so in the context of three areas: a) non-state legal orders; b) the character of the state and its role in creating plural legal orders; and c) post-colonial change and continuity in the evolution of the customary / personal law.

### 2.1. Non-State Legal Orders

16. As we have already noted there exist a number of legal orders whose primary origins are not in state law but perhaps in: a) traditional or customary practices; b) religion; and/or, c) other internally driven or externally facilitated innovations to resolve disputes and conflicts. It is important to stress that these are not watertight categories, for instance, an innovation may actually build upon some pre-existing forms of dispute resolution or there may be a strong overlap between customary and the religious mechanisms. We refer to this constellation of legal orders as **Non-State Legal Orders** (NSLO).<sup>10</sup>
17. It is important perhaps to clarify here that this is not to imply that formal state legal orders are beyond the influence of custom, tradition, religion, etc. It is to stress that in many contexts, there exist legal orders which even though not incorporated into state law continue to regulate people’s lives to varying extents.
18. It is important to stress that this constellation is Non-State only insofar as its primary normative source-code is not state law and does not imply a total absence of any relationship with the state, indeed the state is almost *never* totally absent.<sup>11</sup> The relationship between the state and non-state legal orders is, in many cases one of profound ambivalence and also varies at different levels and is deeply influenced by micro and macro political considerations.<sup>12</sup>
19. As Gover points out “State and non-state law are mutually constitutive. Legal norms are the result of political processes and are subject to revision by the community that created them.”<sup>13</sup> A

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6 For a survey of various approaches to the question of laws, their plurality and legal practices see, for instance, Dupret.

7 It is important that plurality not be confused with internal systemic differentiation within a larger justice system of the state. Most justice systems today are internally differentiated and very complex, owing to reasons of specialized areas of law, especially administrative law, as well as the nature of jurisdictions and disputes, with different types as well as levels of courts. Such a legal order may be unitary and differentiated but not necessarily plural in nature.

8 John Griffiths 1986: 2 in Anne Griffiths Addressing Legal Pluralism and Human Rights Draft Comments at ICHRP Meeting.

9 There is a large body of socio-legal scholarship especially around legal pluralism, which this project will engage with it but will do so not with the aim of drawing relevant lessons from the many debates and controversies that mark this field of study rather seek to clarify them.

10 This constellation is also referred to as non-state justice systems, non-judicial mechanisms, parallel justice systems etc.

11 Celestine Nyamu-Musembi, Comments at ICHRP Meeting.

12 Claude Cahn, Comments at ICHRP Meeting.

13 K Gover. Legal Pluralism and Legitimacy in Multicultural New Zealand Draft January 28, 2007 p. 37.

recognition of this also implies that in evaluating a normative order we need to account not only for the norms themselves but also the “the process by which they were produced”<sup>14</sup> including most importantly inclusivity and participation in and the internal logics of the jurisgenerative process. This perhaps opens the door for more complex ways of evaluating these legal orders.

20. A lot has been said about the relative merits and demerits of NSLO.<sup>15</sup> On the one hand, NFLO are said to be ‘closer’, geographically and culturally, more flexible and well suited to address deep conflicts and schisms that often manifest themselves as acts of human rights violations. In addition, it is often held that they are (relatively) inexpensive and the overall burden of engaging with them is considerably less than in the case of state’s legal system. Hence NSLO are considered more accessible to people and being located within the community potentially accountable. These systems are also advocated as advancing solidarity and building *stronger* communities.
21. On the other hand it is also recognised that non-state systems suffer from a number of shortcomings. NSLO are critiqued for not being sensitive to individual rights and non-conformity or even difference, this leads to those on the structural margins of the community experiencing discrimination. These systems are also viewed as being inherently culturally exclusivist with the prescriptions and moral codes on which these systems are built being by nature, often context and time specific and the confusion and ambiguity about their application and interpretations leading to arbitrariness, prejudice and exclusion. Further, the costs of accessing such systems are not always clear, especially as they may not be fully monetized.
22. It is worth reemphasising that any contrast between the NSLO and state legal system must transcend the “unhistoricized distinction between the traditional and the modern: the former oral and the latter codified; the former representing “certain local values,” and the latter “international human rights standards.””<sup>16</sup> It is also important to recollect that virtually every criticism levelled at NSLO such as arbitrariness, bias and lack of independence, self-referentiality, unpredictability, precedent bound, lack of accountability, etc. may well be and have indeed been levelled against formal state legal systems, often by human rights organisations.
23. A distinct characteristic of a plural legal order is the blurring of lines between the state and the non-state legal orders. NSLO co-exist and relate with the formal legal order of the state. This ranges from the two existing in parallel without intersecting, or intersecting in various complex ways. Balchin and Warraich,<sup>17</sup> point to different ways in which the two systems may intersect or relate to each other, and indeed several possible internal variations in many of those models.
24. In a plural legal context, a human rights perspective has to account for both outcomes and processes by which those outcomes are arrived. This is important to stress since very often the focus tends to be on (justice) outcomes and not necessarily on processes.<sup>18</sup> At the same time in assessing a plural legal context it is also important that comparisons, if any, are made at the right levels, discourses (normative content) with discourses; practices with practices; and outcomes with outcomes.<sup>19</sup>

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14 Webber (2006) in Gover 2008.

15 See, for example, Faundez in World Bank 2006, DFID Briefing Non-State Justice and Security Systems, 2004, Odinkalu in World Bank 2006, Balchin and Warraich 2007.

16 Email from Mahmoud Mamdani to M. Mohamadou, RD, ICHRP, on file 19th December 1999.

17 Cassandra Balchin and Sohail Warraich Same Difference: A Concept Paper for Amnesty International on Parallel Legal Systems, Amnesty International, May 2007.

18 Cassandra Balchin, Comments at ICHRP Meeting.

19 Raquel Yrigoven Fajardo, Comments at ICHRP Meeting.

## 2.2. The Character of the State

25. The human rights framework recognizes the state as being the primary duty-holder with respect to the administration of justice. The fact that legally recognized membership of a state is itself a *human right* is evidence of recognition of the centrality of the state not just in *enforcing* human rights but also to *having* human rights. As Tubb (citing Bosniak) points out “Rights guaranteed under the [international human rights] regime are not self-executing: they are made available to individuals only by way of their states [...]”<sup>20</sup>
26. The problem of course is that empirically speaking the character, presence and nature of the state is far from uniform, and indeed, it is often changing in response to several political, institutional and socio-economic, ethno cultural challenges surrounding it.
27. Any meaningful discussion of the regulatory-enforcement challenges to human rights will have to account for the specificity of the nature of the state, because that will determine largely the precise nature of the human rights implications of plural legal orders.
28. There is in evidence a great deal of variation in terms of the arrangements within states that enable plural legal orders, some of these variations in arrangements are listed below, illustratively:
  - a) The state may choose to (like in India, Pakistan and Niger) recognise or even create institutions or authorities outside of the formal legal system to mediate and settle disputes.
  - b) The state may apply different laws, especially those that affect personal status (such as marriage, adoption, divorce etc) to different people depending on their religious identity, such as in Israel, Indonesia or Malaysia. Similarly, in many states indigenous people are subject, to varying degrees, to their own customary legal orders such as in USA, Canada, and many parts of Africa, Asia and Latin America.
  - c) The state may apply different personal status law regimes but may provide for a common civil law (such as a civil law of marriage) that may allow people to *cross-over*, such as in India.
  - d) The state may completely exempt certain legal orders from its remit, such as provisions in the Zambian, Kenyan and Zimbabwean Constitutions that exempt customary law from conformity with Constitutional standards.
  - e) The state may recognise the special status of customary legal orders but only in so far as they are not contrary to Constitutional standards, such as in South Africa.
  - f) The state may exempt certain geographical areas from its formal legal regime and recognise normative orders prevailing therein as law, such as in Native American Reserves in the USA, or areas of Special Jurisdiction in many Andean countries in Latin America, in both these regions there are some Constitutional exceptions with respect to indigenous legal orders.
  - g) Situations of conflict or transition from conflict also create situations within states of plural legal orders, such as in the Occupied Territories of Palestine, Sri Lanka, and Mozambique and Nepal.
  - h) In addition, the predatory, discriminatory, weak, ineffective and/or inaccessible nature of the state’s legal institutions, or indeed their ‘inappropriate’ form or substance may lead to the further strengthening and growth of a range of *local* legal orders. These may be entirely endogenous or indeed hybrid versions/improvisations of traditional mechanisms that communities, especially the poor and vulnerable, rely on settle disputes and conflicts. Examples include the Romani *Kris*, *jirgas*, *salishes* and *panchayats* in existence across South

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<sup>20</sup> Daniel Tubb Statelessness and Colombia: Hannah Arendt and the Failure of Human Rights, Undercurrent Volume III, No 2, 2006, p.44.

Asia, or a variety of conflict resolution systems in the large urban slums in the *favelas* of Brazil or *barrios* of Colombia.

29. A global human rights system has emerged as one of the most significant ‘normative technologies’ of governance in the past two decades. The language of human rights is being increasingly employed by states and their institutions as well as various civil society actors to frame a variety of justice and even political claims rendering it increasingly complicated to delineate the precise character of various justice claims, especially in terms of the inherent political agendas, including state patrimonialism.<sup>21</sup> In addition, states and their institutions, including the legal system, choose to interact and engage in various complex ways with justice claims made in different vocabularies. Therefore, enforcement of human rights is actually a function of several factors including the character, presence, reach, resources and the relative strengths of the different competing justice claims facing the state.
30. Discussing the development of religious law in Israel, Sezgin traces how “Ben-Gurion’s statist approach meant the primacy of concerns with defense and foreign affairs over such issues of “low politics” as family, gender, education and the minor inconveniences of Sabbath and kosher observance.”<sup>22</sup> He recalls that Ben-Gurion “explained his compromise as a question of priorities”, thus using the decentralization of the legal order to centralize and consolidate political power, a conclusion similar to that Mamdani<sup>23</sup> arrived at while analyzing the result of the political bargaining between the customary authority and the post-colonial state in Africa. Returning to Israel however, Sezgin points out that over time personal status did indeed become a matter of “high politics”, with rabbinical authorities becoming very powerful actors and leading in fact to a situation in which secular political parties can never come to power without support from the religious leadership, leaving little hope for reform of rabbinical courts, for instance. Sezgin goes on to conclude, rightly that “in comparison to minorities, majority groups are more likely to have a greater leverage and ability to maintain their legal institutions even when they are no longer efficient for government.”<sup>24</sup>
31. As Galanter and Krishnan<sup>25</sup> point out the area of personal law (in many contexts referred to as customary law) – marriage, adoption, inheritance, succession, divorce, property and land rights, and rules covering religious establishments, in particular women’s rights in all these spheres – is an area especially ripe for “ideological clashes”. These “ideological clashes”, real and apparent, coupled with tendencies in which majorities and minorities are characterized in monolithic ways, intense polarization on lines of identity and politicized evaluation of religious or culture claims can create a context in which a “secular commitment necessarily means religious or cultural inauthenticity.”<sup>26</sup> This sets the stage for compromises with the most significant adverse human rights consequences, especially for those individuals in structurally disadvantaged positions on account of gender, marital status or sexual orientation, for instance. This is an area that state and non-state actors, in fact even human rights organizations, have come to accept almost as a state of exception from “the need for globally shared legal frameworks based on cross-cultural foundations”<sup>27</sup>.

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21 Karima Bennoune, Comments at ICHRP Meeting.

22 Yüzgel Sezgin, A New Theory of Legal Pluralism: The Case of Israeli Religious Courts, Association for Israel Studies, 19th Annual Meeting, April 2003 p. 31-32.

23 Mahmoud Mamdani Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism, Princeton University Press, Princeton, 1996.

24 Sezgin 2003 p. 34.

25 Marc Galanter and Jayanth K Krishnan Personal Law and Religious Conflicts: A Comparison of India and Israel in Religion and Personal Law in Secular India: A Call to Judgment, G.J. Larsen (ed.), Indiana University Press, Bloomington and Indianapolis, 2001.

26 Bhatt Fetish of the Margins..., p. 114.

27 Bassam Tibi, Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations, Human Rights Quarterly (1994) Vol. 16, p. 285 in Galanter and Krishnan supra note no. 14.

32. These exceptions are often reflected within constitutions: dependent sovereignty and self-government in the case of Native Indians in the United States of America<sup>28</sup>, the recognition of the superiority of indigenous customary law in Kenya and Zimbabwe, and protection of minority rights in India and Singapore, just to mention a few examples. The domain of personal law is in many legal contexts assumed better left governed by distinct institutions and norms whose form and mandate is shaped by traditional, customary or religious practices and codes. This is often justified in the case of religious and/or ethnic minorities and indigenous people as integral to their human rights. Given that no legal or justice system is beyond culture, in multicultural contexts at least, there is a tension involved in terms of the extent to which a 'unitary' system actually reflects (or not) cultural plurality and is not too deeply coloured by the culture of the dominant socio-political group (which may not always be a numerical majority). And indeed the human rights framework itself provides, or at least has been interpreted as providing, a framework to argue for the right for such diversity to be recognised in law and the administration of justice.<sup>29</sup>
33. There of course a number of questions around precisely what such recognition means and entails, and in a sense this project is precisely about unpacking some of those debates. It is also important to underscore that not all ethno cultural groups have or (can) claim to have the same basis for their claims. For instance, indigenous peoples' claim to legal recognition of their customary law and institutions derives substantially from arguments about self-governance and self-determination. The same is not necessarily true of religious minorities, whose claim for recognition of say distinct personal law may rest precisely on the very basis of them being a minority. The two claims have quite distinct legal basis and socio-political and historical origins.

### **2.3. The Customary / Personal: Post-Colonial Continuity and Change**

34. Personal or customary<sup>30</sup> law is a deeply contentious legal arena; one that human rights has only recently began engaging with. This is "really a debate about the state of the state today, one that asks where power actually resides. The discourse on this topic gets mixed with arguments about current transformations of the state through the empowerment of sub-national collective entities, through transnational phenomena, and 'globalism'".<sup>31</sup>
35. The sphere of personal/customary law also represents a significant space where there often appears to be an uncritical acceptance of the need to 'balance rights',<sup>32</sup> especially those of the individuals within communities vis-à-vis the collective right of the community itself. In contexts in which individuals lack the effective choice or option of invoking a broader set of citizenship rights this often implies the granting of a margin of appreciation by the state to certain communal normative authorities to govern the 'private' lives of individuals within their own community.

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28 "While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." Cohen 334-335. It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896). The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer." U.S. Supreme Court, *DURO v. REINA*, 495 U.S. 676 (1990), 495 U.S. 676.

29 Raquel Yrigoven Fajardo, "Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries", in *Beyond Law, Informal Justice and Legal Pluralism in the Global South*, Vol. 10, Issue 27, 2004. See also Julio Faundez in World Bank 2006.

30 In many contexts this includes religious personal law.

31 Moore (2001:11) in Balchin and Warraich 2007.

32 Gita Sahgal, Comments at ICHRP Meeting.



36. Because personal and customary laws are so closely tied with collective identities, and because one of the main sites of collective identity are women's bodies<sup>33</sup> the discriminations arising in this sphere are particularly focused on women. This is largely why, for instance, laws governing *family* are most commonly left to the customary and personal. Hence, within a plural legal order a gender lens is indispensable to understand the nature of the nexus between individual rights, collective identities, and customary/personal laws.
37. It is however not true that such traditional or customary practice is always endogenous. In many parts of the world colonial powers, legal administrators in particular, significantly reshaped such practices, transplanted them into areas where they did not exist or contexts they did not address, or even created new 'traditional authorities' or even new collective identities to suit their own agendas and purposes.<sup>34</sup> Central to the colonial project was 'codifying native law' which often involved civil servants, priests, anthropologists, etc. talking to elders, ritually important persons and community leaders and chiefs seeking to *discover* or *give* law to the natives that was in line with the often highly racialized principles of justice of coloniser. As Mamdani points out most post-colonial states in Africa did not fundamentally alter the basic edifice of colonial law except in some cases to alter the basic frame from racial to ethnicity or tribal origin.<sup>35</sup> The conflation of the religious and customary presents an additional set of complications. For instance in Nigeria native law and custom has also included Muslim law.<sup>36</sup>
38. Mamdani notes how colonial (mis)readings of local cultures resulted in them often conflating ritual and political power holders and the institutionalizing of these tropes as 'customary law'.<sup>37</sup> Underlying the need for such nuanced readings of culture and in particular the role of various normative discourses/authorities within it, Anne Griffiths points to the complex internal differentiation even in communities that share cultural milieus using the example of contrasting roles of Buddhist monks amongst Tibetan communities in Ladakh, India and Amdo, China.<sup>38</sup> She points to how studies have shown that while both communities revere the monks deeply, in Ladakh they have no role to play in resolving conflicts or settling disputes. On the other hand, in Amdo, Buddhist monks do wield "ultimate judicial authority" but "such authority is not based on Buddhist morality" but monks employ local secular traditions of justice, including "revenge and compensation."<sup>39</sup>
39. The most significant colonial vestige retained almost universally across large parts of the post-colonial world is that of segregation, both statutory and institutional, in terms of race, ethnicity and location.<sup>40</sup> However, as Odinkalu observes the nature of post-colonial segregation is 'infinitely more complex' but one that affords "the dominant indigenous elites of Africa a choice in the both the forum and location of the justice process, a choice that is not available to the overwhelming majority of the continent's poor people. [...] When it suits them, they use the formal courts, the police and state paraphernalia [...] customary law could be described as one-half of a composite system of line item ethics that makes it possible, for instance, for a powerful man to implausibly accept marital equality (under civil law) and reject gender equality (pleading customary law)...".<sup>41</sup> In other words the invocation of the customary is not always a retreat into the past but may be used to legitimate certain present and future political claims.<sup>42</sup> Indeed

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33 cf Nira Yuval-Davis *Gender and Nation*, 1997.

34 See for instance Mamdani 1996.

35 Ibid.

36 Chidi Odinkalu *Poor Justice or Justice for the Poor: A Policy Framework For Reform of Customary and Informal Justice Systems in Africa*, in World Bank 2006.

37 Mamdani 1996.

38 Anne Griffiths, *Anthropological Perspectives on Governance in a Transnational World*, p.17-18. On File.

39 Ibid. p. 18.

40 See Mamdani 1996.

41 Odinkalu in World Bank 2006 p.157-158.

42 Franz von Benda-Beckmann, Comments at ICHRP Meeting.

religious and ethnic fundamentalisms and identity politics (discussed at greater length below) are also significant forces in not just the invocation but also the reshaping of the customary.

40. There is also a strong argument that suggests that the recognition of customary law in colonial and even post-colonial states is prompted by the need on the one hand to legitimize state authority and extend its penetration and on the other, to “make the legal system more “authentic”, in order to create a better fit between society and its norms.”<sup>43</sup> In other words, the state may well be seeking to enhance the power and legitimacy of its own law even while riding on the “greater popular legitimacy” of the customary.
41. Customary legal orders in effect draw their power from the deep roots they have in society and consciousness, not easily displaced, and in fact show dynamism and ability to recalibrate themselves to new contexts. In her study of the nature of changes in the customary legal orders, Drzewieniecki notes, “Indigenous law was not wiped out by Peruvian law. On the contrary, it showed a remarkable vitality, adaptability, and legitimacy. The injustice of the Peruvian legal system only served to reinforce indigenous law. Furthermore, indigenous law had a considerable influence on local level administration of justice”<sup>44</sup> Customary legal orders, are constantly though at times almost imperceptibly, mutating, a result of the frequent recalibration of social, economic, political, cultural and technological equations. In this sense, the very act of codifying the customary risks essentialising and even possible freezing of ongoing and possible future re-negotiation of many of its aspects.

### **3. UNPACKING ELEMENTS OF THE CONCEPTUAL-PHILOSOPHICAL CHALLENGE**

42. This section outlines some of the conceptual/normative challenges that human rights comes up against in the context of plural legal orders. This section addresses two very important areas in this connection; a) the challenge of facilitating translation and dialogue between the ‘global’ and the ‘local’; and b) the question of collective rights, cultural diversity and the law.
43. Questions of culture and collective rights have long been a matter of debate within the context of human rights discourse. There are contested terrains with a number of deeply entrenched and even seemingly irreconcilable positions. The idea here is not so much to summarize or let alone settle the debates as much as to call attention to certain positions and point to possible ways to looking beyond the usual binaries.

#### **3.1. ‘Global’ and the ‘Local’: The Challenge of Translation and Dialogue for Human Rights**

44. An old and well-recognised challenge to human rights is that it is essentially a product of western-liberal construction and thus in some ways alien to *other* cultures. However significant the challenges of translation, it is quite common that this dichotomy is often invoked to the advantage of specific political projects, for instance, that the *Asian* values argument was mobilised largely by many repressive governments in the region and itself involved the kind of essentialising that it was ostensibly meant to resist.<sup>45</sup> However as Abdullahi An-Na’im<sup>46</sup> concedes the problem of translation is real and recognizes that intra and cross-cultural dialogue is the way to ensure that “universal values are emphasised in a variety of different ways in

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43 Yüzel Sezgin, A New Theory of Legal Pluralism: The Case of Israeli Religious Courts, Association for Israel Studies, 19th Annual Meeting, April 2003 p. 13.

44 Joanna Drzewieniecki, Indigenous People, Law, and Politics in Peru, State University of New York at Buffalo, Prepared for delivery at the Meeting of the Latin American Studies Association, Washington, D.C., September 28-30, 1995 p. 29.

45 See for example writing by Amartya Sen, Upendra Baxi, Yash Ghai, Abdullahi An-Na’im and others.

46 Abdullahi An-Na’im Promises We Should All Keep in Is Multiculturalism Bad For Women? Susan-Muller Okin With Respondents J. Cohen, M. Howard and M. Nussbaum (eds.), Princeton, 1999.

different cultures and that they are all worthy of respect”<sup>47</sup>. In An-Na’im’s words “I rely on human rights as a shared frame of reference because the alternative would be cultural hegemony at home and imperialism abroad.”<sup>48</sup>

45. Benda-Beckmann points out that at the heart of this debate is the apparent culture human rights-tension that arises from the fact “that ‘the problem’ tends to be phrased as ‘rights in relation to culture’. The parties involved in this relationship are the ‘west’ (with its human rights) and ‘the rest’ (with its culture), which emphasizes the transnational character of the problematic. The consequence of this opposition is that little attention has been given to the fact that both human rights and culture (however it may be defined) in most parts of the world co-exist with a variety of legal forms.”<sup>49</sup>
46. No analysis of law or culture, irrespective of whether its origin is within or beyond the state, can be divorced from an analysis of power. Anne Griffiths notes that both law and culture are often “mobilized to buttress an ideological vision of the world.”<sup>50</sup> Citing the work of Laura Nader, she reminds us that law is a “terrain of political struggle” and stresses the importance of considering how “law really works in the service of power and empire.”<sup>51</sup> It is in this context that Griffiths’ invoking of Baxi’s call for legal pluralist perspectives to move beyond a ‘clash of civilizations’ framework and “engage the consequentialist claims that justify feats of state terrorism as jurisgenerative” assumes significance for this project.<sup>52</sup>
47. Sally Merry reminds us that culture is “contested, hybridized, and dynamic” and she cautions, rightly, against talking “about culture as tradition, static, old customs, and harmful” and posing human rights as “representing modernity and law, a culture-free zone”<sup>53</sup>. Such a view of culture not only forgets that “modernity is also a cultural system” but also ignores the fact that there may be “political and economic incentives to insist on a cultural interpretation of women’s subordination”<sup>54</sup>, for instance. The *misreading* of culture is also inseparable from a “commitment to a model of legal rationality”<sup>55</sup>, one that hinders both the “global spread and local appropriation of human rights concepts”.<sup>56</sup>
48. It is vital to remember, as Benda-Beckmann points out, that casting all contemporary struggles as between ‘Western human rights’ and ‘Third World cultures’ will render us blind to the conflicts between different laws and cultures *within* states. In his study of the Solomon Islands Menzies (quoting Sinclair) notes “that modern movements of significant numbers of people resulting in two (often conflicting) sets of customary laws coexisting in one place, with no traditional way of reconciling them” can create more complications than the interaction between the formal (state) and informal (customary/non-state) systems of law.<sup>57</sup>
49. “International human rights law, constitutional state law and ‘culture’ often co-exist with religious and customary laws, which may or may not share human rights and constitutional legal

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47 Joseph Raz at 19 in *Law, Justice and Rights: Some Implications of a Global Perspective* William Twining at [http://www.ucl.ac.uk/laws/academics/profiles/twining/Law\\_Justice%20Rights.pdf](http://www.ucl.ac.uk/laws/academics/profiles/twining/Law_Justice%20Rights.pdf) accessed on February 25th 2008.

48 An-Na’im 1999 p. 60.

49 Franz von Benda-Beckmann *Human Rights, Cultural Relativism and Legal Pluralism: Towards a Two-dimensional Debate* on file p. 12.

50 Anne Griffiths, *Anthropological Perspectives on Governance in a Transnational World*, p.7. On File.

51 *Ibid.* p. 6-7.

52 *Ibid.* p. 8.

53 Sally Engle Merry, *Human Rights Law and the Demonization of Culture*, *Polar: Political and Legal Anthropology Review* 26:1: 55-77. 2003 p. 27 (page no. as in original ms).

54 *Ibid.* 17.

55 *Ibid.* 30.

56 *Ibid.* 31.

57 Menzies, May 2007, p. 9-10.

values...”<sup>58</sup>, a point Benda-Beckmann illustrates well through a discussion of recent tensions within the Minangkabau people in West Sumatra, Indonesia. Their identity and culture (*kebudayaan*) are firmly rooted in the inseparable unity of their matrilineal *adat*, (their moral and legal frame) and their belief in Islam. The ‘contradictions’ between the matrilineal structures of political and social authority, property and inheritance (*adat*) and their belief in Islam, has meant that the relationship has ranged from being competing, conflicting, and compromising at different points in time. Some years ago, a Minangkabau member of the National Committee on Human Rights, living in Jakarta, raised the issue of matrilineal descent and inheritance as being contrary to human rights demands for gender equality. We are reminded, somewhat soberly, “Looking at the Minangkabau case through the ‘human rights versus culture’ lens would only show us a small portion of the problems involved. Plural legal conditions thus render tensions between culture, human rights law and other (plural) law much more multifaceted than is usually assumed, and form a problem within all legal systems.”<sup>59</sup>

50. Debates around cultures of minority/indigenous peoples have also to account for the construction of cultural tropes by dominant groups. Revisiting the debates around the Sandra Lovelace case, Banda and Chinkin show how minority/indigenous peoples’ “culture can be appropriated and manipulated to fit the shape of the dominant group and the views of the powerful, in this case male members of society”.<sup>60</sup> Canada’s Indian Act, which reduced complex processes of determining kinship to patriarchal descent, was in effect based on a dominant group’s reconstruction of a minority in its own image.<sup>61</sup>
51. A significant response to this challenge of translation is the work of human rights activists and advocates who, as Sally Merry points out, work “at various levels to negotiate between local, regional, national and global systems of meaning”, translating “the discourses and practices from the arena of international law and legal institutions to specific situations of suffering and violation.”<sup>62</sup> It is also important to stress though, as she does, that what are often referred to as the ‘global’ are in fact “often circulating locals”. And indeed that ‘global’ and ‘local’ are tropes that appear across a range of different discursive contexts and movements. Human rights activists and organizations are thus actually transforming the structural and normative character of not only state institutions but also of non-state institutions. One example, amongst innumerable, is the work of some local human rights organizations in Bangladesh that are engaged in reshaping the local *Salish*, a community based alternative dispute resolution mechanism, into a system that adheres to basic human rights standards in resolving disputes and conflicts.

### 3.1. Collective Rights, Cultural Diversity and the Law

52. The idea of group or collective rights has often been at the heart of some of the most controversial debates in human rights especially in the context of ethnic and religious minorities or indigenous peoples. Article 4 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities calls on states to “take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards”. The key question here is of course, whether and if so how and under what circumstances intra-group rights is linked to inter-group rights.

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58 Benda-Beckmann Human Rights, Cultural Relativism... p.13.

59 Ibid. p.14.

60 Fareda Banda and Christine Chinkin, Gender, Minorities and Indigenous Peoples, Minority Rights Group International, 2004, p. 25.

61 Ibid.

62 Sally E Merry Transnational Human Rights and Local Activism: Mapping the Middle American Anthropologist, Vol. 108, No.1, March 2006, p. 40.

53. Will Kymlicka<sup>63</sup> distinguishes between two kinds of group rights, the first of which are those that groups may claim against their own members ('internal restrictions') that aim to essentially circumscribe individual member's rights to move away from aspects of the group's culture, traditions, religion etc.). The second ('external protections') that groups may claim against state or society to protect their own identity and ways of life including and especially protection of economic, social, political, cultural and habitat/territorial integrity. Kymlicka argues, and rightly, that justice *within* ethnocultural groups is as important as justice *between* ethnocultural groups. In other words that evidence of injustice, say for instance on the grounds of gender or sexual orientation, within a group is reason enough to seek enforcement of more universal principles of equality within the group. He also cautions against the "liberal complacency" that can be blind towards justice claims of ethnocultural minorities just as it was, and can still be, blind to justice claims of women.
54. Fundamental also to Kymlicka's reading is the fact that all individuals within a group must have an option, of renegotiation their rights from within or even *exiting* the group. Option however does not always translate into choice,<sup>64</sup> for both having and exercising it, presumes autonomy (in several areas) and other resources that many individuals often lack. Even more so, choices, even where they are present may actually not even be defined or set by those supposed to exercise them and may involve an 'all or nothing' situation – for instance, in some indigenous communities marrying outside the tribe may imply losing access to land and other community resources. However, this may be presented, at times, on the other hand, as an argument to protect scarce natural resources.
55. According to the UN Special Rapporteur, one important reason as to why indigenous people do not enjoy effective access to justice is "non-acceptance of indigenous law and customs by the official legal institutions of a national state."<sup>65</sup> He notes that a "monist conception of national law" means that indigenous people "whose own concept of legality is ignored, suffer from legal insecurity."<sup>66</sup> Acknowledging that there are concerns regarding the extent to which customary law provides for "sufficient guarantees for the protection of universal human rights", the Special Rapporteur posits this is a "challenge to bring both approaches closer together by making them more effective in the protection of human rights – both individual and collective. Legal pluralism in States is an opportunity for allowing indigenous legal systems to function effectively as parts of or parallel to national legal systems."<sup>67</sup>
56. While it is however true that monist systems, as has been the experience in many parts of the Americas, can be structurally unjust in so far as they *totally* delegitimize or even render illegal all ideas of indigenous justice, this does not mean however that all aspects of the indigenous systems themselves guarantee access to justice or even that the meaning of justice is uncontested even within these systems.
57. A legal order's relationship to cultural diversity is a difficult question. Discussing the case of Australia, McNamara notes that "that the full implications of cultural diversity for law and legal institutions in 'post-colonial' polyethnic countries [...] have not been adequately articulated or taken seriously [...]."<sup>68</sup> He argues that while at one end of the spectrum 'mainstream' 'core values' are seen as "outside the reach of multiculturalism" at the other end it is presumed that

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63 Will Kymlicka, *Liberal Complacencies in Is Multiculturalism Bad For Women?* Susan-Muller Okin With Respondents J. Cohen, M. Howard and M. Nussbaum (eds.), Princeton, 1999.

64 Lynn Welchman, Comments at ICHRP Meeting.

65 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to Guatemala, UN Doc.E/CN.4/2004/80, p. 2.

66 Ibid. para 54.

67 Ibid. para 68.

68 L. McNamara, 'Equality Before the Law' in *Polyethnic Societies: The Construction of Normative Criminal Law Standards*, Faculty of Law, Faculty of Law – Papers, University of Wollongong Year 2006, p. 3.

law's "location *within* culture, mean that 'mainstream' legal standards and norms will incrementally, but inevitably, be transformed in response to the influences of cultural difference".<sup>69</sup> Hence many questions remain largely unaddressed; "Is the legal system sensitive to cultural diversity? Should it be? Should the law *reflect* cultural diversity? Does it? Should the law expressly protect distinctive and differentiated cultural rights?"<sup>70</sup> McNamara highlights the tensions present on this score within the Australian judiciary on this point. He cites the observation of McHugh J, of the High Court of Australia, that "Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of this minorities."<sup>71</sup> The remaining six judges however rejected the idea that an accused person's identity (in this case ethnicity) should (re)shape the "objective standard which is at the heart of the criminal law defence of provocation".<sup>72</sup>

58. A fundamental issue with respect to law's recognition of cultural diversity is the question of *reading* and *fixing* an individual's identity. This brings to the fore the importance of employing an intersectional lens to study cultural-identity itself. "[R]ace, gender, class and other forms of discrimination or subordination are the roads that structure the social, economic or political terrain. It is through these thoroughfares that the dynamics of disempowerment travel. These roads [...] cross over and overlap, forming complex intersections."<sup>73</sup> In addition, these intersections are "dangerous places for women who must negotiate the constant "traffic" through them "to avoid injury and to obtain resources for the normal activities of life".<sup>74</sup> The Special Rapporteur recognizes, for instance that indigenous women in Guatemala experience three levels of discrimination: as women, as indigenous and as poor people.<sup>75</sup> It is also important to recognize however that identities not only intersect but are also mutually constitutive, in other words the experience of identity occurs in a sense both in a differentiated *and* situated manner simultaneously.<sup>76</sup>
59. A 'situated analysis of rights' accounts for individual and group rights in the context of "people's own experience of these concerns and interests as overlapping and intertwined, sometimes in harmony and sometimes in tension."<sup>77</sup> Using the example of *dalit* women in India Celestine Nyamu-Musembi reminds us that "when status as a member of a particular group is so central to how one is defined and treated in a particular social context, it leaves little room to speak of such an individual's rights without addressing the broader issue of the group's status as a rights-holding community. Adopting the perspective of people situated within the reality of this complex web of relationships regulated primarily by social norms changes not only the way we think about human rights, but the way we "do" human rights."<sup>78</sup>
60. Deepening an analysis of situatedness, drawing on the work of Webber, in her work on Aboriginal titles to land Gover suggests adopting a relational perspective to this question.<sup>79</sup> An approach

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69 Ibid. 4.

70 Ibid. 2.

71 Masciantonio v R (1995) 183 CLR 58 at 74 in McNamara p. 5.

72 McNamara p. 6. He also notes that in *Walker v NSW* the Court held that "A construction which results in different criminal sanctions applying to different persons for the same conduct offends" the basic principle of equality before the law.

73 Crenshaw in 73 *Fareda Banda and Christine Chinkin, Gender, Minorities and Indigenous Peoples*, Minority Rights Group International, 2004, p. 11.

74 Ibid. p. 11.

75 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to Guatemala, UN Doc.E/CN.4/2003/90/Add.2, para 79.

76 Cf Anthias and Yuval-Davis.

77 Celestine Nyamu-Musembi, *Towards an Actor Oriented Perspective on Human Rights*, IDS Working Paper 169, 2002, p.8.

78 Ibid. p.8.

79 K Gover. *Legal Pluralism and Legitimacy in Multicultural New Zealand Draft* January 28, 2007. On file.

that seeks to bridge the gap between the communitarian and libertarian views by avoiding the need to choose either the group or the individual as primary but focus instead on the relationship between the two. A focus on the relational would also lead us to a more deliberative reply to the problem of “conflating institutionalized forms of collective public identities with the concept of culture”.<sup>80</sup>

#### 4. THE WIDER POLITICAL CONTEXT: TWO KEY DIMENSIONS

61. Any discussion of culture, law, state and human rights today cannot be divorced from a wider political context. There are many dimensions of the political context, which have already been captured in the discussions above. This section discusses two aspects of the context that deserve particular attention. These are the interventions of powerful international actors in the area of justice reform initiatives and secondly, the politics of religious fundamentalism and the so-called ‘war-on-terror’.

##### 4.1. Justice Reform Initiatives

62. The recent years have witnessed an increasing interest of supra local or global actors such as international development institutions and donors in furthering the translation of human rights norms specifically through reshaping justice systems both within and beyond the state. The World Bank’s World Development Report 2006 identifies as a priority “articulating potentially new entry points for the constituent role of state and non-state justice systems in creating (and thus breaking) “legal” inequality traps”.<sup>81</sup> This arises in part from an understanding that “most previous approaches to judicial reform in developing countries have not yielded hoped for results”. In part, this also emerges from understanding legal reform and ‘legal empowerment’ as being integral to development as a whole<sup>82</sup>.
63. This has also been driven by an acknowledgement of the fact that justice outcomes are inextricably tied to the extent to which the justice system is socio-legally rooted. As Vivek Maru points out “the successful provision of justice services requires serious engagement with the social and legal particularities of a given context. Indeed, an earlier generation of efforts to provide justice services in the “third world” failed because of an unwillingness to heed sociolegal specificity.”<sup>83</sup>
64. The interest in legal reform, especially in ‘non-state justice systems’ (to use a DFID label) such as traditional or customary institutions, alternative dispute resolutions, and/or NGO pioneered hybrid versions needs careful attention not only because of the potential to improve access to justice and expand the rights protection regime but also because of the deeper political questions involved. Franz von Benda-Beckmann traces this trend to the changing understanding of institutions like the World Bank on the role of law in economic growth, in particular an efficient judiciary, and the protection of property rights, and later “good governance”, as central to economic growth.<sup>84</sup> Indeed questions abound about whether the new interest in “local justice” emerges from a concern to unburden and render the judiciary more efficient, in an economic

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80 Benhabib 2002 in Gover 2008.

81 Caroline Sage and Michael Woolcock, Introduction: Rules Systems And The Development Process, World Bank Legal Review: Law, Equity and Development, Vol. 2, The World Bank/Martinus Nijhoff Publishers, Washington DC, 2006, p. 5.

82 Stephen Golub Legal Empowerment: Impact and Implications for the Development Community and the World Bank in World Bank 2006.

83 Vivek Maru, Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide, Yale Journal of International Law, Vol. 31, 427-476, 2006, p. 429.

84 Franz von Benda-Beckmann The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice in World Bank 2006, p. 54.

sense, and even perhaps privatize aspects of it rather than expand access to justice in the substantial sense.<sup>85</sup> From their study of such state-sponsored attempts in India, Galanter and Krishnan suggest there is a clear danger of creating parallel systems of justice, one for the poor and another for the rich.<sup>86</sup> At another level questions also arise regarding the knowledge and understanding based on which such initiatives are planned and exported/imported, especially given the short project cycles and limited resources available for researching the context which are critical to the achieving meaningful justice outcomes.<sup>87</sup>

65. Post-conflict situations are a significant context for interventions related to justice reforms. A post-conflict situation presents in many ways not just an opportunity but in many cases a real need for developing a new social contract.<sup>88</sup>
66. Menzies stresses that “A sustainable post-conflict transition, however, requires a recognition of societal and legal pluralism and a reflection of customary diversity in the governance mechanisms...”<sup>89</sup> This is however extremely complicated in the context of a situation in which there is on the one hand, a) the continued presence of subterranean violence – one that manifests itself in diverse forms in everyday instances – and, b) significant damage to social infrastructure<sup>90</sup>; and on the other, several competing justice claims as well as the wider need for reconciliation.
67. Making a critical assessment of the large scale support for ‘legal decentralization’ and ‘multicultural justice’ by donors in post-conflict Guatemala, Sieder stresses the importance of addressing concerns around institutionalized violence, structural imbalances of power, and poverty, if such efforts are in fact not to have an adverse impact.<sup>91</sup> She notes that “donor-promoted trends towards legal decentralization can have perverse effects in environments dominated by the ‘(un)rule of law’ (O’Donnell 1999). More broadly, they reinforce the more general features and effects of the neo-liberal state: the privatization of state functions, increased inequality, and a reduced institutional capacity to intervene in society to address those inequalities”.<sup>92</sup>
68. Sieder’s warning is especially pertinent, given the fact that situations of conflict often tend to profoundly alter the socio-cultural and economic landscape of communities. This can create post-conflict ruptures and uncertainties creating a situation in which the customary may be inadequate and the statutory (formal) not effectively present. Susana Lastarria-Cornhiel describes, for example, how in a post-conflict situation women’s land rights may be adversely affected because powerful “social actors may create ad hoc informal tenure systems with their

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85 Sara Hossain, Comments at ICHRP meeting on Legal Pluralism and Human Rights, Geneva, 22nd /23rd Feb. 2008.

86 Marc Galanter and Jayanth K Krishnan, Bread for the Poor: Access to Justice for the Needy in India, Hastings Law Journal, Vol55: 789, March 2004.

87 Anne Griffiths, Comments at ICHRP Meeting.

88 Ingrid Massage, Comments at ICHRP Meeting.

89 Nicholas Menzies, Legal Pluralism and Post-Conflict Transition in the Solomon Islands, Hertis School of Governance, Berlin, p.8 and 9, May 2007 available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/LegalPluralismandthePostConflictTransitionintheSolomonIslands.pdf> accessed on 29th February 2008

90 Vivek Maru, 2006.

91 Rachel Sieder, Legal Globalization and Human Rights: Constructing the ‘Rule of Law’ in Post-Conflict Guatemala, available at [http://www.usa.es/~dpublico/areacp/Doctorado0304/Seminario\\_Investigacion03/Sieder04.PDF](http://www.usa.es/~dpublico/areacp/Doctorado0304/Seminario_Investigacion03/Sieder04.PDF) accessed on 29th February 2008

92 Ibid. p. 21.



own rules, authorities, and institutions.”<sup>93</sup> Similarly the ICJ notes with concern that post-conflict mediation discourses in Nepal may not necessarily advance the cause of human rights.<sup>94</sup>

#### 4.2. Evaluating Culture and Identity Claims in the Context of Fundamentalisms

69. An entirely different challenge with respect to translation and the language of human rights comes from the spread of religious fundamentalist movements and state responses to them within the context of the ‘war on terror’. Sahgal characterizes these movements as “*modern, frequently global, political* movements, which [...] while insisting on ‘purity’ and ‘authenticity’ have little relation to traditional religious formations (which may be patriarchal and oppressive but are not necessarily fundamentalist).”<sup>95</sup>
70. It is becoming increasingly common to use the language of human rights to mobilize discourses of what appear to be, for instance, minority human rights but are in effect regressive communitarian positions. As Bhatt points out, “One of the most remarkable mystifications engendered by communitarian-culturalist discourse is the concealment of political interests, groups and parties....through discourses of authenticity, discrimination and victimhood that normalize and habituate what are otherwise quite mendacious political ambitions.”<sup>96</sup>
71. The “rush to *finding and recognizing* the ‘authentic’”,<sup>97</sup> a project that characterized much of colonialism, poses significant challenges for human rights. For instance, it is common for governments and even courts today to consult ‘experts’ such as religious scholars, community ‘leaders’ and elders, and academics to ascertain the *true* interpretation of certain customary or religious codes, or the precise nature and meaning of certain practises. A moot point here is that this consultation often involves the privileging of only *certain* scholars and leaders, those who claim to ‘speak for’ and who match the state’s interpretation of a legitimate representative.
72. This becomes especially significant in the context of the fact that the states’ “ethical-political evaluation of cultural identity claims”<sup>98</sup> is intricately connected to diverse political aims, including among other things the garnering of minority support – in particular Muslim minority support for the ‘war-on-terror’. An important element in this bargaining has involved moves to making concessions with respect to family/personal law, almost as if to offset the fact that the full force of criminal (and especially anti-terrorist and immigration) law disproportionately targets the very same minorities.
73. Last but not the least; it is also important to recognize that new discourses of ‘community’ being authored by fundamentalist movements are actually drawing new and, unsurprisingly, gendered boundaries around individuals and communities alike. As Sahgal points out “The politics of bodily purity are enforced through setting rigid boundaries of community through the enforcement of dress codes, restrictions on freedom of movement and control of the sexual and reproductive rights of women –and of men too.”<sup>99</sup>

#### 5. METHODOLOGY

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93 Susana Lastarria-Cornhiel, Gender and Property Rights Within Post-Conflict Situations, Issue Paper No. 12, April 2005, USAID, p. 9.

94 International Commission of Jurists Nepal: Justice in Transition, Geneva, February 2008.

95 Gita Sahgal, Purity or Danger? Human Rights and their engagement with Fundamentalisms, Women Against Fundamentalisms. On File, p. 2.

96 Chetan Bhatt The Fetish of the Margins: Religious Absolutism, Anti-Racism and Postcolonial Silence, New Formations, 2006, p. 102.

97 Karima Bennoune, Comments at ICHRP Meeting.

98 Bhatt Fetish of the Margins..., p. 103.

99 Sahgal, Purity or Danger, p. 3

74. The primary outcome of the project will be a final report that drawing on the issues and the context above and the two lines of enquiry (conceptual-philosophical and regulatory-enforcement outlined above).

## 5.1. Methodology

75. As indicated above the project takes as its starting point two problems or challenges, the conceptual-philosophical and the regulatory-enforcement. The project will follow these two lines of enquiry during the research and will employ the following **four crosscutting perspectives** across both lines of enquiry:
- a) **Policy** (including state policy legislative action). **Key question:** What is and what should be the state's role, when plurality is a powerful social and political force? What assumptions and understandings (implicit and explicit) underpin public policy, legislative functions and the administration of justice, with regard to plural legal orders and their utility? A related question concerns the reasons why states and donor agencies engage with and strengthen plural legal orders in general, and often non-state legal systems in particular? How do states negotiate the relationship between them and various demands for plurality (ranging from close accommodation to deep hostility)? How do the above assumptions and relationships promote or obstruct the ability of individuals to make choices?
  - b) **Access to justice.** Access to justice – fair, non-discriminatory and conforming to certain universal standards – is a basic human right. Are plural legal orders a part of the problem? If they are, in what contexts and how? Alternatively, are plural legal orders part of the solution? In the context of plural legal orders, how are the main elements of a sound justice system guaranteed? What human rights standards are relevant? These might include: standards for defining just process and outcomes; predictability and clarity; accountability; transparency; the competence of key personnel; enforcement of decisions; issues of accessibility and inclusiveness; cost and affordability; the relations between different systems within a plural legal order.
  - c) **Gender.** Concerns around women's human rights have rightly been at the heart of some of the most contentious debates about plural legal orders. Given the inter-sectional nature of gender discrimination, are existing human rights standards on equality and non-discrimination adequate to challenge gender discrimination in the context of plural legal orders?
  - d) **Indigenous and minority group rights.** This essentially involves demands for greater juridical autonomy, or cultural diversity in law, by ethno-cultural groups, especially indigenous people and religious minorities, in the context of plural legal orders and the administration of justice. Several questions arise in this context. How are such demands to be recognized and understood – for example, in terms of *who* makes them and *what* is demanded? What specific justice claims (in terms of human rights) does the demand for plurality seek to resolve? How are human rights standards relevant to questions such as: why and how are culture claims privileged? Who is entitled to speak on behalf of a culture? How are the rights of individuals (especially individuals who are structurally disadvantaged, such as women) to be assessed and protected within groups that claim distinct legal treatment because of their 'difference'?

## 5.2. Approaching the Research

76. The project requires a multi-disciplinary approach drawing on anthropology, sociology, human rights theory and law, critical legal studies, political and moral philosophy and cultural studies. In addition, it will benefit greatly from the experiences of individuals who are engaged in legal and

institutional reform – notably to protect the rights of indigenous people, religious minorities and women – in a range of societies.

77. The Council recognises that a considerable amount of academic and non-academic research and expertise is relevant to this project. The Council proposes to essentially draw on this ethnographic knowledge and experience rather than conduct new primary research itself.

### 5.3. Key Stages in the Research Process

- a) **First Expert Consultation.** In preparation for the launch of the project in February 2008 the Council convened a two day consultation of human rights experts, academics, lawyers and other civil society experts. The primary aim was to explore substantive and methodological issues and concerns that the project needs to address. The participants commented on an initial proposal for the research and suggested conceptual and methodological directions for the project.
- b) **Preparation and Circulation of Approach Paper.** Following the consultation, an approach paper was prepared. It surveys the field and essential questions and highlights key lines of enquiry and methodology. The approach paper was drafted in April 2008 and has been shared with the participants of the first expert consultation and a number of other experts around the world. Comments continue to be received.
- c) **Preparation of an Exploratory Report.** On the basis of the approach paper and consultation around it, a draft report will be prepared. This will clarify and elaborate the lines of enquiry and deepen exploration of the issue, based on the comments on the approach paper and a wider body of academic and non-academic work and experience. This stage will last from June to September 2008.
- d) **Two Research Workshops.** The exploratory report will be reviewed and discussed at two research workshops. The first will focus on discussing the exploratory report as a whole, while the second will focus on bringing together those engaged in human rights advocacy around legal reforms in plural legal contexts. Short papers may be commissioned for both workshops. These workshops will both take place in October 2008.
- e) **Preparation of Draft Final Report and Further Review.** After the workshops, a final report will be drafted and submitted in December 2008. The draft will be sent out for review and comment to a select group of reviewers in addition to all those consulted on the project. The report will be finalised, taking into account the comments and suggestions received.

### 5.4. Contextualizing the research

78. In addition to preparing the approach paper, the project will contextualize the questions it addresses by examining a number of cases, described in existing documentation and research. Some of these contexts include:
- a) Personal law regimes in multiethnic and multi-religious states, in cases where the state has a declared religious orientation and in cases where it does not: Israel, Malaysia, Egypt, Indonesia, Nigeria, India, UK, Lebanon.
  - b) Indigenous (customary) law regimes in:
    - i) Multiethnic settler-colony nation-states: such as Australia, USA, Canada.

- ii) Contexts in which the indigenous (customary) legal order has special status (*Special Jurisdiction* in many Latin American countries; Zambia; Kenya).
  - c) Contexts in which customary/non-state legal mechanisms are being reformed or reconfigured by state or civil society organizations, especially with support from international development agencies: for example, local council courts in Uganda, *Salishes* in Bangladesh, *Justices of the Peace* in Peru.
  - d) Contexts in which the state is weak or fragile following conflict or emergence from conflict, such as Nepal, Palestine/The Occupied Territories, and Sierra Leone.
79. In addition, the two research workshops will help the project to contextualise the research. Both will involve a group of around 15 experts in addition to members of the research team. The **first workshop** will critically review and reflect on the exploratory report. Participants will be invited to make brief review presentations on different sections of the report, enabling all aspects of the report to be considered carefully.
80. The **second workshop** will have two purposes. In addition to inviting participants to comment on the exploratory report, it will share, review and reflect on experiences of human rights advocacy that addresses legal or judicial reform in plural legal contexts. Participants will be invited to prepare and present short papers that taken together will address the four cross-cutting perspectives outlined in 4.3 above, namely access to justice; policy; gender; and indigenous and minority group rights. The presentations and discussions will provide additional material on the basis which specific and informed recommendations can be made to a range of human rights actors, who are the main audience of the project.