

# Human Rights Encounter Legal Pluralism

Normative and Empirical Approaches

Edited by  
Giselle Corradi, Eva Brems and Mark Goodale

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# 1

## *Introduction*

### Human Rights and Legal Pluralism: Four Research Agendas

GISELLE CORRADI<sup>1</sup>

OVER THE PAST two decades, scholarly endeavours to understand social and cultural diversity in relation to human rights have shifted from concerns over universalism and relativism towards the analysis of how human rights operate in different contexts, and with which effects. A number of reasons explain this. In the first place, one could say that the sharpest edges of the so-called ‘universality debate’ have been polished. On the one hand, human rights scholars have advanced critical approaches to universality (An-Na’im 1995; Bell et al 2001; Brems 2001; Donnelly 2007, 1984). Rather than a priori given, the universal legitimacy of human rights may be constructed a posteriori. Since human rights standards are flexible and evolve, they can become responsive to diverse realities. For example, existing rights may acquire novel interpretations and new rights may be endorsed (Brems 2001). On the other hand, anthropologists have dismissed reified conceptions of culture that portray it as static, consensual and self-contained (Cowen et al 2001; Merry 1998, 2003; Preis 1996; Wilson 1997). Both material and immaterial aspects of culture, such as practices, habits, symbols and systems of meaning, have been shown to be reproduced, modified, acquired and rejected within histories of contact and exchange, embedded in relationships of unequal power.<sup>2</sup> Current anthropological understandings of culture recognise its structuring and agentic dimensions, while underscoring its changing, contested and porous character. This dynamic view of culture and human rights has recast the ‘universality debate’.

<sup>1</sup> I wish to thank Eva Brems and Mark Goodale for their valuable comments on previous versions of this introduction.

<sup>2</sup> See eg Comaroff and Comaroff (1991), Garcia Canclini (1990), Rosaldo (1989).

Although it is possible that tension exists between aspects of cultural traditions and certain standards, or even the entire idea of (human) rights, this perspective allows us to focus on diachronic processes of co-constitution and change (Merry 1997, 2003, 2010). In addition, a number of scholars have reflected on how areas of tension could be resolved. They propose intercultural dialogues as means to redefine culture and human rights, and consider how epistemological bias and power differentials across and within social groups interplay with these undertakings (An-Na'im 1995; Eberhard 2002; Santos De Sousa 2002).

But next to these theoretical advancements, an empirical reality has prompted scholars to reorient their lines of enquiry. By the late 1990s, it was clear that human rights had become a global language for the articulation of a wide range of social struggles the world over. This inspired a wave of studies of the 'social life' of human rights (Cowan et al 2001; Englund 2006; Goodale 2009; Goodale and Merry 2007; Merry 2006a; Speed 2007; Wilson 1997; Wilson and Mitchell 2003). By inspecting the ways in which human rights become platforms for action, these detailed, often ethnographic, accounts of how human rights are mobilised in specific situations demonstrate that a broad spectrum of actors linked through trans-local networks are involved in the sociocultural production of human rights (Goodale 2007). From this viewpoint, UN monitoring bodies and human rights courts produce human rights discourses and practices as much as peasant intellectuals and the team members of development projects debating human rights in rural villages. These studies show that the meanings attached to human rights vary and do not necessarily correspond with the letter of the law. For example, Goldstein has identified discourses on the human right to security in Bolivia that are violent and at odds with international law (Goldstein 2007). In other words, which sources inform these multi-vocal and multi-sited human rights discourses and practices, and which role human rights law plays therein, are matters of empirical investigation. In this context, the extent to which this pluralising human rights landscape enables or constrains processes of emancipation remains a central question.<sup>3</sup>

In this volume, we interrogate how human rights law and practice acquire meaning in contexts of legal pluralism, and influence interactions that are subject to regulation by more than one normative regime.<sup>4</sup> Legal pluralism refers to the coexistence of more than one legal order in a particular field of social relations (Griffiths 1986; Merry 1988; Von Benda-Beckmann

<sup>3</sup> For example, Englund documents how a narrow approach to human rights in terms of freedom impedes the struggle against poverty and injustice in Malawi (Englund 2006). In the area of gender, see Henquinet in this volume.

<sup>4</sup> Theoretically, this interrogation rests on what Eckert et al have called 'the two sides of the sociality of law', ie law's formative impact of the social, and its very constitution in the social (Eckert et al 2012: 1).

2002; Woodman 1998).<sup>5</sup> The concept denotes a plurality of laws and/or mechanisms for processing disputes stemming from different sources of legitimation, such as the state, religion or custom, which operate within a same sociopolitical, temporal and geographical space.<sup>6</sup> In the Global South, legal pluralism is often officially endorsed by state policies, and is mainly, although not exclusively, linked to customary and religious legal orders operating alongside the legal institutions inherited from former colonial powers (Merry 1988).<sup>7</sup> In the Global North, it is mostly unofficial and relates to the coexistence of state and non-state forms of ordering, increasingly prevalent due to migration and intensified transnational relations (Hellum et al 2011; Von Benda-Beckmann et al 2005). As a result, legal pluralism constitutes an important element of the contexts in which human rights operate. Moreover, a legal pluralist perspective on the polycentric production and implementation of human rights law sheds light on how different users of human rights law relate to its many layers.<sup>8</sup>

As in the case of human rights, legal pluralism also has a ‘legal’ and a ‘social’ face, or what we would call normative and empirical dimensions. At the normative level, legal pluralism constitutes a policy field embodied in legislation and case law stipulating how the coexistence of different legal orders should function. These policy frameworks may deal with the status of different legal orders or elements thereof, and their interfaces. For example, they may mandate, make optional or prohibit that customary, religious or state laws are applied in certain domains. They may also regulate the judicial competence of different authorities and the possibility to appeal from one jurisdiction to another (Connolly 2005; Forsyth 2007; Morse and Woodman 1987). When policies take a ‘positive’ stance towards legal pluralism, ie non-state legal orders are not criminalised or ignored, they may dictate that state courts apply non-state laws, that non-state disputing forums are integrated into the state court hierarchy, or that non-state laws and disputing mechanisms are applicable but remain autonomous from the state judiciary. The latter may entail or not that the decisions of these forums can be enforced by recourse to state mechanisms of coercion.

Empirically, or as a social phenomenon, legal pluralism denotes the de facto ways in which a multiplicity of legal orders operate and articulate with

<sup>5</sup> We are not concerned with making a contribution to theoretical debates about which social phenomena should be labelled ‘law’ (see eg Tamanaha 1993, 2000). Our interest lies in understanding the variety of norms and disputing institutions that characterise the contexts in which human rights operate. Therefore, throughout the volume, the terms ‘law’ or ‘legal’ and ‘norm’ or ‘normative’ are used interchangeably.

<sup>6</sup> There may be no equivalence between these two realms. For example, in many countries of sub-Saharan Africa, state courts may handle cases according to customary law, and chiefs may combine custom and state law when processing disputes.

<sup>7</sup> For example, see Weilenmann (2009) on ‘project law’ produced by development agencies.

<sup>8</sup> See, for example, the contributions of Brems and Desmet in this volume.

each other in a given space. This may be more or less influenced by policies on legal pluralism. Classical empirical studies of legal pluralism reveal the co-constitutive dynamics among coexisting forms of ordering (Galanter 1981; Merry 1988; Moore 1973; Von Benda-Beckmann 1981). In her influential article, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’, Moore introduced the notion that social fields have rule-making capacities and the means to induce or coerce compliance, while they are also part of a larger social matrix that invades and affects their operation (Moore 1973). In other words, the regulation of social fields results from intended and unintended intersections amongst normative orders. The concept ‘inter-legality’ mirrors this idea from an actor perspective (Santos De Sousa, 2002). Since the life of most people takes place at the crossroads of multiple regulatory regimes, ‘a mixture and interpenetration of elements from different legal orders arises both in our minds and in our actions. Consequently, social practice is a constant bridging between legal orders’ (Santos 2002: 437). However, in some cases, different legal orders sanction forms of subjectivity that are difficult to reconcile. Merry employs the term ‘double consciousness’ regarding situations in which people move in between normative frameworks that produce disparate understandings of the self (Merry 2006a: 179–217).<sup>9</sup> Processes of exposure to and mobilisation of multiple registers of law affect the legal consciousness of individuals in unpredictable ways.<sup>10</sup> In turn, this may lead to the emergency of new ‘hybrid’ legal institutions, entrench ‘old ways’ or produce changes in existing legal orders (Eckert et al 2012; Merry 2010). Studies of legal pluralism as a social phenomenon seek to capture these dynamics.

In this collection of essays, we explore how the legal and social dimensions of legal pluralism interplay with the legal and social life of human rights. Consequently, the relationship between human rights and legal pluralism is investigated at four levels of analysis: normative legal pluralism and human rights law, human rights law and empirical legal pluralism, empirical legal pluralism and human rights practice, and human rights practice and normative legal pluralism. By distinguishing these sub-fields, we hope to contribute to the development of a fertile ground for enriched exchange across disciplinary boundaries. Misunderstandings, particularly between legal and social science scholars, may easily stem from implicit differences in the use of the concepts ‘human rights’ and ‘legal pluralism’. For example, social scientists may question the usefulness of debating whether legal pluralism

<sup>9</sup> For example, being a rights-bearing subject that is assertive in denouncing gender violence is incompatible with being ‘a good wife’ who accepts this violence as a natural, regrettable fact of life (Merry 2006: 186).

<sup>10</sup> Legal consciousness refers to the ways in which people use and understand the law, which is closely connected to their experiences with it (Merry 1990: 5).

is ‘good’ or ‘bad’, since it is a fact. This may preclude a discussion on how different policies on legal pluralism affect human rights. Furthermore, this fourfold framework allows us to situate existing knowledge and the insights that emerge from the contributions in this volume within more specific, and sometimes quite disparate, research agendas. At the same time, we acknowledge the need to understand the connections between empirical and normative theory, and build bridges between the multiple scholarly projects that are conducted under the umbrella of ‘human rights and legal pluralism’. The present volume reflects our commitment to generating such encounters.

### 1. NORMATIVE LEGAL PLURALISM AND HUMAN RIGHTS LAW

Studying the relationship between policies on legal pluralism and human rights law entails two sets of questions. On the one hand, how should states respond to legal pluralism according to human rights law? Does human rights law recognise a right to ‘one’s own law’? Are there particular policies on legal pluralism that are prohibited, permitted or mandatory according to international standards? And on the other hand, how should states respond to legal pluralism in order to protect human rights? Which specific legislation and case law enable or constrain this protection? Reflections on the second set of questions have sometimes crystallised in the adoption of international standards, and international standards or their interpretation may be subject to criticism and debate, so both levels of enquiry are connected. As demonstrated by Brems in chapter 2, human rights law is not that coherent when it comes to legal pluralism. And although it contains some guidance on the treatment of legal pluralism, it also presents many gaps (ICHRP 2009; Quane 2013).

At present, the status of ‘the right to legal pluralism’ in human rights law is ambivalent. While there is no universal right to ‘one’s own law’, in some cases legal pluralism is mandatory, in others it is permissible, and yet in others it is prohibited (Brems in this volume; Megret 2012; Quane 2013). In the second chapter of this volume, Brems demonstrates that when looking at human rights law from an integrated perspective, this state of affairs is problematic. It means that states may find themselves in a double bind. One branch of human rights law, ie the regime governing the rights of indigenous peoples, makes the recognition of legal pluralism mandatory, whereas another branch of human rights law, ie the case law of the European Court of Human Rights, forbids it as a violation of human rights. Since both duties may apply to the same state simultaneously, this inconsistency is untenable.

In this context, a fundamental question is why adopting a policy of endorsement of legal pluralism would be desirable or undesirable from the perspective of human rights. This interrogation is part of more general debates about how states should respond to legal diversity as an aspect

of cultural diversity, and promote social cohesion in multicultural societies (Megret 2012). In this regard, two issues are of concern. First, that the imposition of a unitary system of law may not be neutral, but reflect the particular viewpoint of hegemonic groups to the exclusion of those that are marginalised. And second, that granting official status to legal orders associated with marginalised groups could entrench power inequalities within those groups, resulting in the exclusion of minorities within the minority. In other words, the adoption of policies that endorse legal pluralism may advance the collective rights of minorities, but may also entail the risk of violating the individual rights of their members. Some scholars have suggested that we look beyond this frame of reasoning, and consider instead whether the recognition of multiple legal orders may be beneficial for society at large (Ardito 1997; Megret 2012). In other words, in multicultural settings, the endorsement of legal pluralism not only concerns minorities, but raises questions on how to capitalise on diversity and strengthen democracy in general (ibid).

The conclusions of Gómez Isa and Corradi in chapters 4 and 6 resonate with this view. These chapters show how the interpretation of human rights may be enriched by the inclusion of voices that have been largely excluded from the definition of these standards. Gómez Isa illustrates how indigenous relationships with a territory have become the platform for a renewed interpretation of the right to property under the Inter-American system for the protection of human rights. In recognition of indigenous legal orders, the Inter-American Court of Human Rights extended the scope of this right to protect not only individual, but also collective property. Considering the socioeconomic realities of Latin America, it is not unthinkable that this broader interpretation of the right to property may not only benefit indigenous peoples, but also other groups with collective claims to land.<sup>11</sup> Similarly, Corradi's analysis of how the right to a fair trial may be interpreted cross-culturally suggests that areas of tension between indigenous procedural norms and mainstream interpretations of this right may open windows of opportunity for exchange and collaboration between state and indigenous authorities, which may strengthen both indigenous and state legal orders.

At the same time, the human rights implications of policies that endorse legal pluralism depend on the concrete substance of these policies. For example, how is the enjoyment of human rights affected by different normative orders and disputing forums being declared mandatory or optional

<sup>11</sup> For the moment, the case law of the Inter-American Court relies on culture and identity as the basis for this recognition, eg *Sawhoyamaxa Indigenous Community v Paraguay* (2006), *Kichwa Indigenous People of Sarayaku v Ecuador* (2012), *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (2014). However, there is no reason to assume that culture and identity should be the only grounds to protect collective property.

for different persons in different fields? Human rights law does not contain ultimate answers to these questions. According to the UN Human Rights Committee, when states recognise the judicial functions of customary or religious courts they need to ensure that these courts cannot hand down binding judgments unless the proceedings are limited to minor civil and criminal matters, meet the basic requirements of fair trial, ensure equal treatment, are validated by the state in the light of human rights and can be challenged in a state court.<sup>12</sup> But apart from these guidelines, states can decide according to their discretion. This is not wholly surprising. After all, the human rights effects of particular policies on legal pluralism are difficult to evaluate in the abstract. This means that these questions remain contested and their answers highly contingent upon empirical realities (ICHRP 2009: 92). Sieder and McNeish note the importance of looking at the legacies of different colonial and postcolonial histories, and how these shaped current constellations of power and governance (Sieder and McNeish 2013: 4–7). In regions such as Latin America, where indigenous forms of justice were either criminalised or ignored by the postcolonial state, the recent adoption of policies that give official status to indigenous law is celebrated as the result of a long struggle for emancipation. By contrast, in most of sub-Saharan Africa, colonial and postcolonial policies on legal pluralism sought to co-opt customary law institutions as instruments of domination. Therefore, the official status of customary legal orders may not convey progressive connotations, and is often met with suspicion (*ibid*). Bearing this in mind, a crucial issue is the extent to which policies endorsing legal pluralism foresee mechanisms of downwards accountability that keep the power of legal institutions in check (Nyamu-Musembi 2000; ICHR 2009).

In this respect, human rights law does demand that states ensure that international standards apply to official non-state legal orders.<sup>13</sup> This is the case in several postcolonial countries, where customary legal orders are recognised by the state, except for when they breach human rights. For example, in the famous case *Bhe v Magistrate Khayelitsha*, the South African Constitutional Court ruled that the customary law rule of male primogeniture could not be endorsed because it was incompatible with the rights to equality and dignity enshrined in the Bill of Rights.<sup>14</sup> In contrast, in Sierra Leone and Lesotho, customary laws are officially applicable but exempted from the constitutional prohibition of discrimination on the basis of gender. This results in the legalisation of discrimination against women who fall under the jurisdiction of customary law (Odinkalu 2006: 155; Nyamu-Musembi 2000). In addition, human rights soft law recommends that states

<sup>12</sup> Human Rights Committee, General Comment on the Right to Equality before the Courts and Tribunals and to a Fair Trial, UN Doc CCPR/C/GC/32 (2007).

<sup>13</sup> See Quane (2013) for an extensive discussion of this duty.

<sup>14</sup> *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004].

take positive measures so that non-state legal orders comply with human rights<sup>15</sup>—for example, by reinterpreting non-state laws in line with international standards, providing human rights training to authorities in non-state courts, and adopting a participatory and inclusive process of law reform (Quane 2013). A key concern here is whether these policies see non-state and human rights law as inherently incompatible or as reconcilable (Perry 2011). As discussed above, to a large extent this depends on how human rights and culture are conceptualised. However, in the final analysis, the potential of policies on legal pluralism to advance or constrain the enjoyment of human rights hinges on the actual influence of these policies on the ground. This brings us to the study of empirical realities and legal pluralism as a social phenomenon.

## 2. HUMAN RIGHTS LAW AND EMPIRICAL LEGAL PLURALISM

The connection between human rights law and legal pluralism as a social phenomenon may be examined from the following two points of view. First, which actors and normative frameworks regulate in practice the social fields in which international standards are applicable? How can international human rights law come to grips with realities of plural regulation and multidimensional power? And second, to which extent are the norms and practices sustained by plural forms of ordering aligned with standards of human rights? This last question may involve assessments of the appropriate interpretation of these standards in the light of legal and cultural diversity.

The first question revolves around the issue of where power resides, and hence, the ability to violate or realise human rights. International human rights law is primarily concerned with the behaviour of states. By observing how social fields are regulated in practice, empirical studies of legal pluralism may question the assumption that the state is the most influential agent (Provost and Sheppard 2013: 2, 3). The limits of the state-centred architecture of international human rights law have already been exposed from other angles. Studies have shown that state sovereignty is increasingly fragmented and linked to complex interfaces between global, national and local scales of governance (Eilenberg 2014; Peluso and Lund 2011). In this context, scholars have examined whether and how international human rights law could impose direct obligations upon transnational non-state actors, such as corporations and international organisations (Clapham 2013; Vandenhole 2015; Noortmann et al 2015).<sup>16</sup> Although most international human rights

<sup>15</sup> See Quane (2013: fns 102 and 103) for numerous examples of such recommendations by UN human rights treaty bodies and independent experts established within the UN Charter-based system.

<sup>16</sup> For the moment, only norms of customary international law concerned with crimes that entail massive violations of human rights apply directly to non-state actors (eg genocide, war

law mechanisms continue to focus on states' behaviour, initiatives such as the UN Global Compact constitute a step in this direction.

Empirical studies of legal pluralism may further inform ongoing reflections on the reach and limits of the Westphalian architecture of international human rights law. On the one hand, these studies show that state institutions may be absent, share or compete with other regulatory sources in different arenas.<sup>17</sup> This may concern an entire geographical space, as it is often the case in conflict, postconflict and some developing regions, but it may also apply to specific domains of social interaction in all societies. By uncovering 'the state of the state' and explaining the reasons behind particular configurations of plural regulation, these studies may provide elements to appraise the ability and willingness of states to protect individuals and entities under their jurisdiction for human rights violations committed by non-state actors. On the other hand, these studies bring to our attention non-state actors with governance capacities at the intra-state level, such as chiefs, indigenous and religious leaders, that have rarely been considered in these discussions.<sup>18</sup> These studies increase our understanding of the sources and nature of these actors' power. As demonstrated by Hellum and Katsande in chapter 7 and by Henquinet in chapter 8, in the context of neoliberal policies and the downsizing or retreat of the state from certain public domains, the influence of customary and religious authorities may derive from or be strengthened by alliances with transnational actors, such as private businesses and transnational aid organisations. In addition, these chapters uncover the spaces in which different forms of power are exercised, enabling or constraining the implementation of human rights. Hellum and Katsande discuss how women's options to challenge discriminatory customary laws opened and closed in a changing political terrain in Zimbabwe. They indicate that the 'hidden power' exercised by traditional institutions and the 'invisible power' embedded in social and religious structures that upheld patriarchal perceptions and practices dominated over the 'visible power' of state laws granting equal inheritance rights to men and women. Although Henquinet's chapter does not refer explicitly to these different dimensions of power, her study

crimes, crimes against humanity, slavery and complicity with state-sponsored abuses). Under the existing soft law, ie the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council by resolution 17/4 of 16 June 2011, businesses' legal liability for human rights violations arises at the national level.

<sup>17</sup> See, for example, the 2011 special issue of the *Journal of Legal Pluralism* on 'Legal Pluralism and International Development Interventions', *Journal of Legal Pluralism*, vol 43, issue 63.

<sup>18</sup> Under international human rights law, state obligations in respect of these actors' behaviour differ depending on whether these actors are considered state agents or not. In the former case, such as when state policies on legal pluralism grant jurisdictional powers to non-state disputing forums, human rights violations committed by these forums are directly attributable to the state, which has the duty to take measures in order to ensure that its agents respect, protect and fulfil human rights. In the latter case, state obligations are limited to taking ex ante and ex post measures to protect individuals for human rights violations committed by third parties.

of transnational women's rights interventions in Niger also exemplifies how the hidden and invisible power of religious networks moulded the scope of these interventions, preventing the incorporation of certain international standards into national legislation. All these insights point to the need to continue to think critically about the way in which human rights law understands power and devices mechanisms to contain it.

Regarding the second entry point to research in this sub-field, ie the extent to which these configurations of plural regulation uphold or violate human rights, two sub-questions may be distinguished. Firstly, whether the substantive, procedural and structural elements of different legal orders abide by human rights law. For example, to what extent are existing normative orders attuned with these standards? Are the decisions made within different disputing institutions aligned with human rights? The same applies to the procedures and structural aspects of different disputing forums. A considerable amount of research entitled 'human rights and legal pluralism' concerns precisely these questions (eg Danish Institute for Human Rights 2013; Farran 2006; Fluét et al 2006; Oppermann 2006; Wojkowska 2006). As discussed before, these assessments are not straightforward but depend on how human rights and non-state norms are interpreted.

Chapters 3–6 in this book suggest that disputes occurring at the intersection of legal orders represent potential spaces of intercultural dialogue that may result in the reinterpretation of international standards. The contributions by Desmet and Gómez Isa in chapters 3 and 4 analyse how these standards acquired new meaning informed by indigenous legal orders. They show, however, that the overlap is never complete. Even in cases of 'alliance' between human rights and indigenous norms, such as in the area of rights to territory, these encounters may also reflect tension. In chapters 5 and 6, Hoekema and Corradi deal with how indigenous legal orders call for flexibility in the interpretation of certain standards. In chapter 5, Hoekema provides examples regarding the right not to be subjected to cruel and inhuman forms of treatment.<sup>19</sup> Amongst others, he describes how the Constitutional Court of Colombia came to the decision that corporal punishments applied by indigenous justice did not violate this right because the indigenous community that applied them saw them as a form of cleansing. In chapter 6, Corradi explores how different modes of processing disputes (eg mediation v adjudication) underpinned by different forms of social organisation (eg simplex v multiplex societies) influence how certain elements of the right to a fair trial may be interpreted. As these chapters show, cultural essentialism always looms in this line of enquiry. One way to mitigate it is by questioning the effects of declaring particular interpretations of norms and practices compatible with human rights.

<sup>19</sup> On the cross-cultural examination of corporal punishments, see also An-Na'im (1995).

A second sub-question in this area is how the articulation between different disputing institutions affects the enjoyment of human rights. For example, standards of fair trial such as *ne bis in idem* would be breached if the same person or entity was punished twice for the same offence, eg first by state courts and then by non-state courts or vice versa. Alternatively, the treatment of a case by multiple disputing forums at the same level may lead to contradictory outcomes, non-implementation of decisions, impunity and lack of accountability. Although existing studies remark that this aspect of the relationship between legal pluralism and human rights is highly relevant (ICHRP 2009: 32; UN Women 2011), so far this issue has remained under-researched.

### 3. EMPIRICAL LEGAL PLURALISM AND THE PRACTICE OF HUMAN RIGHTS

In the previous section, the analysis of legal pluralism as social phenomenon served as the basis for the evaluation of how human rights law should address these realities. By contrast, in this sub-section questions centre around understanding how human rights norms articulate with other norms in the production of legal subjectivities and social change. What is the role of human rights in processes of normative transformation? How are experiences and representations of grievance, entitlement and duty influenced by ideas of human rights? To what extent are these ideas informed by multiple normative repertoires? Which factors influence this and what are their consequences?

These questions have been dealt with at length by Merry in her ethnography of the transnational production of violence against women as a violation of human rights (Merry 2006a,b). She has traced human rights approaches to gender violence from the sites in which legal documents and policies are formulated to those in which they are supposed to have effects. This revealed the key role played by intermediaries, such as community leaders, non-governmental organisations, and social movement activists, in generating variation in the meaning of human rights. As she explains, the logic that underpins transnational human rights does not always resonate with local ways of thinking and interpreting the world. Therefore, these intermediaries, who are acquainted with both systems of knowledge, translate ‘up’ and ‘down’. In order to attract international attention and funding, they articulate local grievances in the language of human rights. At the same time, they reframe human rights in terms that make them ‘speak’ to local concerns. Merry calls this process of downwards translation ‘vernacularisation’.<sup>20</sup> Against this backdrop, Eckert et al have argued that it is necessary

<sup>20</sup> She distinguishes between two sub-types: ‘replication’ and ‘hybridisation’. In the former, the transnational idea remains the same but it is framed in a language that is locally familiar.

to look beyond the role of professional translators (Eckert et al 2012: 10). Subjects of law also make meaning of human rights norms and thus extend the chain of translation. Moreover, their concerns are not uniform. Therefore, Eckert et al suggest processes of normative transformation should be studied through the notion of 'iteration' (ibid). Iterations entail interactions in which norms are interpreted. These processes do not involve the meeting and mixing of normative orders but rather subsuming certain concerns under varying interpretations of specific norms. This goes hand in hand with contestations over the meaning of norms and the validity of different interpretations thereof, which may be fuelled by knowledge of different normative orders. As a result, iterations need to be understood in terms of social struggles (ibid).

In chapter 8, Henquinet provides good illustrations of the reach and limits of normative transformations facilitated by human rights development projects in which the meaning of human rights was informed by religious normative orders. She shows how the scope and success of the women's rights interventions of CARE and UNICEF in Niger were heavily influenced by religious norms used to interpret women's rights. These prevailed over 'global' interpretations of those rights due to the power of religious networks. Religious norms supported the improvement of women's position in public spheres, such as politics and education, but rejected ideas of gender equality in private relations, such as those addressed by sexual and reproductive rights.

Chapter 7 by Hellum and Katsande and chapter 10 by Lecoyer suggest that knowledge of various normative orders constitutes a crucial factor allowing disadvantaged groups to contest the meaning of norms and redefine them in ways that respond to their experiences and stakes. Drawing on the case of inheritance rights in Zimbabwe, Hellum and Katsande elucidate how legal literacy and advice rooted in a plural conception of law enabled women to challenge patriarchal norms and discourses on inheritance operating at different levels. Lecoyer makes the same point when she argues that strategies seeking to improve Belgian Muslim women's equal access to divorce need to engage with all the normative frameworks at play, ie human rights, state law and religious normative discourses.

At the same time, the adoption of a rights-defined subjectivity depends on individuals' experiences with mobilising law (Merry 2006a). In chapter 11, Truffin and Struelens show that state policies that ignore normative diversity may undermine young people's rights consciousness, and their enjoyment of the right to family life. Their examination of the experiences of Belgian families with Congolese roots resorting to state law for the resolution

In the latter, the transnational idea merges with local ideas and gets a more interactive form. An extreme form of hybridisation is 'subversion' in which the name of the transnational idea (human rights) is kept but applied to what are fundamentally local ideas.

of family conflicts points to a plurality of family models (ie egalitarian and hierarchical) operating both within these families and within state law. They argue that in this context of ‘inter-normativity’, the protection of the right to family life and the provision of adequate support for young people requires that state policies deconstruct these contradictions in order to understand how they fuel family conflicts in the first place.

Finally, chapter 9 by Buerger demonstrates that strategic resort to customary norms within a human rights campaign conducted in Ghana increased the chances of achieving the campaign’s goal, while at the same time undermining the acceptability of using the human rights label. Her chapter illustrates how different actors contest and police the boundaries of social action that can be carried out in the name of human rights.

#### 4. HUMAN RIGHTS PRACTICE AND NORMATIVE LEGAL PLURALISM

To what extent are policies on legal pluralism influenced by human rights ideas? How do these policies in turn affect people’s experiences with human rights? The interface between the practice of human rights and policies on legal pluralism is a relatively recent area of study. Nevertheless, a growing body of knowledge is concerned with these questions, particularly in the Global South. In several developing regions, neoliberal policies seeking to make the state more efficient have relied on decentralisation and the delegation of governance tasks to local actors, such as customary authorities (Buur and Kyed 2006; Zips and Weilenmann 2011). This has often led to reforms in the legal frameworks dealing with customary law institutions. At the same time, in recent years, legal development interventions supported by transnational aid organisations have been criticised for their exclusive focus on the state (Derman et al 2013; Harper 2011; Tamanaha 2012). Recognising that most development regions are characterised by legal pluralism, these organisations increasingly engage with non-state legal orders (eg DfID 2004; Danida 2010). These agencies’ adoption of human-rights-based approaches to development has resulted in interventions to promote human rights at the level of non-state law. In this context, studies have examined how existing policies on legal pluralism interplay with these initiatives. They show that normative frameworks for legal pluralism tend to define which non-state actors and layers of law are included or excluded from these interventions (Brems et al 2015; Corradi 2014).

In chapter 8, Henquinet shows that policies on legal pluralism that grant official status to discriminatory religious laws may obstruct initiatives to debate and redefine these laws at more grassroots levels. In chapter 7, Helum and Katsande indicate that even when gender equality clauses are in place and apply to non-state law, individuals may be unable to mobilise them effectively. They identify lack of knowledge and social pressure as

powerful constraints for women, limiting the effectiveness of these policies on the ground. In chapter 5, Hoekema reflects on the positive aspects of non-implementing these clauses. He argues that representations of indigenous justice as inherently at odds with human rights has often led to policies that restrict its jurisdiction.<sup>21</sup> He is particularly critical of policies that demand the compliance of non-state legal orders with international standards without requiring the adoption of an intercultural approach to the interpretation of these standards. According to him, such policies render human rights into an arrogant discourse that justifies the oppression of the legal institutions and practices of marginalised groups. Drawing on examples from Peru, he shows that in practice, local actors may decide to put these policies aside. He concludes that the way in which state and indigenous authorities articulate with each other in practice counterbalances the ethnocentric bias of these policies, and opens spaces for bottom-up approaches to the cross-cultural understanding of human rights.

In chapters 10 and 11, Lecoyer and Truffin and Struelens demonstrate that these debates are also relevant in the Global North. In chapter 10, Lecoyer reflects on how popular sentiments that reject legal pluralism ‘at home’ in the name of human rights lead to a narrow focus on state law as the only means to promote Belgian Muslim women’s rights. This diverts policy-makers’ attention from other non-legal strategies that may be more appropriate in supporting these women and which require engagement with religious normative discourses. Similarly, chapter 11 by Truffin and Struelens suggests that state policies that ignore or essentialise the role of cultural diversity within different layers of law fuel conflicts within families, and undermine social cohesion.

## 5. THE CONTRIBUTIONS IN THIS BOOK

The insights emerging from most of the chapters in this book may be situated within one or more of the sub-fields sketched out above. Nevertheless, the contributions in part 1 can be said to advance arguments that are mainly of a normative nature, whereas part 2 is primarily concerned with empirical findings.

Part 1 opens with a chapter by Brems, in which she analyses the inconsistent treatment of legal pluralism by human rights law as a whole. Brems remarks that one layer of human rights law, ie the regime governing the rights of indigenous peoples, mandates state recognition of legal pluralism, whereas another layer, ie the case law of the European Court of Human Rights, forbids it as a violation of human rights. After examining several

<sup>21</sup> See also the recent decision of the Constitutional Court of Ecuador in the *La Cocha* case, which excludes murder from the jurisdiction of indigenous justice. Sentence 113-14-SEP-CC, 30 July 2014.

arguments that may be advanced in order to justify this contradiction, Brems concludes that the latter cannot be explained in a coherent manner and shows the negative consequences that follow from it. According to Brems, both the privileged treatment of indigenous peoples and the ban on legal pluralism endorsed by the European Court of Human Rights are problematic. The former may be seen as an instance of unjustified discrimination against other groups that may have similar grounds to claim the recognition of their legal institutions. The latter ignores the potential of policies that recognise legal pluralism to foster the protection of human rights, eg by regulating the operation of non-state legal orders. Drawing on the case of legal pluralism, Brems demonstrates that the pluralist nature of human rights law may lead to incongruities that undermine the coherent protection of human rights as a whole. She concludes that in order to counter this, it is necessary to look at human rights law from an integrated perspective, and identify gaps, areas of divergence and alignment, as well as cross-cutting and isolated dynamics.

In chapter 3, Desmet deals with the relationship between international human rights law and legal pluralism at two levels. First, she reflects on the analytical purchase of the concept 'legal pluralism' when applied to ever-smaller bodies of law, such as international human rights law itself. She proposes a distinction between 'legal pluralism', as referring to the simultaneous applicability of various normative systems in a same social field, and 'adopting a legal pluralist perspective' to the study of the simultaneous applicability of norms originating from the same normative (sub)system. In the second part of the chapter, Desmet turns to the relationship between human rights law and other normative orders that are applicable in the same field. She distinguishes two main possible scenarios. In the first one, human rights law and another normative order stand in opposition to each other as regards a particular issue, and hence human rights law may be invoked against the rules of the normative order that violates human rights. In the second one, human rights law and another normative order are aligned on a particular theme, defending similar values, interests or entitlements. In this case, human rights law may be invoked to reinforce the rules of that other normative order. Desmet's analysis of how indigenous legal orders have influenced the emergence and implementation of human rights standards in the domain of indigenous land, territorial and resource rights, demonstrates that in practice, both scenarios may occur at the same time. Despite the apparent alliance between human rights and indigenous law in this area, the overlap is only partial. Indigenous legal orders tend to see nature in a holistic and spiritual way, whereas human rights law reflects an anthropocentric understanding of the connection between men and the environment. Based on this, Desmet challenges any unidimensional characterisation of the relationship between human rights law and other normative orders, even within a particular domain. She argues instead for a nuanced assessment that does justice to what is actually a multifaceted relationship.

In chapter 4, Gómez Isa discusses in detail how this multifaceted relationship played out in one particular case brought by indigenous peoples before the Inter-American Court of Human Rights, ie the famous *Awas Tingni* case (2001). He describes how in the mid-1990s, a poor indigenous community of the Atlantic coast of Nicaragua resorted to the Inter-American system of human rights. They denounced the timber exploitation concession which the government of Nicaragua had granted to a transnational company in their territory without their consent. In this case, human rights law was mobilised by indigenous peoples in alliance with renowned experts and donors from North America, seeking a novel interpretation of Article 21 of the American Convention, which protects the right to property, as including indigenous communal property. The Inter-American Court ruled in favour of the petitioners and identified indigenous traditional practices and customs as the foundation for expanding the scope of this right. This not only implied a flexible interpretation of human rights standards, but also a reconfiguration of indigenous peoples' relationships with space. In the community's understanding, the territory was characterised by porous and fluctuating borders. This stood in contrast with the demand of clear demarcation underpinning the court's view of the right to property and the mechanisms envisaged to protect it. Despite this tension, Gómez Isa concludes that the *Awas Tingni* case constitutes an instance of intercultural dialogue, in which indigenous law informed an inclusive reinterpretation of human rights. An ensuing question is whether this has led to changes in indigenous norms and practices regarding the territory.

In chapter 5, Hoekema brings the reflection on the intercultural interpretation of standards to the national level. He focuses on how international standards are understood within legal pluralism policies embodied in what he calls 'internal conflict rules', ie national legislation and/or case law stipulating the competence of the different legal orders recognised within a state, and which determine how to solve conflicts between them. One such instance of conflict may emerge when one of these legal orders violates the human rights protected by the state. Hoekema takes issue with policies that demand compliance with international standards without adopting an intercultural approach. According to him, such policies may result in Eurocentric human rights discourses that justify the criminalisation of marginalised groups. Hoekema examines how internal conflict rules took shape and were applied in concrete cases in which physical punishments were administered by indigenous justice. These examples from Colombia, Guatemala and Peru illustrate how internal conflict rules may reflect an intercultural interpretation of the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. His conclusion suggests that policies on legal pluralism, and in particular their rules on human rights, constitute a double-edged sword. Depending on how human rights are understood within these policies, they may serve to perpetuate the oppression of marginalised

groups, or they may lead to processes of interlegality, in which inclusive definitions on human rights may emerge.

Chapter 6 by Corradi explores precisely this question, but regarding the right to a fair trial. Her chapter discusses the complexities involved in the cross-cultural assessment of whether indigenous procedural norms comply with this right. Based on a case study conducted in Bolivia, she shows that different modes of dispute processing rooted in different forms of social organisation influence how arbitrariness and abuses of power may manifest at the procedural level, and hence which standards of fair trial may be applicable to prevent this. Her analysis indicates that factors such as the aim of the disputing process, and the role of third parties therein, interplay with the relevance and appropriate interpretation of certain elements of this right in different disputing contexts. She also identifies areas of tension and overlap, and reflects on how policies on legal pluralism may address them. Since indigenous justice operates in a context of interlegality, it is necessary to construct spaces for collaborative interaction between authorities representing different legal orders, in which various normative and epistemological frameworks can be combined in the treatment of cases, particularly at grass-roots level.

Part 2 opens with chapter 7, in which Hellum and Katsande examine the gendered dynamics of justice sector initiatives seeking to advance human rights through a legally plural framework. They present two longitudinal case studies from South Africa and Zimbabwe in which individual women and women's rights organisations undertook legal advocacy, legal literacy and legal aid in order to mediate the tension between the principle of gender equality and the plurality of legal orders that regulate women's lives. The study on South Africa investigates how the right to equality embedded in CEDAW, the South African Constitution and the Land Restitution Act was implemented by state and non-state actors involved in different phases of the land restitution process in the Limpopo Province. The study shows that the spaces of operation of human rights organisations opened and then closed in the political shift from a social-justice-based to a market-based land restitution policy. The former allowed human rights organisations to address power structures within communities, and hence gender relations, whereas the latter saw this as a private matter and foreclosed this possibility. The study on Zimbabwe analyses the work of two women's rights organisations in the area of equal inheritance rights. It shows how the breakdown of the rule of law and the politicisation of customary authorities led to situations of legal impunity that curtailed women's options to negotiate their property rights. Both case studies demonstrate that different paradigms of governance, rooted in changing political and economic terrains, affect the bargaining power of individual women and women's rights organisations seeking gender justice. In both cases, the success of the interventions depended not only on these organisations' ability to develop situational and locally

appropriate strategies of argumentation, but also on the broader political, legal and economic power structures in which they operated.

In chapter 8, Henquinet illustrates this further. She explains how two transnational aid organisations active in Niger, CARE and UNICEF, negotiate the meaning of women's rights and the scope of their interventions within semi-autonomous social fields. These fields are impacted by competing women's rights discourses endorsed by national legislation and popular religious views of Islam. The context in which these organisations work is characterised by neoliberal policies and the retreat of the state from markets, governance and services. In addition, there is a strong presence of ideas of male guardianship and provision, internalised through popular discourses on Islamic jurisprudence. Henquinet shows that in this setting, the process of implementing equality based notions of women's rights is resisted by drawing on other rights discourses that are rooted in Nigeriens' identities as Muslims. As a result, ideas of equality and independence are set aside in exchange for a discourse that emphasises the improvement of women's status in communal relations, without challenging women's subordinate position in the family. This results in the success of certain women's rights interventions, such as the Quota Law increasing the number of women in public spaces. But at the same time, it leads to the rejection of initiatives to reform family law, the persistence of reservations to CEDAW and the reformulation of programmes on the ground to conform to popular notions of the family that reproduce gender inequalities in the private sphere. Henquinet concludes that in Niger, women's rights are largely conceived outside the realm of global discourses on the liberal subject due to the complex interplay of policies on legal pluralism, a weak state and the prominence of religious networks.

Chapter 9 by Buerger turns towards the examination of how a plurality of norms may be used strategically by actors that decide to mobilise in the name of human rights. She discusses the case of a human rights advocacy campaign conducted by two contiguous low-income communities in Accra, Ghana, which sought the improvement of the drainage stream that divided them. The latter had been historically neglected, leading to serious problems of health and sanitation. Her study illustrates how the plurality of legal orders that characterised the milieu of this human rights campaign influenced the strategies pursued, and how the meaning of human rights was contested in the process. In the course of their advocacy, some members of the youth club involved in the campaign combined a human rights discourse on health and sanitation with patriarchal notions of community obligation embedded in custom. While this increased the number of social networks of which they could make claims, it also raised important questions about what methods were considered acceptable for claiming rights, what values fitted under 'a human rights approach', and who had the capacity to decide. Buerger demonstrates that human rights mobilisation outside the strictly

regulated spaces of courtrooms allows for the negotiation of the boundaries of different legal orders, including human rights, making them flexible and unstable. She defines these spaces as ‘legal borderlands’, highlighting not only the porousness of the borders between coexisting legal orders, but also the way in which individual actors attempt to reshape them for strategic purposes.

Strategic use of different layers of law, and the structures that limit different actors’ options with it, is at the core of chapter 10 by Lecoyer. She analyses the women’s rights implications of the de facto coexistence of state law and a multiplicity of Islamic discourses regulating the divorce practices of Muslim families in Belgium. Lecoyer explores how state law and global as well as local Islamic normative discourses available to Belgian Muslim families influence women’s strategies and experiences with divorce, and affect their legal consciousness. She shows that these discourses are heterogeneous and subject to reinterpretation. Nevertheless, they remain controlled by male religious scholars, who stay largely insensitive to the need to adapt these discourses to the realities of women and contemporary life in a secular context. In exploring women’s strategies and experiences with divorce, she shows that besides the options and limits offered by these discourses, other factors enable and constrain women’s agency. Having access to several options for marriage dissolution enhances women’s ability to pursue their interests, as does the support of the social and family networks of which they are part. Conversely, social pressure rooted in patriarchal views of gender relations appears as the main obstacle to divorce. In this context, some women will refrain from challenging discriminatory practices due to fear of the stigma that is associated with making a marital dispute public in court. Against this backdrop, Lecoyer argues that human rights strategies aiming at enhancing the position of these women need to marry the right to equality and religion. Instead of adopting legislation seeking to regulate the plurality of norms at play, these strategies need to enhance Muslim women’s awareness of their rights under all the normative frameworks that apply to them, and their capacity to (re)define them.

Also concerned with individual’s experiences with plural law, the last chapter by Truffin and Struelens interrogates the concept of interlegality. They focus on intra-family conflicts involving members of Congolese families and families of Congolese descent living in Belgium. They analyse two typical conflictual situations that individuals from these families face in their adolescence and adulthood: intergenerational tension between youths and their parents, and contradictory models of conjugal relationships produced by diverse fields of state law affecting couples with a migratory background. By adopting an actor perspective, their study shows that egalitarian and hierarchical models of the family are at play both within families and at the level of state law. As a result, it is not possible to allocate either model to a single normative order. Truffin and Struelens depict these complex configurations

of normative plurality by the concept of ‘inter-normativity’, ie a diversity of references and models entwined in a source of norms. The narratives of young people and spouses examined by Truffin and Struelens uncover the tensions, ruptures and continuities that result from family relationships being reproduced in private and public spheres that are characterised by internormativity. In their conclusion, they reflect on the implications of these findings, and in particular what they mean in terms of enhancing the protection of the right to family life. On the one hand, they argue that stereotypes attributing an egalitarian vision of the family to the public sphere and a hierarchical one to the ‘Congolese community’ lie at the root of the lack of responsiveness of state institutions towards the realities of these families. On the other hand, they question migratory regulations that affect the economy of relationship inside transnational families by granting some members a status on which others depend. As their data indicates, these regulations fuel conflicts within families, which are too high a cost for social cohesion in comparison with the benefits of controlling migration flows.

Overall, the essays in this collection constitute an invitation to continue to think critically about the multiple interfaces between human rights and legal pluralism. At the crossroads of all contributions is a concern with understanding how human rights may become vehicles for social justice.