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Editorial Introduction:

Children and Young People in Legally Plural Worlds

This thematic section entitled ‘children and young people in legally plural worlds’ builds on a panel that was organized by the guest editors during the 2013 conference of the Commission on Legal Pluralism in Manchester. The panel was conceived as an opportunity to bring together theoretical and empirical contributions reflecting on under-researched issues concerning the relationship between children, children’s rights and legal pluralism. The papers presented during the panel addressed questions such as how children and young people engage with the plurality of normative orders impacting on their daily life and well-being, what the rights conceptions of children and young people are in different cultural and normative contexts, and what the role and potential of ‘children’s rights’, understood as the human rights of children, is in relation to other (state and non-state) bodies of law. In other words, the theme of the panel was conceptualised in broad terms, covering many areas of research.

As the preparation of a publication output based on this panel advanced, we decided to focus on the theme ‘children’s rights and legal pluralism’. Although not exclusively, the four articles that follow interrogate how various normative orders interplay with the human rights of children. The first three articles analyse this interplay in the context of judicial proceedings concerning different aspects of children’s lives, such as grandparent-grandchild relationships (Simon), child residency arrangements after parental disunion (Lecoyer and Simon), and adoption (Corrin and Mutilato). More specifically, they describe and reflect on the complexities involved in applying one of the general principles of children’s rights law, the ‘best interests of the child’, when a plurality of normative regimes crisscross the relationships in which children are embedded. Taken together, the three articles suggest that the implementation of this principle by judiciaries operating in contexts of normative and cultural plurality is problematic, either because they are blind to or reject such diversity (Simon, Lecoyer and Simon), or because the state fails to regulate it appropriately (Corrin and Mutilato). The fourth contribution by Corradi and Desmet adopts a different entry point to the subject. By presenting a review of existing literature on legal pluralism and children’s rights, it acts as a backdrop or map against which the other contributions of this thematic section can be ‘located’.

Common to the four contributions is an understanding of legal pluralism in terms of the multiple normative regimes that co-regulate children's relationships and entitlements in practice, independently from whether these norms have official status in state law. Such a 'bottom-up' understanding of legal pluralism is a crucial matter for children and young people, whose capacity to act in the human rights field is more often than not 'mediated' by various relationships with adults and the norms that apply to those relationships. Hence, the articles often use the terms 'legal' and 'normative' pluralism interchangeably. This is not intended to deny the 'social force' of state authority, nor its symbolic power. The point is rather that understanding how children's rights operate in concrete contexts, requires an empirically grounded approach to legal pluralism that makes the researcher attentive to the spaces and processes in which official and unofficial norms applying to children 'meet', and the results thereof. In turn, this suggests that it is necessary to adopt a relational perspective on children and young people as human rights subjects, much in line with the way in which feminist scholarship has investigated the connections between legal pluralism and the human rights of women (Sieder and McNeish 2013; Hellum et al. 2007).

It is from this viewpoint that Simon shows how reference to Congolese customary norms by the disputants in a Belgian Juvenile Court triggers a particular interpretation of the principle of the best interests of the child by the judge. Similarly, Lecoyer and Simon uncover how religious norms and values influence children's caretakers' disputing experiences, strategies and constraints before, during and after court proceedings. The empirical data presented in these two contributions is geographically located in Europe (Belgium), a political context that displays a certain degree of resistance, not to say rejection, of the idea that judiciaries should give recognition to norms originating outside states or supranational organizations.¹ Nevertheless, by adopting an empirically grounded understanding of legal pluralism, the authors demonstrate how a multiplicity of normative regimes are at play in judicial processes concerning the best interests of the child and co-mould the way in which the different actors in these processes give concrete shape to this principle.

The contribution by Corrin and Mutilato is concerned with the extent to which Samoan state law takes account of empirical realities of adoption processes, in which the customary social institution 'vae tama' often plays a central role. In this sense, their entry point to legal pluralism is rather different, as they mainly focus on state policies, providing a critical

¹ See eg European Court of Human Rights (Grand Chamber), *Refah Partisi (The Welfare Party) and Others v. Turkey*, 13 February 2003.

analysis of how such policies can be informed by empirical realities of normative plurality. Finally, a significant proportion of the literature analysed by Corradi and Desmet demonstrates that norms need not be endorsed by state coercive authority to generate social expectations, reasons to act and perceptions of appropriateness and obligatoriness determining children's rights in concrete situations.

The contributions to this thematic section suggest that whether legal pluralism advances or constrains the values and ideals upheld by human rights discourses in relation to children cannot be determined in the abstract, but is a matter of empirical investigation in concrete situations. In that sense, a common thread running throughout the four articles is a concern with linking empirical insights with normative analysis. Not surprisingly, these contributions adopt an interdisciplinary perspective (Lecoyer and Simon), rely on social science methods as the basis for legal analysis (Simon), or draw on literature from multiple disciplinary orientations (Corrin and Mutilato; Corradi and Desmet).

Simon examines the responses of Belgian state courts in the face of normative plurality generated by transnational migration processes. Based on this, she advances the hypothesis that general and flexible children's rights norms, such as the best interests principle, have the potential to create more receptiveness towards cultural diversity and normative pluralism in what are otherwise Eurocentric judicial systems. This would increase the legitimacy of state law and the quality of litigants' experiences with the state legal system, while giving true meaning to the principles of neutrality and impartiality. In the next article, Lecoyer and Simon offer a grounded account of the negative effects of the blind application of co-parenting as the most appropriate way of interpreting the best interests of the child after parental disunion. This allows them to propose that judges should carry out a gender and context sensitive evaluation of the extent to which the equal shared residency formula is indeed the most beneficial for children and their caretakers. Moreover, they uncover children's caretakers' post-judicial difficulties with enforcing co-parenting arrangements and on this basis suggest possible ways to address them. Although Corrin and Mutilato do not take an explicit position about how state law should regulate 'vae tama', they underscore that national laws and policies regarding children and the family need to pay more attention to the benefits of customary adoption practices. For example, they suggest that family law reform projects build on empirical research and dialogue with customary leaders.

Also the literature analysed by Corradi and Desmet dedicates considerable attention to the question of how empirical insights can inform strategies for the realisation and promotion of children's rights in contexts of normative plurality.

On the whole, this thematic section addresses only a small portion of the many questions that can be studied in relation to legal pluralism and children's rights. However, it is our hope that it will provide useful insights, as well as inspiration for future research in this and related domains.

The contributions

The special section opens with an article of Simon that is concerned with the extent to which European judiciaries may be responsive to cultural diversity and normative pluralism generated by transnational migration processes. It suggests that this could be achieved by making use of children's rights standards that are flexible and open to a wide range of interpretations, such as the best interests of the child principle. Simon's analysis of the factors that may enable or constrain such responsiveness in practice is based on a case study of the Mobembo family, which concerns a Belgo-Congolese family struggling for the recognition of the grandparents' right to personal relationships with their grandchildren. The selection of this case study is based on the fact that a breach of customary norms lied at the basis of the dispute. However, customary norms were not invoked by any of the parties as a relevant element to be taken into account by the judge when deciding whether it was in the best interests of the children to have contact with their grandparents and extended family. Nevertheless, the mere presence of this 'other' normative regime at the background of the conflict, triggers a decision in which the judge is more concerned with preventing that legal pluralism enters the court room than with making a well-founded decision about what is in the best interests of the children. The article illustrates that normative pluralism interplays with the interpretation of this particular human right of children, even though legal pluralism is rejected by state law. Based on this, Simon concludes that more openness for normative pluralism in decision making processes concerning the best interests of children with migratory backgrounds would prevent the reproduction of biased Eurocentric court decisions, and hence improve the quality and legitimacy of state justice.

The second article by Lecoyer and Simon identifies a series of factors that account for the gap between mainstream ideals depicting 'equal shared residency' as the best formula to guarantee the best interests of children after parental disunion, and the lived realities of

children's caretakers with a migratory background in Belgium before, during and after judicial proceedings. The article demonstrates that a mix of gendered norms are at play throughout the entire process, influencing when a case reaches the courtroom, how the encounter with the judiciary is experienced and the extent to which the implementation of shared residency arrangements is viable in practice. Based on this, it shows that even though the main goal pursued by the idea of equal shared residence is to develop a more egalitarian family standard, when applied as a blue print and without any understanding of the realities and contexts in which such arrangements are to function, it results in the entrenchment of gender inequality. In turn, this leads to the disempowerment of children's caretakers which are, more often than not, women. The article concludes with some concrete suggestions on how Belgian judiciaries could respond to these challenges.

The third article by Corrin and Mutilato examines the multiple tensions that arise from the co-existence of customary, state and international laws regulating adoption in Samoa. By comparing state laws and customary laws, the latter including 'vae tama', i.e. the equivalent of adoption in customary law, the authors show that a different cultural understanding of the social institution of adoption constitutes one of the main factors accounting for the many challenges involved in such processes in Samoa. The article then moves into examining how international children's rights law, and in particular the best interests of the child principle, adds another layer of complexity to this legally plural configuration. This is done by means of a critical analysis of the way in which state law and customary law protect the rights of the child. Finally, the authors highlight the gaps that exist in state law regarding the regulation of customary law and 'vae tama', as well as the uncertainties that result from this. They refrain from taking a position on how such regulation should take shape, but argue that 'vae tama' protects the best interests of the child in a culturally sensitive way and that addressing its status in state law would contribute to solving some of the current tensions.

In the last contribution, Corradi and Desmet provide a review of English-language literature on children's rights and legal pluralism. As explained before, the aim of this exercise is to be able to reflect on the 'location' of this thematic section on a map of existing knowledge regarding the human rights of children in legally plural contexts. The review reveals that scholars have addressed three main research questions: how global children's rights standards interrelate with local normative orders and practices, how children as well as justice providers navigate legally plural orders, and how legal pluralism interplays with social change and the realisation of children's rights. In addition, intra-family relations have received more

scholarly attention than the position of children in the wider society. At the level of theoretical approaches, a social constructionist view of children and childhood is predominant, while there is no salient trend in terms of the conceptualisation of children's rights (e.g. as semi-autonomous or static) and legal pluralism (e.g. as dichotomous or multi-level). Based on this, it is suggested that some of the issues that deserve further attention include the rights perceptions of children and young people in contexts of legal pluralism, the experiences and strategies of children involved in disputes in legally plural settings, and the interplay of socio-economic factors with the normative regimes affecting children and young people's wellbeing.

Against this backdrop, the articles of Simon, Lecoyer and Simon, and Corrin and Mutilato can be said to be in line with the thematic approaches that have dominated this area of research so far. As for theory, the three contributions show that normative pluralism, both as a social reality and as a policy field, influences the processes in which judiciaries interpret children's rights in multicultural contexts. The contributions of Simon and of Lecoyer and Simon emphasise how empirical normative plurality 'enters' judicial proceedings, even when uninvited, whereas Corrin and Mutilato are concerned with how gaps in the regulation of legal pluralism constrains the way in which judiciaries address children's rights. Nevertheless, the three contributions come to the conclusion that adequate protection of children's rights in multicultural contexts requires that judiciaries come to grips with cultural diversity and the normative plurality it entails.

References

- Sierder, Rachel and Jonh-Andrew McNeish (eds.) 2013. *Gender Justice and Legal Pluralities, Latin American and African Perspectives*. Oxon: Routledge.
- Hellum, Anne, Julie Stewart, Shaheen Sardar Ali and Amy Tsanga (eds.) 2007. *Human Rights, Plural Legalities and Gender Realities. Paths are Made by Walking*. Harare: SEARCWL