Children's Rights: Law and Social Realities in the Developing World

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Introduction

Thank you for the invitation to speak at this symposium/conference. It helped me to realise in how many areas children are facing very serious problems, how juridification has become a major approach in addressing them, and how little I know about children's rights.

The symposium/conference is about the crossroads and transversal nature of children's rights. So, here we are, at the crossroads, somewhere between the broad academic domain of children's rights, and the admittedly very broad field of law, governance and society in developing countries.

From the program I learnt that some of you will discuss children's rights in countries beyond the West, in rural China, Indonesia, Turkey, and Nigeria. I hope that those working on Europe, on children's rights in Belgium, Sweden and England, on EU law, and the ECHR will not mind me speaking mainly on developing or non-western countries, as that is where I may offer some expertise.

In real life, distinctions between types of social behavior in western and non-western countries have become blurred since many migrants from Asia, Africa and the Middle East, have come to the West, bringing their norms along, and often living accordingly. Meanwhile, parts of societies in those regions have rapidly modernized, westernised if you like, also in terms of their laws. So, what is said about 'developing countries' may also be relevant for those studying law and society in Europe.

I would like to begin with a case about four children in the Gaza strip. The case comes from a socio-legal PhD thesis by Dr. Nahda Shehada, entitled *Justice without Drama: Enacting Family Law in Gaza City Sharia Court.*[1] After discussing the case, I will make some observations about four concepts, namely legal pluralism, heterogeneity, governance, and finally, development.

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[1] The case discussion here provides a general overview and does not include all details as described by Shehada. For more information concerning the case and relevant family laws, please see Chapter 8 'Negotiating Custody Rights' in Shehada (2005) *Justice without Drama: Enacting Family Law in Gaza City Sharia Court.* Additionally, see Shehada (2004), 'Uncodified Justice: Women negotiating family law and customary practice in Palestine' for a concise discussion of the case.

The case of Salha's children

The setting of our case is Gaza, by all standards not a good place for children's rights. In its recent report 'Children at risk in Gaza conflict', UNICEF described the devastating impact of the 2014 war – and preceding wars - on socio-economic conditions of children. UNICEF itself is therefore investing in health, education, sanitation, and psycho-social support in Gaza.[2]

Our case dates from before this last war. These are the four children: Reema (girl, 14 years old), Sa'ad (boy, 12) Sami (boy, 10) and Muna (girl, 7).[3] Their mother is Salha. She is 34 years old and works as a cleaner in a hair salon. Unfortunately, their father, Ahmed, a taxi driver, just had a terrible car accident, and he died. Fortunately, Ahmed has left his family with a good life insurance. The insurance company has promised a relatively high compensation for the family.

Upon Ahmed's death, his brother Mustafa, the children's uncle, has taken the children from Salha, their mother. Now, as their guardian, he can claim the insurance compensation. In addition, he wants Salha's eldest daughter, Reema, to marry his son. Mustafa has threatened Salha that if she would take any legal action, and thus would bring scandal to the family, the children will not see her anymore. He is after the insurance money, and not after the best interest of the children, it seems. Now, who can possibly stop him? Not the children, neither the mother. The law perhaps?

The family law that applies to this case has two main sources. First, there is the Law of Family Rights enacted in 1954 during a twenty year period when Egypt administered Gaza. Secondly, there is an Ottoman Family Code of 1875, the so-called Book of Personal Status Rulings. The latter allows mothers to keep their children until the boys reach the age of seven years and the girls nine years. The former, more recent, allows the court to extend the ages to nine and eleven, respectively.[4] So, if a court would grant Salha this right, she would at least be allowed to keep the two youngest children with her.

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[2] 'Children at risk in the Gaza conflict', UNICEF, 9 December 2016, https://www.unicef.org/infobycountry/oPt_74620.html, last accessed on 4 December 2016.

[3] Nahda Shehada, *Justice without Drama: Enacting Family Law in Gaza City Sharia Court* (Maastricht: Shaker Publishing, 2005), 252.

[4] See Shehada (2005), "the shari'a courts in the Gaza strip rely on two legal references for the application of family law: the Law of Family Rights (LFR) of 1954 and the Book of Personal Status Rulings According to the School of Abu Hanifa compiled by Qadri Pasha (BPSR) of 1875. The LFR provides a less-detailed account than the BPSR on how courts should treat custody cases. This makes *qudah* (judges) more reliant on the BPSR for their rulings." Nahda Shehada, *Justice without Drama: Enacting Family Law in Gaza City Sharia Court* (Maastricht: Shaker Publishing, 2005), 238.
The LFR and BPSR stem from the same source, the Hanafi school of Islamic jurisprudence. The former is more recent, and in matters of custody slightly more liberal. Again, in Shehada (2005), "article 391 of the BPSR allows mothers (divorced or widowed) to keep their children until the boys reach the age of seven and the girls the age of nine." Ibid, 252. The LFR in art. 118 applied in Gaza enables the *qadi* (judge) to let mothers extend the period of their *hadana* (custody) over boys until they reach the age of nine and girls until they reach age of eleven, if "the qadi believes that their interest will be served thereby." Ibid.

We assume that all four children want to remain with their mother. Salha herself surely wants to keep them with her. But she is not in a strong position. Salha is poor, she is an orphan, and has no powerful family to support her.[5] In developing countries, without a social support network, one is much disadvantaged, socially and economically. During her marriage, Salha and her husband had struggled to build a small apartment in the Al-Shati refugee camp. Salha will have to pay off the mortgage on the apartment for three more years.

One day, Salha, in great distress, has taken a bold step and walks into the family court building. During an interval at the court, she approaches a judge, whom she thinks she has seen before in the Al-Shati camp where she lives. She explains her case to him, and begs the judge to intervene. The judge listens to her and then tries to convince her that it will be better for her to negotiate with her brother-in-law. Otherwise, if the court intervenes, Mustafa will make her life and that of her children miserable.

The judge suggests that she returns home and that she asks the leader of her family clan, the so-called *mukhtar*[6], to consult with him. The next day, the *mukhtar* comes and sits with the judge for an hour. The *mukhtar* then goes off to have talks with Mustafa, the brother-in-law. After several days, the *mukhtar* succeeds in persuading Mustafa. A solution is reached that not only allows Salha to keep her children for the time being but also obliges Mustafa, who as the formal guardian will cash the insurance money, to pay her a monthly allowance for maintenance of the children.

The role of law, legal pluralism and heterogeneity

The substantive law in Gaza seems to be both harsh and outdated. It is an old Egyptian piece of legislation. However, in today's Egypt the law allows children to stay with the mother until the age of 15, and between 15 and 21 they themselves may choose with which parent they prefer to stay. So, in 2016 Egyptian law has moved closer to the rules of the United Nations Convention on the Rights of the Child (CRC), and thus to the rule of law, than the 1954 law in force in Gaza.

Now, let us move from the rule of law to the *role* of law. Did the law play a role at all in the described case? The judge, who Salha had approached 'at the interval', has stepped out of his formal role as a judge. His action was informed, though, by a clear sense of justice. He knew that the law was to a considerable extent on her side, and he could have accepted her claim and applied the law. But, he also realised the limits of law. It would have been entirely unrealistic to expect sustainable enforcement of his ruling. The law would simply not be able to overcome the power differential between Salha and her brother-in-law. Angered by a court case, Mustafa may not give in, and treat Salha and her children even worse. For these reasons, the judge refers the case to the *mukhtar*. He knows the *mukhtar* as a morally respectable person, who regards the interests of the children and the mother, and, importantly, whose informal authority may help to convince Mustafa to change his position.[7]

[5] Shehada, *Justice without Drama: Enacting Family Law in Gaza City Sharia Court*, 251.
[6] Ibid, 255.
[7] Ibid, 254.

The author suggests at some point that the case has moved from state law into the realm of customary law.[8] This raises the conceptual question whether terms like 'customary law', Islamic law', and 'legal pluralism' are helpful concepts when researching such situations. I think they rarely are, as these terms often bring more confusion than clarity. So-called Islamic law[9] is not a directly applicable system of fixed legal rules in the way legal professionals commonly understand it, and need it. Nor is the so-called customary law.

Actually, we owe the concept of legal pluralism to colonial history. Colonial law used to differentiate between different population groups, and prescribe that each population group be regulated according to their own rules - which would often be based on customs and religion - and by their own authority, chief, *imam*, or *pandit*. Motives behind this colonial legal pluralism were an odd mix of administrative pragmatism, socio-political discrimination, as well as well-meant protection of local communities – as Cornelis van Vollenhoven did with regard to competing land claims in the Netherlands Indies.[10]

When European expansion and political domination had come to an end, states in Asia and Africa and their new political elites aspired to build nations with their national legal systems. These should do away with the hateful differences between population groups, with colonial divide and rule politics, and with legal pluralism. The new law should be unified, modern, and secular. Socialism and communism became the first sources of inspiration.

We now know that the ambitious project of building unified national legal systems has remained uncompleted. The modernizing socialist states lost much of their initial appeal and legitimacy. What is more, in the 1970s and 1980s, religious authority and customary authority have staged something of a comeback. Remarkably, this trend coincided with the globalization of democracy and human rights, time-, and in part also, substance-wise.

States with heterogeneous societies

So, the developing world has seen the rise of national states, with constitutions, democracy and human rights, elected bodies, legal courts, huge bodies of modern law, technological change, and quite some progress in terms of social and economic development. However, at the same time, the benefits of development are unevenly divided, primordial loyalties have remained strong, stark power differences are omnipresent, ethnic politics and conflict are widespread, elections and governments are often plagued by ethnic and money politics, and corruption is mostly endemic.

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[8] Nahda Y. Shehada, "Uncodified Justice: Women negotiating family law and customary practice in Palestine," *Development* 47, no. 1 (2004): 106.

[9] This is why I prefer the term Sharia over 'Islamic law'. The term Sharia is commonly used in three different ways, namely a) as God's will, b) as its medieval, classical interpretation by Islamic jurists, c) as one of the many different contemporary interpretations by Islamic jurists and others, in different parts of the Muslim world, which are almost always contested. Many confuse these three different meanings of Sharia.

[10] Buskens and Dupret have even argued that Islamic law, for example, is merely a colonial construct. Please see, Leon Buskens and Baudouin Dupret, "The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient," in *After Orientalism: Critical Perspectives on Western Agency and Eastern Re-appropriations*, ed. by François Pouillon and Jean-Claude Vatin (Leiden/Boston: Brill Online, 2014).

Pristine, homogeneous traditional societies hardly exist anymore, and so, purely traditional legal systems, whether customary or religious, have ceased to exist. Part of it has been incorporated in state laws, or overlaps with it. What remains in real life, is a *bricolage* of norms of different origins, with overlapping functions, and often a painful lack of normative consensus in society, leaving the stage to real power holders. Hence, a sense of lawlessness can prevail in many situations, as in Salha's case.

Today, societies in developing countries are heterogeneous, in the sense that sociologically speaking, neither traditional norms nor modern state-based law have the degree of legitimacy that leads to broad compliance. Both coexist, sometimes merge, and their functions overlap. In such a context, a judge who can be most effective when he steps out of the formal legal system, and the ensuing negotiations between the *mukhtar* and Mustafa are not an exceptional way to solve a problem, but rather the rule – both in developing countries and among many migrant communities in the West.

Governance, development, the law, and children's rights research

In most developing countries, both types of norms, traditional and modern, and their guardians, seem to be engaged in an enduring interaction at all levels of society and in several arenas of governance. Sometimes they are in acute conflict, but quite often they coexist in some harmony. You may have noticed that instead of the term 'government', as the executive power applying the law, I use the term 'governance'. This is not because it is fashionable but because governance precisely connotes this interaction, through which actors of state and society constantly negotiate and shape the rules of the game at various levels and in distinct 'arenas of governance'.[11]

So, for example, the formation and implementation of living rules regarding children's rights can be studied in various arenas of governance. Goran Hyden, a leading theorist of governance, has pointed at six such arenas, namely government, political society, economic society, bureaucracy, civil society, and the judiciary. Of course, also other places and institutions may be worthwhile studying. As lawyers, we are trained to focus on legislation and court rulings, and the governance arenas where they are produced, i.e. parliament – which Hyden sees as part of political society – and, the judiciary. Whether these two are, in real life, the most relevant arenas of governance for realising children's rights remains to be seen. On which arena you focus, depends on the purpose and problem of your research. In many situations, civil society, bureaucracy, or businesses may matter more. This kind of research is not just legal in a strict monodisciplinary sense, but socio-legal: it shows what people do with legal rules. Isn't that what law is all about? Any legal system should benefit from socio-legal research which tests common assumptions of legislators and judges.

In Liefaard and Sloth-Nielsen's book *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead,* Vitit Muntarbhorn wrote the opening article, in which he pays attention to international development programming and the Sustainable Development Goals (SDGs). Today 'Development', one of the greatest projects

[11] Hyden provides an explanation of 'governance arenas' and a relevant definition of governance, "the formation and stewardship of the rules that regulate the public realm – the space where state as well as economic and societal actors interact to make decisions." Goran Hyden, Julius Court, and Kenneth Mease, *Making Sense of Governance: Empirical Evidence from Sixteen Developing Countries*, (Boulder/London: Lynne Rienner, 2004), 5-6.

of the 20th century, seems to have lost much of its initial appeal and credibility. But the problems of development, such as insecurity, poverty, oppression, illiteracy, disease, and destruction of the environment are still there and waiting to be addressed, as are major problems of governance.[12]

So, development is in dire need of a *renaissance* – the SDGs are an important step, perhaps. If development and good governance, in all of their dimensions, would be achieved, the goals of the CRC would also be fulfilled. Since 1989, this Convention has successfully opened up new legal avenues. Its legal approach is one in a bundle of approaches that are all needed to solve complex, crucial problems of governance and development.

If our case has shown anything, it is that as a solution to real life problems, law can have its limits, certainly in the developing world (cf. Allott 1980). Saying that Reema, Sa'ad, Sami and Muna, according to the Convention, are full-fledged right holders gives them no direct relief, of course.

Yet, the Convention has undoubtedly contributed to the improvement of legal systems. Egypt has adapted its Sharia-based law on guardianship, Gaza not, or perhaps, not yet. Also in developing countries, state-based law does play a role, sometimes visible and concrete, while often the gap between law and social reality is such that the law seems to be merely symbolic. But then, symbolic laws also have a role to play in the evolution of legal systems, as has been aptly demonstrated by Aubert (1966) and his symbol act theory.

In socio-legal research the focus is on the interface of law and society. To explain what happens right there, it often helps to include one or more cases in your thesis. If you do so, I encourage you to make 'thick descriptions'. It is only a certain type of rich, detailed, in-depth information that makes qualitative socio-legal research indispensable and convincing. In our case study we would need to know more about the children, the mother, her financial position, her knowledge of legal rights, the family relations, the *mukhtar*, but also about the law, its development and its interpretation in Gaza, about the court, the case law, the judges and their backgrounds, legal aid services, or the role of the local government. Two academic approaches, the legal and the social, meet at the interface of law and society. When you are a legal researcher, you might want to make use of the work of experts in social sciences, humanities, and the foreign law. Or you may want to develop into a socio-legal scholar, as we try at the VVI, standing in a long tradition of combining legal research with approaches from social sciences and humanities.

Let me end here, wishing you all a successful completion of your research, which, as we all hope, will help us to understand how law can best contribute to solving the pressing problems of vulnerable children, now and in the next generations.

[12] For a summary of problems of development and problems of governance, see Otto (2009).

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