Introduction

Legal Pluralism and Development Policy

Scholars and Practitioners in Dialogue

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For the vast majority of people in today's low-income or conflict-affected countries, everyday life entails negotiating between the claims of multiple rules systems and regulating institutions of varying authority, legitimacy, coherence, and capacity, any of which can, depending on the issue, exert their influence or be appealed to in the quest for justice or conflict management. In many of these countries, everyday transactions, such as marriage, inheritance, and land exchange, may fall under different (or multiple) legal orders and jurisdictions, ranging from the legal or administrative institutions of the state (sometimes at multiple levels) to religious authorities and traditional, cultural, or community-based systems, each of which may interpret and thus adjudicate a given issue in very different ways.[1] Legal pluralism – the coexistence of multiple legal systems within a given community or sociopolitical space (Merry 1988; Benda-Beckmann 2002) – is a normal state of affairs in all societies, but it presents distinctive challenges and opportunities in low-income or conflict-affected countries.

Development theorists and practitioners have tended to either blindly ignore the ubiquitous phenomena of legal pluralism or regard it as a constraint on development, a defective condition that must be overcome in the name of modernizing, state building, and enhancing "the rule of law." Efforts were often made to codify and transform what were seen as informal and idiosyncratic local systems into something more "legible" and uniform within the umbrella of the state (Escobar 1995; Scott 1998). Another prevailing assumption was that the transformation of such rules systems was largely a technical exercise, one optimally achieved by the adoption of legal systems deemed to be effective elsewhere. Programmatic efforts to build state

[1] Legal pluralism also often characterizes issues over which there is larger-scale contestation, such as who controls national budgets, security forces, and natural resources. Our focus in this volume is predominantly on local-level manifestations, even as we acknowledge the importance of national and international instances of legal pluralism (see Berman 2006; Michaels 2009).

legal systems in these countries via this approach, however, have often fared poorly (Haggard, MacIntyre, and Tiede 2008). Despite the deployment of vast resources over several decades, many state legal systems remain weak or dysfunctional, while non-state systems continue to operate. That such "schemes to improve the human condition have [so often] failed" (Scott 1998) is testimony to the resilience, importance, and complexity of prevailing rules systems (Carothers 2006; Scott 2009) and the inherent flaw in the idea that the ways in which people structure, regulate, and understand their lives can be rapidly transformed via external technical fixes.

Although the development community has tended to regard legal pluralism as a "problem," people living under such circumstances, especially the poor and marginalized themselves, do not necessarily share this view. If the state legal system under which one lives is perceived as captured, corrupt, inefficient, or hostile, or if engaging with it requires traveling great distances, waiting in long lines, completing complex forms, enduring humiliating treatment, and paying prohibitively expensive fees, only to receive an unsatisfactory outcome (or no outcome at all), it may be beneficial to have other options available. People in these situations often understand the norms and processes of the local religious, traditional, or customary justice system and are eminently familiar with the key decision makers presiding over them, whereas the state legal system may remain obscure, remote, expensive, slow, and unaccountable. When disputes arise, an overwhelming majority of these people eschew the state legal system and instead seek redress in a range of non-state institutions, which to them are accessible (geographically, administratively, and financially), efficient, and socially legitimate.

As such, the key tension of legal pluralism is its potential to be both a problem and an opportunity. The fact that development organizations have tended to perceive legal pluralism in low-income countries as a problem can be understood from a number of perspectives. Primarily, it stems from a series of widely held underlying assumptions: that law must be uniform, comprehensive, and monopolized by the state; that the rule of law consists of a single model or form to which all constituent legal systems must conform; and that political and economic development depend on conforming to this model (because of the greater "predictability," "efficiency," and "justice" such conformity will allegedly provide). Related, but perhaps less intentional, explanations stem from the near monopoly of the discipline of economics in setting development agendas and approaches (Rao and Woolcock 2007) or the institutional imperatives of large bureaucracies to make complex social realities legible, actionable, and measurable – preferably in three bullet points or a simple diagram.

Despite this history, in recent years development organizations have begun to reexamine some of the underlying assumptions about legal pluralisms and to explore the opportunities that might exist in contexts where legal pluralism is a pervasive reality. This undertaking, however, is fraught with its own concerns and unknowns. An uncritical embrace of legal pluralism, for example, might exacerbate the already

seemingly impossible task of building the state legal system and might worsen legal uncertainty. Moreover, the norms and procedures of many customary or traditional justice systems raise real concerns about gender equity, human rights, due process, and capture by the traditional elite; many of these systems have been seriously distorted by oppressive colonial histories or more recent forms of state or non-state violence. Importantly, it is difficult to adequately gain the knowledge base necessary to engage with context-specific idiosyncratic systems that do not fit into a clearly understood model (McGovern 2011); without such knowledge, how can one design technical solutions? How can these tensions be acknowledged and addressed in constructive ways? What role, if any, can external agencies play in facilitating a domestic policy dialogue that ensures that these tensions are addressed in ways that are perceived to be fair, legitimate, and effective, especially by those groups whose voices and interests are otherwise marginalized? Under what conditions can the "lessons" of any such experiences from different times and places be applied elsewhere?

The contributors to this volume comprise leading scholars of legal pluralism and experienced development practitioners, brought together here to engage in a critical dialogue on the key analytical and applied issues. The purpose of this volume is to enhance the analytical rigor underpinning the development community's engagement with legal pluralism, not so much because the particular interactions presented here yield "the answers" (they do not), but because they demonstrate to scholars and practitioners of legal pluralism the mutual benefit of engaging in sustained dialogue, a process we believe is underused but potentially of mutual benefit. The various contributions to this volume were initially presented at a workshop hosted by (and held at) the World Bank and have benefited greatly from the lively debate that ensued. It is crucial to point out up front that the aim was not to craft a "unifying" theory of legal pluralism and development or to identify "best practice" policy solutions to inherently complex problems. We hope instead that these contributions demonstrate that enhancing rigor and relevance at the nexus of legal pluralism and development policy is instead an emergent phenomenon, arising from an ongoing commitment to understanding and nurturing the political spaces wherein diverse (and often opaque) rules systems – their forms, jurisdictions, sources of legitimacy, modes of dispute resolution, and enforcement mechanisms – can be recognized, and the tensions between them constructively addressed. We hope that the tone and content of this volume, which includes contributions from people representing an array of disciplines, regional expertise, theoretical perspectives, and professional standpoints, embodies this principle.

The challenges and opportunities of legal pluralism can be addressed more constructively through open debate, we contend, but they have been a stumbling block for (large) development agencies over many decades, suggesting that a more structural concern must be addressed if more constructive engagements between different normative orders and legal systems are to be brokered (Toomey 2010). Even with

the best of intentions, the imperatives of development agencies constrain them to conceive of legal pluralism as a particular *kind* of development problem – that is, a variant on more familiar development problems. Unfortunately, seeking solutions through orthodox approaches is often itself a central part of the problem.

WHY IS ENGAGING WITH LEGAL PLURALISM SO DIFFICULT FOR DEVELOPMENT AGENCIES?

In high-income countries, rule of law systems have emerged over time in ways that provide, for the most part, a coherent, overarching set of enforceable procedures ("meta-rules"[2]) for regulating a vast array of socioeconomic interactions and political relationships – from the most personal of family ties to the management of natural resources to the structuring of state institutions – as well as determining which issues fall under whose jurisdiction (North, Wallis, and Weingast 2009; Fukuyama 2011). Such systems have emerged conjointly with the modern state as the ordering principles structuring government and the ways in which such governments govern. So understood, a rule of law system is not an immutable or fixed end state, but a perpetual work in progress, an ongoing effort to constructively accommodate numerous (sometimes contending) normative orders while adapting in legitimate ways to new social realities. As such, "the law" itself is not a stand-alone "sector" operating at a high level of abstraction or autonomy, but rather a constituent element infusing all aspects of everyday life, from buying train tickets and car insurance to determining the rights and obligations of citizenship. All "policies" are expressed in, and made actionable by, law, and all laws, by extension, are a subset of broader rules systems governing society (Sage and Woolcock 2008).

The political dynamics underpinning the historical emergence of different rule of law systems remain a subject of ongoing scholarly inquiry (Tamanaha 2005, 2008; Glenn 2010),[3] with little consensus on what such knowledge implies for development policy. Even so, "building the rule of law" now enjoys the broadest possible endorsement across the North/South, left/right, and disciplinary divides and has been hailed by World Bank president Robert Zoellick as the highest-priority development policy issue. For its part, however, the international development community has a mostly unhappy record of engagement with legal development over many decades, a record borne, as we contended previously, of strong – but too often flawed – underlying assumptions about the nature of "the law," its institutional embodiment, and the mechanisms by which legal reform can be brought about, especially at the local level.

[2] Meta-rules, as articulated in Barron, Smith, and Woolcock (2004), are higher-order rules that provide a basis for mediating between (and, where necessary, reconciling) lower-order rules. At the level of individual decision making, see also Sunstein and Ullmann-Margalit (1999) on the related idea of "second-order decisions."

[3] See also the influential writing of Amartya Sen (2009) on this subject.

In too many instances, development actors have presumed that a rule of law system is an institutional form that can and should be transplanted into contexts in which it is otherwise absent – that is, where the "problem" of legal pluralism prevails. Building the rule of law is thus a project that "develops" contexts that are either "pre-legal" or suffused with legal pluralism. The underlying assumption, consistent with reforms sought in other sectors in development (such as education and public financial management), is that the "functionality" of a legal system is a direct product of its "form" – that is, what it "does" stems from what it "looks like" (Pritchett, Andrews, and Woolcock 2010).[4] Ipso facto, enhancing the effectiveness of a given legal system is often construed in development policy circles as being largely a matter of replicating the practices understood within, or that can most plausibly appeal to, the frames of reference of external professionals: adopting particular legal codes, passing legislation, signing resolutions, building courthouses, and holding training ("capacity building") seminars.[5] But there is no single or universal rule of law system, and even putatively similar systems can generate a strikingly diverse range of outcomes in particular settings. Every legal tradition, though it may share broadly similar philosophical and historical roots with those of others, is unique in its constitutive elements and particular application, in how it is connected to the particular culture, polity, and economy in which it is embedded.

Despite decades of trying and the expenditure of billions of dollars, the "law and development" effort – which overtly sought to transplant Western commercial and criminal codes into developing countries – is now widely agreed (even by its original protagonists) to have been a great disappointment. But the organizational imperatives to continue its practices live on;[6] the same kinds of legal development programs are tried time and again. The instincts of development professionals – underpinned and reinforced by their career incentives, especially in large organizations – are to regard the rule of law problem as a variant on other familiar technical problems (such as engineering), one that has a knowable solution that can be readily discerned and implemented by "experts." They are inclined to think that efforts to date have so often failed largely for want of adequate resources, domestic "capacity,"

[4] Critics of "institutional isomorphism" (DiMaggio and Powell 1983) and organizational "monocropping" (Evans 2004) have provided compelling explanations of why these phenomena are so prevalent: metrics of success in such instances are inherently problematic, so credibility is inferred on the basis of having adopted a "best practice"; when uncertainty is high (as in civil war or post-conflict settings), the imperatives to justify one's actions in this way are even stronger.

[5] Recent legal reform initiatives in the Solomon Islands aptly reflect this. Millions of dollars have been spent in regional centers to construct state-of-the-art courthouses and jails to address the "tensions" (civil war) from the early 2000s; the buildings use locally sourced materials and conform to indigenous architectural styles. They certainly look like modern judicial institutions, but, unfortunately, they are yet to function as one; a year after its opening, the jail has only a handful of inmates, and the courthouse has been used twice. Meanwhile, little dent has been made in the hundreds of backlogged cases stemming from the everyday disputes that affect most Solomon Islanders most of the time.

[6] For a review of some of the most recent initiatives, see Trubek and Santos (2006).

"political will," or donor "coordination" (Pritchett and Woolcock 2004). Even in the most propitious of circumstances, however, engaging in legal reform and seeking to respond effectively to the challenges and opportunities of pervasive legal pluralism is a qualitatively different challenge from building roads, immunizing children, and fertilizing crops (important and difficult as these tasks are), because legal systems, and rules systems more broadly, are social inventions. Like languages (which are also a form of rules system), social inventions draw their salience and strength from the acquiescence of those using them, becoming meaningful, actionable, and legitimate through idiosyncratic political and cultural processes. Reforming or enhancing social inventions (such as legal systems) is a different kind of policy problem, and as such these require different kinds of solutions, informed by correspondingly different kinds of analytical and assessment frameworks from those that tend to dominate most (large) development agencies.

Institutional imperatives to regard legal and judicial reform as merely a variant of other development problems are compounded by the bureaucratic nature of development agencies (like the World Bank), which demands that such reforms and systems to implement and manage them, be made legible, broadly understandable, and actionable. For fiduciary and quality control mechanisms to work at scale in such an organization, project documents need to be written and assessable by non-specialists, providing results indicators that can be easily measured; the privileging of templates, bullet points, matrices, or the simple triangle to deftly link together fundamental aspects of social life leaves little space for the inherent complexities that characterize a given context. To get approval to support a particular initiative or policy reform, staff must present a coherent, persuasive story about how certain actions will lead to expected change in a given context in a given time frame (usually three to five years);[7] these imperatives encourage staff to present knowledge that is either not known or perhaps even not knowable as clearly legible within the existing apparatus of institutional categories, discourse, and frameworks. Such representations tend to say more about the context within which they are written than the social realities they purport to represent. Personal career incentives of course come into play as well, with staff rewarded for delivering "successful projects" and providing policy responses that demonstrably "work." Even more highly prized are those projects and policies that meet predetermined targets such as the Millennium Development Goals, and with a minimum of political controversy. There are few

[7] Such short time frames are themselves deeply problematic. As the World Bank itself observes in its World Development Report 2011 on conflict and security (World Bank 2011), achieving a one-standard-deviation improvement in its "rule of law" indicator took forty-one years, on average, among the twenty *fastest*-reforming developing countries. For those not "reforming" at all, or even regressing, the time frame is essentially infinite (or at least unknown). Sustaining political support and justifying financing for development initiatives whose impact – even when implemented by the best people, with adequate financial backing and administrative cooperation – may not be apparent for multiple decades is a serious challenge for our contemporary international aid architecture.

incentives, however, to document the real activities and complexities of everyday development practice: the constant negotiations, exchange of ideas, and building of networks, partnerships, and understanding across all spectrums of a given society, the development community, and within the development agency itself, as well as the political maneuvering required to get any initiative off the ground. It is in these spaces that development practitioners come in contact with legal pluralism in all its forms, but it is these stories – and this understanding of what all these exchanges are actually about and why they so often stall – that are rarely told.

The fact that the analytical and empirical work in large development organizations (such as the World Bank) tends to be dominated by economists also complicates the task of responding effectively to legal pluralism. Paradoxically, for all its apparent sophistication and rigor, economics can provide (or justify) the "simple" answers that large bureaucracies require.[8] Although there is a vibrant sub-field on "law and economics" (see Cooter and Ulen 2007), for example, its prevailing assumption is that the content and effectiveness of the law is best understood via the tools of neoclassical economics. Ontologically, this gives rise to a view of "the law" (and companion concepts, such as "property rights" and "contracts") that largely assumes similarity across different contexts; such assumptions, in turn, justify certain preferred epistemological entry points for empirical research, strongly favoring comparative econometric analysis over the more context-specific (idiosyncratic) findings of anthropology, sociology, and history (Woolcock, Szreter, and Rao 2011).[9] Such economic methods based on quantitative data collection and analysis – generally gleaned from individual people or events – tend to overlook or undervalue the inherently relational and inherently contested nature of socioeconomic life. This is particularly problematic for the analysis of legal orders that are fundamentally about establishing rules that define and govern relationships and allow for peaceful contestation; in turn, institutional transformation implies a shift in relationships and

[8] In principle, one might imagine that "small" development agencies (e.g., specialist nongovernment organizations), many of them inspired by rights-based or political concerns rather than economics, may be inherently better placed to respond to the specific legal issues of poor communities. This may be so in certain instances, but small is not always beautiful, especially when considerable leverage (symbolic and/or substantive) is required to move and sustain a legal reform agenda in a more inclusive direction or at scale.

[9] Commenting on recent work by economists studying the causes of civil war, McGovern (2011, 353) astutely observes that the "extensive and intensive qualitative research required to obtain context-specific knowledge is neither a luxury nor . . . a kind of methodological altruism to be extended by the softhearted." It is, in purely positivist terms, the epistemological due diligence work required before one can talk meaningfully about other people's intentions, motivations, or desires. The risk in foregoing it is not simply that one might miss some of the local color of individual "cases." It is one of misrecognition. Analysis based on such misrecognition may mistake symptoms for causes or view two formally similar situations as comparable despite their different etiologies. To extend the medical metaphor one step further, misdiagnosis is unfortunate, but a flawed prescription based on such misrecognition can be deadly.

the rules and norms that govern them, all of which is likely to be deeply contentious (Barron, Diprose, and Woolcock 2011).

Even if different theoretical and methodological approaches are largely complementary, too often the "disciplinary monopoly" (Rao and Woolcock 2007) at large agencies manifests itself in a very narrow rendering of what counts as a question and (most important) what counts as an answer. This is deeply problematic for development policy, especially, as indicated, in the field of legal and judicial reform, because it largely precludes, from the outset, the very possibility of engaging with questions of legal pluralism on its own terms. However, the absence of different disciplinary perspectives in shaping approaches to development should not be seen as the fault of economists alone. Among the social sciences, the discipline of economics has been by the far the most adept at translating research and analysis into policy solutions and practical action (thereby bridging the divide between theory, research, and practice), whereas other disciplines, such as anthropology, with its uncomfortable relationship to colonial histories, has until recently actively steered clear of development policy and practice. As a consequence, other disciplinary perspectives that have come to the table in more recent years find it difficult to do so on their own terms without being sidelined or steamrollered. It is undeniable that the ability to work effectively in the World Bank (and other large development agencies) is helped greatly by an ability to understand and communicate with economists. At the same time, establishing partnerships and collaborative relationships with leading social scientists in academia or research institutions was one of the primary motivations behind the workshops and meetings that led to this publication.

None of this is to say that alternative approaches cannot be pursued, even in an institution like the World Bank.[10] However, doing so brings with it an added complexity: on the one hand, rule systems and justice institutions provide frameworks and spaces for contestation and innovation, while on the other hand, these systems and institutions themselves emerge from these same processes. How it is that broadly coherent and legitimate "rule of law" systems emerge in any given country context is only clear with the benefit of hindsight; they are not (or are very rarely) the product of anyone's grand design, and they inherently entail conflict because their articulation and consolidation over time necessarily benefit some while (actually or potentially) being costly to others (North et al. 2009). For this reason, mechanisms for addressing conflict need to be incorporated into the design of interventions seeking to facilitate the emergence of "rule of law" systems.

If development agencies and the disciplines that dominate their analytical frameworks struggle in general to engage adequately with legal pluralism, responding more constructively to the challenges and opportunities that legal pluralism presents

[10] A key theme of the World Bank's Justice for the Poor program, for example, is that "building the rule of law" fundamentally requires local organizational innovation and that processes of reform at the local level must be undertaken on the basis of a detailed understanding of the context in which they will occur (see Sage, Menzies, and Woolcock 2010).

requires a clear articulation of exactly why it is a development issue. It is to this that we now turn.

LEGAL PLURALISM AS A DEVELOPMENT ISSUE

Legal pluralism characterizes those situations in which there are multiple legal and normative orders governing everyday life (Merry 1988). The phenomenon of legal pluralism per se is not unique to developing counties – social norms and multilayered legal systems are ubiquitous in developed countries, as when states in a federation have different laws pertaining to criminal penalties, or the United States seeks to accommodate the particular rules governing Native American communities – but it is experienced most intensely in such contexts because (a) there is often no credible overarching system for mediating between these different orders; (b) such orders may be deeply embedded in broader political and cosmological systems, which themselves may be incommensurate; and (c) there may be so many qualitatively different and contending orders in a given context, yet (d) each of these elements, individually or collectively, may be fluid, relatively weak, and/or overwhelmed by the wider array of social challenges they now confront. Let us address each of these aspects in turn.

Legal pluralism becomes a development issue when

(a) There Are Weak or Absent "Meta-Rules." In many respects, the development of a rule of law system entails forging a set of enforceable agreements about how to manage the contending claims of subordinate legal and normative orders. International law is perhaps the highest embodiment of such agreements – for example, when it helps individual countries sort out their differences on trade. But agreements can also emerge at lower units of analysis in developing countries in settings of high legal pluralism, thereby constituting an organic set of "meta-rules" (Barron et al. 2004) for mediating everyday disputes between contending orders. To the extent that external agents can facilitate the emergence of such "meta-rules" (e.g., through carefully designed development projects or supporting paralegal intermediaries), they can be said to be building "interim institutions" (Alder, Sage, and Woolcock 2009) that attempt to engage constructively with competing legal-normative orders in ways that allow for nonviolent contestation around points of difference without predetermining the final end state.

(b) Different Normative Orders Are Embedded in (Incongruent) Political and Cosmological Systems. As Gauri (2009) stresses, a defining characteristic of many non-state legal systems is their conjoined status with political structures and the encompassing-meaning systems by which people make sense of what happens to them.[11] Although this can also be said for state legal systems – that they reflect and

[11] On the importance of intersubjective meaning for development policy, especially in "fragile" states, see Gauri, Woolcock, and Desai (2011).

serve to reinforce prevailing political structures and value systems – such systems also ensure some level of "separation of power" by making clear distinctions between the core functions of state to enact, to implement, and to adjudicate the law. In non-state systems, this separation of functions and powers may not exist. In such systems, political power vested in ruling elites also tends to confer discretionary power to determine the rules, whereas both the rules and the rulers themselves may embody (and/or draw their legitimacy from) cosmologies that are deeply constituent of people's identities, beliefs, aspirations, and values. In some contexts, this may lead to outcomes that upset liberal sensibilities and thus become (deeply) problematic for development practitioners to engage with. Upholding the integrity of a community's system may be seen as a higher priority than discerning what is "just" for a given individual, as when a community facing a rape charge asserts the primacy of restoring group "harmony" and family "honor" over prosecuting the individual perpetrator. Moreover, if a feature of rule of law systems is the formal separation between politics, law, and religion, in many developing country settings (and indeed for certain groups within developed countries, such as Aborigines in Australia), these "powers" remain fused, their separation unthinkable. As Polanyi (1944) long ago argued, in the course of the development process, transactions of all kinds that were once deeply embedded in familial and cosmological relations became increasingly separated, giving rise to widespread conflict as identities and power relations were reconfigured. In many respects, these processes continue to play themselves out in developing countries today; as such, legal pluralism is less a "problem" (to be "fixed" by "experts") than a pervasive empirical reality whose political salience is only enhanced by deeper processes of social change.

(c) The Volume and Diversity of Contending Orders Is Large. Legal pluralism in developing countries can differ in degree from counterpart situations in developed countries because of the sheer volume and diversity of (often contending) legal-normative orders. In any given social realm – but particularly one characterized by high ethnic diversity – different religions, different forms of "customary" law, different layers of state law (national, regional, and local), and indeed the administrative requirements of different development projects together constitute the prevailing "rules of the game" that those seeking justice must navigate. Much of this legal pluralism will be "unobservable" in a statistical sense and thus difficult to detect (let alone understand) via the dominant modes of enquiry (e.g., large-scale household surveys) typically used to plan, to implement, and to assess orthodox development projects and policies.[12] Moreover, standard "development" activities, such as the provision of roads, schools, telecommunications, and public transport, only serve

[12] This is not to say, of course, that local justice issues cannot (or should not) be assessed using household surveys (and the statistical analysis to which such data give rise); it is just a far more vexing issue than collecting information on (say) standard demographic categories, which itself is hard enough. Indeed, see Himelein, Menzies, and Woolcock (2010) for a "second best" attempt to construct an instrument (based on various isolated initial efforts) for assessing local justice issues via household surveys.