The Rule of Law and Legal Pluralism in Development

Brian Z. Tamanaha*

After decades of disappointing progress in building the rule of law in societies that suffer from poorly functioning legal systems, the development community has turned its attention to legal pluralism. Legal pluralism is a prominent feature in many development contexts, with both negative and positive implications for the rule of law. The negative questions revolve around whether or to what extent the presence of multiple coexisting legal forms hampers or detracts from efforts to build the rule of law. The positive questions revolve around whether alternative legal forms in situations of legal pluralism might satisfy rule of law functions that failing state legal systems are unable to provide. This essay explores these questions.

After decades of disappointing progress in building the rule of law in societies that suffer from poorly functioning legal systems, the development community has turned its attention to legal pluralism. Legal pluralism is a prominent feature in many development contexts, with both negative and positive implications for the rule of law. The negative questions revolve around whether or to what extent the presence of multiple coexisting legal forms hampers or detracts from efforts to build the rule of law. The positive questions revolve around whether alternative legal forms in situations of legal pluralism might satisfy rule of law functions that failing state legal systems are unable to provide. This essay will explore these questions.

Two limitations of this exploration – the first involving application and the second involving theory – must be acknowledged at the outset. Rule of law development projects take place around the world in extraordinarily varied situations, each of which is unique. Observations about the interaction between the rule of law and legal pluralism, therefore, can be offered only as broad generalizations. Whether these generalizations apply, and what their concrete implications are, depend upon the circumstances at hand. What is relevant to isolated islands in

* Professor of Law, Washington University in St. Louis School of Law, St. Louis, Missouri.

Hague Journal on the Rule of Law, 3 : 1–17, 2011

doi:10.1017/S1876404511100019

the Pacific, for example, may have no application to rural areas in Africa or to jungles or favelas in Latin America. Nothing in this essay applies everywhere, and for some contexts the themes taken up here will have little bearing. This essay sets out a framework for thinking about matters, not a formula with concrete application.

A theoretical limitation arises because theorists sharply disagree over the meaning and implications of the rule of law *as well as* over the meaning and implications of legal pluralism.[1] One highly contested notion is hard enough to manage, but working with two such notions in tandem threatens to defeat the exploration before it begins. To avoid getting bogged down in irresolvable theoretical disputes, I will posit a basic working formulation of each. The *rule of law* means that government officials and citizens are bound by and generally abide by the law. *Legal pluralism* refers to a context in which multiple legal forms coexist. These are minimalist formulations of vastly complicated ideas. Although legitimate objections can be raised against each, and other formulations could have been offered in their place, they represent sound understandings of these notions and their pared-to-the-bone quality makes it possible to examine the interaction between them.

State Legal Systems in Development

To begin, a set of broad generalizations will be offered about the relative power and functional capacity of state legal systems in development contexts. In societies with well established legal systems, the state legal system is highly differentiated (legislatures, police, prosecutors, judges), with amply funded and solidified legal institutions, well trained and disciplined legal officials, a well educated legal profession, and a substantial body of legal knowledge which developed gradually over time in connection with internal social-political-economic dynamics. Government officials and the public identify with and feel some obligation to abide by the state legal system. Failures in the legal system and law-breaking among officials and citizenry are normal conditions at the margins, but by and large the system operates effectively owing to the combination of broad voluntary compliance backed up by the threat of coercive sanctions imposed upon violators.

Rule of law development projects are undertaken in societies that lack these basic characteristics.[2] They have less differentiated and entrenched state legal

[1] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 2004; Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', in: 30(3) *Sydney Law Review* (2008), p. 375.

[2] Brian Z. Tamanaha, 'The Primacy of Society and the Failures of Law and Development', in: 44 *Cornell International Law Journal* (2011 forthcoming).

institutions, fewer financial, material and human resources, defectively trained and disciplined legal officials, a poorly established legal profession, and an inadequately developed body of legal knowledge (with a greater proportion of transplanted legal norms derived from external sources). The presence and power of the state legal system may be weak or may have a limited reach (hardly any presence in distant or inaccessible rural areas, ineffective in the slums of megacities). The populace may be wary of the state legal system. Law may be perceived as alien or inscrutable; it is sometimes written in a language different from the vernacular of groups within society. Or it may be seen as corrupt or incompetent or inefficient or prohibitively expensive. Or it may be seen as a tool of the elite. Or it may be dominated by a particular ethnic or religious subgroup in society. Or it may be stained by a history of oppressive authoritarian rule or by the use of the law by political or economic elites as a means of economic predation. When a combination of these conditions holds, a substantial proportion of the populace will not identify with state law – they will not see it as *their* law, serving *their* needs.

What makes rule of law development so difficult is that a failing state legal system cannot be fixed by focusing on legal institutions in isolation. Take judicial reform – a favorite of law and development projects. Training judges accomplishes little by itself. A sizable group of trained legal practitioners are needed to handle cases and to help develop legal practices and shared legal knowledge. Competent clerks and transcribers with adequate office space and equipment are necessary to process cases and record proceedings. Judicial compensation must be set at a level sufficient to attract qualified individuals and to lessen the temptation to corruption. Judges must resist the influence of prejudices, or class or group loyalties, the calls of friendship or extended networks of relations, or other inappropriate factors. Judges must not be subject to intimidation from war lords, drug lords, organized crime, terrorists, or other dangerous elements, including other government officials. The public must generally comply with judicial rulings and judicial orders must be backed by effective sanctions when voluntary compliance is not forthcoming. Political leaders, military leaders, the economic elite, the police, and government officials must abide by judicial rulings, including rulings that go against their interests or frustrate their desires. As this list illustrates, functioning legal systems require a host of secondary supportive conditions, involving a confluence of social, economic, cultural, and political factors. When the background conditions that support legal systems are woefully inadequate, as is the case in many development contexts, the legal system will be dysfunctional, reform efforts will be stymied, and the populace will avoid or despise the legal system. As one development practitioner in Africa noted, more 'than 80 to 90 percent of day-to-day disputes in Africa are said to be resolved through nonstate systems such as traditional

authorities.'[3] The UK Department for International Development estimates that 'in many developing countries traditional or customary legal systems account for 80% of total cases.'[4] This might well be an understatement.

If a state legal system is stuck in a dysfunctional state, viewed negatively by the populace, with reform efforts persistently failing, it is sensible to explore alternatives that might satisfy legal functions. But the development community has been slow in coming to this realization. Two recent Reports of the UN Secretary General emphasizing the importance of 'United Nations support for the rule of law' focus almost exclusively on efforts to build state legal institutions, listing 'court administration, legal drafting, judicial accountability, … prison management, reparations, prosecutions, international and mixed tribunals, legal training, land and property rights, international humanitarian, human rights and refugee law, constitutional law, institution-building, public administration reform and so on.'[5] Only passing mention was given to 'the presence of traditional and customary systems.'[6]

The Rule of Law Briefly

Before turning to legal pluralism, several implications of the stipulated definition of the rule of law – government officials and citizens are bound by and abide by the law – must be drawn out. At a minimum, it assumes that legal rules exist and that government officials and citizens know what the rules require in connection with their actions (the rules must be declared in advance and made public). Otherwise it is impossible to be bound by and abide by the law. The rule of law operates at two levels: it imposes legal limitations on and coordinates the behavior of government officials and it imposes legal limitations on and coordinates the behavior of citizens.[7]

Government officials are subject to two distinct types of legal limitations. The first limitation is that government officials *must abide by valid laws in force* at the time of any given governmental action. Officials must remain within established legal bounds when exercising the power attached to their public positions. If they

[3] Laure-Helene Piron, 'Time to Learn, Time to Act in Africa', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad; In Search of Knowledge* 2006, p. 275 at p. 291.

[4] Stephen A. Golub, 'A House without a Foundation', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad; In Search of Knowledge* 2006, p. 106 at p. 106.

[5] Report of the Secretary General, 'Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law', United Nations General Assembly Security Council, 2006, p. 7.

[6] Report of the Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', United Nations Security Council, 2004, p. 12.

[7] Brian Z. Tamanaha, 'A Concise Guide to the Rule of Law', in Gianluigi Palombella and Neil Walker (eds.), *Relocating the Rule of Law* 2009, p. 3.

wish to do something that is legally prohibited or not authorized by current law, the law must be changed to remove the prohibition or grant the authorization before the actions can be taken. Citizens benefit because they are apprised in advance – by consulting the relevant legal rules – of the range of actions they can engage in without fear of government interference or reprisal. (For convenience, I label limits on officials the 'vertical' effect because it relates to the relationship between government and citizens.) The second limitation *imposes restrictions on the law itself*, controlling the law-making power of state officials. This limitation sets a higher hurdle than the first because it imposes legal restrictions that cannot be altered through ordinary legal processes. Versions of such limits include the constitution of a given country, binding international law, human rights provisions, and religious or natural law proscriptions. State law makers are prohibited (at least in theory) from enacting laws that contravene these legal constraints.

Legal limitations on citizens (including corporations) establish rules that govern social intercourse. (I label this the 'horizontal' effect because it relates to the relationship between citizens.) This includes property rights, contracts, injuries or harms inflicted upon one another (tort law), familial obligations, and crimes against persons or property. Legal rules help coordinate social behavior and maintain social order. These rules secure the person and property of citizens from interference by others and they facilitate and effectuate transactions. Disputes that arise between citizens are resolved in accordance with these rules.

A frequent misunderstanding must be preempted here. To say that state law helps establish rules for social intercourse and maintain social order emphatically does not mean that it is the main source of social order or that the entire realm of social behavior is or should be governed by state law. That is neither possible nor desirable. Multiple normative orders exist within every society, including customs, morality, religious norms, social etiquette, workplace norms, business norms, and more. The presence, scope and penetration of state law vary by subject matter and location. Certain matters, like banking or corporate law, are thickly governed by state law. Certain societies are more permeated by state legal regulations than others. But state law can be marginal or even non-existent in many social arenas. To conform to the rule of law requires that whatever state law addresses should be generally adhered to, but it does not entail that law covers everything. The scope of coverage of state law varies widely among societies, and nothing in the rule of law necessitates that state law covers the same things everywhere.

It must also be kept in mind that nothing in the rule of law itself – at least not in the bare terms set for here, known in legal theory as the 'thin' or 'formal' version of the rule of law[8] – entails that the legal rules must be good or just in content or application. The law can be bad, unfair, or harsh, yet still be consistent with the

[8] Tamanaha, *On the Rule of Law,* pp. 91-102.

rule of law (think of former racial segregation laws in the USA). An oppressive legal order can satisfy the rule of law as long as the rules exist in advance and government officials and citizens abide by the rules.

A final clarification relates specifically to legal pluralism. The notion of the rule of law is typically applied to state law, and sometimes to international law. The above analysis reflects this state law thrust. However, the pared down definition I adopt in this essay – government officials and citizens are bound by and abide by the law – does not specify any particular type of 'law.' This generic quality allows it to be applied more broadly to other forms of law, as I will demonstrate in the course of this essay.

Legal Pluralism Involving Custom, Tradition, and Religion

A common form of legal pluralism involves the presence of norms and institutions identified with custom, tradition, or religion, or with informal or village tribunals, operating alongside state legal institutions. Colonization in the 18th and 19th centuries was a major source of these types of legal pluralism.[9] Transplanted legal regimes imposed by colonizers on subject lands mainly addressed the affairs of colonial government (taxes, maintaining colonial rule), economic matters (protecting commercial interests), and relations among expatriate settlers or mixed cases between settlers and indigenous people.[10] Initially, colonizing powers often used indigenous leaders and institutions for indirect rule, and otherwise largely left them alone. Over time, as colonial rule was extended, state legal systems selectively incorporated customary or religious laws (subject to repugnancy clauses), and recognized or created customary or village tribunals to handle local matters (family law, customary and religious norms, minor disputes). Colonization thus produced legal pluralism, grafting or erecting a variegated mix of legal systems: transplanted state legal systems focused on matters of government and commerce, alongside modified indigenous laws and institutions, with mutual interpenetration and hybrid combinations of both.[11] The legacy of these historical arrangements continues today, decades after the end of colonization. Legal arrangements like this also exist in places where colonization was not a factor, when indigenous rules developed state legal institutions but did not (could not or saw no need to) extend the reach of state power into the hinterlands, or over distinct ethnic or religious groups within the territory which maintained a degree of autonomy from central government.

[9] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* 2002.

[10] Wolfgang Mommsen and Jaap de Moor, *European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* 1992.

[11] Tamanaha, 'Understanding Legal Pluralism'.

A multitude of such arrangements exist, no two exactly alike. Customary or village or traditional or religious or informal courts or councils, or leaders or elders, handle social disputes and other problems, applying their own norms in their own ways. Some are officially recognized by and incorporated within the state legal system, enjoying symbolic and financial support from the state, while others operate independently of the state. Some are decades-old standing institutions that take on the trappings of state courts, while others are occasional informal bodies that meet only when the need arises. Some make decisions oriented toward the application of rules, whereas others strive to reach a consensual resolution that satisfies all the parties involved and repairs the breach in the community. Although they frequently bear the label 'customary' or 'traditional' or 'religious' courts or tribunals, these are contemporary institutions that deal with everyday problems.

A few preliminary propositions will be offered about these tribunals with the caveat that what is stated may not hold in a given context. In contrast to most state legal institutions in development contexts, these institutions are *of* the community, closer in derivation and proximity, and hence more accessible to members of the community. Its norms and processes, its modes of decision making, are understood by members of the community. The proceedings are less costly, more timely, and often do not require the intermediation of legal professionals. The decision makers are known to or recognized by the community. Remedies or sanctions issued by decision makers rely upon the acquiescence of the parties and upon community support, which usually necessitates that the result be perceived by the community as acceptable (either owning to the appropriateness of the outcome, belief in fairness of the proceedings, or deference to the status of the decision makers).

These local tribunals must not be overly idealized. The norms they enforce may be objectionable, their processes may be skewed, and decision makers may have warped motivations or be self-interested or corrupt. They may fail to meet due process standards like neutrality, opportunity to be heard, and equal application of the rules without regard to the identity or status of the parties. The fact that they are *of* the community does not necessarily mean they are *for* the entire community; nor is it always the case that everyone in the community respects them. Furthermore, certain customary or religious norms, especially those imposing harsh punishments or unequal treatment of women, or enforcing caste systems, may chafe against human rights and women's rights. But they usually enjoy at least one major advantage over state legal systems: they work in ways that people understand and can generally anticipate. This awareness provides the participants a greater sense of control over their fate and it makes the decision makers more accountable because what they are doing can be evaluated against shared community standards and expectations.

Now let us apply the definition of the rule of law to these legal forms.

When members of the community understand and identify with these local tribunals, when they are more accessible, when the orientations and norms of the decision makers are familiar, it is more likely that people in the community will feel an allegiance to them. When this holds, basic rule of law functions can be filled by these legal forms irrespective of whether they are officially recognized as part of the state legal system. The core 'horizontal' (person to person) functions of the rule of law – to help coordinate behavior and resolve disputes between members of a community – are achieved by these local norms and institutions. The high percentage of people in development contexts who currently take their disputes to non-state legal institutions for resolution is evidence of their usefulness.

These institutions, however, might not be adequate substitutes for state law on all horizontal matters. Crossover situations – when a dispute involves members of different communities or religious groups, or between a person attached to traditional ways and a person who rejects those ways – are problematic. For example, when a dispute arises between a commercial enterprise and a local merchant or member of the community, the commercial enterprise may have structured the transaction relying upon state legal norms which are incompatible with customary or religious norms. To have a traditional or informal tribunal resolve these types of disputes may be contrary to the prior expectations of at least one of the parties, making it difficult to produce a consensus decision, and perhaps generating uncertainty for future transactions.

With respect to vertical (government-to-person) functions, these institutions cannot replace an essential benefit provided by the rule of law: erecting legal restraints on government officials (which is also poorly achieved by state legal systems in many development contexts). Customary and religious legal institutions cannot do this because usually they do not address or enforce state legal norms, and their coercive power is limited. Notwithstanding this crucial incapacity, non-state legal norms and institutions can sometimes erect vertical legal constraints on government officials in other ways. A few post-colonial legal regimes accord superior status to customary law in a way that trumps state legal provisions, or they reserve for traditional or religious authorities certain geographical regions or subject matters beyond the reach of government officials. Religious and traditional authorities, in turn, are themselves subject to religious and customary legal restrictions, which is a type of vertical restraint.

Although the foregoing discussion focuses on the contrast between state law and customary or informal or religious norms and institutions, pluralistic situations manifest all sorts of interaction. Customary institutions and religious institutions may be in conflict with one another. This occurs in Afghanistan, where battles wage between tribal elders in the name of traditional institutions against

the Taliban bringing strict Islamic norms. When different groups live in tension side-by-side, the contest can be between two customary systems, or two religious systems, over which norms and institutions will prevail within the community or over mixed interaction between members of different communities. Another variation can be found in urban favelas or slums, where unofficial norms established and enforced by the community, or by criminal gangs, *de facto* govern property transactions and maintain social order more effectively than the state legal system.[12] The potential combinations that can arise in legal pluralism are limitless.

It must also be emphasized that, while the analysis thus far highlights clashes between coexisting legal systems, the relationship between coexisting systems can be complementary and mutually reinforcing. State legal systems that incorporate or recognize customary or religious regimes benefit by providing locals with a forum that serves their needs, while the state maintains some control by setting the terms of incorporation and (sometimes) by paying local authorities; customary or religious tribunals and leaders, on their part, benefit by securing state funding and by enjoying the boost of status and authority (and sometimes coercive backing) that follows from state recognition.

Legal Pluralism Involving Capitalism and Liberal Rights

Colonization brought on the first wave of legal pluralism, as described above. A second wave is occurring today, consisting of two distinct strains. Legal norms and institutions attached to global capitalism (the first strain) and to liberal democratic norms (the second strain) are now being exported to societies around the world with different social, cultural, economic, and political underpinnings and legal systems. Several notable parallels are evident in the first and second waves of legal pluralism. During colonization as well as today, much of the impetus for and models applied in legal transplantation came from outside and the process on the receiving end was less than consensual. Economic motives were the prime movers of colonization (then) as well as in the spread of global capitalism (now). Missionaries brought Christianity to the natives then; today Western development organizations and NGOs proselytize about capitalism, democracy, human rights, and women's rights. In both waves, those exporting law assumed that their version was *the* right or best model, using templates taken from home to build legal regimes elsewhere. As occurred with colonization, the result today is a hodge-podge of coexisting, potentially clashing social and legal norms and institutions. Each strain of the modern wave will be taken up sequentially below.

[12] Boaventura de Sousa Santos, 'Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada', in: 12 *Law & Society Review* (1978), p. 5.

The spread of global capitalism, a historical process set in motion several centuries ago, must not be conflated with the efforts to promote economic development made by the modern development community. The former involves an epic transformation around the globe in the organization of economic activities – albeit with many impoverished areas excluded; the latter involves the ideas and activities of (mostly) Western funded development organizations. The spread of capitalism is an undeniable fact, manifested in the rise of the Asian tigers, the collapse of communism, and the recent growth of China, India, and Brazil;[13] whereas, programs to promote economic development, which concentrate on regions left behind, are widely considered a failure.[14] The spread of global capitalism owes relatively little to the activities of the development community.

The bulk of the funding for law and development activities is provided by institutions, like the World Bank, whose primary mission is to advance economic development. Law is touted as a *means* to advance the economic development *end*.[15] The standard package includes laws on incorporation, securities, antitrust, banking, intellectual property, commercial transactions, protections for foreign investors, and property rights and contract enforcement. This was the law component of the 'Washington Consensus' plank of market friendly reforms actively pushed around the world in the 1980s and 1990s.[16]

A conventional set of assumptions about the role law plays in economic development are articles of faith among many in the development community. The protection of property secures the fruits of one's labor, which encourages people to devote greater efforts in productive activities. The enforcement of contract enables people to engage in transactions with assurances that that they will be carried through, expanding the range of contracting parties to include strangers at a distance over time, increasing the number of transactions. Society benefits from property and contract laws because encouraging productive activities and economic transactions increases aggregate social wealth.[17] A prominent voice from the South, Peruvian economist Hernando de Soto, highlighted the special economic significance of property rights.[18] A great deal of land in development contexts is not officially titled, especially where registering title is a lengthy and costly process. In the absence of legal recognition, he argued, property cannot be used as col-

[13] Jeffry A. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* 2007.

[14] William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* 2006.

[15] Tamanaha, 'The Primacy of Society and the Failures of Law and Development'.

[16] Paul Brietzke, 'The Politics of Legal Reform', in: 3 *Washington University Global Studies Law Review* (2004), p. 1.

[17] Kenneth W. Dam, *The Law Growth Nexus: The Rule of Law and Economic Development* 2006.

[18] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* 2000.

lateral to secure loans, people are less inclined to improve the property (fearing they will lose it), and the market for real property is artificially constrained. As a result, much of the potential wealth and capital in developing societies is locked up unproductively.

Many law and development projects conducted in the name of economic development have increased legal pluralism. This pluralism (the coexistence of multiple legal forms) almost invariably follows whenever legal regimes are transplanted from elsewhere. Titling projects, which rank high on the development agenda, are a prime example. Property in many societies is conceived of and controlled in a variety of ways that do not match freehold ownership by individuals. In such societies, family and clan members possess various capacities to use land – to cross it, graze their animals on it, collect its fruits, till it – and others must be consulted about uses of the land. The process of titling extinguishes much of this because use and access rights are not recognized by standard legal titles and banks do not favor encumbered collateral. When property is titled in situations like this, individuals are confronted with conflicting rule systems – state law granting freehold ownership versus communal use and possession rights – that confer different advantages and disadvantages. Traditional leaders, for instance, can officially register and sell or borrow against property, dispossessing members of the community and altering access to and the distribution of land in ways that were not possible under customary systems. The dispossessed can no longer live off the land and will be forced to find other ways to feed and house their families. Women stand to be adversely affected because ownerships rights in many cultures, if reduced to a single titular 'owner', often favor men.[19] The broader social structure can also be disrupted because social relations in many local communities revolve around the land.

Although titling projects have been promoted to bring clarity to property ownership, the immediate consequence of these projects, owing to legal pluralism, may be the opposite.[20] Two coexisting bodies of law, state and customary, are brought into clash in a manner that unsettles both, allowing competing claimants to point to different legal sources in support of their conflicting positions. (An increase in pluralism does not result in all circumstances; granting official legal title to squatters in urban slums to acknowledge their *de facto* possession-based ownership might reduce legal pluralism and enhance certainty.) State law may assert that official title is superior, but people within the community can effectively place a cloud over ownership by resisting state issued titles.

[19] Ambreena Manji, *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* 2006.

[20] Easterly, *The White Man's Burden*, at pp. 95-97.

The foregoing example is negative, but legal pluralism might also hold positive implications for the rule of law and economic development. Commercial enterprises that prefer to avoid state legal systems – owing to corruption, ineptitude, delay, or bias – can resort to (or create) alternatives, like independent commercial arbitration or a tribunal instituted by the merchants themselves that operate apart from the official legal system. By encouraging alternative legal institutions that compete with state law, this increase legal pluralism, but for the positive purpose of satisfying rule of law functions – resolving disputes – that go unmet by failing state legal systems.

The second strain of the contemporary wave of legal pluralism goes beyond economic development. In the past decade development efforts have placed a growing emphasis on democracy, human rights, women's rights, labor rights, environmental protection, and access to justice for the poor. These initiatives are often bundled with rule of law promotion.

Unlike the economic development strain, these efforts often take direct aim at the culture and order of a society. The spread of capitalism visits sweeping changes on cultures and societies: drawing people from the country to the city, bringing women into the workplace, imposing work discipline, controlling the daily rhythm, providing money to families and communities from external sources, offering a broader range of goods for consumers, increasing exposure to mass media, and much more. The disturbances of cultures and societies that result, however, are mostly side effects rather than intended consequences of global capitalism.

In contrast, human rights and women's rights initiatives directly target the culture, society, and polity when challenging harsh or discriminatory treatment of low caste, the poor, children, women, or social outcasts (homosexuals, criminals, etc.). The transformative consequences of global capitalism on local culture and society might well be more thoroughgoing, but the indirect versus direct nature of the consequences matters greatly in how they are received. People who eagerly seek the economic fruits of capitalism are less wont to protest its adverse cultural side effects, whereas human rights and women's rights initiatives are viewed as frontal assaults on their way of life – which they rise to defend – offering little in return in the eyes of those who oppose the changes (although beneficiaries, like women, may embrace them).

Legal pluralism produced in connection with this broader development strain is dynamic and multisided. NGOs press human rights or women's rights (with women's rights now often couched as human rights) as universally applicable and superior to customary and religious traditions.[21] In defense of the challenged norms or practices (for example, relating to divorce rights, domestic violence, and

[21] Asifa Quraishi, 'What if Sharia Weren't the Enemy? Rethinking International Woman's Rights Advocacy on Islamic Law', in: 30 *Columbia Journal of Gender & Law* (2011 forthcoming).

inheritance of property), traditional leaders cite to customary or religious norms and institutions. State legal systems may be caught in the middle, when they officially recognize human rights or women's rights, while they also recognize the validity of customary and religious law. In these contexts, several legal regimes are in play – international law, state law, customary law, and religious law – the parties invoking whichever system aligns with their preferred goals.

These broader development initiatives are not always or inevitably set against culture and society – it depends upon the situation, the objectives, and strategic alignments that arise among parties. Environmental NGOs that seek to limit mining or deforestation by multinational corporations, for example, can find allies in traditional leaders who wish to preserve their lands and way of life or to secure a bigger share of the economic benefits of the activities. In these situations international law advocated by the NGOs and customary law advocated by local leaders will join and be pitted against corporate actors, supported by government officials, who cite the authority of state law issued mining or forestry licenses. The cumulative consequence of the first and second waves is to enhance legal pluralism across several dimensions: by increasing the raw number of legal regimes; by increasing the layering and nesting of legal regimes; by placing more legal regimes side-by-side within a single community; by multiplying the ways in which these coexisting regimes interact and interrelate; by creating hybrid blends which join qualities of more than one regime.

The Unique Qualities of Legal Pluralism in Development

The academic literature on legal pluralism is filled with reminders that legal pluralism exists in *all* societies, Western and non-Western, North and South, developed and developing. That is doubtless correct – but it is like observing that the sun shines everywhere, from the Arctic Circle to the Arabian Peninsula. What is significant here lies not in the similarities between Western and non-Western contexts about legal pluralism but in the essential differences.

In Western societies the primary locus of law was gradually established within the state over the course of the 15th through 19th centuries, when the state system coalesced in Europe.[22] Prior to this, the Medieval Period was marked by a rich plurality of coexisting legal systems, including local customary law, Germanic customary law, feudal law, law of merchants, law of separate guilds, canon law of the Catholic church, and roman law.[23] The consolidation of the state system involved several key developments: establishing the supremacy of monarchs within territorial boundaries; creating the public-privation distinction around the separa-

[22] Martin van Creveld, *The Rise and Decline of the State* 1999.
[23] Tamanaha, 'Understanding Legal Pluralism', pp. 377-381.

tion between public office and the person who occupies it, between public resources and private resources (previously the monarch's resources came mainly from personal holdings, and officials were members of the king's personal staff), and between public functions and private activities; building a government bureaucracy which included royal courts and tax collectors. The unification of law within the state was a central aspect of these developments. In the course of this consolidation, other preexisting forms of law, like customary law and canon law, lost their independent 'legal' status. They either were absorbed into the state legal system – as occurred with the law merchant and family law aspects of canon law – or were shunted to the private side of the public/private divide, where they lived on as private rule systems, but shorn of their previous full-fledged legal status. Through a slow and lengthy process, legal systems in the West thus arrived at their centralized monopoly position.

Development settings today differ in several crucial respects: multiple legal forms with legal status continue to exist alongside state law (law has not been consolidated in the state), state legal institutions and legal traditions are younger and less entrenched, the public-private divide is poorly established, and many legal institutions and norms did not evolve over time in connection with society but have been transplanted from external sources (colonization, global capitalism, liberal democratic rights). Legal pluralism will remain a reality in development contexts for the foreseeable future (although in some locations interrelations with state law may become better articulated with the passage of time). This currently entrenched state, reinforced by path dependence, is deepened by the contrast between the socio-cultural normative ordering of developing societies and the normative underpinnings of state legal systems. This normative contrast was set in place during colonization and is fed today by the continuous external assault on these societies by global capitalism and liberal norms. This clash can be erased only if cultures and societies around the world converge to better match the normative underpinnings of law brought in from the outside. Western societies have never had to grapple with this sharp normative contrast because capitalism, liberalism, and their legal systems collectively developed in sync with their own cultures and societies. Therein lay the pivotal difference.

This leads to an alternative way to perceive the current situation in development contexts. Rule of law projects, which focus almost exclusively on building state legal systems, are implicitly informed by an unstated assumption that the trajectory in developing nations matches that of Western countries – that law will be (must be) consolidated within the state. But this is a problematic assumption for at least two reasons. A different path has brought these societies to their contemporary plural legal arrangements, which are now entrenched. And the state system in Western countries is now undergoing change, devolving away some of its former

monopoly powers, giving up limited aspects of its sovereignty to transnational bodies or greater autonomy to sub-territories, and delegating some of its legal functions to private actors (private security, privately run prisons, private arbitration, etc.).[24] The entrenchment of pluralism makes unification in the state more difficult, while the ongoing devolution of legal functions to private actors suggests that state consolidation of legal authority might not be necessary or desirable.

Rather than an unfinished stage of legal development, legal pluralism is more aptly viewed as a reality in its own right – a functional arrangement that reflects and manages the normative inconsistencies between the society and the state legal system. It may be prudent, in this light, for state legal systems in development contexts to eschew the standard claim to possess a monopoly over law, exercising instead a narrower scope of authority focused mainly on the affairs of a functioning government and the modern economy, and dealing with high crimes. The bulk of ordinary social intercourse can perhaps be better dealt with through local tribunals that are continuous with the surrounding normative ordering. In many locations, rural and urban, this *de facto* division already exists.

Two barriers stand in the way of embracing this perception of legal pluralism. First, the strongly held assumption that the state must hold a monopoly over law paints these as defective legal systems rather than intelligent accommodations to existing circumstances. Second, many local tribunals fail the Western tests of legitimacy. They are usually dominated by males; they might not conform to norms of due process and procedural fairness, they might not strictly apply the rules (compromising to achieve consensus or peace); they might visit harsh punishments or apply inequitable rules; they might resort to ordeals, magic, or other unorthodox modes; and so forth. These societies have their own norms, institutions, and ways of doing things that do not always conform to Western institutions and norms. Nonetheless, these tribunals are accessible and understandable to the people and they can provide fora to resolve disputes and help maintain social order.

Legal pluralism, as shown in various ways above, can comport with and serve rule of law functions, even when they do not meet what the West considers to be standard legal requirements. It is an alternative constellation of law within society that has arisen out of these circumstances and can operate in ways that meet the needs of the community. This is the positive takeaway of this exploration.

Instrumentalism and Uncertainty

Legal pluralism also has worrisome implications, however. The main negative implication for the rule of law is the increase in legal uncertainty that it potentially

[24] Tamanaha, 'Understanding Legal Pluralism'.

creates. All legal systems suffer from uncertainty and excessive instrumentalism.[25] In situations of legal pluralism, however, these problems are magnified. The presence of coexisting legal systems fuels strategic resort to law to advance particular agendas, several examples of which were offered in the course of this essay. Legal disputes usually center upon which party has the better case under the law; disputes in contexts of legal pluralism present an additional layer of questions about which law controls when two or more contrasting legal regimes point toward different outcomes. This puts at issue the respective authority and power of the competing legal systems themselves. Uncertainty is increased – *ex ante* as well as after a dispute arises – for everyone in situations of legal pluralism owing to the ever-present latent potential for a clash of legal regimes. This uncertainty, moreover, can encourage legal disputes because an apparently solid legal position is vulnerable to being unsettled by a challenge grounded on a competing legal regime. Conflict of law rules that exist on paper or officially prescribed legal hierarchies that purport to resolve clashes between coexisting legal regimes might not dampen this uncertainty. The bottom line in these clashes is not the authority a given legal regime claims to possess, but, in the end, which result can be made to stick. Social and political power may matter more in the resolution of these disputes than law.

Legal pluralism, to draw out the crucial point, provides fertile terrain for intensifying legal disputes, with competing legal systems strategically utilized by the parties as weapons in the fight. This scenario leads to the virtual antithesis of the rule of law.

Development Activities and Legal Pluralism

Development projects must be sensitive to and anticipate the implications of legal pluralism, which can be good or bad, depending upon one's objectives and the circumstances at hand. The success of these projects may by stymied or facilitate by the presence of other legal forms. When contemplating legal pluralism, an eye should be cast in two directions: on the legal institutions themselves and on strategic actors in a given social arena. (Development organizations must remember that they too count as such strategic actors.) Each legal form present should be evaluated for its operational capability, the amount of financial or martial or political resources it can enlist, which way its norms point, its relative standing, power, and relations vis-à-vis other coexisting legal forms and other relevant actors (especially economic, political, and military elites). *Power* includes the ability to impose sanctions – ranging from social disapprobation to coercive force – as well as to rally public opinion. The people who staff legal institutions and who have a

[25] Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* 2006.

stake in them and benefit from them must also be considered – including their personal interests and ideological commitments. It is essential to anticipate who stands to gain or lose by a particular course of action, contemplating not only the immediate parties but also the coexisting legal institutions themselves and the people who are vested in them.

Finally, it must be kept in mind that legal development activities are often active *sources* of legal pluralism. Legal pluralism is sharpened when a clash arises between cultural and legal norms. That is what occurs when development organizations promote titling projects or advance human rights or women's rights agendas that run contrary to entrenched cultural or religious norms. The design and evaluation of these projects should consider not only their objectives and the likelihood of their attainment, but additionally whether the project itself will exacerbate legal pluralism in a manner that worsens legal uncertainty and generates divisive battles within law that accomplish little. Social change can be brought about in a variety of ways, including education and exposure to new ideas. When law is used as a coercive mechanism to force change on recalcitrant people, it may prompt a backlash which includes not just law-breaking behavior and avoidance of legal officials, but also resentment toward the law which undermines the long term efficacy of the law itself.