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Legal pluralism across the global South: colonial origins and contemporary consequences

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ABSTRACT

This essay conveys past and present legally plural situations across the Global South, highlighting critical issues. It provide readers a deep sense of legal pluralism and an appreciation of its complexity and the consequences that follow. A brief overview of colonization sets the stage, followed by an extended discussion of colonial indirect rule, which formed the basis for political and legal pluralism. Thereafter, I discuss in order, the transformation-invention of customary law, socially embedded village courts, the enhancement of the power of traditional elites, uncertainty and conflict over land, clashes between customary and religious law and women's right and human rights, the recent turn to non-state law by development agencies, and the entrenched structure of legal pluralism. Notwithstanding innumerable variations and changes across locations and over time, the essay shows that legal pluralism across the Global South constitutes a distinct, enduring social-historical formation with shared structural features that must be understood on its own terms. The essay is written for scholars, government officials, international development agencies, and law and development theorists and practitioners interested in law in postcolonial societies.

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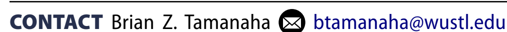
Legal pluralism is ubiquitous across the Global South today—and widely seen as profoundly flawed. Its roots lie in European colonization. Following decolonization, it was thought in many circles that these societies should, and presumably would, follow the path previously taken in the West toward consolidating unified systems of law within the state. More than a half century later, however, legal pluralism remains entrenched and intransigent. It is time to formulate a different understanding of these situations. Rather than see legal pluralism as a temporary, intermediate stage in the evolution of law toward unified systems, these societies and their pluralistic manifestations of law must be understood as distinct, enduring social-legal arrangements here to stay owing to deep historical, social, cultural, economic, political, and legal factors.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Aspects of this article have been published in Chapter 2 of *Legal Pluralism Explained* (Oxford 2021). However, this essay is a standalone piece with far greater depth and detail, which articulates a theoretical account of the structure of legal pluralism not contained in the chapter. I thank two anonymous reviewers for their extensive critical comments of an earlier draft, which helped me substantially improve the essay.

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Consider two accounts, four decades apart. Legal anthropologist Lloyd Fallers in 1962 wrote:

> Among the long list of intractable problems faced by the new independent states of Africa, by no means the least severe is that of creating national legal systems out of the welter of indigenous and introduced bodies of law with which they come to independence. Bodies of customary law have survived, and in some cases have even been strengthened, during the period of colonial administration; European and, in some instances, Near Eastern and Asian elements have been added to the potpourri.… This legal pluralism is, of course, merely the legal aspect of the general cultural fragmentation which is so characteristic of the new African states. Consisting of congeries of traditional polities—some tiny clusters of a few villages, others great kingdoms numbering their subjects in the millions—thrown together by European diplomacy in the nineteenth century, the new states have little common culture to unite them. (Fallers 1962: 605)

In 2005, the World Bank legal department reported:

> In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as "the rules which, by custom, are applicable to particular communities in Sierra Leone." Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana.… In many of these countries, systems of justice seem to operate almost completely independently of the official state system. (Chirayath, Sage, and Wookcock 2005: 3)

Although many changes have occurred in the two generations since independence, at a fundamental level legal pluralism is largely the same.

To observers it is increasingly evident that legal pluralism must viewed in a new light. World Bank development experts elaborated, "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'" (Sage and Woolcock 2012: 1). Recently, however, they "have begun to reexamine some of the underlying assumptions about legal pluralism and to explore the opportunities that might exist in contexts where legal pluralism is a pervasive reality" (Sage and Woolcock 2012: 2). "Understanding legal pluralism is important for any legal or policy intervention, including but by no means limited to state building," a development theorist asserted (Swenson 2018: 458).

This overview is intended to deepen our understanding of legal pluralism: describing how it came about, highlighting its most salient contemporary consequences, and articulating a framework to help grasp these extraordinarily complex situations. Given the monumental scope of the topic, by necessity this is a selective, partial account. The historical discussion of colonialism focuses on British indirect rule, variations of which existed in many locations. Africa takes up the bulk of the coverage, and to a lesser extent parts of Asia and the Pacific, with almost nothing said

about the Americas. It sets aside an enormous variation in cultural, religious, legal, political, economic, ecological, and other circumstances among indigenous societies that underwent colonization. It bypasses all the various paths they have traveled since decolonization, from revolutions, to civil wars, to military coups, to stable regimes, to religious, ethnic, and tribal conflicts, to famines, droughts, economic crises, and much more. Not everything about legal pluralism in the Global South is covered, and not everything covered plays out in the same ways in every situation of legal pluralism. Each situation is unique. To cover these vast topics and all the myriad variations would require volumes of books. Instead, this essay provides selective snapshots of past and present legally plural situations on major issues, elucidating broad patterns and the dilemmas they manifest, explaining why they exist and will persist.

Contemporary aspects of this overview will be familiar to many legal anthropologists, whose work substantially informs this account. Adding historical depth, I delve into colonial legal initiatives to show the implantation of the basic structure that has continued to the present. My hope is to package and convey this historical and contemporary information to development theorists and practitioners, government officials and NGOs, legal theorists, and academics interested in culture, law, politics, and economics in the Global South. I abstain from addressing the long-standing theoretical debate surrounding the concept of legal pluralism, which is not directly relevant to the matters I canvass (see Woodman 1998; F. von Benda-Beckmann 2002; Tamanaha 2021: Chapter 5). However, I proffer a theoretical claim: notwithstanding innumerable variations, legal pluralism across the Global South constitutes a recognizable social-historical formation that must be understood on its own terms. What I identify as the fundamental structure of postcolonial legal pluralism consists of features that help explain the issues it gives rise to and why it will remain entrenched.

A brief introduction of colonization sets the stage, followed by an extended discussion of colonial indirect rule, which formed the basis for political and legal pluralism. Thereafter, I discuss in order, the transformation-invention of customary law, socially embedded village courts, enhancement of the power of traditional elites, uncertainty and conflict over land, clashes between customary and religious law and women's rights and human rights, the recent turn to non-state law by development agencies, and the structural features of legal pluralism. An underlying theme throughout these discussions is the continuity from the past to the present and future.

Colonization

European countries exercised political, economic, and legal domination of large parts of the world from the sixteenth through the mid-twentieth century, exploiting subject peripheries at great distances from the imperial center. European political domination involved exerting control over peripheral territories through an asymmetrical power relationship of ruler and ruled (Streets-Salter and Getz 2016). Economic domination involved utilizing the land, labor, markets, natural resources, and trade of a peripheral territory for the economic benefit of the metropole and its expatriate settler population. Legal domination involved instrumental use of law by the colonial state

to maintain its own coercive power, enforce its political rule, generate revenue for itself, obtain indigenous labor for the colonial government and for settler economic enterprises, and achieve its exploitative economic objectives.

European colonization evolved over time. For the first three or so centuries, roughly 1500–1800, European initiatives, aside from proselytizing by Christian missionaries in Spanish America, mainly focused on securing natural resources and products for trade, creating markets for their goods, and establishing trading routes and outposts. These early efforts were carried out primarily by government backed private trading companies—most famously the British East India Company (Stern 2011)—and for the most part did not involve extensive control over territory. Colonial activities in the Americas were profoundly transformative, decimating local populations through disease and killing, and bringing large numbers of settlers and slave laborers who numerically overwhelmed indigenous populations. Elsewhere, however, the impact of European colonizers and law was more limited. European law initially applied to their own personnel, forts, and trading establishments at African and Asian outposts. "Up to the late eighteenth century there was no serious European endeavor to develop jurisdiction over an autonomous population according to their own law. Nor were there attempts on a large scale to extend European law to the subject population" (Fisch 1992: 23). It would have been costly and disruptive for Europeans to get involved in local law and disputes, which were largely outside their concerns and beyond their capacity to address.

Not until the second half of the nineteenth century did European states attempt to achieve full political control over periphery territories (though British India occurred earlier). Europeans waged wars against native kingdoms, caliphates, and villagers, ultimately prevailing over larger native resistance through superior weaponry, including canons, Gatling guns, and repeating rifles (Crowder 1971). The infamous 1884–1885 Berlin Conference was the apotheosis of European assertion of superiority. England, France, Belgium, Portugal and Germany divided sub-Saharan Africa amongst themselves. No African leaders participated. The territorial borders drawn by Europeans at the time, and in immediately ensuing decades, remain largely the same today. The assertion of rule over Africa was authorized under international law, European jurists argued, because African countries lacked state sovereignty (*territorium nullius*), and under international law were not independent nations entitled to respect (Fitzmaurice 2014: 6–7).

The moral justifications Europeans offered for taking over the continent were threefold: to end indigenous slavery, to bring civilized administration and law to Africans, and to better utilize its abundant natural resources. Frederick Lugard, the former Governor of Nigeria (and previously of Hong Kong), explained: "Europe benefited by the wonderful increase in the amenities of life for the mass of her people which followed the opening up of Africa at the end of the nineteenth century. Africa benefitted by the influx of manufactured goods, and the substitution of law and order for the methods of barbarism" (Lugard 1922: 615). "The conviction that there was nothing wrong in the occupation of Africa and that the African would indeed benefit from it, is the principle unifying theme in the French and British subjugation of West Africa" (Crowder 1968: 71).

Colonial indirect rule

European colonizers copied administrative approaches and applied methods from one context to the next as colonial administrators moved to new settings. Variations aside, they used a basic template: erect a colonial state, engage in tax collection, create courts, transplant law, accept local law on personal matters and in the villages, and rely on local intermediaries. "Due to circumstances and scare resources the European powers were forced to make use of the techniques of indirect rule, wherever possible, although in different degrees, depending on local circumstances" (Mommsen 1992: 7). Actions along these lines are required when relatively small numbers of colonial administrators govern substantial populations in faraway lands with vastly different ways of life. Even French rule, often characterized as "direct rule," recognized religious and customary law and tribunals in its African and Asian colonies (Lugard 1922: 568–69; Crowder 1968: 192). The main difference is that French officials exerted greater selection and control over chiefs who collected taxes and carried out local directives, though as a practical matter they often appointed chiefs with traditional claims to the position (Crowder and Ikime 1970: xix), and "as a matter of immediate expediency [they were forced] to use the political institutions of the people" (Crowder 1968: 171).

Lugard provided a detailed first-hand account of indirect rule utilized by the British in Africa and elsewhere in *The Dual Mandate in British Tropical Africa* (1922). "The essential feature of the system," he wrote, "is that the native chiefs are constituted as an integral part of the machinery of the administration" (Lugard 1922: 203). The paramount chief was a regional ruler (advised by a British District Officer), supported by subordinate chiefs at lower levels of administration. The British Governor approved and could depose a paramount chief for abuse of power, but in general the colonial state supported and magnified the power of chiefs. "The native ruler derives his power from the Suzerain, and is responsible that it is not misused…. To intrigue against him is an offence punishable, if necessary, in a [British] Provincial Court. Thus both British and native courts are invoked to uphold his authority" (Lugard 1922: 203). Only the British Colonial State had the power to impose taxation and to legislate. Only British Courts had jurisdiction over non-natives and natives who lived in the townships. As for natives outside the township, "A native ruler, and the native courts, are empowered to enforce native law and custom, provided it is not repugnant to humanity, or in opposition to any ordinance" (Lugard 1922: 206). State backing for traditional leaders, who at higher levels received payments from the state, enhanced their financial position and bolstered their authority within the community.

British colonies were subject to the common law and equity, to laws passed in England for the colonies, and to laws declared by the colonial government. A hierarchy of courts was created: a British staffed "Supreme Court" in the colonial capital and commercial centers heard trials and appeals on matters within the city (with appeal therefrom to the Privy Council in London); "Provincial Courts" with British judges for large districts outside the major colonial cities; and "Native Courts" in each district staffed by chiefs (advised by British "Residents"). All three levels were created and funded by the colonial government. Courts staffed by British judges

(informed by local assessors) as well as Native Courts would apply native customary law in cases involving natives, "especially in matters relating to property, marriage, and inheritance" (Lugard 1922: 536). As one observer characterized the system: "the law of the colonizing power serves as the white man's own tribal law—a tribal law, however, of special status; for whereas Africans are compulsorily subject to certain branches of the colonizer's law, whites are not subject to any branch of African customary law to which they have not expressly or impliedly submitted themselves" (Cowen 1962: 555).

Provincial Courts had exclusive jurisdiction in disputes involving non-natives as well as over natives in serious crimes like murder, applying British and colonial law, and concurrent jurisdiction with native courts in cases involving natives. Native Courts exercised jurisdiction only over natives, mainly involving "marital disputes, petty debts, trespass, assaults, and inheritance" (Lugard 1922: 550). Although staffed by natives, Native Courts were not indigenous institutions but creations of and funded by colonial administrations. They cited little official law and barred the participation of lawyers (Chanock 1992: 302–303). Operating within the legal system subject to higher review, with chiefs undergoing judicial training sessions, Native Courts developed hybrid forms of law that interwove elements of customary law and state law (Gocking 1993; Farran 2011). In Islamic areas, pre-existing Muslim *kadi* courts were officially integrated into the colonial legal system, with jurisdiction over marriage, divorce, inheritance, personal status, civil matters (with financial limits), and certain criminal matters, subject to appeal to Provincial Courts, though typically their judgments remained final (Mwakimako 2011; Hashim 2005).

Operating outside the official state court system were existing tribunals in villages, functioning in traditional ways, handling a significant proportion of local disputes. "The headmen and the village chief will continue to exist, and their customary right to sit in arbitration for the settlement of small local disputes will not be interfered with," Lugard (1922: 553) wrote.

Though presented as enlightened rule over indigenous populations, colonial recognition of native law and not interfering with pre-existing village tribunals was not altruism on the part of colonial authorities. That was an expedient way for colonial powers to advance their economic interests with the least expenditure and social disruption. The colonial legal system claimed to "empower" indigenous law that had long existed, which the colonial state did not have the power to abolish or capacity to replace. Indigenous populations arranged their social relations through customary law.

Colonial state governments were economically self-sustaining, obtaining revenues mainly by taxing natives, imposing customs fees, and obtaining royalties on mining concessions. Local headmen collected regular hut or head taxes on behalf of the paramount chief, who turned revenues over to the colonial state. The British Governor determined tax rates. Lugard emphasized that "the actual assessment is in the hands of the native ruler and his representatives—the district and village heads—guided and assisted by the British staff. It therefore appears to the taxpayer as a tax imposed by his own, native ruler, though he knows that the vigilant eye of the District Officer will see that no unauthorized exactions are made, and that any injustice will be remedied" (Lugard 1922: 207). Natives without income were

required to provide labor to the government in lieu of tax payments, due on top of regular demands by colonial authorities for unpaid native labor on public projects.

Hut or head taxes, which could amount to the equivalent of a month's labor, also served the policy of compelling natives to work in the money economy for European-run plantations, ranches, and mining enterprises. The colonial state incentivized and subsidized this work through "a rebate of half the amount if the occupier could prove that he had worked for a European for wages for a month" (Lugard 1922: 256). Non-native settlers, almost all of whom were employed by the colonial government or European enterprises, many earning a "considerable" income, "are free from any form of local income tax in Africa" (Lugard 1922: 261). Foreigners were exempted from taxes because it was thought that settler companies would end up bearing these taxes through increased wages, so it was better to not impose the tax at all. Thus, colonial tax policies were specifically designed to support European economic enterprises.

Colonial law, as Lugard's account shows, was geared to advancing the political and economic interests of the colonial power and its expatriate settlers.[1] "Colonial rule created new 'crimes', many of which were offences against the imposed structure of colonial management" (Killingray 1986: 416). Colonial criminal law unabashedly secured state power; for instance, it was a criminal offense to disobey any "reasonable order," defined as "any order which the circumstances may make necessary but which is not actually provided for in this or some other law" (Chanock 1992: 283). Court enforcement of colonial tax and employment laws far outnumbered cases for assault and larceny (Chanock 1992: 284). Detailed regulations were promulgated on methods of cultivation, sales of products, use of forests, movement, and much more, which were published only in English, although many natives did not speak the language. "The picture is one of a population subject to extensive regulation imposed by laws, the content of which they did not know, and randomly administered by officials, both white and African, who combined administrative and judicial roles" (Chanock 1992: 284–85). This was British law and order, extolled by Lugard for replacing native barbarism.

The main commercial activities in colonies were trade, plantations (coco, rubber, coffee, sisal, flax, cotton, palm, spices, etc.), harvesting timber, and mining diamonds and precious metals—enterprises mostly owned and run by European companies and expatriates. Trade to and from colonies was protected by government granted monopolies up through the nineteenth century, until the rise of free trade views led to their reduction. Plantations and mining operations required securing land and a disciplined labor force. Native land tenure in many colonial contexts was held communally, but land utilized by European plantations—seized as unoccupied, or purchased or leased from native chiefs—was based on transplanted property regimes conferring fee simple ownership or long term leases (Lugard 1922: 295–96). Land deemed unproductive "waste land" was taken by colonial authorities and used for public works or plantations. "In areas of European settlement," historian Christopher Bayly found, "these new definitions of property rights could become blunt instruments to bludgeon the weak. They made it possible for white settlers, and sometimes indigenous elites, to expropriate the common lands and labor of the original inhabitants" (Bayly 2004: 112, 134). Natives who lived on land seized by European settlers

for plantations were forced to enter tenancy agreements that required them to supply several months of labor, enforced by criminal sanctions (Chanock 1992: 294). For mining, it was common across British and other colonies that "the ownership of all minerals is unreservedly vested in the Crown" (Lugard 1922: 347), which leased the right to mine to European run companies in exchange for royalties.

Procuring sufficient labor for European plantations and mines was a challenge because natives—portrayed by colonizers as indolent and undisciplined—were reluctant to engage in backbreaking work ruinous to their health (Lugard 1922: 390–405). The Dutch in Java and Germans in Samoa forcibly compelled natives to work under threat of criminal punishment (Lugard 1922: 417–18). The British preferred to avoid forced labor given their claimed justification to end slavery. In many colonial locations, European enterprises brought large number of workers from outside, especially Indians and Chinese, many on indentured servitude contracts (Lugard 1922: 415–19; Streets-Salter and Getz 2016: 157–60, 364–69). To meet the need for laborers for mining and cash crops like sugar, cotton, coffee, and rubber, "imperial officials supervised a system of indentured labor that resulted in the migration of nearly 1.5 million Indians, Africans, Chinese, and Pacific Islanders to other tropical colonies between 1834 and 1920" (Streets-Salter and Getz 2016: 366). Twenty million Chinese emigrated abroad via Chinese migration networks, 90 percent of whom went to Southeast Asia, many to work on plantations (Streets-Salter and Getz 2016: 367).[2] Employment contracts with native and alien labor were enforced by criminal penalties for desertion (Fitzpatrick 1987), as well as "neglect of duties, negligence, and refusal to work" (Chanock 1992: 294). "The criminal punishing of defaulting workers was one of the major occupations of the colonial courts" (Chanock 1992: 293). The influx of immigrants, in turn, resulted in the introduction of marriage, inheritance, and other personal laws followed within immigrant communities.

A wave of legal pluralism was created around the world in the wake of European colonization through the transplantation of legal norms and institutions and the movement of people and ideas. This occurred in five basic ways. First, colonizers implanted Western-derived laws and legal institutions in colonized areas to maintain colonial rule, further colonial economic enterprises, govern expatriate settlers, and maintain order in colonial towns and outposts, while local forms of customary and religious law continued to function for the bulk of indigenous people. Second, European leaders drew state boundaries over colonized lands in ways that disregarded preexisting political-cultural-ethnic-religious polities and communities, bringing within a single territorial state groups with different customary and religious laws, while conversely cultural groups with the same laws were divided across separate state borders.[3] Third, colonial economic enterprises like mines and plantations imported immigrant laborers in significant numbers (via slavery, indentured servitude, or voluntarily), who recreated communities with their own cultural or religious laws, especially on family law and inheritance matters. Fourth, powerful non-Western states that were not colonized (e.g. Russia and China) created states that spanned areas with different languages, ethnicities, and customary and religious laws; and some states adopted Western laws and institutions in efforts to modernize, introducing transplanted forms of official state law alongside existing local law. Fifth, people from colonized countries emigrated to imperial centers, settling in immigrant

communities, bringing their customary and religious laws with them, particularly on family law and inheritance, creating pockets of legal pluralism in the metropole. These five occurrences created legal pluralism along two axes: communities living side-by-side following different bodies of law, and state law coexisting with contrasting bodies of community law—and in many locations both.[4]

Legal Pluralism: An Introduction to Colonial and Neo-Colonial Law, by M.B. Hooker (1975), is a magisterial survey of legal pluralism produced in the course of colonization, focusing on the first four modes mentioned above. He covers the interaction of British colonial laws with Hindu law, Buddhist law, Islamic law, African customary law, Chinese customary law, and Adat law; French colonial civil law with indigenous forms of law in Africa and Indochina; Dutch colonial law with indigenous forms of law in Indonesia; Anglo-American common law with indigenous law in the US, New Zealand, Australia, and South Africa; voluntarily borrowed Western law in Turkey, Thailand, and Ethiopia; and Marxist law in the USSR and China alongside customary and religious forms of law.

Following decolonization, native-born people assumed governmental and judicial positions, but the existing pluralistic structure remained intact, with state courts applying state law while selectively incorporating customary law, and village tribunals applying customary and religious law. Now let us examine core issues discussed in the literature on legal pluralism, extending from the colonial situation to the present.

The transformation-invention of customary law

Colonial legal systems made overt efforts to alter and control customary law and religious law through judicial rulings based on equity or statutory provisions and repugnancy clauses that restricted slavery, child brides, polygamy, infanticide, witchcraft, ordeals, and other native practices opposed by colonial officials. However, more subtle changes were also made to customary law and religious law through recognition and incorporation within the colonial legal system, a process that involved transformation and invention.

A fundamental aspect of this transformation is that native legal notions were translated for the purposes of recognition into Western legal categories that appeared to roughly match (divisions in property rights, for example, discussed shortly). Another factor in the transformation of customary law is that the orientation of European legal systems differs fundamentally from indigenous justice systems. To make a broad distinction (which does not hold everywhere), European law centers on the application of written legal rules to rights-bearing individuals involved in a given matter; indigenous systems, particularly at the village level, are oriented to arriving at an equitable resolution of a dispute that takes into consideration applicable norms as well as broader social relations within the community (see Cain 2001: 51; Powles 1997: 64). The norms take contrasting forms—written versus unwritten—and those who preside have contrasting decision making orientations—applying rules to determine outcomes versus considering applicable norms and values while striving to achieve outcomes satisfactory to the community. Using Max Weber's terms for this contrast: the former is rule-oriented formal legal

rationality, whereas the latter is outcome-oriented substantive legal rationality (Weber 1967: 61–64).

The ascertainment of customary law for application in colonial courts proved to be challenging (see Bentsi-Enchill 1969). Customary law norms "have been found to be in a state of flux with different versions; there are conflicting or contradictory norms; norms are described in a 'vague or elusive' manner; norms have multiple contingencies or exceptions; stated norms often do not match actual behavior; it is not always clear how to move from the abstract norm to application in a given case; and sometimes a number of normative orders coexist" (Tamanaha 1989: 103–104). Contributing to these difficulties, norms are not applicable in the abstract, but rather are linked to social relations involved in disputes. "This multiplicity not only makes it difficult to state the norms precisely, but sometimes may make it impossible, since the assortment of contingencies can vary so much from one case to another" (Moore 1969: 374, 376). Customary norms also vary in the degree to which they are compulsory and the appropriate sanctions vary depending on the totality of the circumstances at hand (Woodman 2011: 13–14). The flexibility of customary law matched the orientation of customary tribunals:

> An adequate account of a dispute therefore requires a description of its total social context—its genesis, successive efforts to manage it, and the subsequent history of the relationship between the parties….
>
> … [I]ndigenous rules are not seen a priori as 'laws' that have the capacity to determine the outcome of disputes in a straightforward fashion. It is recognized, rather, that the rules may themselves be the object of negotiation and may sometimes be a resource to be managed advantageously. (Comaroff and Roberts 1981: 13–14)

Evaluated from the standpoint of Western legal systems, this sounds defective. However, it makes sense in light of the objective of many customary tribunals to achieve outcomes that restore peace within small communities that must live together. Strict rule application results in winners and losers, whereas dialogue and negotiation encourages acceptance.

Owing to these differences, the codification and judicial application of customary law by European judges inevitably transformed their content and operation. Codifications of customary law suffered three difficulties.[5] First,

> What seems to be most misleading about these attempted codifications of customary law is not that the formulated rules would, in themselves, be necessarily wrong, but that they are fatally incomplete. For every 'rule' assumed, there are hundreds overlooked—'rules' which would qualify those stated, balance them, enlarge them or narrow them down. An enormous proliferation of rules will be needed if one insists on proceeding that way and no outsider will ever be able to do it. For those on the other hand who share the values of the community, the feeling of a balance will be something spontaneous and self-evident. (Nekam 1967)

Second, customary law varies by region, ethnic group, and religion. Namibia today, for example, has 49 recognized traditional communities, most with their own customary laws (Ruppel and Ruppel-Schlichting 2011: 40). One must write many customary law codes or a territorial or regional code that picks one set of customs

over others. Both alternatives are problematic, which is why relatively few customary law codifications have been written (Tanner 1966: 114).

The third problem is that, whether taken from a code or informed by native law experts, state court judges who apply customary law in the same manner that they apply state law distort its operation. "The essence of these customary systems may be said to have lain in their processes, but these were displaced, and the flexible principles which had guided them were now fed into a rule-honing and—using machine operating in new political circumstances" (Chanock 1985: 62). Consequently, "the norms cannot retain their original content as components of a different system" (Woodman 1985: 157). "The village elders, once having given evidence as witnesses in court, … find their opinions are then divorced from the particular context in which they were given and that an impersonal authority is bestowed on them." (Kolff 1992: 230–31). Setting forth customary law in a code or judicial precedent further transforms customary law by rendering it relatively fixed, while unwritten customary law more readily changes in relation to variations and changes in circumstances (Bentsi-Enchill 1969: 23, 27).

Owing to these differences, the codification and judicial application of customary law by European judges inevitably transformed their content and operation. Transformations of customary law also occurred in Native Courts staffed by natives. Native judges were not necessarily familiar with local customary law in the areas they presided over and lacked full awareness of the social relations and ramifications of the matters in dispute. The training they received in law and legal practices, and higher level review of their decisions by British judges, carried legalistic imperatives that native magistrates imitated consciously and subconsciously. "It orients their minds toward the rule aspects of their task and thus it loosens their emotional comprehension of customary law and weakens their capacity to satisfy the balancing requirements of community" (Nekam 1967: 51).

A number of anthropologists have argued that customary law was not truly customary at all, but rather was an invention that advanced the interests of colonial authorities as well as indigenous elites in situations undergoing massive changes in social, political, and economic arrangements (Snyder 1981). Doubts have been raised about the reliability of native assessors or experts, who might idealize the law (describing what they think it should be), or portray customary law in ways that benefit their personal or group interests, or present contrasting accounts of customary law on both sides of a dispute (Ubink 2011: 96–97). "There are competing versions of lived customary law *within communities*" (Ubink 2018: 222). What won the stamp of recognition in court was not customary law in the sense of lived social relations within the community, but involved selective formulations or interpretations of existing customs in new economic circumstances (Snyder 1984). Once customary law was recognized by courts in the context of legal institutions and practices, it became "juridical customary law" (Allott 1984: 266), which diverged from "living customary law" in the community (Woodman 2011: 24–25, 27).

The assertion that customary law recognized within the state legal systems has been transformed or invented should not be taken to deny or discredit its existence. These are genuine bodies of law continuously developed and applied within many state court systems today, subject to constitutional, statutory, and human rights limits

(which in effect function like repugnancy clauses (Woodman 2011: 25)). This discussion highlights a reality that applies to *all* systems of law constructed by jurists, which selectively recognize law from external sources and integrate it in legally constructed terms. For centuries, British jurists claimed that the common law of England represented customs from time immemorial, though in fact the common law was the product of judges who systematize and develop law within the official legal tradition. Moreover, British common law judges were from the landed gentry, and formulated land rights that advanced the interests of their class—much like the observations of legal anthropologists that customary law has been selectively constructed by traditional elites to advance their interests. This is a reminder that one must not confuse customary law recognized in courts with customary law utilized within the community. Both are forms of customary law, generated in different settings, official and unofficial, and though they may coincide in certain respects, they are not the same.

Socially embedded informal village tribunals

The preceding discussion applied to customary law recognized within the official state system. As mentioned earlier, however, a significant bulk of legal activities in many of these societies during and after colonization takes place at the village level in informal tribunals, carried out by people within the community.[6] These informal tribunals were officially acknowledged in some locations but not others, and typically the state legal system had little involvement in their operations.[7]

In many locations, particularly in rural areas, it is a routinely followed customary practice to take disputes to unofficial local tribunals first, rather than to state courts (Woodman 2011: 25; Fallers 1962: 608, 613). These tribunals are staffed by village chiefs, or elders, or respected members of the community applying local customary law, called together for the occasion, usually in open discussion with others present. Proceedings are informal, with people presenting evidence and offering their views, though a common restriction in many locations is that only men can participate in the discussion (Koyana 2011: 44–45). These tribunals handle disputes involving property, inheritance, divorce, adultery, custody of children, debt, theft, accidental injuries or damage to property, accusations of witchcraft, rape, and assaults short of homicide.[8] They do not mark a distinction between criminal and civil wrongs, and aim at restitution and reconciliation, though punishment is also involved.

These tribunals are socially embedded in the sense that those who preside in the tribunal and those involved in the dispute are familiar to one another, with multiple ongoing connections, and share a past and future together within the community. "Judges and litigants, and the litigants among themselves, interact in relationships whose significance ranges beyond the transitoriness of the court or a particular dispute" (Velsen 1969: 138). Since they are from the same community, furthermore, people are familiar with the situation and applicable norms. The hearing aims at reconciliation, repairing the rupture among the kin groups and community, to enable people to continue live together—coming to an outcome seen as fair, or at least acceptable, all things considered. "To do this, they have to broaden their inquiries to cover the total history of the relations between the parties, and not only the

narrow legal issue raised by one of them" (Velsen 1969: 138). A decision is arrived at through a combination of open debate and discussion over the relevant facts and the appropriate norms and outcome, as well as negotiation, and social pressure to settle. A remedy is determined, often involving payment of goods or services and/or an apology, though it can also include corporal punishment or expulsion. A traditional feast or reconciliation ceremony involving the parties and the community closes the proceedings (Shack 1969: 158).

Village tribunals have proven to be highly resilient across the Global South. Following decolonization, a number of newly independent states considered it important to assert the monopoly of state law and officially banned village tribunals. However, "in each of these enactments the holding of arbitration under customary law is either expressly or implicitly exempted so that arbitration under customary law continues to exist" (Ollennu 1969: 112). After Indonesia became independent from the Netherlands, lawyers advocating a uniform legal system led to the explicit abolishment of village *adat* courts (Jaspan 1965: 260–61). Yet little changed on the ground: "because of the general desire to maintain local cohesion and solidarity, adat law continues to be operative in most cases. The village and *marga* [parish] heads no longer judge cases but are said to arbitrate or mediate" (Jaspan 1965: 262).

A recent comparative study of the relationship between non-state informal tribunals and state legal systems in post-colonial contexts across Africa, Asia, South America, and the Pacific found a range of treatments by the state: from active repression of the non-state tribunal (rare); to no formal recognition of the non-state tribunal but tacit acceptance and encouragement by the state (the vast majority); to formal recognition by the state of the non-state tribunal, granting it exclusive or non-exclusive jurisdiction over selected locations or matters, and in certain instances also providing state enforcement of its decisions (less common) (Forsyth 2007).[9] (To be clear, this survey excludes official Native Courts, which are state courts; this is about informal tribunals not created by the state.) Whatever the particular relationship with the state, non-state tribunals still play a significant role dealing with basic legal issues in rural communities of post-colonial societies. This point is borne out also in the one instance of state repression identified by the author. In an effort to create a unified state legal system with state courts applying customary law, Botswana made it illegal for people to preside over cases in a customary tribunal; but "in reality," it turns out, "not formally recognized chiefly courts are tolerated, or even supported, by the official police forces" (Forsyth 2007: 73). Informal local tribunals provide dispute resolution functions for the community that state legal systems lack the institutional capacity to accomplish, and they do so in a way that matches the needs and comports with the understandings of the community.

Three points about informal village tribunals and their relationship with state courts merit emphasis. First, in contrast to "judicial customary law" in state courts, village tribunals are the locus of "living customary law" of the community. Though they regularly diverge for the reasons stated earlier, these two forms of customary law also interact and overlap in that respected elders who sit in village tribunals can appear in state court to testify on customary law. Second, both judicial and living customary law evolve in relation to surrounding factors (though the former can be more fixed when recognized as legal precedent). For example, following the

introduction of individual title and the emergence of a land market, customary land rights in many locations came to recognize new interests in land like individual ownership and tenancies, and written documents were used in customary transactions (Woodman 2011: 15–16). Third, for multiple reasons, village tribunals are often preferred over state courts: they exist in many villages so are immediately accessible; typically they are affordable; customary law is familiar to the community; people are able to participate in the proceedings themselves (at least men); proceedings are conducted in the local language; and the dispute is resolved without substantial delay (Koyana 2011: 230–31, 243–44).

The editors of a recent collection centered on the paradoxical position of customary law within and outside state legal systems summarized: "The field of customary law—in Africa and beyond—has become ever more complex and unclear. It is a hodgepodge of multiplying perspectives, positions, and practices, constituted by a plethora of documents, descriptions and (legal) decisions, all caught up in opaque dynamics between (post) colonial contaminations and current normative realities, between the official and the living" (Zenker and Höhne 2018: 2). Though this depiction is accurate, emphasizing paradoxical aspects tends to obscure a bigger picture of mutual accommodations, interactions, and influences (Pedersen 2018). The lines between non-state tribunals and state tribunals have become blurred and intertwined, often through unofficial arrangements and connections. State officials may refer cases that non-state tribunals are more suited to handle; one study found that "Many cases, including homicide, are also *de facto* delegated by courts to elders and customary proceedings, since the judgements of elders carry greater weight and are therefore more easily implemented than court decisions (which betray the prevailing sense of compensatory justice)" (Zenker and Höhne 2018: 29). State officials may also recognize the decisions of village tribunals, for example, when deferring to their land decisions. On their part, customary tribunals may refer cases to state courts that are beyond their capacity to resolve or enforce, for example, when disputes involve migrants or outsiders or local parties do not voluntarily comply with their decision (which is occurring in some rural locations). Another intertwining occurs when government officials also separately sit on customary tribunals as respected members of the community (Dempsey and Coburn 2010). While state and non-state tribunals have different norms and processes, and give rise to forum shopping and competition between state and local tribunals for litigants, they can function in a complementary fashion, an effective a division of labor in the delivery of legal functions.

Authority of traditional elites

Indirect rule bolstered the power of traditional leaders in several ways. Chiefly authority customarily had been tied to tribes, clans, and kinship, but in the territorially based political and court system created by the colonial state, chiefs presided over native people living within their territory who were outside their clans, a significant expansion of their authority, while still retaining personal authority over clan members outside the territory (Simensen 1992: 263). Since the colonial state had limited reach in rural areas, chiefs and headmen bore much of the responsibility

for criminal law, investigating and detaining wrongdoers, and serving as witnesses in criminal trials in state court (Chanock 1992: 284). They also presided over cases themselves. "Not only were African tribunals transformed in this way by being incorporated into the colonial system and by being made responsible for the administration of coercive colonial regulations, they also had at their command the unwritten customary criminal law, which could be used to punish conduct which they disliked which was not against any written law" (Chanock 1992: 284).

After decolonization, traditional leaders in many countries suffered a backlash for collaborating with colonial authorities. Chiefs have been criticized as local despots and rent-seekers who collect income from hearing disputes (Schmid 2001: 33–34), utilizing their judicial powers for corrupt purposes, soliciting bribes, bringing cases against people in order to impose financial penalties (Simensen 1992: 271–72). Socialist governments, educated professionals, advocates for democracy, and other progressive sectors within society favored abolishing or diminishing the political and legal power of traditional leaders, seeing them as reactionary holdovers that stood in the way of creating a modern unified state legal system.

Nonetheless, they continued to hold prestige and authority within communities, and the 1990s witnessed a resurgence of traditional leaders across Africa, in some instances achieving enhanced constitutional and political recognition (Englebert 2002). Moreover, international development agencies and NGOs viewed traditional leaders as potentially effective vehicles to facilitate rural development projects, providing a bridge to citizens that the state could not achieve (Englebert 2002: 60; Ubink 2007: 126–28). In many locations, chiefs operate like state officials at local levels, providing public services (education, water, sanitation, food projects); some chiefs are incorporated within the state political apparatus (reserved seats on assemblies, Councils of Chiefs, financial support, etc.); many exercise legal authority within the state legal system similar to that in colonial indirect rule (Englebert 2002).

A highly consequential increase in the power of traditional leaders relates to authority over land. Under customary land tenure, landed property typically was not bought and sold in fee simple terms. Communal land tenure was common, providing various people rights to control and use the fruits of the land, though not an unfettered right to dispose of it. Drawing on familiar notions of feudal land tenure, British administrators presumed that paramount chiefs held the land in trust, with sub-chiefs arrayed below, each level exercising the power to allocate possession and use of the land. To prevent abuse by chiefs, it was common for colonial law to restrict land sales, particularly to foreigners, though land could be leased out, and final say was given to traditional leaders. In addition, colonial states gave chiefs authority over land designated as traditional or tribal areas.

Control over the allocation of land made people subject to chiefs in ways that did not previously exist, affecting rules of kinship and marriage, all of which were wrapped together (Chanock 1992: 288). Certain chiefs monetized their control over the land by imposing yearly rents on people living on the land, claimed as a form of customary tribute (Simensen 264–65). Chiefs also sold or leased the right to possess the land to large agricultural enterprises and granted mining concessions (Peters 2004: 290–300); in some instances they have asserted the right to dispose of land held by farmers in peri-urban areas where land values have increased through

expanding settlements and commercialization (Ubink 2007: 126–28). Because of "overlapping leases and double granting" by various chiefs, in one region the land formally leased "exceeded the total area of the state" (Simensen 1992: 267). These actions generate disputes between paramount chiefs, lesser chiefs, and villagers, over the authority to sell or lease land, and raise questions about how the proceeds are to be distributed (more on this shortly).

Thus, traditional leaders exercise significant powers in many places across the Global South today, again with many variations. They have administrative authority in allocating land and benefits, legislative authority in declaring customary law and advising the legislature on the impact of proposed laws, and judicial authority in resolving local civil and criminal disputes. They also organize community labor, administer development projects (building electrification, sanitation, schools, etc.), manage natural resources on customary land, lead celebrations and ceremonies, articulate needs on behalf of the community, and other community activities (Ubink 2007: 130). Their authority remains substantial in rural areas. In urban areas where multi-ethic groups have settled, their power has been diluted, particularly in conflicts among young men from different ethnic groups who are less tied to traditional sources of authority (Helbling et al. 2015: 8–13). "In the absence of strong common bonds, disputants have less incentive to accept an unfavorable outcome or to consider a ruling as binding" (Barfield, Nojumi, and Thier 2011: 161).

The result is coexisting, intertwined, mixed forms of governance that interact in multifaceted ways (see generally von Benda-Beckmann, von Benda-Beckmann, and Eckert 2009). Traditional leaders defend their power and prerogatives against encroachments by the state, and lobby the state for recognition of and support for their power, drawing on ideological legitimation grounded in custom and tradition (Claassens 2011: 187). State officials are wary of traditional leaders as rival sources of power, but they also rely on traditional leaders to manage a range of social, political, economic, and legal functions. Sometimes traditional leaders operate as a check on state officials, and vice versa. Sometimes both government officials and traditional leaders utilize their positions to obtain titles or control over communal land for their own benefit (Peters 2004: 297). Traditional leaders are subject to social and political forms of accountability, as well as customary law and state legal restrictions, and many embrace their responsibility for the community and tradition.

Yet abuses by traditional leaders undoubtedly exist, particularly when revenues can be gained from a growing land market in peri-urban areas, agribusiness, mining, and other economic uses of land. Studies have found examples in which traditional leaders leverage their position straddling the state and customary systems to advance their interests while avoiding accountability from both. One study concluded that traditional elites "were able to use their political platform to influence legislation governing local jurisdiction in their own favor and exploit the system of customary law to secure their material interests" (Simensen 1992: 257). For example, traditional leaders may claim customary law entitles them to control land rights to grant a mining concession or sell land; when local villages seek to challenge these actions on the grounds that customary law does not permit a traditional leader to do this without prior consultation or equitably sharing the revenue, state officials may defer to traditional leaders as authoritative on customary law (Ubink and Pickering 2020;

Claassens 2011). Regularly in these contests, occurring in areas with rising land values, traditional leaders secure a lion's share of the benefits and family farmers or villagers lose out. Instances of violence have occurred over succession to a chieftainship in part because their control over the allocation of land can be a source of substantial revenue (Joireman 2011: 299–300).

Notwithstanding these problems, substantial portions of native populations continue to support traditional authorities. A study of 19 African countries involving 26,000 face-to-face interviews found that "Large majorities believe that [traditional authorities] should still play a significant and increasing role in local governance; traditional authorities appear to enjoy a widespread popular legitimacy that undergirds the institution's resilience" (Logan 213: 355). Contrary to what one might assume, the study found that popular support for traditional authorities holds not only among the rural population, but also among educated people, women, young people, and urban dwellers (Logan 213: 368–71). Their popularity appears to be based on appreciation for the important role they provide in resolving local disputes, underpinned by cultural views of respect for the chieftaincy that survived the distortions introduced by colonization. While chiefdoms are viewed positively in general, studies that look specifically at people's views of the performance of their particular chiefs have found more negative views, particularly when chiefs are seen to have personally profited from their claimed authority in ways that do not benefit the community (Ubink 2007). Thus, people continue to hold the institution of chiefdom in esteem, separating the position from disreputable actions of particular occupants.

Uncertainty and conflict over land

Among the many issues raised by legal pluralism, those surrounding land are perhaps the most complicated, fraught, and consequential. The conflicts include overlapping claims to ownership or occupation rights, boundary disputes, enclosures, use of land for grazing and harvesting, inheritance shares, government seizures of land, and the distribution of proceeds, rents, and income from land sales and concessions. While the circumstances vary across countries, a broad generalization is that in large urban centers state land law and registration is utilized (with the major exception of peri-urban squatters), while in rural areas customary land tenure is used within the community.

A source of conflict from the colonial period through the present has been small-scale subsistence farming on family worked plots with community based land tenure struggling to stave off large scale consolidation of land for economically productive uses—with land taken by state authorities and transferred to developers, or claimed by chiefs and leased or sold to private enterprises. Frequent land conflicts arise today because population growth and migration of people—from rural to urban areas seeking work or fleeing conflicts or famine in neighboring countries—have made land scarcer and more expensive. Land is becoming commoditized through commercial ranching or agriculture for export, and the construction of factories, stores, offices, and apartments, leading to rising property values in peri-urban and urban areas (Peters 2004; Deininger 2009).

Land conflict takes place on a legal terrain with two contrasting conceptualizations of property and land tenure rights (state versus customary), two systems of legal authority (state courts versus informal local tribunals), and different modes of land utilization (commercial economic maximization versus subsistence family farming). At the most general level, attitudes toward land involve a contrast between two different world views and forms of social, economic, and political organization (Kaneko 2021). In advanced capitalist societies land is an economic asset individuals utilize for various purposes: a place to live or obtain rents from, an investment that appreciates in value, an asset to use as collateral for loans or to sell, a container of wealth to pass on to loved ones upon death. Land is *univocal*—an economic asset with multiple uses. Land in much of the Global South, particularly in rural areas, is far more complex and a central component of their life-world. Land involves wealth, a source of social power and status, a place to live and source of subsistence, a basis of social security, an aspect of social and ethnic identity and kinship and community relations, a locus of spirituality, and an ongoing link to ancestors that they hold in trust for future generations (see Abubakari, Richter, and Zevenbergen 2019). As just mentioned, moreover, land is a basis of political, economic, and legal power for traditional leaders, who frequently allocate land and receive rents therefrom for personal benefit and community distribution, as well as preside in customary tribunals that make determinations in land disputes. Land is *multivocal*—with multiple meanings, uses, and implications.

Land issues are enmeshed in legal pluralism in several ways. One way is that customary land tenure is carved into various layers and slices inconsistent state land law. State property regimes and registration systems typically are constructed in categories that treat real property as an economic asset held by individuals (including entities), with variations: fee simple, joint tenancy or tenancy in common, servitudes on the land, usufruct, life estates and remainders, and contractually based lease rights and trusts. Customary land tenure often accords different, overlapping rights and responsibilities to people within the family, kin group, lineage, or community: to occupy or possess; to be consulted about; to seek permission from; to use for planting, hunting, grazing, or gathering; to reap present or future benefits from; to allow others to use; to pass on after death; and to dispose of. Customary land tenure combines individual and communal rights and responsibilities: "Research showed the vast majority of farms in Africa being worked by individual and small familial units who have separate claims, rights and responsibilities, even though land in its most general sense is usually vested in collectivities such as chiefdoms or clans" (Peters 2004).[10]

Over time, customary law notions in certain areas have moved toward combining elements of individualist and collective property notions, with farmers and traditional leaders, respectively, presenting competing accounts. Legal anthropologist Janine Ubink identifies three versions of their respective rights: 1) farmers or families have secure use rights that they can convert or sell (chiefs have ceremonial approval, but no right to control); 2) chiefs have the power to control disposition, but conditioned on the best interests of the community; or 3) chiefs have complete power to do what they want with the land, though they should take care of community interests (Ubink 2011: 91). In given land conflicts, farmers may espouse the first or second

as customary law, while traditional leaders espouse the third (meanwhile insisting that they *are* serving the community). Thus, customary law itself has evolved in connection with economic changes to be internally pluralistic and contested, particularly in peri-urban locations with an active market in land.

During the colonial period, and again in recent decades through initiatives by global development agencies like the World Bank, efforts have been made across the Global South to officially title property in the furtherance of economic development. This has resulted in multiple clashes and inequitable consequences. Ownership titles and land registration required by state law does not capture the full gamut of customary land tenure rights and responsibilities, as mentioned, giving rise to conflicts between the two respective regimes, the former followed by the state and the latter by the community (Abubakari, Richter, and Zevenbergen 2019: 13). When titles are granted and land is registered, customary land tenure rights may be officially extinguished, and the official records may not reflect actual possession and understandings within the community. Because people with customary tenure can be illiterate and lack required documents or evidence, moreover, titling programs have resulted in many people being dispossessed (Lund 2020; Kaneko 2021). (For an egregious recent example, nearly a half million families who had farmed their land for generations were dispossessed as a consequence of Cambodia's 2001 land titling law, their land seized by the government and transferred to large agricultural producers and economic developers (Gillespie 2021).) In many of these countries, a significant percentage of land acquired through customary transfer is not officially recorded, including property surrounding expanding cities (Frimpong Boamah and Walker 2016: 97). In Africa, only about 10 percent of land is formally recognized, and in major parts of Africa and Asia as much as 50 percent or more of the population in peri-urban areas live under informal arrangements (Deininger 2009). Even when titling does occur and is registered under the formal system, parties who receive property through transfers or inheritance do not always register, so progress in titling land can subsequently regress.

Uncertainty and conflicts arise from the coexistence of these systems. When land is sold, the outcome of an ownership dispute depends on whether the transaction is legally recorded or is conducted orally, as well as whether the dispute is taken to a customary tribunal or to a state court—or to both. If title is registered in state property records, a state court will order the sale valid, whereas a customary tribunal might decide otherwise on customary grounds. A study in Kenya found that 89 percent of land disputes filed in the local magistrate's court had previously been submitted to the customary council of elders (Helbling, Kälin, and Nobirabo 2015). This involved a sample of 27 cases in one district, and it does not indicate how many cases were resolved satisfactorily by the council of elders, but the high percentage shows that people are willing to go to customary tribunals *and* to go to state courts when pursuing a desired outcome. In a significant proportion of land disputes, one study found, people prefer not to bring the case to a chief who may have a direct interest or conflict, instead turning to respected persons, family heads, courts, or direct negotiation (Ubink 2007: 144–46). Land conflicts between different ethnic groups living together through migration may be taken to state tribunals because the contesting parties do not trust elders of the other group (Pedersen 2018:

177). A study of conflict over land in West Africa found evidence that levels of violence are higher where existing legal arrangements (de facto and de jure) allow cases to be brought to both state court and traditional courts, compared to unified systems in which people have only a single forum to adjudicate land claims—although the causes of this higher level of violence are unclear (Eck 2014).[11]

Among four possible combinations of land transactions, three produce uncertainty and the most secure fourth combination is less common (Frimpong Boamah and Walker 2016: 95–100). When transfers satisfy customary land tenure requirements, but official titles are lacking and/or are not recorded in the state registry, ownership is not secure and banks are less likely to accept the property as collateral for loans. Titles may not be registered because the cost is high owing to the necessity to pay officials bribes, required proof of ownership is lacking, the titling or registration process can take years, those who inherit land fail to register, or other reasons. When property titles are registered with the state, but customary land tenure requirements are not satisfied, ownership is tenuous because it is subject to challenge on customary grounds and local resistance to the official legal owners. The least secure combination is when the land is neither properly acquired under customary law nor registered with the state—the condition in certain squatter settlements in major cities in Africa and Asia. The most secure combination is when customary law is satisfied *and* title is registered with the state, but this is the most expensive option and takes the most time and effort to accomplish.

Inheritance is another land-related context in which legal pluralism regularly occurs. State laws on intestate succession (which specify how property passes when people die without wills), customary laws, and religious laws may all differ on the disposition of land owned by a deceased. A single country may include customary systems with patrilineal inheritance that sends property to sons or brothers if there is no son (daughters receive nothing and widows have use rights), as well as matrilineal inheritance in which property passes through females and their children (Abubakari, Richter, and Zevenbergen 2019: 6–9), and also Islamic inheritance that provides shares for various family members, with wives entitled to one-eighth of the husband's estate (divided among all the wives), whilst sons receive twice the share of daughters (Evans 2015: 80). Furthermore, inconsistencies arise when people do not record land transferred through inheritance, so official records of property ownership do not match ownership recognized within the family and community.

Women suffer significant disadvantages under customary law property rights, in contrast to official state law. "[M]arried women in most African countries do not co-own marital property, do not have autonomous rights to lineage or family land, and do not have the ability to protect and retain their homes and moveable possessions at the death of or divorce from a husband" (Joireman 2011: 301). A study of 15 sub-Saharan African countries in rural and urban settings found that, because of customary inheritance rules, a majority of widows received *no* assets from their husband's estates upon death (going instead to his family and children) (Peterman 2012). In some societies, flexible customary arrangements provide for widows, but this is less likely to occur when an active market for land exists (Joireman 2011: 303). During colonization women "learned quickly to seek relief in colonial courts" for better legal treatment under state family and inheritance laws (Chanock 1992:

297). Today, state law in many countries similarly offer women better protections for their interests in divorce and inheritance cases, though women must overcome substantial hurdles to obtain these benefits. Access to state courts requires that they know about the law, have marriage certificates and property deeds, possess the financial wherewithal to retain legal assistance or enlist the support of a local woman's rights NGO, and be willing to suffer social condemnation within the community—"going to court to settle a marital dispute is regarded as an unforgivable offense" (Evans 2015: 87).

As many as a billion people around the globe (not limited to post-colonial societies), according to one estimate, claim property rights and conduct property arrangements on terms inconsistent with official state law, ranging from urban squatter settlements (like favelas) where families have lived without official titles for generations (though still exchanging and passing on property) to rural areas where people follow customary land tenure (Fitzpatrick 2016). Yet people *want* secure property rights under state law and hold up whatever documentation they might have to support their legal claim—old grants or deeds, tax payments, family records, sales agreements or leases, hand written notes, etc.—even if not legally valid for title (Lund 2020). People in possession of land without state legal recognition are perpetually vulnerable to eviction by the state or by those with official legal titles, who can invoke the coercive force of the state on their behalf.

Customary and religious law clash with human rights

Constitutions and legislation in post-colonial societies commonly include provisions recognizing customary and religious law, as well as provisions recognizing international law and human rights. A fundamental tension exists in this combination. On the one hand, an overwhelming majority of countries in the United Nations have ratified the UN Declaration of the Rights of Indigenous Peoples (2007), which recognizes the right "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" (Article 5). The Indigenous and Tribal Peoples Convention (1989) recognizes the right of indigenous people in post-colonial societies to live in accordance with "their own social, economic, cultural, and political institutions" (ILO 1989: c169, Article 1(b)). "In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary law" (ILO 1989: c169, Article 8.1). On the other hand, many of these countries have agreed to the Universal Declaration of Human Rights and the UN Convention on the Elimination of all Forms of Discrimination against Woman (CEDAW), among other international rights declarations. CEDAW recognizes the equality of women in "political, social, economic, and cultural fields," the same rights as men to enter and dissolve marriages, the same rights to ownership of property and to obtain employment, and more (CEDAW 1979). The tension is that certain customary law practices have been sharply criticized as violations of women's rights and human rights (see Sevastik 2020). This is yet another layer of legal pluralism—state law, customary law, religious law, international law, and human rights—that has come to the fore in recent decades (Farran 2006).

Objections to customary and religious law and tribunals come in three main themes: 1) discriminatory treatment of women and violations of their rights, 2) harsh criminal sanctions, and 2) inadequate trial procedures. Women typically are not eligible to become traditional chiefs and do not sit on councils of elders. As mentioned above, women often do not hold or receive land under customary laws of possession, divorce, inheritance, or the death of a spouse. Customary law or religious law (or a blend) in some areas permit child brides; force a rape victim to marry the rapist; give girls to a victim's family as compensation for injuries or wrongs; condone honor killings; restrict women's work outside the home; and divorce, adultery, and inheritance laws are more favorable to men than women (Amnesty International 2003: 7). A report on customary tribunals by International Development Law Organization summarizes:

> In many customary justice systems, women are routinely discriminated against with respect to their roles as guardians, their inheritance rights, and their right to freedom from sexual and domestic violence. Further, sanctions may be exploitative and/or abrogate women's basic human rights; such sanctions include the practice of wife inheritance (where a widow is forced to marry a male relative of her deceased husband), ritual cleansing (where a widow is forced to have sexual intercourse with a male in-law or stranger), forced marriage, and the exchange of women or young girls as a resolution for a crime or as compensation. (Harper 2011: 23)

Abhorrent to outsiders, it helps to view these practices in social context. The marriage of a widow to a relative of the husband is a means for her to obtain land to live on and obtain sustenance from; rape victims may suffer ostracism and discrimination, so marrying the rapist is a way to regain social respectability (Harper 2011: 23). That said, these practices are difficult for outsiders to accept, and activists in these societies (often supported by international NGOs) have been working to reduce or reform them, invoking human rights, international declarations, and state law.

In connection with criminal sanctions, human rights concerns prompted by customary and religious law include torture, harsh physical punishment (spearing, beating, stoning), ordeals, and punishment for witchcraft. "Possibly the most salient criticism leveled at customary legal processes," the IDLO report states, "is that they fail to uphold international human rights and criminal justice standards. The sanctions imposed can include corporal punishment, humiliation, banishment, retaliatory murder, the betrothal of children and forced marriage. Such punishments violate, inter alia, the rights to life, protection against cruel, inhumane or degrading treatment, and protection from discriminatory treatment, as enshrined in international law" (Harper 2011: 24). Nonetheless, many people in these societies consider these punishments appropriate (while they may view Western incarceration as cruel and harmful to the family that depends on the prisoner and makes it difficult for the prisoner to compensate the victim). Objections to legal procedures include the following: "they can lack procedural safeguards that protect the rights of disputants, such as the presumption of innocence or the rights to a defense and due process"; "the methodology for ascertaining facts or assessing evidence may be arbitrary or violate human rights"; "unsound evidentiary practices not based on modern scientific rationalism often lead to equally unsound resolutions" (Harper 2011: 23).

Proposals to make indigenous customary and religious law conform to human rights norms are regularly put forth at the international level. The right to a fair trial guaranteed in the UN Convention on Political and Civil Rights explicitly applies to "when a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks." "It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet basic requirements of fair trial and other relevant guarantees of the Covenant" (UN Human Rights Committee 2007: Comment 32, Article 14). The core right in the Covenant is "The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed" (Section III, 15), which "is an absolute right that is not subject to any exception" (Section III, 19). This requirement is derived from Western trial conceptions, including an independent judiciary protected from dismissal and unbiased judges who do not "harbor any preconceptions about the particular case before them" (Section III, 20).

This cluster of proposals might sound appealing in the abstract but make little sense in these contexts. Keep in mind that customary tribunals involve gatherings where the adjudicators "generally know not only the disputants, but also the history to the dispute and other matters that may be regarded as important to its resolution, such as a transgressor's capacity to pay damages" (Harper 2011: 27). The strengths of socially embedded, informal customary tribunals seeking to restore community harmony in a timely fashion are among the very features that make them inconsistent with due process requirements in formal courts. To impose the due process requirements of formal state court systems on customary tribunals not only would distort how they function, but is also not actually achievable. The chiefs or elders who preside in disputes are members of the community, connected through networks of relationships with others, and people from the community (including the disputants) often participate directly in the proceedings, debating and discussing applicable customary law, what occurred and background circumstances, and appropriate resolutions. This does not fit the model of an independent judge following due process to apply the law. Customary tribunals are more aptly compared to mediation or equity aimed at achieving outcomes acceptable to those involved and the broader community.

An especially unrealistic proposal was urged by Amnesty International in its report on establishing the rule of law in Afghanistan. The report details profound dysfunctionalities, corruption, and human rights violations of the state legal system; then it turns to address informal customary and religious law tribunals, *jirgas* and *shuras*, which are widely utilized for disputes in Afghanistan. The report recommends:

> Regulate the informal justice system: The competence of informal justice systems must be clearly set out in the law in order to remove any ambiguity regarding the role of Afghan informal justice mechanisms. The relationship between informal systems and the formal judicial system must be set out by law. In order to fulfil its obligation to exercise due diligence in protecting human rights, the [government] must ensure that *jirgas* and *shuras*, if they are allowed to continue to function, fully conform to international human rights law. If this cannot be ensured then these informal justice

> mechanisms must be abolished. All cases in which there are indications that a *jirga* or *shura* has perpetrated human rights abuses must be thoroughly investigated and all those participating in them must be brought to justice. (Amnesty International 2003: 47–48)

This recommendation is odd as well as hubristic.[12] The oddity is that, after expending many pages exposing the abject failures of the state legal system, the solution it proposes to human rights violations by customary tribunals is to place them under close supervision by the (dysfunctional) state legal system. The hubris is the suggestion that these tribunals "must be abolished" if they cannot be made to respect human rights. This presupposes that the government has the power to abolish these deeply rooted tribunals, many operating in rural areas where state institutions are absent. (What would replace them?) "Customary justice systems exhibit remarkable resilience, outlasting changes in government, conflict, natural disaster and state-based attempts to abolish them" (Harper 2011: 37). *Shuras* and *jirgas* have operated for centuries and currently handle the majority of civil and criminal disputes in Afghanistan; they are quick, accessible, and familiar to people in the community, who comply with the results (Dempsey and Coburn 2010: 2).

Reducing human rights violations in connection with women and criminal justice is a long-term project that extends beyond the customary tribunals themselves. Their sources lie in cultural notions embodied in customary law and religious law. As these ideas change to become less problematic, the human rights clash will diminish. Women's rights advocates who support customary tribunals—which are often popular among indigenous women despite their flaws—recommend education and consciousness raising among men and women, as well as organizing among women to press for reforms (ILDO 2020: 17–38; Sieder and Barrera 2017). Customary and religious law and tribunals are not traditional institutions fixed in the past, it must be remembered, but continuously evolving *contemporary* creations at that reflect cultural attitudes and religious views within the community. In a number of locations, thanks to changing attitudes, women are being included in customary decision-making, and certain chiefs no longer award women and girls as compensation for serious crimes (ILDO 2020: 10).

Recent turn to non-state law by development agencies

Upon achieving independence, many leaders in formerly colonized countries set out to leave behind the badges of colonization. Elites and professionals, especially lawyers, promoted the enactment of a unified state legal system as necessary for economic development and joining the modern world. In the 1960s and 1970s, what came to be known as the law and development (or modernization) movement brought a wave of transplantation of Western laws and legal institutions across the Global South through voluntary borrowing, promoted by Western development agencies, welcomed by recipient governments in pursuit of economic, political, and legal modernization. Another wave of legal transplantation occurred the 1990s and 2000s following the collapse of communism and the Asian financial crisis. The so-called "Washington Consensus" was a package of reforms promoted to facilitate entry to global capitalism, often required as conditions for development loans and

grants: the implementation of neo-liberal property, contract, foreign investment, and banking legal regimes, and free market reforms (eliminating subsidies, tariffs, and government controls). The latest iteration of these efforts is "rule of law" development, the mantra of the World Bank, USAID, and other development organizations. Governments and development agencies have spent several billion dollars in recent decades to develop state legal systems across the Global South, with disappointing results (Marshall 2014; Humphreys 2010: 128–132; Tamanaha 2011).

Meanwhile, as time went on, customary law and tribunals increasingly received affirmative legal recognition by states. The constitutions of sixty-one countries across the Global South "explicitly recognize forms of traditional governance and customary law" (Holzinger, Kern, and Kromrey 2016). Constitutional recognition of customary law and traditional authorities is highest in sub-Saharan Africa (about 50 percent of countries recognized both), South and East Asia and the Pacific (48 percent recognized customary law, 34 percent traditional authorities), followed by the Americas (20 percent recognized both) (Holzinger, et al. 2019). Additional states statutorily recognize customary law and traditional leaders. An estimated 57 percent of the global population live in states with both customary law and state law (Holzinger, Kern, and Kromrey 2016: 469). In many countries, high percentages of people who seek a tribunal for resolution of disputes go to customary tribunals; for instance, between 80–90 percent in Afghanistan (Barfield, Nojumi, and Thier 2011: 161), 80 and 90 percent in Malawi, 60 to 70 percent in Bangladesh, and 80 percent in Burundi (Wojkowska 2006: 12). "In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa" (Chirayath, Sage, and Wookcock 2005: 3). A survey of 2,300 households across Liberia found that 3 percent of civil cases went to state court, 38 went to customary tribunals, and 59 percent did not go to any forum, with similar percentages in criminal cases (Harper 2011: 26–27). "It has become clear that in most of Africa, traditional authorities are here to stay, at least for the foreseeable future" (Logan 2013: 353).

People in these societies do not take their disputes to state courts for various reasons (Harper 2011: 26–30). "In Africa, doubts about the state's very legitimacy is widespread" (Zenker and Höhne 2018: 20). The state legal system may function poorly, with a dearth of trained lawyers and judges, poor funding, and inadequate staff, equipment, and facilities. With a population of 7.5 million, for example, Rwanda in the early 2000s was served by about fifty lawyers, twenty prosecutors, and fifty newly recruited judges; Malawi had three hundred lawyers for nine million people (Piron 2006: 275, 291). Other common reasons are that state courts may be too distant to easily access; lawyers and court fees are too costly for most people; the procedures and legal rules courts utilize are unfamiliar to people; the language used by the court differs from the local vernacular; state court judges do not understand the social context or norms of the community; the state legal system may be seen as oppressive and/or corrupt; court cases take a long time to process; court outcomes, which have winners and losers, might not resolve the social rupture; and there may be social pressure to resolve the dispute within the community (Wojkowska 2006: 13). Local tribunals, in contrast, are easy to access, inexpensive, understandable, and

transparent, use familiar procedures and norms, produce immediate results, and effectively resolve the matter.

There is a deeper reason why people prefer customary tribunals. State legal systems are doubly removed from the community. First, the legal institutions, norms, and procedures have been derived from Western societies in which they evolved, and then grafted on to societies with entirely different social, cultural, economic, and political milieus—alien implants that have not lost this misfit even after generations. Second, state legal institutions entail highly technical languages, techniques, and procedures that operate within bureaucratic legal organizations (legislatures, courts, prosecutors, police, etc.). Highly technical legal systems in every society are dis-embedded from community relations. Informal tribunals, in contrast, involve people within the community directly participating in and carrying out their own law without the intervention and removal by legal specialists taking over with their inscrutable legal terminology and actions. Traditional tribunals and customary and religious laws are what people know and identify with. As one commentator put it, "The customary legal framework is not seen as law at all, but as a way of life, how people live—State law on the other hand is something imposed and foreign" (Harper 2011: 28).

The World Justice Project (WJP) Rule of Law Index acknowledges that in many former colonized countries with weak state legal systems informal justice can be "timely and effective." Informal tribunals have not been factored into WJP country rankings, however, because "the complexities of these systems and the difficulties of systematically measuring their fairness and effectiveness make cross-country assessments extraordinarily challenging" (WJP 2020: 12). Because WJP cannot measure the effects of informal justice tribunals, they are treated as if they do not exist. Given the high percentages of people using these systems in many countries, this omission significantly undermines the reliability of their Index.

In recognition of their widespread use, and of the limited functional capacities of many state legal systems across the Global South, international development agencies lately have advocated greater attention to and support for customary tribunals (see Janse 2013). The United Nations Development Program (UNDP) (Wojkowska 2006), World Bank (Chirayath, Sage, and Wookcock 2005), International Development Law Organization (IDLO) (Harper 2011), and United States Institute for Peace (USIP) (Isser 2011), among others, issued publications on the significance of customary justice systems. The IDLO report states: "The question of customary justice and its role in promoting the rule of law has emerged as the most promising—and thorny—development in the field of justice reform" (Harper 2011: 5). This is by no means an enthusiastic embrace. A World Bank report observed, "many forms of traditional law are seen to discriminate against marginalized groups and perpetuate entrenched discriminatory power structures within the local community" (Chirayath, Sage, and Wookcock 2005: 4). Belatedly and almost begrudgingly, it is a pragmatic concession to reality.

In addition to concerns about the treatment of women and human rights, and worries that these tribunals reinforce local power structures, mentioned earlier, two main objections have been lodged against greater recognition of customary tribunals. One objection is from state legal officials who are concerned that engaging with

these tribunals diverts resources away from the development of state legal systems. "By working with informal mechanisms, they argue, the international community will promote and shift attention to non-state institutions at a time when the state is in desperate need of support" (Dempsey and Coburn 2010: 7). The response to this concern is that recognizing customary tribunals does not necessarily involve substantial funding—to the contrary, infusing money into them will warp existing incentives and affect how they function. More to the point, taking customary tribunals seriously does not entail abandoning efforts to build state legal systems. Rather, it involves constructing legal development efforts with a holistic awareness of, attention to, and engagement with the full range of legal institutions operating in these contexts. Development practitioners who place their faith in building state law should also take a realistic look at how legal systems function in their own societies. The high cost of legal services and lengthy court proceedings have resulted in large numbers of people in the US and the UK with unmet legal needs. Viewed in this light, the benefits of village tribunals that handle problems should not be underestimated.

The second objection is that it creates opportunities for forum shopping and uncertainty: "strengthening the customary system can result in a competing and overlapping set of laws, which, while giving choice, can obstruct claim-holder's access to justice and impede effective handling of grievances. This may create confusion or promote instability" (Harper 2011: 34). Even when rules exist to clarify the respective jurisdiction of state courts and customary tribunals, legal pluralism inevitably creates opportunities for forum shopping and inconsistent bodies of law, which elites and wealthy are more able exploit than poor masses. Undeniably, this is problematic. But no solution is available under the circumstances. And the presence of alternative tribunals can prompt improvements in the performance of each because their power and standing depends on attracting users, and people will resort to accessible tribunals that function effectively over those that do not. The bottom line is that customary tribunals are popular and widely utilized and they serve people's needs.

The structure of legal pluralism of the global south

This concluding section steps back to take the most general view of these situations to identify two connected structural features underlying the patterns found in postcolonial legal pluralism. In my usage of the term, structure refers to entrenched complexes of social ideas, practices, and institutions that perpetuate, even as they undergo contestation and change. Structural features have two dimensions: they emerge in path dependent ways out of the historical development of societies (diachronic); and they are interconnected and interact with all other aspects of society (cultural, economic, legal, political, technological, ecological, etc.), as well as interact with external cultural, economic, legal, etc., influences (synchronic).

The key to understanding these structural features lies in the mirror thesis (Tamanaha 2001: 1–3). Law and society scholars widely hold as a (nigh) truism that society pervasively influences law and law undergirds society in a mutually constitutive relationship. Prominent legal historian and sociologist Lawrence Friedman

stated, "Legal systems do not float in some cultural void, free of space and time and social context; *necessarily*, they *reflect* what is happening in their own societies, like a glove that molds itself to the shape of a person's hand" (Friedman 1996: 72) (emphasis added). A leading *Law and Society* text observes, "Law *reflects* the intellectual, social, economic, and political climate of its time. Law is *inseparable from* the interests, goals, and understandings that deeply *shape or comprise* social and economic life. It also *reflects* the particular ideas, ideals, and ideologies that are part of a distinct 'legal culture'—those attributes of behavior and attitude that make the law of one society different from that of another" (Vago 1981: 3)(emphasis added).

At the time of colonization, law in European societies had evolved over centuries in conjunction with surrounding social influences and changes (cultural, economic, political, technological, etc.). By the mid-nineteenth century, common law and civil law regimes had become specialized bodies of concepts, rules, doctrines, practices, and institutions maintained by professional jurists; they were territorial-based legal systems focused on rule application (formal legal rationality), with property, contract, tort, family law, criminal law, etc., regimes addressing the interaction between and among individuals (including entities) and the government, with separations between private and public spheres, operating in rapidly industrializing, urbanizing, capitalist, market societies. In the same manner, societies across Africa, Asia, the Americas, and the Pacific had also developed over centuries in conjunction with *their* histories and surrounding circumstances. At the time of colonization, law in many indigenous societies remained socially embedded knowledge, norms, practices and institutions encompassing property, injuries, assaults, marriage, rape, labor obligations, witchcraft, etc.; many indigenous justice systems were oriented toward reaching acceptable or right outcomes (substantively rational systems) organized around family, community, and relations of fealty to and respect for political leaders and elders, with a range of subsistence and economic activities in various areas linked to ecological features (hunting, herding, farming, fishing, trading etc.)—but they were not capitalist market-based societies, urbanization was limited, and no clear public-private demarcation existed. Law in European societies and in indigenous societies thus reflected radically different ways of life.

The colonial implementation of law involved extracting law and political systems that reflected one way of life and juxtaposing them alongside wholly different forms of life that had their own law and political systems—this *juxtaposition* is the *first structural feature* underlying legal pluralism. In addition, the orientation of colonial legal regimes was disciplinary, exploitative, and extractive, aimed at maintaining the power of the colonial state and its economic interests. Along with legal regimes, colonizing powers erected territorial states in indigenous societies that had very different forms of polities, drawing boundaries that did not match existing ethnic and political groupings, and they created economic activities oriented toward extracting resources for external trade. This juxtaposition wrought a mishmash of cultural, legal, political, and economic arrangements that were completely different, which then proceeded to evolve together, mutually interacting and influencing one another in all the ways described above. After decolonization, moreover, repeated waves of legal reforms continued to occur based on Western derived, capitalism-oriented laws and legal systems, and lately women's rights and human rights, at the urging of

Western states, development agencies, and NGOs, initiatives accepted (willingly or under pressure) by state officials seeking development aid.

One might think that the assumption that law mirrors society does not apply to the Global South since state law is largely transplanted from the West—but this truism still holds, though with a twist. Legal pluralism in post-colonial contexts is a complex bricolage that reflects profoundly heterogeneous societies. Anthropologists John and Jean Comaroff portray the situation:

> Because of their historical predicaments, postcolonies tend *not* to be organized under a single, vertically integrated sovereignty sustained by a highly centralized state. Rather, they consist in a horizontally woven tapestry of partial sovereignties: sovereignties over terrains and their inhabitants, over aggregates of people conjoined in faith or culture, over transactional spheres, over networks of relations, regimes of property, domains of practice, and, quite often, over various combinations of these things; sovereignties longer or shorter lived, protected to a greater or lesser degree by the capacity to exercise compulsion, always incomplete. (J.L. Comaroff and J. Comaroff 2006: 35)

These societies are highly pluralistic along multiple axes: cultural, ethnic, racial, caste, ethnicity, religious, educational, economic, political, and legal. The pluralism of law reflects these pluralities. Since law reflects society, fragmented societies cannot have unified law.

The second structural feature also relates to the mirror thesis, but follows from what was left behind during the transplantation: the absence of society-wide social, economic, bureaucratic, and ideational infrastructure necessary for state law. State legal systems in the West developed in conjunction with essential supportive conditions, particularly these four: 1) broad literacy and widely available educational institutions for the populace (including legal training); 2) broad-based economic activities sufficient to support taxation to fund government institutions that provide an array of public services; 3) (dependent on the first two) the existence of bureaucratic legal institutions distributed throughout society (legislators, municipal councils, courts, police, prosecutors, private lawyers, etc.); and 4) (dependent on the first three) general identification with and utilization of state law among the populace as *their* law and way of life. Pursuing a narrow agenda aimed at economic extraction, colonial states did little to establish the first two conditions; indirect rule was a deliberate refusal to build the third by instead outsourcing the bulk of legal functions for the populace; the fourth condition was impossible to create precisely because the transplanted laws and legal system were *not* the law of the populace. This means the supportive conditions necessary for effective, comprehensive state legal systems were lacking. Since every complex society organizes polities and social intercourse through law, and disputes must be addressed, versions of the third and fourth conditions had to be provided through traditional leaders and customary law.

Once this *division of labor of political and legal functions between state and traditional institutions* was put into place—the *second structural feature*—it could not be dislodged because it is self-reinforcing, particularly through actions by elites striving to preserve their sources of wealth and political power; and there was, and remains, no other way to provide the third and fourth conditions. Predatory, extractive, colonial states and legal regimes all too often continued in their predatory

mode under native management following decolonization, with ethnic and religious conflict playing out through efforts to seize control of the state apparatus and sources of wealth it provides access to (see Rotberg 2003). Traditional leaders have acted strategically to maintain their authority and economic position vis-a-vis the state and the community. State legal authorities and traditional leaders, respectively, built and maintain institutional capacities to meet the tasks they have managed for generations, which provides them with prestige, power, and income. Many of these societies lack sufficient educational institutions and government revenues—lack social and economic capital—for state legal systems to function well or to expand the reach of the state legal system to replace traditional leaders at the village level. Multiplying the challenges for the state, many of these societies consist of multiple communities following their own customs and laws. Nor is there a pressing need to undo the division of labor, since state legal systems are struggling to handle their own tasks, while villagers often prefer local tribunals.

All of the issues covered in this essay on the consequences of legal pluralism relate to these two structural features: fault lines from the juxtaposition of laws from one way of life onto wholly different ways of life, and from the division of labor for political and legal functions. The transformation-invention of customary law involves the juxtaposition of rule-oriented formally rational state courts applying written law alongside, and selectively incorporating norms from, outcome-oriented substantively rational informal tribunals applying unwritten customary law. The authority of traditional elites involves the juxtaposition of non-state governance structures to engage in governance, public services, and legal functions alongside state institutions. Uncertainty and conflict over land involves the juxtaposition of contrasting conceptions of property (individualist/communal) and the deepening penetration of capitalism in creating markets for land owing to migration to cities, commercial agriculture and ranching, mining, and manufacturing facilities. Customary and religious law clashes with human rights involves the juxtaposition of liberal legal conceptions and rights alongside indigenous cultural and religious legal conceptions. These issues followed from throwing together separately evolved holistic ways of life (cultures, political structures, economic system, and law), which then evolved in the same space over ensuing decades, coexisting, mutually influencing (hybridizing), interacting, intertwining, and responding to internal dynamics as well as external influences—driven especially by the forces of global capitalism.

For framing purposes, the situation can be roughly broken down into three groups. These societies have modern governmental and commercial sectors (linked to global capitalism), based in urban centers, employing educated or semi-educated people at decent compensation, many with contacts and relatives in the West, who purchase property, enter contracts, and so forth—the members of the rising middle classes who often desire modern rights-based legal systems (Comaroff 1998). State legal systems operate largely in connection with people (citizens as well as expatriates) and organizations in this modern sector. These societies also have substantial rural regions where less educated people live in villages, working for meager pay as laborers, or outside the money economy engaging in subsistence farming, herding, fishing, hunting, trapping, gathering, etc. Traditional leaders and customary tribunals continue to function effectively in these settings, applying customary law on

marriage, divorce, inheritance, property, assaults, injuries, etc., while state courts are distant and infrequently utilized (Woodman 2011: 26). Finally, these societies have increasingly large multi-ethnic, peri-urban sectors in growing cities, filled with internal and external migrants from rural areas, mixing with people with different ethnicities, seeking a better way of life, living as squatters and working in the informal economy. This third group lives at the margins of both the state legal system and customary tribunals: partially outside the state system because they work in the informal economy, they lack official property rights, and state law presence is limited in squatter areas (and mainly disciplinary); and partially outside customary systems because the hold of customary tribunals is attenuated the further one goes from rural strongholds, particularly in multi-ethnic settings. These generalizations are porous and blurry at the edges, offered as illustrative.

Urban governmental and economic activities are grounded in and revolve around state legal regimes, just as rural activities and community life are grounded in and revolve around customary law. Those respective bodies of law constitute the taken-for-granted backdrop of daily social and economic intercourse. Urban professionals and government officials purchase property and enter employment contracts (though many have various ties to rural communities). As for rural communities, as long-time scholar of African legal pluralism Gordon Woodman put it, "For those communities, customary law is their social life…. Now as always, they live it" (2011: 30). The main change going forward involves continuing migration from rural areas to cities for work, a world-wide phenomenon, decreasing the numbers in the second category and expanding the third. Efforts to develop state law should focus on encompassing people in this group, particularly finding ways to vest long-term squatters with legally recognized property rights.

The respective state and traditional authorities may carry out conflicting legal norms, and they typically defend their turf from encroachment by the other, but in many locations they have established a modus vivendi. Relations between coexisting legal systems can be thought of in three categories: cooperative, competitive, and combative (see Swenson 2018).[13] Cooperative relations among these fora can be cohesive socially (though they may cooperate in ways that are jointly oppressive of certain disfavored groups). Competitive interaction can motivate coexisting fora to improve their functioning to meet the needs of people (though it can result in pandering to attract users). Combative relations among coexisting legal forms exacerbates legal uncertainty and may inflame social strife. One, two, or all three of these interrelations can exist in a single context of legal pluralism, shifting over time or arising on different matters. People in these pluralistic situations make choices for normative, strategic, and pragmatic reasons as they pursue their objectives and interests. Some people prefer state law while others are committed to the law of their own community or religion. People use the law with which they are most familiar—which comports with their expectations and normative views—and law and tribunals that are available to them. When they have access to more than one legal forum, they regularly seek out the ones they consider most advantageous. This always occurs in situations of legal pluralism.

Despite widespread expectations that postcolonial countries will eventually evolve toward unified legal systems, it is now evident that legal pluralism will endure.

Evaluated from the standpoint of the idealized state legal system, legal pluralism appears hopelessly defective. Evaluated on its own terms, however, legal pluralism is a functional arrangement under circumstances marked by deep cultural, social, political, economic, and legal heterogeneity. These pluralistic societies will not retrace the evolution of the West to arrive at unified state legal systems because the two entrenched structural features prevent this from occurring. To put this in context, keep in mind that even Western societies do not have unified systems with a monopoly over law. Despite sustained efforts by the state legal officials over centuries to suppress, deny, and marginalize their existence, forms of native law followed within indigenous communities continue to exist in New Zealand, Canada, Australia, and the United States, and manifestations of Jewish law, Sharia law, and Romani law exist in many Western countries today (Tamanaha 2021: Chapter 3). *Many* countries across the globe have multiple, co-existing communities of inhabitants that follow their own distinct cultural and legal ways (India, China, Russia, Turkey, etc.). Whenever communities arrange their affairs through collectively recognized laws that differ from the dictates of official state law, legal pluralism will prevail unless the state engages in a campaign of sustained, total repression of community ways—a grievous path with an enormous human cost.

What marks legal pluralism in the Global South as distinct is that state law and indigenous political and legal forms are caught in an interlocking jigsaw puzzle equipoise, both significant and influential, inextricably intertwined in manifold respects, one exerting a greater impact than the other depending on the matter, the parties involved, the interests as stake, the respective balance of powers at play, and the location. This constellation—each manifestation of which is unique—is fated remain for generations to come.

Notes

1. For an account of various ways in which colonial states supported European exploitation, see A. Seidman and R. B. Seidman (1984).
2. On a personal note, my grandfather emigrated from Okinawa to Hawaii in the 1920s via indentured servitude to work on a plantation.
3. The continuing deleterious consequences of the arbitrary drawing of state boundaries in Africa and the Middle East are discussed in Tim Marshall (2016: Chapters 5 and 6).
4. These arrangements commonly occur in empires. See generally Lauren Benton and Richard Ross (2013) and Tamanaha (2021).
5. For a balanced view of the challenges, see Allott (1984).
6. The transformation of customary law described above occurs in state courts that recognize customary law, in contrast to unofficial village courts. See F. von Benda-Beckmann (1984).
7. An example is Namibia's recognition of certain traditional authorities, which function much the same way as traditional authorities in other parts of Namibia that did not receive official recognition. Ruppel and Ruppel-Schlichting (2011: 44–45).
8. A dated but still informative account of these courts is Beattie (1957).
9. My description compresses Forsyth's seven model typology (2007). The author's study examined Australia, New Zealand, Samoa, Kiribati, East Timor, Vanuatu, Fiji, Papua New Guinea, Solomon Islands, Tuvalu, Tokelau, South Africa, Malawi, Nigeria, Zambia, Mozambique, Lesotho, Botswana, Bangladesh, Philippines, Peru, and Columbia.

10. An overview of the debate over individual versus collective ownership is Tania Murray Li (2010).
11. Eck recognizes that the existence of multiple jurisdictions might not causally enhance violence, but is itself a reflection of underlying factors that produce greater violence (2014: 450).
12. An incisive critique of this recommendation and of Comment 32 is Ala Hamoudi (2014).
13. Geoffrey Swenson suggests four archetypes: combative, competitive, cooperative, and complementary. I drop complementary because cooperative relationships include those that are complementary. See Geoffrey Swenson (2018). Another useful typology is ignorance, awareness, recognition, and rejection. See Zenker and Höhne (2018: 21–25).

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