

# A turn to legal pluralism in rule of law promotion?

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# A Turn to Legal Pluralism in Rule of Law Promotion?

Ronald Janse\*

## Abstract

Over the past 25 years, international organizations, NGOs and (mostly Western) states have spent considerable energy and resources on strengthening and reforming legal systems in developing countries. The results of these efforts have generally been disappointing, despite occasional successes. Among donors, one of most popular explanations of this failure in recent years is that rule of law promotion has wrongly focused almost exclusively on strengthening the formal legal system. Donors have therefore decided to 'engage' with informal justice systems. The turn to legal pluralism is to be welcomed for various reasons. But it is also surprising and worrisome. It is surprising because legal pluralism in developing countries was a fact of life before rule of law promotion began. What made donors pursuing legal reform blind to this reality for so long? It is worrisome because it is not self-evident that the factors which have contributed to such cognitive blindness have disappeared overnight. Are donors really ready to refocus their efforts on legal pluralism and 'engage' with informal justice systems? This paper, which is based on a review of the literature on donor engagement with legal pluralism in so-called conflict affected and fragile states, is about these questions. It argues that 7 factors have been responsible for donor blindness regarding legal pluralism. It questions whether these factors have been addressed.

**Keywords:** legal pluralism, rule of law promotion, legal reform, customary law, non-state legal systems, donor policy

## 1 Introduction

Over the past 25 years, international organisations, non-governmental organisations (NGOs) and (mostly Western) states have spent considerable energy and resources on strengthening and reforming legal systems in developing countries. The results of these efforts, as critics and donors agree, have generally been disappointing, despite occasional successes. Among donors, one of the

most popular explanations of this failure in recent years is that rule of law promotion has wrongly focused almost exclusively on strengthening state legal systems. By devoting attention to such activities as drafting and enacting laws, training and equipping legal professionals, making courts more efficient in handling cases, and coordinating the activities of courts and other legal institutions such as prosecutorial offices and prison services, donors have sadly ignored the fact that the state legal system is largely irrelevant to the lives of most people in developing countries. Donors now routinely point out that 'at least 80 or 90 per cent' of disputes in developing countries are resolved by non-state justice systems,<sup>1</sup> *i.e.* governance and justice mechanisms that operate outside the framework of the state or in the fringes between state and society.<sup>2</sup> These systems, donors now argue, are both more legitimate (application of local norms by local people) and more accessible (physical, monetary and opportunity costs, familiarity with language and procedure) for people than the state legal system.<sup>3</sup> Moreover, non-state justice systems regulate issues of deep concern to people, such as protection of land, property and livestock, and personal security and local crime. Therefore, donors have decided to 'engage' with non-state justice systems.

The turn to legal pluralism, loosely defined here as a context within which multiple legal forms coexist, has not yet had an overwhelming impact on rule of law promotion, which continues by and large to focus on state legal systems. But there is no doubt that donors have started to take non-state justice systems seriously. Prominent organisations have encouraged groups of

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1. The distinction between non-state justice systems and state legal systems will be used throughout this article, but it is not a fortunate distinction. Firstly, non-state justice systems can consist of highly formalised rules and procedures. Secondly, most justice systems are hybrids of state and non-state systems. Still, the distinction seems more appropriate than the pair formal-informal. Another often-used distinction is between state and customary systems. For discussion of appropriate terminology (non-state, informal, customary, community-based), see P. Albrecht, H.M. Kyed, D. Isser and E. Harper (eds.), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (2011).
2. J. Faundez, 'Legal Pluralism and International Development Agencies; State Building or Legal Reform?', *3 Hague Journal on the Rule of Law*, 18-38, at 19 (2011).
3. This claim about the disadvantages of formal versus non-state justice systems is very often repeated in donor policy documents, but seriously distorts reality in some (or many?) cases. See for instance R.C. Crook, 'State Courts and the Regulation of Land Disputes in Ghana: The Litigants Perspective' (*IDS working paper 241*, Institute of Commonwealth Studies, Sussex, 2005), 1-21.

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practitioners to develop programs that engage with non-state justice systems. These include the World Bank and its Justice for the Poor Program, the United States Institute for Peace, the Open Society Justice Initiative, the International Development Law Organization and the United Nations Development Program. Moreover, donors have co-sponsored and participated in various international conferences that brought together practitioners and academics from various relevant disciplines. Some of these have resulted in publications with the state of the art.<sup>4</sup> As a result, programming experience, know-how and knowledge based on empirical research and theoretical analysis are accumulating and spreading. Moreover, there is growing consensus among practitioners on the broad contours of frameworks for engagement with non-state justice systems. In short, leading donors are aware of the many challenges of engaging with non-state justice systems, but also have some clues on how to proceed further and expand their activities in the area of non-state justice systems. They seem better prepared to engage with non-state justice systems than they were more than two decades ago when they started rule of law promotion targeted at formal justice systems. The recent burst of intellectual and practical activity regarding legal pluralism has undoubtedly revitalised the field of rule of law promotion. Yet the turn to legal pluralism is also surprising and worrisome. It is surprising because legal pluralism in developing countries was a fact of life before rule of law promotion began and because this fact was well known in the West and elsewhere. What made donors pursuing legal reform blind to this reality for so long?<sup>5</sup> It is worrisome because it is not self-evident that the factors that have contributed to such cognitive blindness have disappeared overnight. Are donors really ready to refocus their efforts on legal pluralism and 'engage' with non-state justice systems? This article, which is based on a review of the literature on rule of law promotion in so-called conflict-affected and fragile states, is about these questions.<sup>6</sup> It starts with some remarks on when and why rule or law promotion turned its attention to legal pluralism. It then offers a

series of explanations of why donors did not see the importance of legal pluralism before. It subsequently looks at whether the factors that led to cognitive blindness have been addressed.

## 2 The Discovery of Legal Pluralism

Rule of law promotion has a long history, albeit under different names.<sup>7</sup> Its renaissance since the late 1980s, however, is unprecedented in various respects. Fifteen years ago, Thomas Carothers opened a widely read article in *Foreign Affairs* on the 'Rule of Law Revival' with the observation that 'one cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles'.<sup>8</sup> This observation is even more true today than it was back then: the rule of law is promoted around the world for many reasons, including the wars on drugs and terrorism, counter-insurgency, poverty alleviation, economic development, comprehensive development, European integration, post-conflict state-building and the protection of intellectual property rights. As this list, which is not exhaustive, indicates, rule of law is being promoted by an ever-expanding number of organisations (states, international organisations, NGOs, multinational corporations, consultancy firms, think tanks, universities, law firms) from many different walks of life, including development aid, justice and law enforcement, business, defence and diplomacy. Also, the amount of resources spent on rule of law promotion has risen significantly and averages around 2.7 billion USD per year, according to a recent report by the International Development Law Organization.<sup>9</sup> In short, rule of law promotion has recently been pursued by ever more actors for ever more

4. B.Z. Tamanaha, C. Sage and M. Woolcock, *Legal Pluralism and Development* (2012); H.M. Keyd (ed.), 'Special Issue on Legal Pluralism and International Development Interventions', 63 *Journal of Legal Pluralism* (2011); D.H. Isser (ed.), *Customary Justice and the Rule of Law in War-Torn Societies* (2011); J. Ubink (ed.), *Customary Justice: Perspectives on Legal Empowerment* (2011); E. Harper (ed.), *Working with Customary Justice Systems: Post-Conflict and Fragile States* (2011); E. Harper, *Customary Justice: From Program Design to Impact Evaluation* (2011); P. Albrecht, H.M. Kyed, D. Isser and E. Harper (eds.), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (2011).

5. This article is about the policies and *modus operandi* of donors and presents them as monolithic entities. Needless to say, many people working in donor agencies are more aware than anybody else of the shortcomings of main policies and *modus operandi*. Indeed, this article is based to a large degree on papers written by experts in donor agencies.

6. This article does not aim to discuss empirical studies on legal pluralism in developing countries. When mentioning issues in legal pluralism that present challenges for donor engagement, the claim is not that these issues are representative of legal pluralism in developing countries, but just that they sometimes do occur and present problems for donors.

7. A detailed history of rule of law promotion has not been written. The usual story traces current rule of law promotion to the law and development movement, but Twining has correctly pointed out that this account is one-sidedly focused on the US and leaves out legal reform by European countries during colonisation and decolonisation. See W. Twining, *General Jurisprudence; Understanding Law From a Global Perspective* (2009), at 326-329. For law and development, see E.M. Burg, 'Law and Development: A Review of the Literature and a Critique of "Scholars in Self-Estrangement"', 25 *American Journal of Comparative Law*, 492-530 (1977); J. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (1980); B.Z. Tamanaha, 'The Lessons of Law-and-Development Studies', 89 *American Journal of International Law*, 470-486 (1985); D.M. Trubek and M. Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development', *Wisconsin Law Review*, 1062-1101 (1974). S. Humphreys, 'Laboratories of Statehood: Legal Intervention in Colonial Africa and Today', 75 *Modern Law Review* 4, 475-510 (2012).

8. Reprinted in T. Carothers (ed.), *Promoting the Rule of Law Abroad* (2006), at 3-14.

9. International Development Law Organisation (IDLO), *Legal and Judicial Development Assistance Report* (2010), at 4, 10-14.

reasons with ever more resources.<sup>10</sup> It has become a complex and crowded field.

There are different reasons why rule of law promotion has come to enjoy such popularity. Growing enthusiasm about the results that have been achieved is not one of them. On the contrary, one of the striking features of the current wave of rule of law promotion is that it has grown exponentially in the face of ever-increasing scepticism and criticism from both academics and prominent practitioners. Initially, this criticism focused on the superficiality of the reform menu. Rule of law promotion was seen to put much effort in such activities as drafting laws, equipping courts and introducing court management systems. It did not seriously attempt, let alone succeed, in subjecting the exercise of power by government officials to law or in inculcating values in political elites, officials and citizens that are required to make rule of law a reality. In the early 2000s, critics also began to point out that the almost exclusive focus of reform efforts on state legal systems was misguided because the vast majority of people in developing countries have no access to and little respect for state law and mostly rely on non-state justice systems.

The last criticism struck a chord. By the mid-2000s, prominent donors started to publish notes and policy documents that reflected their realisation that non-state justice systems cannot be ignored. These included the British Department for International Development, the United Nations Development Program, the World Bank and the Development Cooperation Directorate of the Organization for Economic Co-operation and Development, and the United Nations' Secretariat and Department of Peace Keeping Operations.<sup>11</sup> Although the criticism of academics and prominent practitioners played a role in the turn to legal pluralism, it seems that donors primarily learnt the hard way that top-down legal reform has clear limits and that non-state justice systems deserve to be taken seriously. Also, the lesson was learnt by donors from different walks of life.

A first group of donors that was confronted with the importance and resilience of non-state justice systems were international development agencies and other organisations involved in development aid. From the late 1990s onwards, these organisations had invested heavily in reforming legal systems on the assumption that Western-style laws on contract, property and bankruptcy as well as well-functioning judiciaries are essen-

tial to attract foreign investment and stimulate economic growth. Non-state legal systems, on the other hand, were seen as an obstacle to growth and one of the key reasons why developing countries did not experience economic development.

The limits of these assumptions perhaps became nowhere clearer than in programs aimed at titling property. Although land tenure has been an area of development studies and practice for half a century, it only became a prominent item on the agenda of donors in the 1990s.<sup>12</sup> There were different reasons for this, including the experience of international transitional administrations and state-building operations that disputes over land are a major factor in causing and perpetuating violent conflicts,<sup>13</sup> but one of the most important was the ideas of Hernando de Soto.<sup>14</sup> According to this Peruvian economist, the poor in developing countries are poor because they cannot turn their assets (houses, crops, businesses, talents) into capital, trade them outside a narrow local circle where people know and trust each other, or use them as collateral for a loan or a share against an investment. The reason is that these assets are not represented with titles under national law, but buried in an extra-legal sphere. Hence the recipe: if the assets of the poor are formalised and acquire legal protection, their dead capital will come to live and be an engine of unprecedented economic growth and prosperity, just like history in the United States has demonstrated. However, the experience with rapid and massive titling and registration programs was that they mostly did not produce the intended results.<sup>15</sup> They led to competing state and non-state rules, which created more legal pluralism and uncertainty for the poor with respect to their assets. They uprooted and disrupted social relations in communities that use land for different economic and social purposes. They undermined land rights of the poor, disadvantaged, women, minorities and youth, since middle and upper classes tend to profit from titling programs. They did not increase access of the poor to credit and loans. For these reasons, the poor mostly prefer their assets to remain in an extra-legal sphere controlled by non-state rules and rights, which, to be sure, are usually highly formalised, though of a

10. V.L. Taylor, 'Frequently Asked Questions about Rule of Law Assistance (and Why Better Answers Matter)', 1 *Hague Journal on the Rule of Law*, 46-52 (2009); A. Santos and D.M. Trubek (eds.), *The New Law and Development; A Critical Appraisal* (2006).
11. Department for International Development, *Briefing on Non-State Justice and Security Systems* (May 2004); United Nations Development Programme, *Doing Justice: How Non-State Justice Systems Can Contribute* (December 2006) (by E. Wojkowska); L. Chirayath, C. Sage and M. Woolcock, 'Customary Law and Policy Reform; Engaging With a Plurality of Justice Systems' (July 2005) (background paper for World Development Report 2006: Equity and Development); OECD/DAC, *Enhancing the Delivery of Justice and Security* (2007); Secretary General's reports 'The rule of law and transitional justice in conflict and post-conflict societies' (S/2004/616) and 'Uniting our strengths: enhancing UN support for the rule of law' (A/61/636-S/2006/980).

12. J.W. Bruce, 'Simple Solutions to Complex Problems: Land Formalization as a "Silver Bullet"', in J.M. Otto and A. Hoekema (eds.), *Fair Land Governance; How to Legalise Land Rights for Rural Development* (2011) 31-56; J.M. Otto, 'Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto', 1 *Hague Journal on the Rule of Law*, 173-194 (2009).
13. P. McAuslan, 'Land and Power in Afghanistan: In Pursuit of Law and Justice?', in A. Perry-Kessaris (ed.), *Law in the Pursuit of Development; Principles into Practice?* (2010) 269-287; C. Deschamps and A. Roe, 'Land Conflict in Afghanistan', in W. Mason (ed.), *The Rule of Law in Afghanistan; Mission in Inaction* (2011) 205-222.
14. H. De Soto, *The Other Path; The Economic Answer to Terrorism* (1989); *The Mystery of Capital; Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).
15. Bruce, above n. 12; Otto, above n. 12, at 183-190; B.Z. Tamanaha, 'The Primacy of Society and the Failures of Law and Development: Decades of Stubborn Refusal to Learn', at <<http://ssrn.com/abstract=1406999>>, at 46-49; J.M. Ubink, A.J. Hoekema and W.J. Assies, *Legalising Land Rights; Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America* (2009).

non-state nature.<sup>16</sup> Clearly, the transformative powers of the state legal system had been grossly overestimated. Moreover, non-state justice systems turned out to be more resilient than anticipated.

A second group of donors that was confronted with the limits of top-down legal reform were those involved in post-conflict state-building, *i.e.* the effort to reconstruct, or in some cases to establish for the first time, effective and autonomous structures of governance in a state where no such capacity exists or where it has been seriously eroded. In the 1990s and early 2000s, the United Nations Security Council not only established an unprecedented number of peacekeeping operations, but also vastly expanded the responsibilities of these missions. Unlike the thirteen UN peacekeeping operations during the Cold War, which had primarily been tasked with monitoring ceasefire lines, many of the fifty operations since 1988 had comprehensive mandates, which in some cases, Kosovo and East Timor, amounted to nothing less than responsibility for and a large part of the exercise of all the executive, administrative, legislative and judicial powers normally carried out by a state.<sup>17</sup>

One of the inevitable components of many of these 'complex', 'comprehensive' or 'multidimensional' missions was legal reform.<sup>18</sup> Since 1992, Security Council rhetoric and practice have stressed the importance of rule of law, and this was repeated in multiple high-level UN meetings and publications, including the 2000 Millennium Declaration, the Brahimi Report of the Panel on United Nations Peacebuilding Operations,<sup>19</sup> the 2005 World Summit Outcome document and the 2012 UNGA high-level segment.<sup>20</sup> At an abstract level, UN efforts to promote rule of law were guided by the Secretary-General's well-known 'thick' definition of the rule of law.<sup>21</sup> The departments within the UN responsible for overseeing and implementing the UN's peacekeeping policy, the Department of Peace Keeping Operations and the Department of Field Support, operationalised the UNSG-definition of rule of law by breaking it down

into four basic areas: police, prisons, courts and human rights. In practice, the focus of UN rule of law efforts was on criminal justice and law and order.<sup>22</sup> It was also entirely oriented on the state justice system. It was not very successful, however, in creating state legal systems and in replacing non-state justice systems.

A clear case was East Timor. In 1999, the United Nations (UN) took full sovereign authority over East Timor.<sup>23</sup> One of the responsibilities of the UN Transitional Administration in East Timor was to build a state justice system. The UN efforts, however, 'fell short in both design and implementation'.<sup>24</sup> No functioning institutions were created; there were hardly any qualified legal professionals, and the effectiveness of training and mentoring programs were severely hampered by language barriers and lack of knowledge among trainers; fewer courts were built than initially planned, and they opened with long delays; administrative routines were not established; various incidents regarding unclear procedures, the applicability of Indonesian law, and unqualified prosecutors, defendants and judges shook whatever weak confidence in legal institutions had been established; there was confusion over the precise roles of the legislative, judiciary and executive branches. In his final report to the Security Council before independence, the Secretary-General had to admit that the state justice system failed to deliver justice in crucial matters such as violent crime, land disputes and the prosecution of serious human rights violations. There was '[...] a serious lack in the justice system' and this system was 'one of the most critical areas in need of continuing assistance'.<sup>25</sup> Meanwhile, a widely publicised 2004 report by the Asia Foundation found that while citizens distrusted and did not feel protected by the state legal system, 94 per cent of respondents were confident in community-based justice systems and 77 per cent stated that local process was in accordance with their value systems. A similar report was published by *Advocats Sans Frontières*.<sup>26</sup> In view of these and other experiences, it is no surprise that the UN Secretary-General, in his 2004 report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, for the first time

16. Bruce, above n. 12, at 35.

17. For the evolution of peacekeeping, see G. Evans, *Cooperating for Peace: The Global Agenda for the 1990s and Beyond* (1993), at 99-106.

18. R.Z. Sannerholm, *Rule of Law After War: Ideologies, Norms and Methods for Legal and Judicial Reform* (2009).

19. Doc. A/55/305-S/2000/809, 21 August 2000, paras. 39-40.

20. J. Ferrall, 'Impossible Expectations? The UN Security Council's Promotion of the Rule of Law After Conflict', in B. Bowden, H. Charlesworth and J. Ferrall (eds.), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (2009) 134-156, especially at 139-153; S. Barriga and G. Kerschischnig, 'The UN General Assembly Resolution on the Rule of Law: Ambition Meets Pragmatism', 2 *Hague Journal on the Rule of Law*, 253-258 (2010).

21. The rule of law is '[...] a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' See S/2004/616 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.

22. Ferrall, above n. 20, at 146-147; R. Zajac-Sannerholm, F. Möller, K. Simion and H. Hallonsten, *UN Peace Operations and Rule of Law Assistance in Africa 1989-2010: Data, Patterns and Questions for the Future* (2012); S. Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (2010), at 155-162; C. Kavanagh and B. Jones, *Shaky Foundations: An Assessment of the UN Rule of Law Support Agenda* (November 2011).

23. On international territorial administration, see R. Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (2006); R. Wilde, *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (2008).

24. T. Chopra, C. Ranheim and R. Nixon, 'Local-Level Justice under Transitional Administration', in Isser, above n. 4, 119-157, at 119; L. Grenfell, 'Legal Pluralism and the Challenge of Building the Rule of Law in Post-conflict States: A Case Study of Timor-Leste', in B. Bowden, H. Charlesworth and J. Ferrall (eds.), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (2009) 157-176.

25. UN Doc. S/2006/251, 20 April 2006, End of mandate report of the secretary-general on the UN office in Timor-Leste, para. 14.

26. Grenfell, above n. 24, at 170.

emphasised the importance of taking non-state justice systems seriously.

A last group of donors that came to appreciate the importance of non-state justice systems is military counter-insurgency. When George W. Bush sought to be elected in 2000, he famously derided the idea that national building was part of the mission of the US military: 'I'm worried about an opponent who uses nation building and the military in the same sentence. See, our view of the military is for our military to be properly prepared to fight and win war [...].'<sup>27</sup> A few years later, after facing massive insurgencies in 2003 in Afghanistan and Iraq, the US military became engaged in the largest military state-building operation since the years immediately following World War II. To justify and explain the role of the military in state-building, the US military, under the leadership of US Army Commander David H. Petraeus and US Marine Corps Commander James F. Amos, developed a new doctrine of counter-insurgency, which was published in 2006 as the *US Army Field Manual on Counterinsurgency* (FM-34). Rule of law promotion was an important component in this doctrine.<sup>28</sup> The foreword to FM-34 boldly announces that 'Soldiers and Marines are expected to be nation builders as well as warriors. [...] They must be able to facilitate establishing local governance and the rule of law'.<sup>29</sup> It was clear that the military understood rule of law promotion as an effort to establish state legal systems. As FM-34 explains,

The presence of the rule of law is a major factor in assuring voluntary acceptance of a government's authority and therefore its legitimacy. A government's respect for pre-existing and impersonal legal rules can provide the key to gaining it widespread, enduring societal support. Such government respect for rules – ideally one recorded in a constitution and in laws adopted through a credible, democratic process – is the essence of the rule of law. As such, it is a powerful tool for counterinsurgents.<sup>30</sup>

Initially, rule of law promotion on steroids, as development practitioners like to call it, thus focused entirely on strengthening the state legal system. Counter-insurgency, under the new doctrine, essentially meant outgoverning the enemy, and it was thought that this required

27. Speech in Chattanooga, TN, 6 November 2000.

28. T.J. Röder, 'Civil-Military Cooperation in Building the Rule of Law', in M. Zürn, A. Nollkaemper and R. Peerenboom (eds.), *Rule of Law Dynamics in an Era of International and Transnational Governance* (2012) 206-232.

29. D.H. Petraeus and J.F. Amos, 'Foreword', in *The US Army Marine Corps Counterinsurgency Field Manual* (2006) xlv-xlvi, at xlvi.

30. *The US Army Marine Corps Counterinsurgency Field Manual* (2006), 39 (I-119). To give more specific practical guidance to US efforts to promote the rule of law in counterinsurgency operations, the Judge Advocate General's Legal Center and School, in 2008, published *Rule of Law Handbook: A Practitioners Guide for Judge Advocates of the US Army*. It is 'highly likely', the Handbook notes, 'that the Global War on Terror (GWOT) will require US military to engage in operations that include rule of law operations as an essential part of the overall mission'.

enhancing the capacity of the state to deliver justice and security so that people would choose sides for government rather than for the insurgents. In 2006-2007, however, when tribes massively revolted against al-Qaeda in al Anbar in Iraq, it became clear to the US and Coalition forces that they could not secure victory and stability if they ignored tribal leaders and tribal culture. Hence, they cemented an alliance with the Iraqi government and the tribes.<sup>31</sup> This did not lead to an abandonment of efforts to strengthen the state legal system. On the contrary, tribes were asked to respect and guarantee the authority and supremacy of the state legal system. But in return the jurisdiction of tribal customary law in many areas was recognised. Reflecting on recent experiences in Iraq as well as Afghanistan and the Horn of Africa, David Kilcullen, the prime theorist of counter-insurgency as a competition for government, suggests that '[...] bottom-up, civil society-based programmes that focus on peacebuilding, reconciliation and the connection of legitimate local non-state governance structures to wider state institutions may have a greater chance of success in conflict and post-conflict environments than traditional top-down programmes that focus on building the national-level institutions of the central state'.<sup>32</sup>

The importance of non-state justice systems thus dawned upon all the important players in the worlds of legal assistance: the development community, high-level diplomacy and the defence establishment. This does not mean, of course, that these communities have joined hands in developing new strategies to engage with non-state justice systems. But it does explain why legal pluralism is so high on the agenda now and why continued attention and spending is to be expected in the years to come. This makes it all the more important to understand why the three Ds did not see legal pluralism before and whether they have indeed addressed the issues that led to their disregard.

### 3 Why the Blindness?

There are different reasons why donors have long been blind to the reality of non-state justice systems. These reasons are not mutually exclusive. They do not apply to all donors in all regions. They are not mentioned in any particular order. They are broad generalisations.

The first is amnesia. Donors are easily excited about ideas that promise to end poverty, terrorism, insurgency, and other problems in foreign and development policy. They dislike the notion that almost all the big ideas have been tried before and that their results were, at best, mixed, modest and dependent on context-specific

31. P. Asfura-Heim, 'Tribal Customary Law and Legal Pluralism in al Anbar, Iraq', in Isser, above n. 4, 239-284, at 274-278.

32. D.J. Kilcullen, 'Deiokes and the Taliban: Local Governance, Bottom-Up State Formation and the Rule of Law in Counter-Insurgency', in W. Mason (ed.), *The Rule of Law in Afghanistan: Missing in Inaction* (2011) 35-50.

circumstances. They are always ‘future-positive’.<sup>33</sup> Many academics have pointed this out with respect to rule of law promotion in general<sup>34</sup> or with respect to such particular ideas as titling property, which has had a long history before De Soto,<sup>35</sup> or bottom-up legal reform, which began before the current vogue of legal empowerment programs.<sup>36</sup> It has been suggested that the history of law and development can briefly be summarised as ‘decades of stubborn refusal to learn’.<sup>37</sup> There are different reasons for this forgetfulness. One is a lack of institutional memory in development and foreign policy organisations, where civil servants seldom work on portfolios with rule of law for more than a few years; knowledge management is non-existent or underdeveloped, and, indeed, knowledge sharing is actively discouraged<sup>38</sup>; similar activities are labelled differently over time because of changing political moods and trends. In addition, it seems as if donors are not interested in putting problems and solutions in historical context. Although they regularly sponsor academic work on whether new ideas have been tried before, and if so, where, how, and with what results, it is unclear how, if at all, this information is taken on board in policy-making. Policy papers on rule of law are usually about current and future problems and solutions and pretend they do not have a past.

The second factor is operational. Much has been written about shortcomings in the organisation and delivery of rule of law assistance.<sup>39</sup> Some of these explain why attention has largely focused on the state legal system. The assessments (‘inception missions’, ‘needs assessments’, etc.) on which programs are based are usually too short to understand the functioning of the state legal system, let alone the functioning of non-state justice systems, of which there are many. Also, they are often restricted to the capital or to easily accessible cities and areas where the state legal system has some presence. Moreover, programs tend to focus on specific areas – drafting laws, improving court performance – with little attention to the interconnectedness of parts of the state legal system, let alone its place and function in the overall legal landscape, or indeed its social or economic context. Rule of law promotion, as Wade Channell puts

it, suffers from ‘excessive segmentation’.<sup>40</sup> Furthermore, lawyers are strongly involved in the making of programs, and lawyers, unlike anthropologists, are not trained to understand the nature and functions of non-state justice systems, nor do they have a professional interest in advising to divert attention from the state legal system to non-state justice systems. Ongoing education and training could go some way to remedy these defects, but education and training in legal reform is virtually absent and ongoing education and learning does not exist. To obtain approval and funding for projects, it is imperative to present persuasive and accessible narratives, preferably accompanied by bullet points, matrices, tables and graphs, of how interventions will meet a limited and measurable set of targets within the next three to five years, which is not conducive to initiatives that cautiously seek to understand and engage with multiple and multifaceted non-state justice systems. Also, state legal systems are characteristically understaffed and under-resourced in developing countries, so that recommendations to invest in this system always seem to make good sense.

The third factor is legal centralism or state-centrism. Rule of law promotion has always proceeded on the assumption that the paradigm case of law consists of (an idealised version of) modern municipal law in the Western world.<sup>41</sup> Law, in this view, is the law of the state. It is produced by state bureaucratic institutions, impersonally applied by the state to all its subjects and exclusive of all other law. This legal centralist paradigm can rest on various types of claims. It can be based on the empirical assertion that only the state is capable of providing social order, on the legal-normative claim that the state has supreme authority in a given territory and the legitimate monopoly on the use of force and the delivery of justice and security, or on the ideological claim the state offers the best hope for the realisation of economic development, democracy, human rights and the rule of law.<sup>42</sup> Rule of law promotion, and state-building more generally, is usually based on all of these claims. Its underlying belief is that function follows form: if legal systems in developing countries look like legal systems in Western countries, they will start to do the same things.<sup>43</sup> Within this legal centralist paradigm, it is not possible to regard non-state justice systems as law. They are at best rudimentary and primitive forms of law, not to be taken seriously for organisations that aim to improve the delivery of justice and security in developing countries. At worst, they undermine efforts to establish or strengthen the legal system, and must be eradicated, marginalised or completely subjected to state law. The inability to see non-state justice systems as legal

33. M. Edwards, *Future-Positive: International Co-operation in the 21st Century* (1999).

34. Taylor, above n. 10, at 51; L. Nader, ‘Promise or Plunder? A Past and Future Look at Law and Development’, *World Bank Legal Review*, at 87-111 (2006); W. Channell, ‘Lessons Not Learned about Legal Reform’, in T. Carothers (ed.), *Promoting the Rule of Law Abroad: in Search of Knowledge* (2006) 137-159.

35. Bruce, above n. 12; Otto, above n. 12, at 180-183.

36. B. van Rooij, ‘Bringing Justice to the Poor; Bottom-Up Legal Development Cooperation’, 4 *Hague Journal on the Rule of Law* 2, 286-318 (2012).

37. Tamanaha, above n. 15.

38. Channell, above n. 34, at 149.

39. Many shortcomings in ‘the industry’ are mentioned and discussed in almost all the papers in Carothers, above n. 8. In addition, particularly with respect to legal pluralism, see C. Sage and M. Woolcock, ‘Introduction: Legal Pluralism and Development Policy; Scholars and Practitioners in Dialogue’, in Tamanaha *et al.* (2012), above n. 4, at 1-17.

40. Channell, above n. 34, at 138, 143-144.

41. Isser, ‘Conclusion’, in *id.*, above n. 4, at 325; Twining, above n. 7, at 323-375.

42. W. Twining, ‘Legal Pluralism 101’, in Tamanaha *et al.* (2012), above n.4, 112-128, at 116.

43. L. Pritchett, M. Andrews and M. Woolcock, ‘Capability Traps? The Mechanisms of Persistent Implementation Failure’ (*Working paper* 234, Center for Global Development, 2010).

systems because they do not rely on the state is nowhere more clear than in policy documents that describe areas where formal legal institutions are absent as ‘ungoverned spaces’ or ‘black holes’.<sup>44</sup> Legal centralism, quite literally, blocks the view to the reality of non-state governance and law.

The difficulty of taking non-state law seriously is even greater when rule of law promotion is not simply understood as legal reform, but has the more elevated meaning of furthering the ideal of rule of law. It already requires a stretch of the imagination to apply the ideal of rule of law to international law. Despite many resolutions, reports and discussions in the UN General Assembly on ‘the rule of law at the national and international levels’, diplomats have so far produced little more by way of a concept of the international rule of law than a loose set of items and concerns. International lawyers and legal theorists, too, continue to struggle with whether the notion of rule of law can fruitfully be applied to international law.<sup>45</sup> It is even less clear how rule of law might be applicable to forms of regulation, dispute settlement and enforcement with which the state, government officials and legal professionals have little or nothing to do. Indeed, it seems as if discussion of the relation between rule of law as an ideal and legal pluralism in developing countries has only just begun and is still tentative and exploratory.<sup>46</sup> Against this background, it is not surprising that donors have not been able to reconcile their professed commitment to rule of law with attention for and engagement with non-state justice systems.

The fourth factor is political. Programs to promote rule of law are often the result of negotiations and agreements between donors and the governments, mostly the executive branch and sometimes also including legislature and judiciary, of recipient countries.<sup>47</sup> In many cases, governments of recipient countries have an interest in strengthening the state legal system, but little or no interest in outside engagement with non-state legal systems. Legal systems in developing countries usually lack such characteristics as sufficiently funded and equipped institutions, a well-educated legal profession,

a substantial body of legal knowledge, broad acceptance of the system among officials and the citizenry and effective law enforcement. It is understandable that high-level government officials seek assistance that helps them to strengthen the legal institutions of which they are in charge. It is less obvious how outside engagement with and assistance for non-state justice systems will benefit them.<sup>48</sup> Indeed, non-state justice systems are usually part of power structures that run parallel to the state and compete with the state system for exercising legitimate control over people. They are a threat to the power of the state. This gives officials of recipient countries little incentive to invite donors to engage with non-state actors and strengthen non-state justice systems.<sup>49</sup>

The fifth factor is geopolitical. Following 9/11 and subsequent attacks in Madrid and London, the belief took hold in some academic and policy circles in the West that Islam constitutes a threat to Western civilisation and that Sharia is part of an overall destructive program of Islamisation.<sup>50</sup> From Berlusconi to the European Court of Human Rights to Samuel Huntington’s *Clash*

44. See for a recent statement David Cameron’s Speech to the World Economic Forum in Davos David, 24 January 2013. For commentary on the metaphors, see S. Patrick, ‘Failed States and Global Security: Empirical Questions and Policy Dilemmas’, *International Studies Review*, 644-662 (2007) and A. Hehir, ‘The Myth of the Failed State and the War on Terror: A Challenge to Conventional Wisdom’, *Journal of Intervention and State Building*, 307-332 (2007).

45. On the concept of an international rule of law, see, e.g., S. Chesterman, ‘An International Rule of Law?’, 56 *American Journal of Comparative Law* 2, 331-361 (2008); A. Watts, ‘The International Rule of Law?’, 36 *German Yearbook of International Law*, 15-45 (1992); J. Crawford, ‘International Law and the Rule of Law’, 24 *Adelaide Law Review*, 3-12 (2003).

46. B.Z. Tamanaha, ‘The Rule of Law and Legal Pluralism in Development’, 3 *Hague Journal on the Rule of Law* 1, 1-17 (2011).

47. Channell, above n. 34, at 182-183; D. Isser, ‘Re-thinking Legal Pluralism and the Rule of Law in Post-conflict and Fragile Countries’, United States Institute for Peace, George Washington University and World Bank conference on customary justice and legal pluralism in post-conflict and fragile states, Washington, 17-18 November 2009, 13-18, at 13.

48. As one of the most experienced rule of law practitioners writes, ‘[...] all [...] governing entities are referred to as “governments”. They are treated as having the same basic underlying logic of protecting the general welfare, even though many governments have no intention of expanding the benefits of rule beyond their own clique, clan or community [...]’. This poses a problem. When one government provides subsidies to another government to enable the recipient to improve its rule of law, there is high likelihood of failure if the recipient’s purpose in receiving assistance is to benefit a small coterie of privileged individuals’. W. Channell, ‘Grammar Lessons Learned: Dependent Clauses, False Cognates, and Other Problems in Rule of Law Programming’, 72 *University of Pittsburgh Law Review*, 171-198, at 182 (2010).

49. A striking recent example is the 2010 Final Report of the Working Group for Justice and Rule of Law of the Friends of Yemen. Following a failed attempt to blow up a plane from Amsterdam to Detroit by a Nigerian who received his training and instructions from Al-Qaeda on the Arabian Peninsula, a group of 22 states and international organisations came together in 2010 to assist Yemen with addressing a number of challenges, including building and strengthening rule of law. The outcome document was entirely focused on strengthening the formal justice system, especially building extra courts and police stations and equipping law enforcement agencies. It made no mention whatsoever of the existence of non-state justice. Yet Yemen is one of the prime examples of a country where the state legal system is completely irrelevant to the lives of almost all citizens, where disputes are resolved by non-state justice systems, which are a combination of Sharia’ and tribal customary law, and where the non-state justice system is part of governance structures of the tribes which compete with the state. Clearly, the Yemeni government, no doubt backed by like-minded Gulf States Saudi Arabia, Oman, Qatar, and the UAE, all of which were represented in the Friend of Yemen-group, had successfully prevented non-state justice from becoming an item on the agenda. For non-state justice in Yemen, see L. al Zwaini, *The Rule of Law in Yemen: Prospects and Challenges* (2012) at <www.hiil.org/publication/country-quick-scan-yemen>. For the Friends of Yemen, see R. Janse, ‘Counter Terrorism, Rule of Law Promotion and the Friends of Yemen’, in I. Boerefijn, L. Henderson, R. Janse and R. Weaver (eds.), *Conflicts and Human Rights* (2012), pp. 363-374 and more elaborately in *Nederlands Juristenblad* (20 May 2011), 1322-1328.

50. J.M. Otto, ‘Towards Comparative Conclusions on the Role of Sharia in National Law’, in J.M. Otto (eds.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (2010) 615-651; *id.*, ‘The Compatibility of Sharia with Rule of Law; Fundamental Conflict between Civilisations? Which Civilisations? Or between Scholars?’, in A. in ‘t Groen *et al.* (eds.), *Knowledge in Ferment; Dilemmas in Science, Scholarship and Society* (2007) 137-154.



of *Civilizations*, many in the West saw Sharia as incompatible with rule of law and democracy, with harsh corporal punishment, the subjection of women to men, and the inferiority of non-Muslims to Muslims, and the Taliban regime as key examples. The prospect that Islamic law could become dominant in Muslim countries in the Arab world and in a large part of Central and South-East Asia was frightening to Western policymakers. Formal state law incorporating international human rights treaties was to be supported, and non-state law consisting of Sharia mixed with customary law was to be subordinated to the state legal system or marginalised. It was only when Western powers were heavily involved in trying to stabilise and democratise Afghanistan and Iraq that they slowly became aware that Islamic law could not simply be ignored, rooted out, or subjected.

The sixth factor is normative. As is well known, there are many different understandings of the meaning of the ideal of rule of law. These differences have usefully been divided into thinner and thicker conceptions of rule of law.<sup>51</sup> The general idea of all these conceptions is that law acts as a constraint on arbitrary power by subjecting officials and citizens to law and requiring them to obey law. Thinner conceptions hold that rule of law requires that laws should be general, prospective, public, clear, certain, and, according to some, produced through democratic procedures. Thicker conceptions, by contrast, require that the laws also satisfy substantive demands, such as civil and political rights, justice and social welfare. Among donors, there is no shared understanding of the meaning of rule of law, at least not in their public pronouncements. The UN, for instance, subscribes to the thick definition given by the Secretary-General in his 2004 report on the rule of law and transitional justice in post-conflict societies. The World Bank, on the other hand, like most multilateral development banks except the European Bank of Reconstruction and Development, has committed itself to thinner conceptions of rule of law, which do not include civil and political human rights.<sup>52</sup> After all, the Bank is prohibited by its basic charter from interfering in the political affairs of member states and from making decisions based on the political character of member states.<sup>53</sup> Yet the variety of conceptions of rule of law among donors is significantly less broad than among academics. No donor subscribes to a purely formal understanding of rule of law and neutrality with respect to the content of the laws. They are at least committed to substantive values of gender equality and non-discrimination generally,

access to justice, fairness (the term preferred by IFIs and which is arguably their way of committing to many civil and political rights without saying so explicitly) and the absence of cruel and unusual punishment or treatment. This normative commitment makes it hard for donors to engage with non-state justice systems. All policy and research papers on non-state justice systems point out that these systems sometimes include practices that seriously fall short of human rights law.<sup>54</sup>

The seventh factor is legal-political. Organisations involved in rule of law promotion have particular mandates, and these define the aims of the activities of the organisation, such as development, human rights, international security, national defence or crime-fighting. While it is true that the aims in mandates are usually broad, they do constrain the activities of organisations. For example, organisations with a human rights mandate find it difficult to engage with non-state justice systems because these are regarded as falling short of international human rights law. In some cases, this has led to a complete disregard for non-state justice systems. In East Timor, for instance, the UN transitional administration never commissioned any detailed, systematic study of local law, partly because local systems violated international human rights standards. As a result, staff members, confronted with the absence of formal institutions and the local reality of non-state justice systems, were obliged to found out on the spot how to deal with local justice.<sup>55</sup> The UN, to be sure, has found ways to engage with non-state justice systems, but only, it appears, when the objective is complete subordination of these systems to formal laws that reflect international human rights law.<sup>56</sup>

## 4 Ready to Engage?

Except for initiatives mentioned in the introduction to this article, the impediments to engage with non-state justice systems mentioned in the previous section have not disappeared. The only impediment that has disappeared is the strong form of legal centralism, which denied the existence of non-state justice systems. Legal reform is no longer equivalent to reform of the state legal system, but includes engagement with non-state systems as well.

This is not to say that donors have entirely abandoned legal centralism. They still consider state law as the centre of the universe, not as just another planet. They are focused on interactions between state and non-state justice systems and on such issues as how state law can and

51. B.Z. Tamanaha, *On the Rule of Law; History, Politics, Theory* (2004).

52. A. Santos, 'The World Bank's Uses of the Rule of Law Promise', in A. Santos and D.M. Trubek (eds.), *The New Law and Development; A Critical Appraisal* (2006) 253-300.

53. H. Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank', in H. Cissé, D.D. Bradlow and B. Kingsbury (eds.), *The World Bank Legal Review* (2011) 59-94; J.L. Taylor, 'Legal Challenges at the Start of a New International Financial Institution', 17 *Kansas Journal of Law and Public Policy*, 349-361 (2007-2008); R. Janse, 'The World Bank, the Political Prohibition Clause, and Criminal Justice Reform', 10 *International Organizations Law Review* (2013) (forthcoming).

54. See for instance T. Chopra, Chr. Ranheim and R. Nixon, 'Local-Level Justice under Transitional Administration: Lessons From East Timor', in: Isser, above n. 4, pp. 119-158, at 128-129, 140-141; S.C. Lubkemann, D.H. Isser and P.A.Z. Banks III, 'Unintended Consequences; Constraint of Customary Justice in Post-Conflict Liberia', in Isser, above n. 4, 193-237, at 224-226.

55. Chopra *et al.*, 'Lessons from East-Timor', 136.

56. See, e.g., D. Pimentel, 'Rule of Law without Cultural Imperialism?', 2 *Hague Journal on the Rule of Law* 1, 1-28 (2010).

should respond to non-state law and where lines between permissible and impermissible norms and practices in non-state justice systems must be drawn. Also, donors now typically argue that the new policy of engagement with non-state justice systems simultaneously ‘strengthens’ or ‘enhances’ both the non-state and state legal systems. The explanation for this mutually beneficial relationship is hardly ever spelled out in detail, but boils down to the claim that non-state justice systems become less discriminatory against marginalised groups and less in violation of some human rights norms, whereas the state legal system becomes more legitimate in the eyes of people because it gives space to and is more reflective of local norms and practices. State law is thus regarded as both legal-normatively and ideologically superior to non-state justice systems. It is seen as a mechanism that has the task of managing legal pluralism. The current donor view might thus accurately be labelled as weak or mild legal centrism.<sup>57</sup> It is unclear, however, how donors can pursue their weak legal centralist policy to engage with legal pluralism without addressing many of the other impediments discussed in the previous section.

Firstly, one of the key methods of engaging with non-state justice that donors embrace in their policy documents is ‘linking’ formal and non-state justice systems. The problem with this metaphor is not so much that ideas on how to link formal and non-state justice systems are lacking. On the contrary, there is a wealth of techniques of incorporating or partially incorporating non-state norms, dispute-resolution mechanisms and institutions in state legal systems, many of which have origins in the periods of colonialism and decolonisation.<sup>58</sup> To mention just a few of these techniques, customary norms may be codified or restated in formal law, customary dispute-resolution mechanisms may be incorporated as courts of first instance in the formal court structure and be subjected to appeal by higher courts, and customary leadership positions may be formalised as official state positions. The problem is rather that these techniques have often had a mixed or limited impact in achieving such aims as increasing legal certainty, compliance with human rights norms, or improving the position of marginalised groups. The techniques may not only improve legal certainty and predictability but also diminish the adaptability and negotiability of non-state justice systems. They may also reinforce power imbalances and elite capture. This is because while it is attractive to assume that non-state justice systems are homogeneous and led by an apolitical leadership, they are in fact characterised by contestation and a plurality of views on the contents of norms. Formalising living customary law requires choices between competing versions of the contents of norms. If, as is most likely, elite versions of living customary law are

accepted and incorporated into state law, exclusion and oppression may be exacerbated rather than mitigated. Also, given the contested nature of non-state justice systems, there is a risk that the use of techniques to link non-state with formal law produces a form of official customary law that is illegitimate in the eyes of parts of communities and will therefore be disregarded. In short, linking non-state and formal justice systems is easier said than done and requires extensive contextual analysis, dialogue, negotiations and choices and affects deeply entrenched views and interests. It is not an apolitical and context-independent technology.

Secondly, policy documents tend to assume that formal and non-state justice systems are basically compatible and similar, except for some important substantive and procedural norms. In fact, non-state and formal justice systems often conceptualise social relations in a fundamentally different way. For example, whereas the distinction between civil or private and criminal law is essential in state legal systems, it is often largely absent in non-state justice systems. Whereas criminal justice in state legal systems have a strong punitive aim and corresponding punishments and institutions, non-state justice systems are often aimed at restoring damaged relationships. Whereas state legal systems focus on individual rights and obligations, non-state justice systems have a strong focus on collective interests of ethnic, religious, tribal and other groups. Engagement with non-state justice systems thus requires striking a balance between fundamentally different ways of legally conceptualising social relations and interests.

Thirdly, with their mild legal centrism, donors still regard the state legal system as hovering over the rest of the legal landscape as a distinct and separate entity which is, or rather should be, the ultimate guarantor of justice and security delivery. The state legal system is ultimately still regarded as the sole source of legitimacy. Put differently, as long as the state legal system is weak and unable to manage different non-state legal systems, the state is regarded as ‘failed’, ‘failing’ or ‘fragile’. However, there is growing consensus in the literature on state-building that the conceptual dichotomy between state and non-state justice systems, or more generally between state and non-state, is inadequate to make sense of the political and legal organisation of post-conflict

57. Twining (2012), above n. 42, at 117.

58. J. Ubink, *Research and Policy Note Customary Justice Sector Reform* (2011); L.T. Toomey, ‘A Delicate Balance; Building Complementary Customary and State Legal Systems’, *The Law and Development Review*, 156-208 (2010).

states.<sup>59</sup> This literature suggests that such concepts as hybrid or mixed political and legal orders are more adequate to analyse the political and legal landscape in post-conflict states. In these hybrid orders, justice and security are produced by multiple legal systems that rest on different sources of legitimacy. Moreover, these orders are usually competing with one another. If a more or less stable and sustainable delivery of justice and security occurs, this is usually the result of extensive processes of (re)negotiation and contestation between the different orders. From this perspective, attempts to build Western-style legal systems and states are misguided and produce few or adverse effects. Instead, the relation between the state and the state legal system and other non-state providers of justice and security is more or less horizontal. Indeed, it is only when the state cooperates on a more or less equal footing that its legitimacy is accepted, despite its weakness, from a Western perspective, in terms of enforcement capabilities. According to this body of literature, donors can assist in processes aimed at establishing sustainable justice and security delivery by such interventions as facilitating dialogue and establishing networks between various legal orders. In short, engagement with legal pluralism requires donors to be sensitive to history and context, prepared to take sides in political contests and struggles (both with respect to state vs. non-state actors and with respect to non-state actors), and organise assistance differently (budget cycles, deliverables, skills required of consultants, etc.). Abandoning a strong version of legal centralism is not enough.

## 5 Conclusion

Since the mid-2000s, donors have come to consider engagement with non-state justice systems as a compulsory component in their rule of law agenda in conflict-affected and fragile states. This follows the recent discovery by the development aid, defence and high-diplomacy establishments that legal reform from

the top down has generally had very limited success and that most people in developing countries mostly rely on non-state governance and justice systems to address their justice needs and demands. It is beyond doubt that non-state justice systems are extremely important for the delivery of justice and security in developing countries. But why did it take donors so long to discover this fact? Have they overcome the obstacles that originally blinded them to the obvious reality of legal pluralism? Are they really ready to engage with legal pluralism?

This article argues that seven factors blinded donors to the reality of legal pluralism: a lack of historical awareness, various constraints in the organisation and delivery of rule of law assistance, the distorting conceptual lens of strong legal centralism, a lack of interest in or opposition by political elites in recipient countries and unwillingness to take sides in political contests, geopolitical concerns over the power of Islam, normative aversion against some practices in non-state legal systems that are at odds with international human rights law, and insufficient mandates. The article further points out that many of these factors still characterise most rule of law promotion, except the strong version of legal centralism. It suggests, finally, that abandoning a strong version of legal centralism is not sufficient to make a turn to legal pluralism credible. To a large degree, the turn to legal pluralism seems a forward flight from the disappointing results of more than two decades of top-down rule of law reform.

This is not to suggest that a turn to legal pluralism is unimportant or unpromising. On the contrary, a small body of recent programming and analytic work on non-state justice systems is positive in many ways.<sup>60</sup> It has limited (though still highly ambitious) goals: addressing power abuse and the position of marginalised groups in communities within a framework of equitable and sustainable development. It advocates an incremental approach. It is aware of the importance of many disciplines beside law. It is prepared to take sides in political contest and struggles. It is undogmatic about whether non-state or formal justice systems or both are needed to address specific legal and security needs. It is aware that the influence of outsiders will be marginal in the best of circumstances. Moreover, there is clear evidence that some initiatives have had a positive influence in addressing power abuse and improving the position of marginalised groups, although more elaborate academic research on impact is needed.

59. For statebuilding literature, see the chapter (and references therein) by V. Boege, A. Brown, K.P. Clements and A. Nolan, 'On Hybrid Political Orders and Emerging States: What Is Failing – States in the Global South or Research and Politics in the West?', in M. Fisher and B. Schmelzle (eds.), *Building Peace in the Absence of States: Challenging the Discourse on State Failure*, Berghof Handbook Dialogue Series, No. 8 (2009); A. de Waal, 'Fixing the Political Marketplace: How Can We Make Peace without Functioning State Institutions?', The Chr. Michelsen Lecture (2009), available at <[www.cmi.no/news/?557=fixing-the-political-market-place](http://www.cmi.no/news/?557=fixing-the-political-market-place)> ; A.L. Clunan, 'Ungoverned Spaces: The Need for a Reevaluation', in A.L. Clunan and H.A. Trinkunas (eds.), *Ungoverned Spaces: Alternatives to State Authority in an Era of Softened Sovereignty* (2010) 3-13; K. Menkhaus, 'State Failure and Ungoverned Space', in M. Berdal and A. Wennmann (eds.), *Ending Wars, Consolidating Peace: Economic Perspectives* (2010) 171-188. For application of the statebuilding literature to legal reform, see H.M. Keyd, 'Introduction to Special Issue on Legal Pluralism and International Development Interventions', 63 *Journal of Legal Pluralism*, 1-23 (2011); L.W. Moe, '"Hybrid" and "Everyday" Political Ordering: Constructing and Contesting Legitimacy in Somaliland', 63 *Journal of Legal Pluralism*, 143-177 (2011).

60. See, apart from the materials in footnote 5, the special section around D. Porter, D. Isser and L.-A. Berg, 'The Justice-Security-Development Nexus: Theory and Practice in Fragile and Conflict-Affected States', 5 *Hague Journal on the Rule of Law*, 2, 310-344 (2013).