

INTRODUCTION TO THE SPECIAL ISSUE

LEGAL PLURALISM AND INTERNATIONAL DEVELOPMENT INTERVENTIONS

Helene Maria Kyed (Guest Editor)

Introduction

The concept of legal pluralism is no longer solely an analytical concept, used by socio-legal scholars to describe the plurality of normative orders and institutions that enforce order within a political organization. It is today an explicit ‘policy concept’ applied in the policies of international development agencies and of some governments. Such has been the case especially during the past five to ten years. This special issue is about the influence of international development intervention on situations of legal pluralism as part of Western donors’ support to justice and security reform in so-called ‘fragile states’ and in developing countries undergoing democratic transition.¹ It therefore explores one aspect of legal pluralism as a

¹ The articles in this special issue are revised versions of a selected number of the papers presented at the 1-3 November, 2010 Conference in Copenhagen with the title: *Access to Justice and Security. Non-State Actors and Local Dynamics of Ordering*. The conference was organised by the Danish Institute for International Studies (DIIS) with support from the Danish Ministry of Foreign Affairs and with additional funding from the International Development Law Organisation (IDLO)

newly emerging ‘policy field’ – that is, as a field for problem definition, intervention, reform and regulation (Shore and Wright 1997).² In international development intervention, this is exemplified by donor agencies increasingly recognising the importance of ‘non-state’, ‘informal’ and ‘customary’ institutions, practices and norms in the ‘delivery of justice and security’ (see DFID 2004; Chirayath et al. 2005 (World Bank); OECD 2007; UNDP 2009; OHCHR 2006; Danida 2010; USAID 2005, 2009). In some contexts this has led donors to advocate for “the need to incorporate customary systems in justice reform strategies” (Isser 2011: 325). This new tendency marks a fundamental departure from past international donor policies, which focused on formal state institutions, in effect supporting a kind of legal centralism (see Griffiths 1986; von Benda Beckmann 1997).³

Yet the question still remains: how is legal pluralism actually applied in the policies and programmes of international development agencies? And when we look closer at international interventions: what are their underlying objectives and what repercussions does their recognition of legal pluralism have in practice for the different actors involved?

The contributions to this special issue engage with these questions by providing empirically grounded and critical analyses of the interface between international development intervention and local mechanisms of justice and policing in a number of predominantly African countries (Northern Somalia/Somaliland, South Sudan, Liberia, Vanuatu, Botswana, Sierra Leone, and South Africa). They do so in different ways. Some analyse how internationally-supported reforms have been

(for other outputs from the conference see Albrecht and Kyed (2010); Albrecht, Kyed, Harper and Isser (2011)). I am strongly indebted to Peter Albrecht (DIIS) for discussions of the issues presented here and for collaboration in organising the conference and in developing its ideas.

² The shift in international development policies towards more inclusion of legal pluralism was also discussed in an earlier issue of this Journal, which differs from this issue because it focused specifically on human rights (see vol. 60, 2010, guest edited by Yüksel Sezgin).

³ The concept of legal centralism refers to the ideologically informed claim that “[...] law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions” (Griffiths 1986: 3).

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

implemented locally. Others explore local initiatives that can inspire future international intervention in alternative ways. The article on Somaliland also provides an example of a very low level of international intervention. Moreover, while some articles focus predominantly on dispute resolution and justice issues – the classical focus of legal pluralist studies – others also deal with policing and local security groups.

In common for the articles is a critical stance towards state-centric and legalistic models of intervention and reform. A number of the articles illustrate the negative consequences of such models for ordinary citizens' access to justice and security in post-conflict contexts (Liberia, Sierra Leone and South Sudan). Others give examples of alternative approaches that are small-scale and locally grounded (in Vanuatu, Somaliland, and South Africa) and which may be strengthened by legislative changes and the support of NGOs (in Botswana on land access). In common is the argument that the ideal-typical understanding of 'the State', which informs the state-centric model of intervention, is so far removed from empirical realities – and may actually stumble upon change 'from within' - that there is a need to fundamentally change the way that statehood is (still) conceptualised by international agencies.

Against this background the contributions to this issue bring into play a number of alternative concepts such as 'hybridity', 'plurality', 'networks', 'nodes' and 'webs'. These can be seen as a critique of how international development agencies currently apply the concept of legal pluralism. The issue also highlights the need to focus on 'the politics of legal pluralism' (Kyed 2009), both empirically and as a policy field. This is informed by an understanding of justice and security provision, and by extension social ordering, as deeply political phenomena, being both the product of broader power relations as well as part of (re)producing such relations. However, before discussing the alternative thinking proposed in this issue, it is worth looking briefly at past state-centric models of intervention, how the shift was brought about and how legal pluralism is currently applied in international development programmes.

International Development Policies on Justice and Security: From Past to Present

Until very recently, international support to justice and security reform was directed almost exclusively at formal state institutions (e.g. courts, legislature, the

police and correctional services). Some funding was also given to those civil society organisations that fit the image of their Western counterparts, such as human rights leagues. The objective was to build states along Euro-American lines, based on Western definitions of the rule of law and an ideal Weberian model of state sovereignty (Weber 1978).⁴ In this optic ‘state building’ is equal to strengthening state monopoly on security and justice functions. Simultaneously, justice and security reforms were presented as technical legal tasks rather than deeply social and political processes (see Isser 2011: 3-5; Harper 2011: 34).⁵ This state-centric, legalistic approach became the subject of internal critique from the mid-2000s. In a World Bank background paper it was for instance stated that:

Justice sector reforms have frequently been based on institutional transplants, wherein the putatively ‘successful’ legal codes (constitutions, contract law, etc.) and institutions (courts, legal services organizations, etc.) of developed countries have been imported almost verbatim into developing countries [...] Local level context and the systems of justice actually operating in many contexts were largely ignored. As such, justice sector reformers have failed to acknowledge, and thus comprehend, how the systems—which, at least in rural areas, are predominantly customary, idiosyncratic to specific sub-regional and cultural contexts, and residing only in oral form—by which many people (if not most poor people) in developing countries order their lives function. (Chirayath et al. 2005: 1)

Moreover, customary, or other institutions that divert from ideal ‘rule of law’ templates were seen as representing “[...] archaic, ‘backward’, or rigid practices that are not amenable to modernization, efficient market relations, or broader development goals” (Chirayath et al. 2005: 4), and as frequently violating the

⁴ This focus on state institutions does not mean that international agencies have been unaware of the predominance of non-state and customary justice institutions in many of the countries where they intervene. For instance, of the 78 assessments of legal systems undertaken by the World Bank since 1994, many mention the prevalence of traditional justice, yet none of the World Bank projects deal explicitly with traditional legal systems (Chirayath et al. 2005: 3).

⁵ Stephen Golup (2003) has referred to this as ‘rule of law orthodoxy’ driven by legal professionals, who prefer working within familiar-formalist settings and who view institutions outside of the state as too ‘messy’ and complex.

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

international human rights that most donor agencies commit themselves to promoting (Harper 2011: 34).

Today by contrast the majority of multilateral and bilateral donor agencies including the United Nations and the World Bank, officially embrace the legal pluralist position.⁶ There are different reasons for this apparently drastic shift. One is the poor success rate of interventions aimed at transforming formal state institutions into well-functioning systems. Another is the realisation that international agencies need to accommodate the empirical fact that ‘non-state actors’ or ‘informal systems’ are the primary locus of dispute resolution and often the most accessible and effective justice providers in the eyes of most citizens. This not least concerns poor and marginalized citizens, who are commonly the intended beneficiaries of donor supported reforms. Moreover, there seems to be increased agreement that donors need to engage constructively with ‘customary systems’ because it “can improve the legitimacy of the state and its formal institutions, whereas repressing them can exacerbate tensions” (Isser 2011: 326). This argument also supports efforts to *de jure* broaden the entire system of justice and security provision, by expanding the number of providers, rather than ‘investing’ in the state alone. Finally, many donor agencies now see involvement with for instance customary leaders as a way to stem human rights violations, i.e. by ‘targeting’ the places where they occur (Harper 2011: 36).⁷ In short, the shift in donor policies reflects in part a genuine wish to be more inclusive of plurality, and in part a pragmatic reaction towards ‘targeting’ more beneficiaries, expanding the number of ‘service providers’, and working with ‘what is there’ in contexts with ‘weak’ state capacity. As addressed next this can lead to a rather contradictory application of legal pluralism as a ‘policy concept’.

⁶ During the past three years there have also been a growing number of comprehensive studies for guiding international donor policies and programmes, some commissioned directly by the donors themselves, others with some financial support from donors. The most significant ones have been produced respectively by the United States Institute for Peace (USIP), International Development Law Organization (IDLO); International Council for Human Rights Policy (ICHRP); Danish Institute for Human Rights (DIHR); International IDEA; and the Netherlands Institute for International Relations, ‘Clingendael’.

⁷ For more details on the reasons behind the donor shift towards recognising legal pluralism, see Albrecht and Kyed 2011; Chopra and Isser 2011; Harper 2011; Isser 2011.

How is 'legal pluralism' used by international agencies today?

Overall the contributors to this issue agree that international development agencies have come a long way in accepting the importance of including non-state legal orders in any policy-discussion of justice and security reform.⁸ However, the approach to legal pluralism is surrounded by ambiguity and ideological baggage. Some even suggest that the recognition of legal pluralism remains by and large rhetorical. The actual support to non-state legal orders are marginal and often is simply a 'transitional strategy' towards - or as a pragmatic means to pursue - conventional (i.e. Euro-American style) state-building (Isser 2011: 325; Albrecht 2010). In other situations international agencies recognise the role played by customary or informal 'systems', but support government efforts to constrain their areas of jurisdiction. Or they try to 'fix' customary 'systems' according to rule of law principles so as to make them more like formal state justice (Harper 2011: 38). As such, international donors may actually contribute to suppressing the very plurality that they have otherwise now (officially) come to recognise.

As Bruce Baker argues (this issue), an idealized version of the Weberian state seems to remain the end-goal.⁹ Ultimately this makes it difficult for donors to envision a genuinely plural system. Often when informal institutions are in fact included into justice programmes they are 'targeted' to provide civic education about the formal system and human rights or are themselves seen as targets of such education. Even when more 'pluralistic approaches' are *de facto* used, there is still

⁸ I realise the danger of lumping together 'international development agencies', as if they all share identical agendas and programme approaches. There is indeed variety among agencies in how they approach legal pluralism, not least if we also include the projects and programmes of International and National Non-Governmental Organisations (NGOs). Here I am therefore providing a generalised picture. In the individual contributions to the issue, variety will come to the fore.

⁹ This is also reflected in, for instance, the World Bank's overall approach to development and security, as represented in the very recent World Development report. Despite a new turn towards recognizing non-state institutions the World Bank still holds onto a specific model of statehood where the state has a clear monopoly on security provision (World Bank 2011); see also Nordic Africa Institute comments by Finn Stepputat and Louise Riis Andersen, at <http://www.nai.uu.se/forum/entries/2011/08/22/a-small-step/index.xml>.

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

a tendency for a continuity of the legalistic approaches of the past. Predominantly, resources have been used to: ‘sensitize’ traditional leaders to state law and international human rights; ‘harmonize’ customary practices with Western law; develop the capacity of customary systems through training or infrastructure; establish oversight mechanisms for customary justice processes to ensure compliance with human rights; support national or local processes of codifying or ascertaining ‘customary law’ so as to make it more broadly known and compatible with a system of appeal with the formal court system; efforts to expand the participation in customary decision-making, e.g. by introducing elections or quotas into the membership of dispute resolution forums, and develop institutional linkages to state systems, which is believed to improve the effectiveness of customary justice (Isser 2011: 342-3; Harper 2011: 41-51; Ubink and van Rooij 2011: 12-14).¹⁰ In short, these all include activities that would - if successful - ‘adjust’ or ‘reform’ the non-state legal orders to the main principles and standards of international agencies, however in the very ‘name’ of recognising pluralism.

Commonly, arguments by international agencies for reforming non-state legal orders are that the latter, among positive attributes, also represent ‘negative’ aspects, such as gender discrimination and other kinds of human rights violations. In fact, justice reform practitioners, who today recognise legal pluralism, typically work with an approach that seeks to (1) minimize the ‘negative’ aspects of non-state legal orders, while (2) ‘preserving’ their ‘positive’ aspects such as accessibility and effectiveness and (3) ‘improving’ their ability to meet Western rule of law notions of certainty, predictability and substantive requirements such as equality and due process. Importantly, what is seen here as ‘negative’ and ‘positive’ is based on international criteria of what is ‘good’ justice; not on those notions of justice grounded in local realities and experiences.

Such, essentially ideologically-driven programming, has also informed why many donor agencies, including international NGOs, have actually ended up doing what a World Bank paper recommended in 2005: to focus *not* on supporting already existing non-state legal orders - because “doing so would be hugely time consuming” (Chirayath et al. 2005: 26) - but to aim at “creating new mediating institutions wherein actors from both realms [state and customary] can meet—following simple, transparent, mutually agreed-upon, and accountable rules—to

¹⁰ For detailed accounts of the different international donor approaches to engage with customary and informal justice systems, including empirical examples, see Harper 2011; Ubink and McInerney 2011.

craft new arrangements that both sides can own and enforce” (ibid.). This has supported the establishment of new ‘hybrid institutions’ or new ‘alternative dispute resolution’ (ADR) forums, such as community mediation schemes, paralegals and community policing forums. What characterises these, according to donors, is that they draw on a ‘mixture’ of the ‘positive’ aspects of informal or customary justice – i.e. mediation, participation, conciliation, cost-effectiveness, flexibility and so forth - and international human rights (Harper 2011: 59-78; see also Albrecht and Kyed 2011).¹¹ To international agencies such new institutions should usually involve ‘community’ volunteers from outside of established local power structures, who can be trained in human rights from the outset, while also draw on those local norms and customs that do not violate human rights. They represent a ‘fresh’ beginning, so to speak (Albrecht and Kyed 2011). At the same time they are seen to fill a ‘gap’ where the formal state courts are inaccessible and/or non-responsive to local justice needs, and where customary courts violate human rights, and are seen as ‘too problematic to reform’. Moreover, it is often envisioned that such new institutions can help to improve linkages between ‘formal’ and ‘informal’ justice systems, including assisting citizens in better accessing the formal courts (Harper 2011: 59-60). Such efforts certainly support legal pluralism. In fact, they enhance plurality in terms, at least, of expanding the number of dispute resolution fora available to citizens (ibid.: 71).

The critical issue is that such efforts tend to be, ultimately, driven by concerns for uniformity and standardisation, or as Louise Wiuff Moe (this issue) puts it, by a desire to ‘manage diversity’. This is not least critical, because the choice to establish new hybrid institutions typically means that locally legitimate justice practices and already existing providers are excluded from programming, although they are significant in the plural legal reality, whether donors like them or not.

Technical and timeline constraints are certainly among the factors that help explain why international agencies may find it easier to establish new institutions (on this issue see Albrecht and Kyed 2011; Isser 2011). However, the desire to ‘manage diversity’ also runs through the programmes that do include existing non-state

¹¹ Such new ‘hybrid institutions’ established by international donors or NGOs, often in alignment with national governments, can be contrasted with new ‘community-driven’ or organically developed local initiatives, which have come about as the result of groups of citizens themselves responding to changing demands for alternative justice and security solutions. Examples of the latter are for instance provided in the article by Marks et al. in this issue.

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

providers. The crux of the matter is that even when donors recognise legal pluralism the objective is still, it seems, to eventually see a unified justice system under the regulation of a familiar sovereign authority – i.e. the state. Thus the ideological and bureaucratic-logics of state-building continue to inhibit international agencies from thinking in terms of genuine pluralistic alternatives. While reform efforts now open a space for a plurality of actors in delivering justice and security, they simultaneously close the spaces for *de facto* forms of diversity. Importantly, the latter spaces include those ongoing negotiations, contestations and interactions that are so central to locally anchored processes of change in pluralistic settings. This includes changes of those mechanisms of justice that discriminate certain groups, like women. Consequently, in their efforts to ‘manage diversity’ - according to pre-defined templates from the ‘outside’ - internationally-supported reforms, can easily end up marginalising processes of change from ‘within’ as well as contribute to a denial of the politics involved in such processes (Isser 2011: 5).

Against this background, it seems that international development intervention currently contributes to replicating a kind of ‘weak’ legal pluralism (Griffiths 1986; Merry 1988; von Benda-Beckmann 1997) whereby the central state (with support from international agencies) withholds the ultimate power – i.e. undivided sovereignty - to acknowledge or refuse the existence of different bodies of law (Merry 1988: 871). Applied in this way legal pluralism policies can be used to assert state monopoly on the production of legal norms and to tame non-state legal orders (ICHRP 2009: 93). This was very much the case with colonial indirect forms of rule, giving way to a state-enforced dualistic system (Mamdani 1996). Currently, it is also not difficult to see the politics behind policies that lead to ‘weak’ legal pluralism, when analysed empirically – i.e. how national governments have a political interest in ‘managing diversity’ under a centralised authority. However, today such politics tend to be masked by the universalising discourse of international rule of law programming. Although it may be argued that current international recognition of legal pluralism does not follow the same repressive political agendas of colonial rule, there is a clear continuity of the same state bureaucratic-logic. This logic is concerned with hierarchical ordering, centralisation and boundary-marking. It supports a de-politicisation of the justice and security fields, even as it serves ideological-driven agendas.

Central to the state bureaucratic-logic is a dichotomous conceptualisation of legal pluralism, which reinforces thinking into distinct, separate ‘systems’. As Harper (2011: 37-8) points out about international development programmes that include

customary ‘systems’: “at the strategic level, the topic [of legal pluralism] continues to be approached from a dichotomous perspective – juxtaposing the formal [state] and the informal [non-state] systems by highlighting their differences and evaluating customary systems in terms of how closely they align to state justice precepts.” In this sense, international donor agencies seem to replicate what Merry (1988) refers to as ‘classic’ legal pluralism theory, which viewed state law as separate from other forms of social ordering, instead of viewing each as part of “a continuum of differentiation and organization of the generation and application of norms” (Merry 1988: 877; see also Allott and Woodman 1985).¹² As discussed next, empirical reality calls for much more flexible conceptualisations of legal pluralism, dominated by “mutually constitutive relations” (Merry 1988: 889) rather than distinctive separations. The critical point is that policies, which rely on such separations, run the risk, not only of strengthening those specific power-holders who represent the distinct ‘systems, but also of undermining the justice views and needs of those very users of the ‘systems’ that donors claim to have as their beneficiaries. This calls for alternatives.

Alternative Concepts and Approaches

The contributions to this issue suggest different alternative ways of approaching legal pluralism by international agencies, reflecting variety in disciplinary backgrounds and in the contexts they are dealing with. Yet, even if not explicitly using the concept, they share an emphasis on ‘strong’ legal pluralism (Griffiths 1986): i.e. they argue for the need to take in at the outset empirical manifestations of diversity and the experiences of ordinary citizens, rather than begin with a pre-defined state model. Moreover, they share a critique of the legalistic approach to reform – i.e. of the idea that laws and prohibitions can change behaviour and beliefs – instead arguing for the need to engage with those social and political processes of negotiation and contestation that are taking place in specific contexts. This is, as Lubkemann et al. (this issue) suggest, based on an understanding of justice and law as always deeply implicated in social and political relations, as well as informed by culturally differentiated concepts and hierarchies of value. Another aspect that unites the contributions is an emphasis on relations rather than on

¹² Sally Falk Moore (1973) has strongly contributed to this debate, such as by critically scrutinizing the strict separation between ‘systems’ with her concept of the ‘semi-autonomous social field’.

separate systems or orders, thereby challenging the dichotomous perspective on 'state' versus 'non-state' systems. This focus forms part of efforts to rethink 'the state' and to use more empirically-grounded conceptualisations of the wider political order within which 'the state' is situated.

The socio-legal literature on legal pluralism since the 1980s, in particular, has much to offer in terms of alternative thinking. This issue draws on such scholarly work, and also expands it by drawing on peace and conflict studies as well as on the security governance literature on plural policing (see Boege et al. 2009; Wood and Shearing 2007; Jones and Newborn 2006). In this sense, the issue hopefully adds further insights to the scholarly debate on legal pluralism, which has tended to focus very little on policing actors, and much more on justice forums, despite the many overlaps that occur in practice.

Relational concepts and approaches – hybridity, networks and webs

A key concept running through many of the contributions to this issue is 'hybridity'. While certainly not a new concept in the socio-legal literature (see, e.g. Merry 1988), hybridity is here used not only in the sense of 'legal hybridisations' or as 'interlegality' to describe the complex combinations of different types or sources of *law* within legal orders and individual justice institutions (Santos 2003, 2006). It is also used to describe the wider sphere of political ordering, of which the legal domain, and justice and security provision are seen as integrated elements.¹³ This is for instance captured under the concept of 'hybrid political order' (Boege et al. 2009; Brown et al. 2010; Clements et al. 2007; Lambach and Kraushaar 2008), which is applied to describe pluralistic contexts "in which diverse and competing claims to power and logics of order co-exist, overlap and intertwine" (Boege et al. 2008: 10).

Hybridity is here understood as more than the sum or pooling together of distinct

¹³ There is also an extensive literature on the hybrid nature of chieftaincy or traditional authority in Africa, which extends beyond the legal domain, however this literature tends not to include formal state institutions as equally hybrid, instead approaching 'the state' as more or less monolithic (see for instance van Rouveroy van Nieuwaal and van Dijk 1999; and a 1996 special issue of this *Journal of Legal Pluralism*, guest edited by Ray and van Rouveroy van Nieuwaal 1996).

and remnant sources. It rather implies the coming into being of a different political order, with new institutional arrangements as well as new types of contestations, as for instance shown by Wiuff Moe (this issue) with regards to the merger of different sources of authority and legitimacy in the new political order of Somaliland. Thus, processes of hybridisation create new forms of meaning and action, not a simple co-existence of ‘pure’ elements, from distinct ‘systems’. An ‘order’ or ‘system’ does not have a ‘pure’, ‘autonomous’ identity, but can only be defined in relation to the wider constellation of which it is a part. The term ‘system’ is itself seen as problematic: it denotes structured and relatively comprehensive bodies of law, which do not correspond with the often much more loosely structured mechanisms of justice and security, overlapping and negotiated jurisdictions, as well as clusters of rules that bridge local, national and global frontiers (see Woodman 1998; Griffiths 1986: 12). In line with this thinking, a number of the articles in this issue argue that empirical reality is better understood in terms of networks and webs between different sets of actors and sources, rather than in terms of co-existing entities. Often such networks are continuously negotiated and revised, and therefore both dynamic and productive of new constellations.

The concept of ‘hybrid political order’ also challenges a static view of pluralistic contexts, incorporating the idea that justice and security institutions are not only plural, but continuously overlap, influence and transform each other. Like the concept of ‘strong’ legal pluralism, it does not grant the ‘state’ a “privileged position as the political framework that provides security, welfare and representation; [rather] it has to share authority, legitimacy and capacity with other structures” (Boege et al. 2008: 10). This opens up for new ways of viewing the state, as itself more plural, or multilayered, and therefore as more capable of sharing responsibilities with other institutions, than is the case with the monolithic state model used by international agencies today. It also supports approaches that build on and work with – rather than seek to overcome or manage – already existing forms of diversity. The latter are seen as significant assets in reform processes, not as problems of ‘disorder’ and ‘state weakness’. Thus, the challenge becomes not one of ‘taming’ or ‘managing’ diversity, but of supporting “appropriate forms of complementarity and interaction” (Boege et al. 2008: 16) between a variety of actors and institutions. The result may or may not be new forms of hybrid governance arrangements, but in common will be “networks of governance, which are not introduced from the outside, but embedded in the societal structures on the ground” (Boege et al. 2008: 17).

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

In line with this ‘relational’ thinking, a number of the articles in this issue provide different suggestions to how international agencies can aid mutually supporting linkages between different actors actively involved in policing and conflict resolution (see the articles by Bruce Baker, Miranda Forsyth, Louise Wiuff Moe and Marks et. al). Such linkages can facilitate a more efficient sharing of resources, and should be done in a non-hierarchical way, which leaves more room for creative compromises than if a top-down approach is adopted. The approaches proposed do not *per se* undermine state building, but support a kind of state building where state authorities work with local orders of governance rather than try to impose their supremacy over them (see also Boege et al. 2008: 15). Marks et al. (this issue) in fact argue that with ‘pluralised arrangements’ state ‘weakness’ – here in the sense of a lack of state monopoly on providing justice and security – can actually be a ‘strength’, because state legitimacy is enhanced when state institutions accommodate local orders of governance. The challenge, nevertheless, is to ‘convince’ state authorities, and not least central government departments, that pluralism can also be to their advantage. It is thus imperative to take into account the political interests at play when supporting linkages, networks and webs.

The political dynamics of legal pluralism

There is a real risk of depoliticising the fields of justice and security when applying the concepts of networks, webs and hybridity, and when approaches rely on partnerships and ‘divisions of labour’ within pluralistic arrangements. Supporting linkages does not erase power interests and political contestations, as people enter them with their own agendas. The incentives for collaboration can be countered by, or at the very least co-exist with, overlapping claims to authority. This may not least be the case if the ‘division of labour’ is perceived by the involved actors as instituting a hierarchy of responsibilities, associated with greater authority, such as for instance between dealing with petty versus serious crimes. Formal arrangements based on ‘division of labour’ can particularly run into problems in those contexts where sovereignty is *de facto* shared - i.e. where the state does not have a monopoly on violence and on claims to final authority over significant areas of social life - such as in many Sub-Saharan African countries (Hansen and Stepputat 2005).

When considering policies on legal pluralism it is therefore pertinent to ask: Are the different implicated authorities, and notably centrally placed state representatives, willing to *de jure* share sovereignty? And are international

development agencies able and willing to support that? It is here important to keep in mind that international agencies are strongly influenced by a view of sovereign power as equal to the assertion of territorial sovereignty by states, i.e. through the monopolisation of violence and permanent and visible military and police forces (Hansen and Stepputat 2001). As suggested by Hansen and Stepputat (2005) sovereign power can however be approached as particular claims and practices that may be a dimension of different forms of authority, including non-state ones. Such power encompasses the claim to superior authority within a given political organisation and it covers the capacity to define and enforce the normal situation of a particular order. Sovereign power can therefore exist independently of a 'state'. However, whether a state or a non-state order the question is still the extent to which more decentralised, shared and indeed pluralistic arrangements are conceivable. Such could for instance be organised on a set of shared principles, which are not defined or determined by specific centres, but based on broad-based and continuous negotiations.

What is significant to keep in mind is that even the most pluralistic arrangements contain asymmetries, hierarchies, and double standards (Zips and Weilenmann 2011). While it is important to critically question dichotomies, such as 'state' versus 'non-state', we should not erase differences but "shift them from the zone of timeless oppositions" into that of empirical political issues, including negotiations, contestations and interactions across differences (Brown 2009: 80, quoted in Wiuff Moe's contribution to this issue). Thus when using the concepts of hybridity and networks, 'the political' should not be downplayed, but in contrast be brought more out in the open where differences can be discussed and negotiated. In doing so, as Pieterse (2001) notes, it is important to take note of the historical specificity of hybridity and its continuous interaction with efforts to establish boundaries between different entities, such as 'state' and 'customary'. He stresses: "We can think of hybridity as layered in history, including pre-colonial, colonial and postcolonial layers, each with distinct sets of hybridity, as a function of boundaries that were prominent, and accordingly different pathos of difference" (Pieterse 2001: 231). In short, hybridity is only noteworthy when fixed categories and boundaries are being produced, and boundaries are only produced and notable because there are always patterns of hybridity and border-crossing (Pieterse 2001: 234).

The concept of hybridity can therefore encompass a variety of sources and their combinations, without pretending that distinctions no longer matter for the actors concerned. This is evident in the article on South Sudan by Leonardi et al. (this issue), where the emphasis on distinct 'systems' in the debates about ascertaining

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

customary law was informed by the competition for power at both national and local levels. However, this co-existed with *de facto* amalgamation of norms and procedures in local justice forums. Thus, while ordinary citizens made no clear line between state and non-state judicial institutions, but perceived them as part of a hierarchy within a single system, politically powerful actors had an interest in establishing clear boundaries. Jackson (this issue) also shows for Sierra Leone how different justice institutions at the local level are entangled within the same networks of power, despite past and present reform efforts to 'single' out the state and new democratic institutions from 'customary' ones.

Lund (2006: 673) captures this apparent paradox in his general discussion of the 'twilight' character of public authority in Africa: "On the one hand, actors and institutions in this [political] field are intensely preoccupied with the state and with the distinction between state and society, but on the other hand, their practices constantly befuddle these distinctions". Consequently, "we should pay careful attention to *how* concepts and distinctions are produced, instrumentalized and contested" (Lund 2006: 678, emphasis in original), and thereby "problematize the distinctions we tend to accept as given" (Lund 2006: 679).

While it is empirically often difficult to exactly specify what "is 'state' and what is not [because] many institutions have a twilight character" (Lund 2006: 673), it is important to take seriously the continuous and inherently political efforts by the actors involved in networks/linkages to mark out boundaries between distinct 'systems' – such as 'state' versus 'traditional' (Kyed 2007). One type of actor here is the international donor community itself, but also state authorities, customary authorities and other powerful players often have an interest in such boundary-marking. Noteworthy, as Baker suggests (this issue), is that the state versus non-state distinction is mostly important to the powerholders and the legislators, because it is part of consolidating their specific kind of authority. It is much less, if at all, significant in the eyes of ordinary citizens. To them it is less important *who* provides justice or public safety, and much more important *how* such justice is provided (see also Leonardi et al. this issue).

Central here is to recognise that justice and security provision are fields where power is contested, authority is reconfigured and constituted, and where different actor interests are at stake over power, resources and 'clients' (Kyed 2009; Tamanaha 2008). Part of this is the intensely political nature of 'law' itself - whether state or customary or other forms of law - exemplified by continuous negotiations and contestations over the meanings of justice and law (see Forsyth and Leonardi et al. in this issue). The contexts we encounter embed contradictory

conceptions of justice, not alone because of differences in cultural values and beliefs, but also due to the distinctive socio-economic situations within which people live (see Lubkemann et al. in this issue).

Another factor is that justice institutions and policing actors are often tightly linked into political power structures, locally and nationally. In Sierra Leone, for instance members of the local elite use their power to manipulate cases in the formal courts, and court cases sometimes become subject to political party disputes (see Jackson this issue). Importantly, certain groups in society do not have the ability to negotiate the power networks within which courts and dispute resolution forums are embedded, and therefore do not have equal access to justice. This is irrespective of whether there are well-functioning linkages or not between (state and non-state) providers. Similarly in Liberia, the vast majority of citizens view the justice system as little more than arenas where the more powerful can assert their interests, not for a fair outcome, but rather to leverage personal resources. Economic and political resources are constantly at stake. Class differentiation and (in)justice coincide, and makes everyday forms of case resolution highly political and often overtly unjust (see Lubkemann et al. in this issue).

The relationship between legal pluralism and unequal power relations is not, however, given. Von Benda-Beckmann et al. (2009) suggest that legal pluralism can reinforce inequality by decreasing the binding power of the law over the more powerful. Greater flexibility can also work against the weaker parties because the strong tend to determine the choice of forum or rules. In other situations, however, weaker parties can manipulate and exploit the contradictions in the rules to pursue ‘creative strategies’, which may push for changes in established power hierarchies and of discriminatory practices.

The key issue here is that any reform efforts should realise and make explicit the political dynamics of pluralistic arrangements, rather than try to ‘remove’ or ignore politics. There are at least three dimensions of such politics to consider: first, the competition for authority between providers, often marked by efforts to articulate distinctions, even as (or at times exactly because) they collaborate and have overlapping jurisdictions; second, contestations over the meanings of justice and law, which reflect power relations and the socio-economic situation, but that can also lead to changes ‘from within’ to the benefit of weaker groups; and third, unequal access to justice due to differences in the resources and skills people have available for negotiating the power networks within which justice and security institutions are embedded.

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

Such political dynamics are commonly ignored or poorly understood by international development agencies, as are the political implications of their interventions (Isser 2011). In fact, in some situations internationally supported reforms contribute to reinforcing unequal power relations, as the Sierra Leone and Liberia cases in this issue suggest. Rather than trying to 'depoliticise' the field of justice and security, it is better to constructively engage with the ongoing contestations over legal norms and practices between individuals and groups of individuals within and across localities. This can for instance be done by facilitating forums and arenas for debate (see for instance Forsyth and Leonardi et al.). International agencies can also support the empowerment of less resourceful groups to navigate and negotiate within both formal and informal power networks. These suggestions are informed by an understanding of legal orders as the result of internal processes of contestation, competing interests and changing socio-economic circumstances.

The Contributions

The first article by Bruce Baker represents a general critique of the state-building approach to security and justice sector reform in Sub-Saharan Africa. He calls for increased local ownership of reform efforts and approaches that are adjusted to what is available, affordable, effective and legitimate in the eyes of ordinary citizens in each specific context, whether this is state provision or not. In general, however, this would imply a 'multi-layered' approach, which is based on the inclusion of a plurality of providers and which has an emphasis on networks. This suggestion is given empirical depth in the article on South Africa by Monique Marks, Jennifer Wood, Julian Azzopardi and Thokozani Xaba. They address the significant role of community safety groups in the 'everyday policing' of neighbourhoods in Durban. Here the state police *de facto* play a minimal role, either relying on non-state actors or allowing them to perform policing activities independently. This empirical reality, the authors argue, ought to be formalised. They therefore support a minimalist state, but within a framework where locally elected governments ensure democratic control of policing actors. It is also at the decentralised level that international development agencies ought to concentrate their support, rather than at central state level.

The article by Stephen Lubkemann, Deborah Isser and Peter Chapman on the internationally-supported post-conflict efforts to reform the justice system in Liberia also provides an empirically grounded critique of the state-centric perspective, and of the 'rule of law' policy approach. By promoting a 'single

justice system' this approach clearly undermined legal pluralism, and with this, ignored ordinary Liberian's justice preferences and experiences. It also had the consequence of perpetuating the power of elites over justice institutions rather than promoting, as intended, more equal access to justice. A similar critique of the 'Rule of Law' approach is provided in the article by Cherry Leonardi, Deborah Isser, Leben Moro and Martina Santschi on the joint UNDP-Government plan to ascertain customary law in South Sudan. A key difference here is that legal pluralism is recognised by the reformers. However, this is compromised by a legalistic desire to regulate and order the hybrid, composite practices and laws of the local courts. The risk is that a 'fixing' of customary laws not only fuels ethnic divisions, but also undermines those local contestations over legal norms, which challenge discriminatory practices and elite power.

The Somaliland case, presented by Louise Wiuff Moe, supports the case for international engagement with internal processes of change, including the facilitation of linkages and spaces for negotiations between a diverse set of actors. She focuses on how a 'hybrid political order' has *de jure* been institutionalised as a result of an internally driven peace-building process, rather than one driven by international agencies. The process has not been without tensions and conflicts, as different claims to political legitimacy have been allowed to come into play. However, the plural, hybrid governance arrangements that have resulted from the process has helped sustain peace, strengthened government, and improved local security and justice provision. The article also provides a number of concrete examples of how international NGOs have supported the internal processes of political ordering, including within the areas of conflict resolution and policing. In the next article, Miranda Forsyth similarly argues for more incremental, locally-grounded, international engagement with justice reform processes, which focuses on enabling dialogue and linkages between actors and initiatives, resulting in what she terms a 'conflict management web'. She bases this on an analysis of a range of different initiatives by international donors, academics, the government and community leaders over the past few years in Vanuatu, which have all sought to align the *Kastom* (customary) and state systems of conflict management.

Paul Jackson's article on Sierra Leone criticises internationally supported post-conflict reforms for failing to address the political dynamics of justice and security provision. He shows how decentralisation reforms have contributed to a further consolidation of local elite power, which ultimately acts to the detriment of those who have always lost out on access to justice. Jackson argues that international agencies should support mechanisms to enhance the ability of ordinary citizens to negotiate the power networks and justice structures at a local level. Anne Griffiths'

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

article on women's improved access to land in Botswana, also supports the case for 'empowering' vulnerable groups' ability to better access social networks and engage in informal transactions. Legal reforms and reformed institutions have certainly contributed to the substantial increase in land titles to women over the past 25 years. Yet just as important have been factors that contribute to women's capacity to negotiate poverty and access justice in both formal and informal domains, namely: education, employment and changing social dynamics of families and households. In Botswana such socio-economic developments owe much to the strong lobby work of NGOs, some of which are supported by international development agencies. The article by Griffiths also points to the fact that processes of legal and institutional change take a very long time, and therefore require not only longitudinal research to be comprehended thoroughly, but also long-term engagement with reforms, rather than quick, pre-defined 'fixes', based on abstract models. This is not least because justice and security issues, being far from neutral, apolitical fields, are deeply embedded in political power structures and diverse socio-economic situations.

COPENHAGEN,
November 2011.

References

ALBRECHT, Peter

2010 'Betwixt and between – chiefs and reform of Sierra Leone's Justice Sector.' *DIIS Working Paper* 2010: 33

ALBRECHT, Peter and Helene Maria KYED

2010 'Justice and Security. When the State isn't the main Provider', *DIIS Policy Brief*, December 2010, Copenhagen: Danish Institute for International Studies (DIIS).

2011 'Introduction: Non-State and Customary Actors in Development programs'. Pp. 3-2 in Peter Albrecht, Helene Maria Kyed, Erica Harper and Deborah Isser (eds.), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*. Rome: International Development Law Organisation (IDLO).

ALBRECHT, Peter, Helene Maria KYED, Erica HARPER and Deborah ISSER (eds.)

2011 *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*. Rome: International Development Law Organisation (IDLO).

- ALLOTT, Antony and Gordon WOODMAN (eds.)
1985 *People's Law and State Law*. Dordrecht, Holland: Foris Publications.
- BENDA-BECKMAN, Franz von
1997 'Citizens, Strangers and Indigenous peoples: Conceptual Politics and Legal Pluralism.' *Law and Anthropology*, 9: 1-42.
- BENDA-BECKMANN, Franz von, Keebet von BENDA-BECKMANN and Julia ECKERT (eds.)
2009 *Rules of Law and Laws of Ruling: on the governance of law*. Farnham: Ashgate.
- CLEMENTS, Kevin .P.; Volker BOEGE; M. Anne BROWN; Anna NOLAN and; Wendy FOLEY
2007 'State Building Reconsidered: The Role of Hybridity in the Formation of Political Order.' *Political Science* 59(01): 45-56.
- BOEGE, Volker, M. Anne BROWN and Kevin P. CLEMENTS
2009 'Hybrid Political orders, Not Fragile States.' *Peace Review* 21/1: 13-21.
- BROWN, M. Anne
2009 'The pursuit of grounds'. Pp.55-90 in M. Anne Brown (ed.), *Human Rights and the Borders of Suffering*. Manchester: Manchester University Press.
- BROWN, M. Anne; Volker BOEGE, Kevin P. CLEMENTS and Anna NOLAN
2010 'Challenging statebuilding as peacebuilding – working with hybrid political orders to build peace.' Pp. 99-116 in Oliver P. Richmond (ed.), *Palgrave Advances in Peacebuilding. Critical Developments and Approaches*, Basingtoke: Palgrave Macmillan.
- CHIRAYATH Leila, Caroline SAGE and Michael WOOLCOCK
2005 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems' (World Bank Background Paper, July 2005).
- CHOPRA, Tanja and Deborah ISSER
2011 'Women's Access to Justice, Legal Pluralism and Fragile States'. Pp. 23-38 in Peter Albrecht, Helene Maria Kyed, Erica Harper and Deborah Isser (eds.), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*. Rome: International Development Law Organisation (IDLO).
- DANIDA
2010 *How to Note on Informal Justice Systems*. Copenhagen: Danish Ministry of Foreign Affairs.
- DFID (DEPARTMENT FOR INTERNATIONAL DEVELOPMENT)
2004 *Non-State Justice and Security Systems*. London: DFID.
- GOLUP, Stephen
2003 'Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative'.

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

- working papers*, Rule of Law Series 41, October, Washington DC: Carnegie Endowment for International Peace.
- GRIFFITHS, John
1986 'What is Legal Pluralism?' *Journal of Legal Pluralism*, 24: 1-50.
- HANSEN, Thomas Blom and Finn STEPPUTAT (eds.)
2001 *States of Imagination. Ethnographic Explorations of the Postcolonial State*. Durham & London: Duke University Press.
- 2005 *Sovereign Bodies. Citizens, Migrants and States in the Postcolonial World*. Princeton and Oxford: Princeton University Press.
- HARPER, Erica
2011 *Customary Justice: From program Design to Impact Evaluation*. Rome: International Development Law Organisation (IDLO).
- ISSER, Deborah (ed.)
2011 *Customary Justice and the Rule of Law in War-Torn Societies*, Washington: United States Institute for Peace.
- JONES, Trevor and Tim NEWBORN
2006 *Plural Policing. A Comparative Perspective*. London and New York: Routledge.
- ICHRP (International Council for Human Rights Policy)
2009 *When Legal Worlds Overlap: Human Rights, State and Non-State Law*. Geneva: ICHRP.
- KYED, Helene Maria
2007 *State Recognition of Traditional Authority. Authority, Citizenship and State Formation in Rural Post War Mozambique*, PhD dissertation. Roskilde: Roskilde University.
- 2009 'The Politics of Legal Pluralism: state policies on legal pluralism and their local dynamics in Mozambique.' *Journal of Legal Pluralism and Unofficial Law* 59: 87-120.
- LAMBACH, Daniel and Maren KRAUSHAAR
2008 'Hybrid Political Orders: the Added Value of a New Concept', Occasional Paper, Australian Center for Peace and Conflict Studies. <http://www.issr.uq.edu.au/acpacs-publications> (visited Oct 2010).
- LUND, Christian
2006 'Twilight Institutions: An Introduction.' *Development and Change* 37(4): 673-684.
- MAMDANI, Mahmood
1996 *Citizen and Subject. Contemporary Africa and the legacy of late colonialism*. Princeton: Princeton University Press.
- MERRY, Sally Engel
1988 'Legal Pluralism.' *Law & Society Review* 22/5: 869-895.

MOORE, Sally Falk

1973 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.' *Law & Society Review* 7: 719-746.

OECD (ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT)

2007 *Handbook on Security System Reform – Supporting Security and Justice*. Paris: OECD.

OHCHR (OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS)

2006 *Rule-of-Law Tools for Post-conflict states: mapping the justice sector*. New York & Geneva: OHCHR

PIETERSE, J.N.

2001 Hybridity, So What? The Anti-hybridity Backlash and the Riddles of Recognition, *Theory, Culture and Society*, 18 (2-3): 219-245.

RAY, Donald I. and E. Adriaan B. van ROUVEROY VAN NIEUWAAL

1996 'Introduction. The New Relevance of Traditional Authorities in Africa.' *Journal of Legal Pluralism and Unofficial Law* 37-38: 1-38.

ROUVEROY VAN NIEUWAAL, E. Adriaan B. van, and Rijk van DIJK (eds.)

1999 *African Chieftaincy in a New Socio-Political Landscape*. Leiden: African Studies Centre.

SANTOS, Boaventura de Sousa

2003 'O Estado heterogéneo e o pluralismo jurídico'. Pp. 47-128 in Boaventura de Sousa Santos and João Carlos Trindade (eds.) *Conflito e Transformação Social: Uma Paisagem das Justiças em Moçambique*. Porto: Afrontamento.

2006 'The Heterogeneous State and Legal Pluralism in Mozambique'. *Law and Society Review* 40(1): 39-76.

SHORE, Chris and Susan WRIGHT

1997 *Anthropology of Policy. Critical Perspectives on Governance and Power*. London and New York: Routledge.

TAMANAH, Brian Z.

2008 'Understanding legal pluralism: past to present, local to global.' *Sydney Law Review* 30/3: 375-411.

UBINK, Janine and Thomas MCINERNEY (eds.)

2011 *Customary Justice: perspectives on Legal Empowerment*. Leiden: University of Leiden, Faculty of Law. Rome: International Development Law Organisation (IDLO).

UBINK, Janine and Benjamin von ROOIJ

2011 'Towards Customary Legal Empowerment: An Introduction.' Pp. 7-28 in Janine Ubink and Thomas McInerney (eds.), *Customary Justice: perspectives on Legal Empowerment*. Leiden: University of Leiden,

INTRODUCTION: INTERNATIONAL DEVELOPMENT INTERVENTIONS
Helene Maria Kyed

- Faculty of Law. Rome: International Development Law Organisation (IDLO).
- UNDP (UNITED NATIONS DEVELOPMENT PROGRAMME)
- 2009 *Community Security and Social Cohesion. Towards a UNDP Approach* (2009) 9.
- USAID (UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT)
- 2005 *Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies*, Washington DC: USAID.
- 2009 *Security Sector Reform* (February 2009). Washington DC: US Agency for International Development, US Department of Defence, and US Department of State.
- WEBER, Max
- 1978 *Economy and Society: An Outline of Interpretive Sociology*. (2 volumes). Guenther Roth and Claus Wittich (eds.). Berkeley: University of California Press.
- WOODMAN, Gordon R.
- 1998 'Ideological combat and social observation: recent debate about legal pluralism.' *Journal of Legal Pluralism* 42: 21-59.
- WORLD BANK
- 2011 *World Development Report 2011: Conflict, Security, and Development*. Washington DC: The World Bank.
- WOOD Jennifer and Clifford SHEARING
- 2007 *Imagining Security*. Portland: Willan Publishing
- ZIPS Werner and Markus WEILENMANN (eds.)
- 2011 *The Governance of Legal Pluralism. Empirical Studies from Africa and Beyond*. Wein and Berlin: Lit Verlag.