

# [How Legal Pluralism Can Subvert or Support the Rule of Law](#)

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In the United States and throughout the Global North, people generally take for granted that law means state courts and legal institutions. Sure, people may opt out of certain government regulations, for example, by signing an arbitration agreement, but state courts can still step in if deemed necessary.

This may all seem intuitive but globally the US and other highly developed states are outliers.

Legal pluralism, whereby multiple legal systems coexist, is the dominant feature of most legal systems in most places. These nonstate justice systems, usually rooted in custom, tradition or religion, frequently operate with substantial autonomy from the state. [Only relatively few high-capacity legal systems](#) ever come close to monopolizing judicial authority. And even then, legal pluralism endures.

## Understanding Legal Pluralism

My new book [Contending Orders: Legal Pluralism and the Rule of Law](#) looks at the dramatic role non-state justice plays worldwide, but especially in the Global South and conflict-prone states. Non-State justice carries the force of law and is the dominant form of legal order globally. It is estimated these forums [handle over 80% of all disputes](#) worldwide. Thus, non-state justice dramatically influences how people behave individually and in relation to each other. And the consequences for breaching non-state regulations can be stark, sometimes even including capital punishment. Robust legal pluralism challenges conventional notions of sovereignty by undercutting the state's claim to a monopoly on the legitimate use of violence within its territory.

Legal pluralism presents challenges and opportunities. These forums often enjoy greater legitimacy and effectiveness at a fraction of the time and expense of their state counterparts. More broadly, they can play a vital role in promoting security, stability, and progress toward the rule of law. However, these systems can often lack core procedural and due process protections and often violate human rights, particularly those of women and other vulnerable populations.

Legal pluralism matters, but it is not a monolith. It [can and does take very different forms](#) with very different consequences. The book proposes four new distinct legal pluralism archetypes: (1) combative, (2) competitive, (3) cooperative, and (4) complimentary. These archetypes can help explain the dynamics of legal pluralism in any setting.

Under combative legal pluralism, state and non-state systems are overtly hostile to one another and may even attempt to destroy each other through violence. Combative legal pluralism is widespread in conflict zones. For example, these dynamics characterized post-2001 Afghanistan between the Islamic Republic of Afghanistan and the rival insurgent Taliban justice system, which both sought to destroy the other.

Competitive legal pluralism features significant, often deep tensions between state and non-state legal systems, but clashes rarely endanger the state's formal judicial authority. This dynamic is commonplace throughout the Global South. These non-state actors are not trying to become the government or supplant state courts. However, they can still operate with real autonomy. Thus, these non-state authorities may pursue approaches to human rights, particularly women's rights, that sharply diverge from state-sanctioned regulations.

In a cooperative legal-pluralist environment, non-state justice authorities still retain significant autonomy and authority, as in contemporary Timor-Leste. However, state and non-state legal authorities are generally willing to work together toward shared goals despite some lingering tension. Again, these tensions are usually but not exclusively related to human rights concerns.

Finally, under complementary legal pluralism, non-state justice authorities operate under the umbrella of state authority and without substantial autonomy to reject state decisions. For example, in the United States, tribal sovereignty operates with exemptions from certain state legal regulations but is still under the overarching legal authority of the United States government.

## **Engaging Legal Pluralism**

The type of legal pluralism that exists and how states and international actors respond to it has big implications for what happens on the ground.

This is evident in recent state-building efforts in Afghanistan and Timor-Leste—two countries with extensive legal pluralism.

After prolonged misrule and conflict, both countries established new regimes in the early 2000s with international help against a backdrop of competitive legal pluralism where most disputes were settled by non-state mechanisms. However, the results in the two countries were very different. Efforts in Afghanistan decidedly failed, but Timor-Leste has made impressive progress.

### *An Unexpected Success*

At first glance, Timor-Leste presented a [challenging landscape for establishing democracy](#) and advancing the rule of law.

Throughout its history, the country featured extraordinarily high levels of competitive legal pluralism and, until recently, profound skepticism toward state institutions. Timor-Leste endured over four hundred years of Portuguese colonial rule, which did remarkably little to develop the country. Indonesia's occupation, which began in 1975, was even more brutal. It led to the death of 200,000 people; about one-fifth of the population. After the overwhelming vote for independence in 1999, a further wave of Indonesian militia-backed violence engulfed the country. Most of Timor-Leste's already limited infrastructure was destroyed. [International peacekeepers were deployed](#) to restore order. In October 1999, Timor-Leste was placed under UN trusteeship. In May 2002, the country achieved full independence.

Despite these inauspicious origins and ongoing challenges, most notably political violence and upheaval in 2006, Timor-Leste became an unlikely success story. Even as they jostled for electoral victory, all major political parties remained committed to constructing a democratic state underpinned by the rule of law. These parties also enjoyed legitimacy because of their longstanding roots in the independence movement.

Success requires institutions as well as individuals. Timor-Leste saw credible and sustained efforts to develop institutions that promote democratic accountability, inclusiveness, and the rule of law from state officials and society more broadly. This includes attempts to build an independent, merit-based judiciary and broader state legal system. It also meant establishing sensible political institutions. The country features a strong prime minister who depends on

support from parliament, a body elected through proportional representation. The president—directly elected but relatively weak—nevertheless provides some checks and balances.

Last, but by no means least, the state engaged and collaborated with key non-state actors. These actors had played a vital role in maintaining local legal order for centuries and many had played an [important role in the independence struggle](#). Consequently, they were seen as more legitimate and effective than the nascent state legal system. Non-state justice authorities could have been state-building spoilers. Instead, they supported the new state because it embodied values and policies they too believed in.

State officials also pursued a sensible strategy to engage non-state judicial actors. Instead of trying to uproot them wholesale or transform them overnight, state law provided for a minimal but highly effective regulatory framework. This has been achieved by pursuing incremental changes in non-state justice and, most importantly, providing for the direct election of non-state-justice authorities. While by no means perfect, international actors played a constructive role by establishing security, helping rebuild, and supporting the development of new state institutions.

In the years since its independence in 2002, Timor-Leste now enjoys cooperative legal pluralism where powerful non-state actors have helped bolster the state and consolidated democracy. Indeed, Timor-Leste is the only country in Southeast Asia ranked ‘free’ by Freedom House. Timor-Leste made significant progress toward developing the rule of law by establishing a democratic state with an increasingly effective state justice sector and a workable partnership with local non-state authorities.

### *A Catastrophic Failure*

In contrast, the post-Taliban regime founded in 2001 helped trigger a slide from competitive legal pluralism to combative legal pluralism. Indeed, the last twenty years (and beyond) have been a humanitarian disaster for much of Afghanistan’s population and a foreign policy disaster for the United States and other Western states.

Afghanistan was not also plagued by endemic conflict. Indeed, it enjoyed decades of relative peace. However, a 1978 coup and Soviet intervention to support sparked serious, endemic violence. The Soviet-backed regime finally collapsed in 1992. No credible central government emerged to take its place. Instead, a series of highly predatory warlords emerged. Against the background of immense popular dissatisfaction, the Taliban arose and quickly took over most of the country by 1996. The Taliban regime provided a safe haven to Al-Qaeda terrorists during the planning and execution of the September 11, 2001, attacks. Shortly thereafter, the United States backed the anti-Taliban Northern Alliance in a major offensive. By December, the Taliban regime had collapsed.

In late 2001, Afghanistan’s future looked brighter than it had in decades. The country was ready for a fresh start under the new Islamic Republic. Legitimate law and order and democratic accountability held broad appeal. While the new state explicitly endorsed the goals of liberal democratic state-building, democracy and the [rule of law remained elusive](#). Failure, however, was not predestined. The policy decisions undertaken by the state officials and other domestic



actors, most notably the regime of President Hamid Karzai, played an important role in the outcome. Not only was the judiciary prevented from being professionalized and independent, but it was also incentivized to become predatory. The executive was overpowered, unaccountable, and unrepresentative. Political parties were undermined and suppressed. The election system was badly flawed and unrepresentative. [Elections themselves lacked integrity](#). Many of the same warlords that provoked such fierce resentment during the 1990s were once again empowered with predictably disastrous results. Violence began in 2002, and by 2006, the Afghan government faced a [full-blown insurgency](#) from the reconstituted Taliban.

The Islamic Republic never seriously attempted to engage the non-state justice actors rooted in tribal and religious authority. These systems had long been the foundation of legitimate legal order in Afghanistan. Indeed, most Afghans [still preferred them for settling disputes](#). Efforts to engage tribal justice leaders proved half-hearted and ineffective. A 2010 draft law envisioned incorporating non-state justice forums into state courts and heavily regulating their jurisdiction and operations. There was minimal consultation with tribal non-state justice actors. Ultimately, the central government proved too divided to pass the legislation. Indeed, up until the final days of the Islamic Republic in August 2021, officials were still debating non-state justice regulations. Even if a law had been enacted, it is unlikely to have meaningfully altered local dispute resolution given the substantial autonomy of non-state authorities and the weakness of state authority in many areas. State officials not only failed to constructively engage key tribal authorities, they actively alienated many of them.

International actors fared no better. External aid frequently served to prop up a corrupt regime and [did not help foster the rule of law](#) or build a more cooperative relationship with non-state justice actors.

The Taliban insurgency took a very different approach to legal pluralism. [Pledges to restore law and order](#) constituted the core of their political program, the Taliban prioritized working with tribal authorities and promoting effective law and order, albeit a version that was extremely brutal and highly discriminatory against women. The relationship between Taliban justice and the Islamic Republic was fundamentally combative. Both sides sought to destroy each other. It is important to stress that whatever merits the Taliban justice system possessed, they were only relative to the arbitrary and capricious state justice system, which remained among the most corrupt parts of the state apparatus right up until the moment the regime collapsed. Nevertheless, the Taliban's judicial state-building success, despite extensive sustained efforts to repress their justice system, highlights just how vital it was to engage with the longstanding pillars of the legitimate legal order in Afghanistan, namely Islam, tribal identity, and provision of public goods.

## **Conclusion**

Like it or not, legal pluralism exerts substantial influence over both domestic and international judicial reform efforts and state-building attempts. Simply because a state court exists does not mean that people will prefer it or that it be viewed as more just or effective than non-state forums. Moreover, there is no reason that powerful, pre-existing non-state justice authorities will necessarily support state initiatives, or even the state itself. For long-term success, state courts

must be viewed as legitimate and at least relatively effective.

To be sure, advancing the rule of law demands far more than just engaging with legal pluralism. Nevertheless, as recent experiences in Afghanistan highlight, governments and their international supporters ignore non-state justice at their peril. And, as Timor-Leste highlights, real progress is possible through culturally intelligible and constructive engagement with non-state justice authorities.

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