

INTRODUCTION

PAPUA NEW GUINEA, LEGAL PLURALISM, AND LAW AND ECONOMICS



A few years ago, in the arrivals hall at Jackson's International Airport in Port Moresby, I saw a sign that read: 'Welcome to Papua New Guinea. Please Respect our Laws'. While this seems a reasonable request of any visitor, a student of legal pluralism would ask: 'Which laws?' In Papua New Guinea this is not merely an academic question, but one with very real consequences. This is so, as its two most powerful legal orders – customary law and the state law – can differ markedly in what they deem to be wrong and in the sanctions (punishments) they attach to such behaviour.¹ This can create situations where, no matter what one does, a wrong is committed, either under customary law or the state criminal law. Consequently, Papua New Guinea's citizens (and visitors) face circumstances in which they must choose which laws to respect.

On my first day of work in Port Moresby, more than a decade ago, I was instructed on which legal order I should respect. Among other things I was instructed that, if I was involved in a car accident or if I hit a pedestrian, I was not to stop but keep on driving. I was further told not to go to the police, and not to go to home or work, but to drive directly to the airport and get on an outbound flight. The reason for these instructions is that the customary law sanction of 'payback' is practised to varying degrees across Papua New Guinea, including in Port Moresby. Under 'traditional' customary law, it can be permissible to engage in a retributive homicide, regardless of the state law conceptions of fault.

Given this practice it is common for people to flee accident scenes, either by driving on or, if the car is damaged, on foot. While the advice given to me was practical given the circumstances, it is a requirement

under Papua New Guinea's Motor Traffic Act 1950, Section 24, for a motorist to stop in case of an accident where there is injury or damage, and to report it to the police as soon as is practicable. Needless to say, a payback killing is an offence under Section 299 of Papua New Guinea's Criminal Code Act 1974 labelled Wilful Murder. If such an accident did occur, the agents for my employers assured me that they would resolve the situation with any aggrieved parties, most likely through a compensation payment – a common customary law remedy for wrongdoing once tempers have cooled.

Following European colonization, conquest and settlement, many societies in the Pacific, Africa, Asia, the Middle East and the Americas were subject to legal transplants that were often very different to their pre-existing legal order, and it is noteworthy that many do not fare well on measures of personal security. The Comaroffs (2006: 6) describe much of the post-colonial world as a 'Hobbesian nightmare of dissipated government, suspended law, and routine resort to violence as a means of production'.² Like many parts of the post-colonial world, large parts of Papua New Guinea have a serious crime problem. Foreign Policy (2009) listed Port Moresby as one of its five 'murder capitals of the world', and while comparable crime data are rare, the one cross-country victimization survey that included Papua New Guinea suggested that rates of serious crime such as murder, rape and robbery in Port Moresby were incredibly high, and higher than in Johannesburg, Rio de Janeiro or Manila.³ More recent crime victimization surveys of Port Moresby (Guthrie, Hukula and Laki 2006a) and Lae (Guthrie, Hukula and Laki 2007) suggest that violent crime rates remain extremely high, albeit seemingly lower than earlier estimates. Regardless of the statistics, the effects of violent crime in Papua New Guinea are destructive and pervasive, particularly in urban centres: many of my colleagues had been victims of robbery and car-jacking, and took extraordinary steps to limit their movements to protect themselves and their families. I also learned of many personal and family tragedies caused through violence. In addition, it became apparent that Papua New Guinea's personal security problems were not restricted to its capital. In many areas of the country, crime and its prevention was a major cost of business, with obvious effects on employment and economic development.

Among the scholars writing on Papua New Guinea and crime, such as Levantis (2000) and Dinnen (2006), the exceptionally high rates of crime are sometimes blamed on high rates of unemployment, poverty, and a low expectation of being punished by the state. It is then argued that this low expected punishment is due to a lack of crime fighting resources, low per capita police numbers, poor policing practices, and a lack of training and equipment.⁴ Within Papua New Guinea, the crime

epidemic is referred to as the country's 'law and order problem'. In addition to crimes committed by violent *raskol* gangs, and those motivated by greed and malice, customary sanctions such as violent payback and the execution of sorcerers are still common across the country, despite tough penalties imposed by the state if the offender is tried. As Pitts (2001: 131) concludes, some 'traditional' controls 'are crimes against the state', and include tribal fighting and payback which can manifest in burglaries, car thefts, muggings, killings or sorcery.

While the state once sought to distinguish between customary motivations and other more malevolent motivations, it generally no longer does. Indeed, the state seems to have taken aim at customary motivations with the intention of eradicating them. Recent evidence of this is the widely reported repeal of the Sorcery Act 1971 in mid-2013.⁵ As will be explained, the Sorcery Act 1971 was an attempt by colonial authorities to deal with the widespread belief in sorcery in Papua New Guinea. It was a practical measure that aimed to deal with the realities of Papua New Guinea, and as such made some acts of sorcery crimes and extended the defence of provocation where the perpetrator of violence was motivated by beliefs in sorcery. While alleged sorcerers *ought* not to be killed, the reality is that there remains a widespread belief in the supernatural causes of events in Papua New Guinea. Most communities have people within them that are identified (or suspected) as sorcerers or witchdoctors, who are considered able to use their powers for healing or death or injury. Many deaths across Papua New Guinea, including in cities and towns, are attributed to the work of sorcerers. Therefore, one effect of repealing the Sorcery Act 1971 could be to create an even bigger chasm between the criminal law of Papua New Guinea and its customary law. Alternatively, the repeal could be seen as an acknowledgement of the fact that state legislation and the (higher) courts have been unable to deal adequately with sorcery cases, and that they are best handled by village courts and various customary processes and tribunals.

This book explores the interactions of Papua New Guinea's two most powerful legal orders, customary law and state criminal law, in relation to crime (or wrongs more generally) using the concept of deep legal pluralism and the economic analysis of the law.⁶ It will be argued that the interaction of Papua New Guinea's two most powerful legal orders can see each undermine the other, a phenomenon labelled 'legal dissonance'. Legal dissonance can result in neither legal order being able to do its job. In doing so, this analysis provides an alternative explanation for the extremely low level of personal security in parts of Papua New Guinea. It will be shown that a lack of coordination in the punishing of wrong behaviour can be problematic both for legal orders themselves and for

those subject to such a legal phenomenon. This can lead to a situation where an activity can be simultaneously advanced by one legal order and punished by the other, leading to injustice and, perhaps more importantly, to an undermining of each legal order's ability to deter wrongdoing.⁷

Papua New Guinea

People have lived on the landmass and islands that now make up Papua New Guinea for around 60 thousand years.⁸ Nonggorr (1993) suggests that the first migrations were from South East Asia by people similar to the Australian Aborigines, followed by later migrations that brought the people who spread out across the South Pacific. At the time of European contact, the population was mainly made up of thousands of small stateless tribal units, often consisting of around two hundred to five hundred people. Narokobi (1996: 28) considers the primary distinguishing factor of Melanesia at the time of European contact was its 'small self-contained communities'. According to the Müller et al. (2000) *Atlas of Pre-colonial Societies* which, as its name suggests, aims to capture institutions, social organizations and production technologies prior to colonization, Papua New Guinean societies mainly consisted of compact permanent settlements, with extensive but relatively rudimentary agricultural activities (that included the domestication of pigs and the cultivation of taro and other root crops) as well as fishing in the coastal areas. Apart from pronounced differences between the sexes in terms of occupation, succession and marriage, Papua New Guinean societies prior to colonization were highly egalitarian, with the vast majority having no hereditary local headmen or class distinctions of any type, and a complete absence of caste and slavery. This is in sharp contrast to neighbouring Polynesia and much of the rest of the world at the time.

Once the people of Papua New Guinea did encounter European colonization, they had four colonial rulers in a period of less than one hundred years. As will be outlined in more detail in Chapter 2, following an agreement to partition the eastern half of the island of New Guinea in 1884, Britain declared the southern part a protectorate and named it British New Guinea, and Germany annexed the northern part and the New Guinea Islands (German New Guinea). Soon after, both governments set up colonial administrations and transplanted their criminal laws. In 1906, the Australian Government assumed control of British New Guinea and renamed the territory Papua, and with the First World War, German New Guinea also came under Australian control in 1914. Both territories remained under Australian control until 1942 when the Japanese Imperial

Army occupied large portions of the territories during much of the Second World War. Following the Allied victory, Australia resumed colonial control until 16 September 1975, when the autochthonous constitution of the Independent State of Papua New Guinea came into force.

Today, Papua New Guinea has an estimated population of just over seven million, which is growing rapidly. Queen Elizabeth II is the head of state, and the country has a vibrant, albeit sometimes turbulent, parliament. Despite some close calls, it has remained democratic since independence from Australia in 1975, with high voter turnout and relatively peaceful changes of government. However, it is a poor country with high levels of income inequality. According to the World Bank (2014) the estimated average per capita income was US\$1,790 per year in 2012, with approximately 40 per cent of the population living in poverty. Most people live a traditional lifestyle and Papua New Guinea has the third highest rural population level in the world at 87 per cent. Many others live in settlements surrounding the nation's main towns and cities. Education levels are especially low: the World Bank (2014) estimates the gross secondary school enrolment rate to be 40 per cent for 2012, which is slightly below the sub-Saharan African average.⁹ Many families simply cannot afford the fees to send their children to school. The United Nations Development Program (2013) ranks Papua New Guinea 156th of the 187 countries on the Human Development Index.

Like much of post-colonial Melanesia, the Papua New Guinean state is weak. This weakness is characterized by an inability of the state to provide basic services to its citizens. In addition to the poor headline statistics outlined above, other manifestations of this weakness include the first ever reported cholera outbreaks in Papua New Guinea in 2009 and the state's failure to contain them (World Health Organization 2010), an inability to bring most offenders under the Criminal Code to trial, and continued mass jail breakouts that have seen approximately 7 per cent of the prison population escape every year (Papua New Guinea Law and Justice Sector Secretariat 2007).

Forsyth (2009: 1) suggests that the shared Melanesian characteristic is 'diversity' and Papua New Guinea, Melanesia's largest state, is the flag bearer. While there are often clear ethnic distinctions between the people of the Highlands, the Sepik, the Papuans and the Islanders, there are also marked distinctions and deep cleavages within these broad groups. With at least 853 different languages spoken, Reilly (2008) suggests Papua New Guinea is the most ethno-linguistically diverse country in the world. Levine (1997) suggests that Papua New Guinea may have more than one thousand ethnic groups, broadly defined as having their own language, customs and memories that cause them to distinguish

themselves from other groups. Within these ‘tribal’ groupings are ‘clans’ or extended family groupings. The loyalty displayed to one’s own tribe or clan is referred to as the *wantok*¹⁰ system, where primary loyalty belongs to the people of one’s own family, clan, language group and region over other groupings, including the central state. Ethnic tensions can be high and sometimes spill into violent raids and fierce fighting, including in Port Moresby and other urban centres. Nonetheless there is a strong sense of national identity and the state does enjoy a degree of legitimacy, but other loyalties come before it.

The ethnic diversity can, at least in part, be explained by geographic factors. Papua New Guinea is a mountainous country, with large plateaus and deep valleys, and with a large population living on islands. The Highlands run through the centre of the mainland and effectively separate the north from the south. There are no roads that connect the two main cities on the mainland, Port Moresby and Lae. Terrain within the regions is also believed to have led to isolation and the creation of individual cultural identities. Today, due to limited, expensive and sporadic transport, many regions and villages remain relatively isolated. Although from empirical work undertaken in the New Guinea Islands for this book, it was striking how many people, even in the most remote parts visited, have lived in or visited Port Moresby (or beyond) during some part of their life.

Introduction to Legal Pluralism and the Economic Analysis of the Law

Over the decades, there have been a number of academic works on Papua New Guinea’s legal arrangements. However, this book is unique in that it combines two seemingly unrelated literatures to form the basis of its analysis: ‘legal pluralism’ and ‘law and economics’. Using the insights and analytical tools of these literatures, the interaction between customary law and state criminal law is re-analysed, for the primary purpose of finding workable policy prescriptions to ameliorate Papua New Guinea’s debilitating law and order problem – for none yet have been found. However, given that at least one of these literatures will be unfamiliar to the majority of readers, an overview of the key concepts and insights from both legal pluralism and law and economics is provided below.

Legal Pluralism

Perhaps Moore (2005: 246) best highlights the essence of legal pluralism when she says:

The rules and institutions attached to governments are only one category of a vastly more extensive set of sites producing rules and obligations ... In our society, rules made by legislatures and enforced by the state are only one piece of the existing system of obligatory norm. There are many other ways in which enforceable rules are created, some of which intersect with the formal system ... Others include rules made by companies, schools, universities. Often non-official rules are socially enforced ... Members of the social milieu must conform or get out ... An organization can expel ... a member, and a business person may not want to do business with someone who does not play the game. Thus the capacity for enforceable rule making is not found in the courts alone, nor in the legislature, nor in administrative agencies, nor in the police, but also in myriad unofficial sites of policy making. Norm setting and enforcing is found in many legitimate social settings outside of government, and is also found in illegal organizations ... In anthropology, when a multiplicity of enforceable rule systems operate concurrently this circumstance has been called 'legal pluralism'.

While there are a number of definitions, I consider legal pluralism is best succinctly described as 'a situation where at least two legal orders assert jurisdiction over the same geographical space and persons within that space' (Larcom 2014: 2). Before unpacking this definition, it is worth highlighting the most important insight that the legal pluralism literature has to offer legal scholars: that the state does *not* have a monopoly on the generation or enforcement of law. That is, legal pluralism highlights the social reality that state law is but one of many that coexist in all societies, and that these other legal orders can gain their legitimacy from completely separate sources from that of the state. Furthermore, the literature insists that legal pluralism is the norm rather than the exception, both in terms of human history and geography. Indeed, Griffiths (1986: 39) argues that legal pluralism is the 'omnipresent, normal situation in human society' – whether that society is post-colonial Papua New Guinea or post-imperial England.

The claim that legal pluralism is the normal (or natural) state of any society may unsettle some readers who might find comfort in the thought that only the state can produce, authorize and enforce law; and for good reason, as sometimes legal pluralism can produce chaotic, unjust and detrimental consequences, which is indeed the focus of this book and will be explored in great depth. Others may consider the supposed ubiquity of legal pluralism to be simply a matter of semantics – hinging on how one defines law. While it is true that what defines 'law' (and 'legal') is highly contested, history (at least in Western societies) does seem to be on the side of the legal pluralists claim that it is the norm rather than the exception. A number of scholars highlight that the current conception of

a nation state and its monopolistic claim to ‘law’ is a relatively new phenomenon, scarcely more than two centuries old. Benton (2012: 26) concludes that ‘[s]tates’ claims to legal hegemony developed in an *ad hoc* and incomplete way, gathering force particularly over the long nineteenth century’. Similarly, Tamanaha (2008: 381) tells us that the ‘monopolisation of law by states in Western Europe reduced legal pluralism at home just as a new wave of legal pluralism was being produced elsewhere through colonisation’. Tamanaha (*ibid.*: 380–81) suggests that it was in the seventeenth and eighteenth centuries that ‘[s]tate law became the pre-eminent form of law’, and that over time customary norms and religious law lost ‘their former, equal standing and autonomous *legal status*’. Berman (1983: 10), taking a long-term historical perspective, suggests that ‘[p]erhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems’. He also suggests that legal pluralism had many beneficial aspects:

The pluralism of Western law, which has both reflected and reinforced the pluralism of Western political and economic life, has been, or once was, a source of development, or growth – legal growth as well as political and economic growth. It also has been, or once was, a source of freedom. A serf might run to the town court for protection against his master. A vassal might run to the king’s court for protection against his lord. A cleric might run to the ecclesiastical court for protection against the king.

In terms of unpacking the above definition of legal pluralism, the first important word is *jurisdiction*. It is suggested that jurisdiction can be asserted three main ways: over place, over persons and over behaviours (actions and omissions). For legal pluralism to be present, two (or more) legal orders must assert jurisdiction over the same place and persons. The dictionary definition of jurisdiction refers to the ‘the official power to make legal decisions and judgements’ or ‘the territory or sphere of activity over which the legal authority of a court or other institution extends’ (Oxford Dictionary Online 2011). This can be extended to include any legal order’s ability to make legal decisions, judgements and to sanction wrongs. Indeed Justice Holmes (c.f. Michaels 2007: 1028) asserted that ‘[t]he foundation of jurisdiction is physical power’.

The second important term in the definition is *legal* – or law more generally. Some scholars have tried to include all enforceable rules as law while others wish to only include state law (see Griffiths 1986; Roberts 2005). There are risks associated with taking a definition of ‘law’ (and ‘legal’) that is too broad; most importantly, the word could simply lose its meaning, making analytical rigour and precision difficult or impossible.

In recognition of this very real risk, some such as Twining (2010) have favoured talk of ‘normative pluralism’ over ‘legal pluralism’. However, there are also substantial costs with an overly narrow definition; not least, we know non-state law can and does exist, with the most prominent examples being various religious legal orders, including Canon Law, Halakha and Shari’a Law.¹¹ But perhaps more importantly, by denying non-state legal orders the status of *law*, it may imply a hierarchical relationship that simply does not exist, whether this relationship is between state law and religious law or between state law and customary law. While this hierarchical relationship is asserted by most states, including the Independent State of Papua New Guinea, it is also strongly contested by those who consider custom as *law* and that it derives its legitimacy from sources other than the state.¹² By not defining indigenous custom as *law* we run the risk of undervaluing (and undermining) it through the use of language. But more importantly, not recognizing non-state law as law makes us more prone to fall into the analytical trap of ‘legal centralism’ (Griffiths 1995: 201) and model interactions in a vertical manner when reality suggests they should be analysed horizontally. Given the strength of customary law in Papua New Guinea and its countless parallels with the state legal order (as will be outlined in the next chapter) modelling a vertical relationship, as many scholars have in the past, would be to mis-specify the relationship and could lead us to incorrect conclusions. If one is to accept the reality of different sources of law, which the legal pluralism literature rightly insists, it seems that any definition should not imply a hierarchical relationship – unless this relationship actually exists. For a vertical relationship to actually exist, it would seem that three conditions are necessary: first, one legal order must assert it; second, it must be able to enforce it; and third, this vertical relationship must be recognized and accepted by practitioners (or agents) of *both* legal orders.

While it is argued that there is a need to keep the ‘legal’ in ‘legal pluralism’ for both analytical and practical reasons, it is still necessary to distinguish legal institutions from other social institutions.¹³ Therefore, a legal order is defined as ‘a set of rules and practices that are oriented towards ordering relations between persons with its own source of authority’ (Larcom 2014: 2).¹⁴ This definition allows us to separate legal institutions from non-legal institutions, primarily based on their purpose – that is, whether they are aimed towards the ‘ordering of relations between persons’, or not. Clearly law serves many purposes; however, it seems difficult to deny that a basic job of law is to order relations between persons within a society.¹⁵ Under this definition, Papua New Guinean ‘custom’ would fit neatly, while other phenomena not normally labelled

law, including individual social conventions and internalized morals (often labelled norms) would be excluded, due to the requirement of a set of rules. Other forms of social life which have elements of social control, such as education, would also fall out, as they are 'not oriented towards ordering relations'.

If we are to completely unpack the concept of legal pluralism, the distinction between 'state' legal pluralism and 'deep' legal pluralism also needs to be crystallized. State legal pluralism refers to a situation in which the state is considered dominant and may incorporate laws, norms or legal practices from outside into its own (Griffiths 1986: 8). As Sezgin (2004: 1) suggests, this type of legal pluralism can be seen as a 'mere arrangement within state law', where the legitimacy of non-state norms is considered to rely on state authority. Griffiths (1986: 8) rightly concludes that state pluralism is conceptually flawed and only has a 'nominal resemblance to legal pluralism' as it is based on the idea that law must 'ultimately depend from a single validating source'. Conversely, deep legal pluralism, or simply 'legal pluralism', acknowledges the fact that different legal orders can have different sources of authority and that they can coexist or assert their jurisdiction regardless of the recognition by other legal orders, and hence an order having its own source of authority.

Like much of the legal pluralism literature, the discussion on sources of authority (state versus deep legal pluralism) could be seen as a mere exercise in semantics; but to take this view would be to fail to comprehend legal pluralism's key analytical insight. This can be illustrated with respect to the Papua New Guinean state's recognition of customary law. Prior to the passing of the Underlying Law Act 2000, the state referred to customary law as 'custom', in both the Constitution of the Independent State of Papua New Guinea and the Customs Recognition Act 1963. However, with the passing of the Underlying Law Act 2000, customary law was thence referred to as 'customary law' and is now considered as part of the nation's underlying law. That is, the state has begun to recognize customary law as 'law'. Does this legislative change mean that custom was elevated to law with the passing of the Act? A legal centralist might say yes, however a (deep) legal pluralist would say no because customary law does not derive its authority or legitimacy from the state. Of course, this is not to suggest that state recognition of customary law is not important. Indeed much of this book is devoted to highlighting the interdependencies of state law and customary law, despite having their own sources of authority and legitimacy.

To highlight what legal pluralism is, and what it is not, it is worth testing the above definition against two different legal circumstances: the existence of a separate body of Scottish criminal law coexisting with

English criminal law in the United Kingdom; and the practice of customary law in a peri-urban village in Papua New Guinea. The difference between these two examples is that there is no overlap of geographical jurisdiction in the first, but there is in the second. In the first, even though the two legal orders share the same geographical space of the United Kingdom, they do not assert geographical jurisdictions over one another. The Scottish criminal legal order only asserts its jurisdiction over Scotland while the English criminal legal order only asserts its jurisdiction over England and Wales.¹⁶ However, in a post-colonial peri-urban village both customary law and the state criminal law assert jurisdiction.

While two legal orders may overlap in geographical jurisdiction, they may not in terms of person. Take the case of a foreign diplomat stationed in London, who under the terms of the Vienna Convention on Diplomatic Relations (1961) is immune from prosecution under English criminal law.¹⁷ English criminal law does not assert jurisdiction to diplomatic persons under the terms of the Vienna Convention, and the Vienna Convention applies only to diplomats. Clearly, the two bodies of law overlap in terms of geographical jurisdiction, however not in terms of person. Therefore, such a legal circumstance is not legal pluralism as it is missing one of the key elements in most descriptions of the phenomenon, jurisdictional overlap in terms of persons.¹⁸ It should be noted that the jurisdictional overlap in terms of person only needs to be in one direction for legal pluralism to be present. For instance, a Catholic living in England would represent an instance of legal pluralism, as the English state law asserts its jurisdiction over all persons within England (including Catholics, unless having diplomatic immunity), but Canon Law only asserts its jurisdiction over Catholics (including those who are in England).¹⁹

Problematic Legal Pluralism

Acknowledging the reality of deep legal pluralism (henceforth 'legal pluralism') is one thing, but it is a completely different matter to ascertain whether it produces good or bad outcomes. For instance, Narokobi (1996) and others have described the injustices that can arise for those people living under customary law who find themselves in a Western court, while Woodman (2012) and others have highlighted the fact that customary obligations can lead public officials to engage in corrupt and criminal activities. While Griffiths (1986: 24) is right in telling us that legal centralism is a 'myth, an ideal, a claim, an illusion' when used as an analytical tool to describe reality, it is also wrong to suggest that attempts should not be made to ameliorate its problematic aspects.²⁰ Legal pluralism may be

ubiquitous; however, this does not mean that it should simply be accepted where it is problematic. Indeed, Watson (1998: 13–15) argues that from a historical perspective, imitation and transplantation are the main methods for legal change, and that ‘borrowing has been the most fruitful source of legal change in the Western world’. Importantly, however, he also acknowledges that these transplanted legal rules ‘are frequently and for long stretches of time dysfunctional, ill adapted to meet the needs and desires of society at large, its ruling elite or any recognisable group’. Berkowitz, Pistor and Richard (2003b: 171) suggest that societies can be subject to a ‘transplant effect’, which they define as ‘the mismatch between pre-existing conditions and institutions and transplanted law, which weakens the effectiveness of the imported legal order’. Their empirical work supports their hypothesis that the ‘mismatch’ between the pre-existing law and institutions and transplanted law severely weakens the effectiveness of the state law.²¹ Both Montesquieu ([1748] 1914) and Bentham ([1802] 2011) arrived at similar conclusions centuries ago. Both cautioned against legal transplants, particularly in societies with different physical circumstances, norms and habits, and suggested that laws, when transplanted, are often likely to be less effective than in the place they originated.²² Bentham (1789) also directly discussed the influence of norms, customs and religious convictions on peoples’ behaviour and how these can clash with the state’s legal order.²³

Therefore, it would seem to be wilful blindness not to acknowledge the (sometimes) chaotic consequences that can be generated through multiple legal orders asserting their jurisdiction over the same place and people. Tamanaha (2008: 410) notes that: ‘Sometimes these clashes can be reconciled. Sometimes they can be ignored. Sometimes they operate in a complementary fashion. But very often they will remain in conflict, with serious social and political ramifications’.

More recently, Tamanaha (2012: 44–45) has tried to establish the key differences in relation to legal pluralism found in many Western societies compared to that often found in post-colonial societies, asserting that merely repeatedly noting the ubiquity of legal pluralism across all societies does not significantly advance the debate. Indeed, he likens this to ‘observing the sun shines everywhere, from the Arctic Circle to the Arabian Peninsular’. He argues that the ‘pivotal difference’ in the legal pluralism often found in post-colonial societies is that many legal orders did not evolve over time in connection with society but have been transplanted from outside through colonization and Western hegemony pushing the virtues of global capitalism and liberal democratic rights. He goes on to argue that Western societies ‘have never had to grapple with this sharp normative contrast because capitalism, liberalism and their

legal systems collectively developed in sync with their own cultures and societies'. In this regard Narokobi (1996: 182) refers to the colonization of Papua New Guinea 'as a huge tidal wave that swept over the land and its people'.

The State's Relationship with Customary Law

Morse and Woodman (1988: 7) categorized three potential approaches the state can take towards customary law: negative measures, incorporation and acknowledgement. Negative measures include the prohibition of certain conduct, including certain customary sanctions; incorporation refers to the adoption of customary wrongs, sanctions and remedies within the state law; and the final category, acknowledgement, refers to an approach where the state acknowledges that it does not have the 'exclusive capacity to perform certain functions to do with law'. Within this final category there are different types of acknowledgement, including whether the state acknowledges the legitimacy of the other legal order or simply sees itself as conferring power on the other legal order; and whether the acknowledgement sees a withdrawal of the state's assertion of jurisdiction or whether it attempts to maintain concurrent jurisdiction. More recently, Woodman (2012: 136–37) has used the term 'recognition', which he divides into 'normative' or 'institutional' when conceptualizing efforts to reduce conflict and increase harmony between state and customary legal orders.²⁴ Woodman defines normative recognition as an instance when a legal order accepts certain norms of the other as 'valid and to be observed'. He goes on to suggest that the normative recognition may be passive or active, where active recognition sees one legal order apply the norms of the other in its own institutions. The effect of such a measure of recognition is that weak or state legal pluralism is added to the pre-existing deep pluralism. Woodman (*ibid.*) considers that institutional recognition is given when one legal order accepts 'as legally valid the decisions reached by institutions of the other', for instance the state accepting the decisions of a non-state tribunal as valid. Institutional recognition can be passive when the state leaves the other legal order to enforce its own decisions, or active when it enforces the decisions of the other legal order. He acknowledges that both forms of recognition require 'considerable knowledge and understanding of the recognised law' especially when it is 'active'.²⁵

All states, especially those in post-colonial societies, have formal measures (including legislation) that are not implemented or enforced. Often the same legislation is enforced with marked differences from place to place. Indeed, Griffiths (1995: 213) tells us that '[n]o legal rule produces effects just because it is there. A legal rule, as it leaves the legislative

body, is nothing more than so many black ink markings on paper'. Allowing for this reality, Tamanaha (2008) suggests that the state has tended to deal with customary legal orders in three main ways. The first is for the state to explicitly condemn contrary customary rules, but take no action to enforce this condemnation. Such action may result from officials realizing they do not have the power to combat it, or because they are sympathetic to customary law, but pressured by some external group to condemn it (e.g. other countries, international organizations, NGOs). The second is to absorb competing systems by explicitly recognizing them, either in part or whole. Such action may take place out of genuine recognition of the legitimacy of customary law, or a transparent recognition of the lack of power of the state in some areas or spheres of social life, or simple expediency in an effort to keep order at least cost. This can reduce the uncertainty caused by legal pluralism, and could take place in relation to an area of the law, a geographical area, to a group of people, or to combinations of these. The third course of action is to make aggressive efforts to suppress conflicting norms, customs and non-state laws by declaring them illegal and actively working to eliminate them. Tamanaha (2008: 404) notes that efforts at suppression 'raise a direct test of the relative power of the competing systems' and mean the 'state legal system is confronted with a formidable task, which it often falls short of achieving'. While Tamanaha's typology, with its focus on action and consequence, is informative and helps to explain the actual relationship between legal orders, clearly it is not exhaustive.²⁶

In a recently re-edited publication of Bentham's *Place and Time* that includes previously unpublished passages, it appears that he went further than much of the more recent literature in providing practical advice for the transplantation of laws and dealing with their potential problematic effects. Bentham ([1802] 2011: 156–57) suggests that before the transplant process, a summary of the 'moral, religious, sympathetic, and antipathetic biases of the people' of the recipient country should be collected to enable 'alterations' to the transplanted law. Bentham (ibid.: 173–74) also sets out a list of eight rules for transplantation:

1. No law should be changed, no prevailing usage should be abolished, without special reason: without some specific assignable benefit [which] can be shown as likely to be the result of such a change.
2. The changing of a custom repugnant to our own manners and sentiments, for no other reason than such repugnancy, is not to be reputed as a benefit.
3. In all matters of indifference, let the political sanction remain neuter: and let the moral sanction take its course.
4. The easiest innovation to introduce is that which is effected merely by refusing to a coercive custom the sanction

of the law, especially where coercion imposed upon one individual is not attended to any profit to another. 5. The clear utility of the law will be as its abstract utility, deduction made of the dissatisfaction and other inconvenience occasioned by it. 6. The value of that dissatisfaction will be in the compound ratio of: a. The multitude of the persons dissatisfied. b. The intensity of the dissatisfaction in each person. c. The duration of the dissatisfaction on the part of each. 7. As a means of obviating such dissatisfaction, indirect legislation should be preferred to direct: gentle means to violent example, instruction and exhortation should proceed, or follow, or if possible stand in the place of the law. 8. The slowness of its operation is *pro tanto* an objection to a measure: but if this slowness may be a means of obviating a dissatisfaction which expeditious measures would excite, the former may be preferable.

The most striking feature of these rules is the high degree of caution he displays towards the use of legal transplants – *place*, in contrast to his characteristic zeal for legal reform in England, *time*. These rules provide practical guidance both for those considering a legal transplant and those saddled with one. In particular, Bentham considers that: if one wishes to change local customary law, a clear assignable net benefit must be demonstrated and that ‘indirect legislation’, such as education, instruction and other policies, should be preferred over coercive or legal means; the transplant process should be a gradual process to minimize dissatisfaction and upheaval; and extreme caution should be used in using the transplanted law to punish those actions that are wrongs under the pre-existing law but not in the origin country. He was thus a forerunner in highlighting the potential dangers of state legal pluralism and appropriation of another legal order’s wrongs.

Law and Economics

While the concept of legal pluralism provides us with considerable insight, it is not particularly useful for making recommendations on institutional design in relation to Papua New Guinea’s legal arrangements. In contrast, as the rules of transplantation above from Jeremy Bentham (the father of law and economics) attest, the law and economics literature is replete with analytical tools that can be readily used to provide guidance on how to improve problematic interactions between legal orders. Therefore, some useful concepts and insights from this literature are briefly outlined below.

One important concept from the law and economics literature relevant to the study of the interaction of customary law and state law, and the potential effects on the prevalence of wrongdoing, is deterrence

theory. At its most basic, the deterrence model, which can be traced back to Bentham (1789) and notably refined by Becker (1968, 1976) and Polinsky and Shavell (2001, 2007), presumes that an individual will commit a crime if the expected pain is less than the expected benefit. Under this most basic approach to law (and human behaviour) people are assumed to have no inherent respect for the law. In this respect, the law and economics literature focuses on the 'external' part of Hart's (1997) internal–external view of the law distinction.²⁷ Cooter (2000) summarizes the deterrence model as taking Judge Holmes's bad man and giving him rationality. In such a case, the rational bad man commits a wrong whenever the expected gain exceeds the expected punishment. While modelling the state criminal law as external to the individual may be an unrealistic assumption in many societies, such as those where the law co-evolved with the development social values and morality, it seems much more realistic in a society subject to a colonial legal transplant. In transplant societies there is no apparent reason why the transplanted law should mirror internalized values or morality. Therefore, deterrence theory seems particularly well suited for the study of the effectiveness of the state criminal law in Papua New Guinea in minimizing those behaviours it deems wrong.

While some criminologists are sceptical of the empirical validity of deterrence theory, Levitt and Miles (2007) who reviewed the vast empirical literature found that differences in the expected punishment, either through policing or degree of sanction, has a significant effect on the prevalence of crime.²⁸ However there were some caveats; they found that it is difficult to separate deterrence from incapacitation, and that the marginal increase of already heavy sanctions, such as the death penalty versus life imprisonment, may have little effect.²⁹

In deciding whether to commit a wrong, a potential wrongdoer weighs up the expected value of committing the wrong versus not doing so. Specifically, a deterrence model suggests that an individual will commit a wrong, such as a robbery, if the expected gain exceeds the expected cost. That is: $g > p.S$

Where g represents the gain from committing the wrong, p represents the probability of being sanctioned (punished) and S represents the magnitude of the sanction.³⁰ While deterrence theory is normally applied to state law, it can also be applied to non-state sanctions; indeed the father of economics, Adam Smith (1759), devoted an entire book to the incentive effects generated by non-state sanctions and internalized moral beliefs.³¹

It can also be useful to think of a legal order having its own production function that converts inputs (for example, labour and capital) into

the provision and enforcement of law. We can expect that the probability of being sanctioned to vary with the level of enforcement activity and the productivity of enforcement activity. The productivity of enforcement effort will depend on: the technology used by the legal order's practitioners and agents, for example the use of fingerprinting or surveillance cameras; the legal principles used, for example the admissibility of evidence, thresholds for guilt, and procedures for determining guilt; and also the degree of legitimacy that the legal order enjoys within society.³²

In addition to deterrence theory, there is a considerable literature on the interaction of 'norms' and 'law' following Ellickson's (1991) seminal work *Order Without Law*. On this, McAdams and Rasmusen (2007: 1575) suggest that '[e]conomics is eminently suitable for addressing questions of the various incentives mediated neither by the explicit price of some good nor by the threats of government, incentives such as guilt, pride, esteem and disapproval', which they contend underlie norms, and while they do not explicitly say it, would also include non-state legal orders.

Perhaps the most important insight from this literature for the study of legal pluralism in Papua New Guinea is the distinction between non-state sanctions that serve as complements to state sanctions and those that serve as substitutes, in terms of their deterrent effects. This literature suggests that high-magnitude sanctions (for example, violent retribution or compensation payments) can substitute for state sanctions, while low-magnitude sanctions (for example, shunning or insults) act as mere complements. There is also a body of research (see Diamond 1971; Zasu 2007) suggesting that, over many centuries, the development of high-magnitude state sanctions began to take the place of high-magnitude non-state sanctions in many parts of the world.³³ Zasu suggests that the fall in the magnitude of non-state sanctions in Europe (that resulted in them becoming complements rather than substitutes) was driven by the relative costs of state and non-state enforcement. He suggests that the relative cost of enforcing non-state sanctions to state sanctions depends on the intensity of kinship ties in a society, with strong kinship ties making non-state sanctions a more cost-effective option.

While the law and economics literature focuses on the role of external sanctions in minimizing wrongdoing, there is some acknowledgement of internalized morals and values. Indeed some authors such as Dharmapala and McAdams (2003) and Geisinger (2002) highlight the *expressive* function of state law and suggest the state is able to create and perpetuate internalized norms and morals through its ability to signal good and bad behaviour. Posner and Rasmusen (1999: 382) also suggest that 'bad norms' can be changed by the state by 'diminishing the benefits of compliance with such norms by creating effective legal remedies' and by

non-legal measures, such as education, which may be more effective in making such behaviour 'dishonourable'. Bisin and Verdier (2008) suggest that internalized norms are transmitted through both 'vertical transmission' (from one generation to another) and 'horizontal transmission' (within generations). This work suggests that internalized norms that run counter to the state law can persist indefinitely if vertical socialization is stronger than horizontal socialization. Knight (1992) suggests that for a new state law to replace conflicting customary laws, expectations among the population must change through expressive information and the use of state sanctions. He suggests that without a proper enforcement mechanism there is unlikely to be a move from the old customary equilibrium to a new state-based equilibrium. However, Posner and Rasmusen (1999: 381) caution against interfering in bilateral sanctions or weakening the power of groups to enforce their norms, suggesting that '[s]ometimes just staying out of the way is the best policy' as interference may hinder more effective forms of social control. Cooter (1998) suggests that if the state is having trouble with the population obeying the state law it should simply align its law with the prevailing morality. Whether he considered that this prescription should apply to post-colonial societies is unclear. Kahan (2000: 607) provides a basic model to analyse state efforts to change what he calls 'sticky norms', and suggests that 'gentle nudges' can be more effective than 'hard shoves' as agents of the state are more likely to enforce minor sanctions and thus create a 'self-reinforcing wave of condemnation' where the state can increase the severity of the sanction over time.

The Ordering of Different States

Making a claim that one state of affairs is better than another is difficult, and some kind of framework is needed to rank the different states. The one most favoured by economists is utility maximization, or the 'the greatest good for the greatest number' principle. One practical problem with using utility is that it is difficult to measure. Aware of this shortcoming, Bentham (1843a; c.f. Twining 2009: 137) conceived of the 'subordinate ends of Government'. He considered subsistence, abundance, equality and security to be intermediate goals to be pursued to maximize aggregate utility. Security for Bentham was broad and included life, person, reputation, property and status. He also recognized that the subordinate ends would be in competition with each other and therefore ranked security and subsistence above equality and abundance. In doing so, Bentham concluded that '[w]ithout security, equality itself could not endure a single day', and considered that the purpose of law was to create

and protect security: 'Without law there is no security; consequently no abundance, nor even certain subsistence. And the only equality which can exist in such a condition is the equality of misery' (Bentham 1843a; c.f. Twining 2009: 139).

Therefore, the various states of affairs that will be primarily considered will be evaluated in respect to how they are likely to achieve security of person and sustenance. Such a ranking method is not without its shortcomings, as concepts such as freedom and diversity are not explicitly considered as part of the evaluation. However, given the foundational nature of personal security for any society to function, it is worth at least considering each state of affairs against this criterion.

Conclusion

The Independent State of Papua New Guinea is a (post) colonial creation. Prior to colonization the people of Melanesia lived in small stateless societies with their own customary legal institutions. With colonization also came a transplanted legal order that was overlaid on these pre-existing legal institutions. This has resulted in a profound case of legal pluralism. Extremely high crime rates and a general lack of personal security are well documented in Papua New Guinea's cities and urban centres. It is also in the cities and urban centres where legal pluralism is most pronounced, as the state has only a limited reach in rural and remote parts of Papua New Guinea. Both the legal pluralism and law and economics literature have much to offer the study of the current state of legal affairs in Papua New Guinea. The legal pluralism literature, while rich in description, historical analysis and conceptualization, is lacking in terms of guidance for institutional design and strategies for dealing with problematic pluralism. However, the economics literature, rich in institutional design and analytical method, mostly fails to recognize the reality of legal pluralism. It is suggested that economic analysis is well placed to better grasp the interactions of state criminal law and customary law in Papua New Guinea. However, this must be adapted for the specific circumstances of Papua New Guinea, where the state is weak and its criminal law does not always mirror society's values. This book aims to gain insight into the interactions of state and customary law and the effects on the overall level of personal security in order to provide some policy advice in ameliorating Papua New Guinea's law and order problem. However, before this analysis can be undertaken, a thorough understanding of how the two legal orders operate and interact is necessary, which is the focus of the next chapter.

Notes

1. The term 'sanction' is used to describe both the customary law and state law remedies and punishments. This term is a compromise, as under both legal orders responses to wrongs may sometimes resemble remedies more than punishments. However, legal responses to wrong behaviour generally involve some harm (or pain) to the wrongdoer, whether it be physical, mental or financial sanctions.
2. Berkowitz, Pistor and Richard (2003a, 2003b) also conclude that notable correlates with such societies are high levels of crime and disorder, and low levels of economic growth.
3. A comparison of crime rate data is discussed in Chapter 3. For actual data, see Egan, Zvekić and Alvazzi del Frate (1995). For a comparison and study of Port Moresby and Papua New Guinea crime rates, see Egan, Zvekić and Alvazzi del Frate (1995), Levantis (2000) and Haley and Muggah (2006).
4. Also see Standish (2001), Lipset (2004) and Miller and Armytage (2008) for an elaboration on the dysfunctional state of the formal state legal order and the prevalence of crime.
5. While the Act was widely reported as being repealed on 28 May 2013 (for example, see Papua New Guinea PM plans to implement death penalty 2013; and Ward 2013), however it was still in force in September 2013 when a man was jailed for twelve months for practising forbidden sorcery under the Sorcery Act 1971 (*Post Courier* 2013). The repeal of the Sorcery Act 1971 has now been certified.
6. The term 'wrong' is used to describe such acts (or omissions) to be avoided, following Narokobi (1996: 156), who concludes the 'criminal and civil law' dichotomy has little or no meaning in Papua New Guinean customary law.
7. Therefore, this book is concerned with that part of the law dealing with prohibiting and punishing crimes – what Hart (1997: 27) termed the imperative element of the law: 'something to be avoided or done'.
8. Papua New Guinea consists of the eastern half of the Island of New Guinea and many islands, including the Bismarck Archipelago.
9. The World Bank's education data for Papua New Guinea are relatively sparse and recent point estimates have varied considerably. This could suggest some degree of measurement error and underscores the difficulty in accessing accurate data for Papua New Guinea.
10. The etymology for 'wantok' in Pisin is literally 'one talk' or 'same language' referring to one's own clan or tribe. Pisin is derived from English, German, Malay and Melanesian, primarily Kuanua, the language spoken by the Tolai people of East New Britain (Mihalic 1989). While English is one of the three official languages of Papua New Guinea, it is usually only spoken on formal occasions, such as lessons at school and university, and in government business. Outside these environments, the vast majority of the population speak their local language, or Pisin or Motu, when conversing in mixed groups.
11. Woodman (2001: 3) takes the extreme position that 'state laws have no distinctive characteristics which are not frequently displayed by non-state laws'.
12. In Papua New Guinea customary law is in general conversation is referred to as *kustom* while the state law is referred to as *govman lo*. Although in Bougainville *kustom lo* was much more frequently used in conversation.
13. North (1990: 3) defines institutions as the 'rules of the game in a society', or 'constraints that shape human interaction'. He considered that institutions structure the incentives associated with human exchange, whether it is political, social or

economic. It should also be noted that when North refers to incentives, he is speaking of both reward and sanction.

14. This definition builds heavily on Twining's (2004) definition of a legal order. The main difference relates to ensuring that there is some boundary to a legal order, as opposed to an agglomeration, and is supported by the von Benda-Beckmanns (2006: 18) who suggest that a 'legal system' is a 'body of legal rules and regulations conceived as a totality'. As in Larcom (2014: 2) it is also suggested that 'each legal order has its own production function that converts various inputs into the provision and enforcement of law'.
15. For example, Twining (2009: 98) concludes that even Tamanaha, who attempts to dismiss the social ordering job of law, mostly uses examples 'concerned with contributing to and maintaining orderly relations'. That is, members of a society have reasonably clear expectations of what are wrong, acceptable and virtuous acts; and what are duties.
16. Of course states do sometimes attempt to assert the jurisdiction of their criminal law extra-territorially. For instance, under the UK Bribery Act 2010 a citizen of the United Kingdom can be prosecuted for bribery even if committed abroad. Such instances do raise the possibility of legal pluralism and the potential associated problems.
17. If the legal orders were to overlap by person – that is, if there was some uncertainty as to whether or not a diplomat was immune from state prosecution because sometimes he or she was, and sometimes not – this would constitute legal pluralism.
18. Griffiths (1986) considered that any definition of legal pluralism should not allow the standard case of diplomatic immunity, where a state cedes its criminal jurisdiction, to fit within it.
19. For instance, the Code of Canon Law (Canon 983) states that it is 'a crime' for a priest to break the seal of confession 'for any reason'. Clearly this can place a priest in direct conflict with the criminal law of the state. Under English common law there is no penitent–priest privilege (Halsbury 2002). Interestingly Bentham (1843c) discussed this issue at some length and concluded that the state should acknowledge priestly privilege (effectively ceding jurisdiction) as he considered the costs of not doing so (in the reduced number of confessions) would outweigh the benefits to law enforcement, which he considered minimal.
20. Griffiths (1986: 7–8) argues that in relation to 'formal acquiescence by the state': 'It is a messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality: until the heterogeneous and primitive populations of ex-colonial states have, in the process of "nation building", been smelted into homogeneous population of the sort which "modern" states are believed to enjoy, allowances must be made. But unification remains the eventual goal, to be enacted as soon as circumstances permit'.
21. In addition Licht, Goldschmidt and Schwartz (2005, 2007) and Guiso, Sapienza and Zingales (2006) also provide some evidence based on cross-country surveys that 'culture' can affect state law and policy, which suggests that societies may choose (if they have a choice) state laws more suited to prevailing norms. More recently, Larcom (2013a) using data for eighty-six post-colonial states has shown that countries that had higher levels of private enforcement of high magnitude sanctions in pre-colonial times currently have lower levels of state enforcement and higher levels of crime.
22. Bentham ([1802] 2011: 167) suggests that '[a] bad form of government may, while it subsists, render it ineligible to introduce a set of *laws in populum* – laws of the penal

- or civil class – which under a good government would be consummately beneficial: the same thing may be said of a bad religion, and a bad system of manners'. Bentham (ibid.: 178) also concludes that '[l]aws appear the worse for being transplanted' as they are 'no longer veiled by partiality, will display themselves in their genuine weakness and impropriety' and that people will 'endure abuses they have been accustomed to, but they will not endure new ones: they will sit easily under the yoke of their own prejudices; but they will not sit easily under the prejudices of another people'.
23. Bentham (1789) considers the interaction between religious conviction and the laws of the sovereign, when discussing motives for action. He notes that religious conviction can motivate people to break state laws. For example he states, '[i]n order to obtain the favour of the Supreme Being, a man assassinates his lawful sovereign'. He also observes that what might be considered pious in one house in England is called superstitious (or even impious) in another, when referring to the Catholic Church's doctrine of Transubstantiation (*An Introduction to the Principles of Morals and Legislation*, Chapter X, XXIV, 1, p.112).
 24. While Woodman (2012: 10) considers the process could involve meta-rules or choice of law rules, such as those proposed by Barron, Smith and Woolcock (2004) he rightfully concludes that '[s]uch meta-rules are not likely to be effective if they are made only in one of the laws, even state law', and in effect would likely result in an attempt to establish 'state law hegemony'.
 25. Woodman (2012: 10–11) also considers that the state can aim for 'ascertainment', where it attempts to clarify and publicize customary law, such as through codification. However he notes that customary law changes over time, and in relation to efforts to bring customary law into accord with human rights laws he concludes that 'ascertainment of law projects are producing statements which are inaccurate'.
 26. For instance, perhaps the most common approach that states take is simply to ignore customary law. As discussed in Chapter 2, states may also try to manipulate or reinvent customary law for their own purposes.
 27. Hart (1997: 89) categorizes views of the law as 'internal and external'; he goes on to say 'it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of a group which accepts and uses them as guides to conduct'. In relation to those who view a law as external he suggests they are likely to make what is effectively a cost–benefit analysis in deciding whether to breach it or not. In later chapters, both the external and internal views of laws will be analysed.
 28. This is not to say it is the only factor. For instance, Soares (2004) provides empirical support that *inequality* can lead to higher levels of crime using cross-country data.
 29. Abrams (2011) attempted to isolate the effect of deterrence from incapacitation. He found that deterrence is a significant factor in addition to incapacitation.
 30. In the literature, a density function, z , is often attached to g to acknowledge that gains from crimes differ amongst individuals within society. Adding a density function acknowledges that the gains from committing a crime differ among individuals, including internalized motivations. Such an addition also ensures that corner (all or nothing) solutions are avoided, such as the whole population is expected to commit a crime or no one is likely to commit a crime. Similarly a density function can be added to the punishment term, S , representing differing attitudes to punishment, including risk aversion. For a detailed discussion of the basic models, see Polinsky and Shavell (2007). While such additions increase the realism of the model, they also increase the complexity. As these issues are not the focus of the analysis they are not included here, with little or no loss of its explanatory power. This is so, as the main

focus of this analysis is on the interaction of the two legal orders – in particular, to what extent they are substitutes or compliments and to what extent they produce externalities for one another in providing a disincentive for crime.

31. The importance of social norms in regulating conduct was highlighted by Smith (1759) in the following passage: ‘Nature, when she formed man for society, endowed him with an original desire to please, and an original aversion to offend his brethren. She taught him to feel pleasure in their favourable, and pain in their unfavourable regard. She rendered their approbation most flattering and most agreeable to him for its own sake; and their disapprobation most mortifying and most offensive’ (*The Theory of Moral Sentiments*, Part III, Chapter II).
32. For a more formal treatment of a legal order’s production function, see Larcom and Swanson (2015).
33. There is also a considerable literature on the evolution of norms drawing on the seminal works of Maynard Smith (1982), Hirschleifer (1982), and Axelrod (1984), whose work suggests that ‘efficient’ institutions (norms and laws) can evolve over time.