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Promise and Pitfalls of Polytheism: A critique of The World Development Report 2017

Shalini Randeria and Lys Kulamadayil

1. Introduction

1 Since the early 1990s, the World Bank has put considerable effort in striking a balance between respecting its mandate, which prohibits it from interfering in the political affairs of member states, and its role as an international development agency, which calls for such interventions. This tension has been exacerbated by its shifting and ever more capacious understanding of development as involving much more than mere economic growth. Defined as the promotion of *economic development* to begin with, it came to encompass *human development* and was expanded more recently to include *sustainable development*. The 2017 World Development Report on Governance and the Law (WDR, 2017) appears to signal a further expansion of the idea in an effort to address long overdue issues of inequality under the umbrella of so-called *equitable development*. This new focus at the World Bank on asymmetric power relations and inequitable wealth distribution, both between and within countries, is more than welcome.

2 The World Development Report, its annual and highly influential publication, is indicative of the Bank's conception of development and of its view on the role of different policy fields in shaping it. As such, WDR17 is not the first Report to consider the link between law and development. If WDR02 highlighted the importance of the judicial system as an institution necessary for the building of markets, WDR04 and WDR06 underlined the significance of judicial institutions in the delivery of basic services and in securing fair process. And WDR11 alerted us to the weakness or failure of legal institutions being a cause of violence and insecurity. What is distinctive of WDR17 is that it places the role of law at the centre of its thinking on equity, in terms

of wealth and power. It is the last of a trilogy of World Development Reports that examine how policymakers can better use behavioural, institutional, and technological instruments to enhance the effectiveness of development policy (World Bank, 2017, 29). It is broadly subdivided into three parts: a conceptual part, one on development governance, and—finally—one on the actors and processes that affect change. Each chapter's practical implications are illustrated through so-called spotlights and the generous use of graphs, figures, maps and boxes that summarise and explain key concepts. These render the Report easily accessible in substance and style to a non-expert audience.

3 Commentators have praised WDR17 not only for breaking away from the 'best practices' rhetoric of earlier World Development Reports but also for reflecting on the *function* of development policy instruments rather than on their form (Gisselquist, 2017; Levy, 2017). This move was read as ushering in a new era, one characterised by a value-driven approach, which perceives development practices as context-dependent, so that development policy no longer means a one-size-fits-all transplant to the rest of the world of whatever worked well for a handful of Western liberal democracies. The Report's rich theoretical discussions of non-economic factors, which determine the effectiveness of policies and of development outcomes, merits praise as well.

4 What has received scant attention so far, however, is WDR17's discussion of the second theme in its title, namely 'the law', to which the Report itself also does not give as much attention as its title would suggest (Booth, 2017). Indeed, the single and self-contained chapter on the role of law seems rather detached from the rest of the Report's argument in terms of not only its content, but also of its language and style. The declared purpose of World Development Reports being to share development knowledge, we may be forgiven for taking equally seriously the normative claims and content of WDR17 as well as how these are communicated. It is thus to the high standards to which the World Bank holds itself that we offer a critical view of WDR17 here, focusing on its chapter on law. In doing so, we structure our thinking along three different threads, namely an inquiry into the radical nature of the substantive shift the Report represents, the voices it echoes, and the depth and coherence of key messages its reading leaves us with.

2. From Rule of Law to Role of Law?

5 In redefining its role to meet changing demands and growing expectations, the Work Bank has invested considerable ideological and material resources in programmes to further access to justice, legal and judicial reform, property rights, legal empowerment and building legal institutions necessary for market economies—in short, investments in so-called rule of law reform.

6 How distinctive then is WDR17's approach to the law as compared to the Bank's earlier focus on the rule of law? To what extent do rhetorical changes conceal continuities with the World Bank's traditional approaches to development policy? Does WDR17 live up to its self-representation as decisively moving away from the World Bank´s much discussed promotion of the rule of law, which had come in for considerable criticism (see, e.g., Humphreys, 2010)? What exactly does its self-proclaimed shift from *rule* of law to *role* of law, which has been largely welcomed by the law and development community, entail? To assess the shift, one would not only need to look past the

rhetoric of novelty but also to delineate the World Bank's earlier rule of law promotion agenda, from which it ostensibly distances itself in WDR17.

7 Avaro Santos (2006) has rightly pointed out inconsistencies marking the World Bank's use of the concept of rule of law. He traces such inconsistencies, and even contradictions, to institutional dynamics within the Bank, its role in the field of development policy, and its expansionist ambitions.

Table 1: Taxonomy of rule of law concepts

		Degree of differentiation of legal norms	
Degree of competing value against other competing considerations		**Institutional** Do rules comply with certain requirements internal to the legal order?	**Substantive** Beyond formal requirements, the rule of law must enshrine specific values.
	Instrumental Rule of law as a mean to achieve other goals.	Max Weber	Friedrich Hayek
	Intrinsic Rule of law is a goal in its own right.	A.V. Dicey	Amartya Sen

Source: after Santos (2006, 239).

8 In accordance with its narrative of having replaced earlier, thinner conceptions of the rule of law by thicker ones since the 1990s, the World Bank has progressively expanded its concept of the rule of law, as Santos convincingly argues. In its early years of rule of law promotion, the Bank expounded a Weberian *instrumental-institutional* understanding of it—that is, as a means to achieve other societal goals of prosperity or equity—and a Hayekian *instrumental-substantive* conception of it that entailed rule-abiding in order to promote specific values such as property rights. Over time, however, the Bank expanded its understanding to include the promotion of intrinsic versions of the rule of law. The *intrinsic-instrumental* rule of law concept considers the rule-abidingness of all members of a society to be a value in itself. In contrast, the *intrinsic-substantive* rule of law concept, possibly the thickest of all, equates the rule of law with the achievement of specific normative goals, for instance, the achievement of freedom (Sen, 1999). Despite their differences, all these conceptions of the rule of law have in common that they perceive law's role in society positively. The reasons feeding such a perception vary. Some consider the rule of law itself to be a virtue, while for others the rule of law is a guarantor for other values.

9 Subsuming all of its previous thinking on this under what it refers to as *traditional approaches*—that is, *a focus on strengthening the rule of law to ensure that those policies and rules are applied impersonally*—WDR17 claims to represent a radical shift in the sense that it thinks not only *about the rule of law, but also about the role of law* (World Bank, 2017, 29). It proceeds to describe law as a language, a structure, a product of social and power relations as well as a tool for challenging and reshaping these relations. It attributes to

it principles of justice and rights, defines it as an institutionalised rule system established by governments and claims that it consisted of fundamental customs and usages that order social life. Overall, WDR17 attributes three functions to the law, namely to command, to constrain and to enable contestation.

10 Yet, despite its novel terminology and a focus on law's functions, WDR17 also evinces an exclusively positive view of law so constitutive of the rule of law promotion paradigm. Not surprisingly then, underneath WDR17's role of law rhetoric, one often detects the persistence of the Bank's earlier rule of law promotion—including, for instance, in WDR17's intellectual proximity to the work of Amartya Sen, which some commentators have already noticed with regard to the notion of development (Mannathukkaren, 2017). Yet the parallels to Sen's work also extend to the *intrinsic-substantive* conceptualisation of the rule of law's purpose in the Report. In stressing the prevalence of the rule of law in high-income countries, WDR17 portrays it as an instrument that can be used to achieve a desired development outcome (World Bank, 2017, 92). Identifying law as a means of containing excesses of power, as WDR17 does, is also an idea that Sen has championed (1999). But the *intrinsic-substantive* rule of law conception in WDR17 jostles uncomfortably with other conceptions in the Report with which it may in fact be incompatible. Indeed, this may be the reason behind some of the Report's inconsistencies. This point is best illustrated by a few examples. Considering constitutions as unique power-constraining instruments reflects the Bank's earlier promotion of an *instrumental-institutional* version of the rule of law, whereas the nod towards including socio-economic rights in constitutions is closer to an *intrinsic-substantive* rule of law concept. More importantly, however, a radical departure from its earlier rule of law focus that would have genuinely placed the role of law at its centre would have necessitated an engagement with the ambivalences and abuses of rule *by* law. One is struck by how lightly China escapes in a report that focuses on the role of law. Also remarkable is the absence of any consideration of rule *by* law that is explicitly designed to contravene the rule *of* law, an approach that marks governance in Hungary, Poland or Turkey, all of which have recently changed their constitutions and the composition of their constitutional courts in order to entrench illiberal regimes. These omissions may have to do with the Bank not wanting to undermine its own earlier positions by contradicting these outright. A less charitable interpretation would view the addition of legal narratives and the inclusion of law as a theme of its WDR17as mere window dressing that seeks to enhance the institutional authority of the Bank (Zürn, 2018). But it may also be that given the constraints of its mandate and the necessity of responding to its critics, the Bank failed to escape its *hypocrisy trap*—that is, the persistence of the disjuncture between the Bank's rhetoric and its development practice (Weaver, 2008). WDR17's nod to many gods may be read as an attempt to please the Bank's many and very divergent constituencies with their variety of often contradictory ideas and expectations. One can only speculate on the reasons WDR17 clearly falls short of delivering its promise of a new approach to the role of law in development governance. Possibly because of its shortcomings as a text, the waves that the radical nature of its promise causes in practise yet remains to be seen. As Desai (2018) points out, we do not yet know how WDR17 will affect the internal dynamics of restructuring the organisation of rule of law reform within the organisation itself.

3. Many Masters, Many Voices

11 The Report's failure to acknowledge the pitfalls and unintended consequences of the role of law leads to a lack of balance that somewhat undermines the World Development Report Series' aspiration to offer development *knowledge*. This lack of balance in this regard is all the more surprising as the Report places the contestation of asymmetries of power at the heart of its analysis of law and governance. More concretely, it identifies them as a shaping force defining the relation between rules, the policy arena and development outcomes—a force that has been balanced out by the power of the law (World Bank, 2017, Figure 2.2). It is also surprising as the Report heavily borrows language from postcolonial and critical legal scholarship, which is acutely aware of the risks and failures of the use of law by the subaltern and marginalised. In fact, such scholarship explicitly aims at uncovering law's intrinsically Janus-faced nature by exploring its emancipatory potential along with its fundamentally oppressive and violent nature (Pahuja, 2011; de Sousa Santos, 1995). For instance, it describes law as a 'double-edged sword' that may serve to reinforce prevailing social and economic relations, as much as it can also be a powerful tool of those seeking to resist, challenge, and transform those relations (World Bank, 2017, 83). Thus, while the Report's language is likely to resonate with those who advocate context sensitivity, one looks in vain for any contextualisation of the role of law within the broader arguments of the Report that would, for instance, address law's distributive effects. Unfortunately, such a multifaceted and broad conceptualisation of law and its functions leads to several inconsistencies and ambiguities. A significant source of ambiguity is the Report's lack of specification as to whether and to what extent the various divergent conceptions of law it draws on are compatible with one another, and how they relate to the function of institutions and power asymmetries in the policy arena. These unresolved inconsistencies dilute the stringency and persuasiveness of the arguments that follow. For instance, the Report's focus on power asymmetries is difficult to square with the legal positivist conception of law that understands the law as removed from questions of power. Such tensions could have been bridged by drawing attention to the unsteady relations between power and morality in the constant re-conceptualisation of law by legislators, administrators, courts and in public discourse. They could also have been bridged by drawing attention to the unsteadiness of relations between rigidity and elasticity in law's application.

12 Laudable as its acknowledgement of the coexistence of multiple normative orders is, one wonders why the Report fails to contemplate the possibility that the plurality of legal regimes may also offer powerful actors an opportunity to impose sets of rules favourable to themselves. After all, the ability to recognise or not to recognise the coercive power of a set of legal rules is a privilege that is most often the prerogative of the powerful. Indeed, legal pluralism features prominently in the Report, though it is only discussed in the context of law's contestability function (World Bank, 2017, 15, 85). But, much like the concept of law itself, it is so capaciously defined that its meaning and function become blurred through the conflation of concepts. For instance, legal pluralism and normative pluralism are used synonymously as are transnational legal pluralism and global governance. One result of such a broad conceptualisation is that the distinctiveness of law as compared to other governance institutions is rendered

fuzzy, which raises doubts as to the suitability of law to perform the functions that WDR17 ascribes to it.

13 Moreover, as a result of such a broad understanding of law it is unclear how law is distinct from another factor in the policy arena that WDR17 identifies, namely belief systems. How is the coercive force of law different from that of belief systems? How do these two instruments of political bargaining relate to one another? Does law inform belief systems, or are beliefs absorbed by law? Had it not left its readers to ponder such questions, the practical implications of WDR17's assertions on the role of law would have likely been more evident.

14 Since the Report does not pair a conception of law with the functions that it proposes it serve, the question of *how* law ought to fulfil such functions remains unclear. To constrain power politics, law must not yield to power. Procedural and substantive rights must be upheld and the separation of powers between different branches of government respected. This presupposes, however, that the constitutional and legal order of the state is conducive to delivering justice to the most vulnerable segments of its society. If this is not the case, the Report suggests embracing legal pluralism. Such an embrace would offer the opportunity to those who were failed by public laws and institutions to seek redress through non-state rules with non-state authorities. As much as the embrace of legal pluralism by WDR17 deserves acknowledgement, one wonders how the coexistence of state and non-state legal orders ought to work in practice. The appraisal of legal pluralism, even more so than that of the role of law, would have benefited from more context. It is mentioned often but does not seem to serve any purpose in the Report.

15 Yet another set of ambiguities arises from the account of law's governance functions—that is to say, to constrain, command, and to enable contestation. According to the Report, the command and constraint functions are primarily made use of by elites, whereas contestation could be used by citizens with the support of international actors (World Bank, 2017, 93). Yet it is also easily conceivable that the relationship between the functions of law and the social groups these functions are utilised by is inverted. Law commands and constrains citizens as much as it can constrain elites. It is not evident what would prevent elites from using legal avenues for their own bargaining purposes in the policy arena. Put differently, what happens if law not only fails to fulfil the functions that the Report envisions for it, but even becomes an obstacle to the effectiveness of governance and the achievement of societal basic needs as—for instance—when urban elites use the law to evict slum dwellers, blaming them of illegal encroachment, or environmentalists in the Global North use the law to forcibly displace forest dwelling communities in the name of the conservation of biodiversity (Grunder and Randeria, 2011; Randeria, 2007)? The absence of a consideration of such possibilities creates the impression of a naively idealistic view of law, which mere lip service paid to the double-edged nature of the law cannot counter (World Bank, 2017, 83).

16 An unalloyed positive assessment of the role of law is problematic with regard not only to the overall argument of the Report, but also to the role of law in society more generally. This is well illustrated by the Report's arguments concerning constitutions and transnational legal pluralism. Despite its claim to shift the focus from form to function, WDR17 retains an interest in the proper form to constrain power through constitutional law. However, it fails to consider in this context the shadow side of

constitutions—that is, the use of the stabilising power of constitutional norms by elites to further consolidate their own power (e.g. Tushnet, 2015). With respect to transnational legal pluralism, the Report overlooks the many negative aspects that such plurality may also create, including legally structured tax evasion or obstacles to contestation, such as judicial-forum shopping. It ignores that even instruments, such as human rights treaties and trading and transparency schemes designed to fulfil the power-constraining function that WDR17 imputes to transnational legal pluralism, may enhance the authority of political elites involved in such institutions, thereby adversely affecting the contestability of policy spaces (Dezalay and Garth, 1998). Overall, this Report's discussion of legal pluralism, which departs from earlier, more state-centred Bank positions, appears inconsistent, sometimes even contradictory. This can possibly be attributed to an attempt to please a variety of constituencies with divergent expectations. It could also be seen as an attempt to appease critics of the institution by appropriating their vocabularies and conceptualisations (see Rajagopal, 2001).

17 The Report's assessment of the governance functions of law thus seems one-sided for it omits any consideration of the negative role that law may play. While WDR17 does acknowledge the crucial significance of power in implementation and failures of practices, its understanding of power oscillates uneasily between a Weberian and a Foucauldian one, with Steven Lukes's analysis of the three faces of power thrown in for good measure (e.g. World Bank 2017, 58, 91).

18 Any socially effective use of law, as Baxi argues, is always marked by a necessary ambivalence: legislative and adjudicative law needs to be strengthened against illiberal forces in uncivil society, while at the same time civil society must constrain the sinister tendencies and forces inherent in the exercise of state power (Baxi, 2016). Thus, law in whatever form always moves in the direction of centralised power, whereas the task of social activism is to disorganise, decentre, and (re)direct the powers of governance successfully claimed by the dominant. This tension, fundamental to the use of law, remains unrecognised and its consequences thus unexplored in the Report. WDR17 thus fails to reflect on how and under what conditions the emancipatory role and potential of judicial (interpretive) state power can possibly be disentangled from its repressive dimension.

4. Conclusion

19 WDR17 makes a bold move away from the World Bank's often criticised focus on the promotion of the rule of law and towards a broader framing of law's emancipatory and transformative potential, as well as law's complex role in development governance. Looking beyond the framing of the narrative and scrutinising WDR17's assertions on the role of law, this seems to be more of a symbolic gesture than a substantive shift. A serious analysis of the pitfalls of shaping a policy arena through law alone remains conspicuous by its absence. This omission not only reduces WDR17's comprehensiveness, more importantly it compromises the practicability of the Report's stated objectives. It is thus its unalloyed faith in the promise of law that leads WDR17 to fall short of its intention of offering a new approach to development governance that is mindful of power asymmetries. Such an approach would have to address how and to what extent power asymmetries themselves are created by law, instead of merely pointing to law's potential in curtailing them. It would also have to engage with the

role of law in addressing issues such as socio-economic mobility and fairness, redistribution between and within societies, citizenship rights, people's right to free movement,, expropriation and displacement, and distributive outcomes of intellectual property regimes.

20 Some development practitioners may draw satisfaction from WDR17's promotion of concrete legal instruments, most notably socio-economic rights, but it remains unclear to us how this relates to the Report's stated aim of providing a more reflective and open-minded approach to development governance. These may be the reasons that WDR17 has so far failed to produce its much anticipated consequences for development policy and practice.

21 What distinguishes WDR17 from its predecessors is its laudable ambition to engage with power and social contestation in the analysis of law and governance. However, as Desai (2018) puts it, this leaves WDR2017 as an eclectic mix of game theory, new institutional economics, and political, organisational, and legal sociology. A less than stringent theoretical conceptualisation of law and its role in development governance as well as shifting understandings of the rule of law mar WDR17's obvious strengths. Santos (2006) has argued that such incoherence with respect to conceptions of the rule of law and its deployment is intentional, for it fulfils a political function within the Bank: it enables divergent and often conflicting projects to be implemented under the same rubric. It can accommodate, for instance, advocacy for participatory grassroots legal empowerment as well as top-down rule of law reform programmes within the same agenda. If inconsistencies in its reflections on law in the chapter on the role of law undermine in part its aim to provide a new approach to development governance, the rather weak relationship of the chapter to the broader arguments of the Report as a whole creates further problems. Some of the Report's language and arguments on the functions that law ought to serve in the policy arena are inspired by critical scholarship on the use of law by social movements in the Global South (e.g. Rajagopal, 2000; also see Mannathukkaren, 2017). But WDR17 does not rise fully above the Bank's earlier rule of law promotion agenda, many of whose elements have found their way into it rendering it oblivious to the role of law in perpetuating power asymmetries, for instance. Concepts like legal pluralism are part of the new WDR pantheon without asserting any influence on policy prescriptions. These inconsistencies appear to reflect a desire to please different constituencies with very different ideas of what the role of law ought to be. Though claiming to break new ground, WDR17 seems to retreat into the safety of continuing with its earlier rule of law promotion. In the end, the Report is thus not too much at odds with decades of institutional knowledge and practice on law in development.

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ABSTRACTS

This article offers a critical analysis of the *2017 World Development Report on Governance and the Law*. The Report marks a shift away from the single-minded worship of the market (World Development Reports [WDR] 2000/2001 and 2002) as well as the elevation of the state and the rule of law to the World Bank's pantheon (WDR, 2005). Its expansive polytheism now includes law and recognises its local plurality along with its imbrication in power asymmetries. This move to a capacious and diverse pantheon, which accommodates variety albeit at the expense of stringency, may possibly please those calling for a sensitivity to context instead of one-size-fits-all prescriptions. But it is unlikely to generate either a coherent theoretical perspective on law or a coherent set of policy recommendations. In terms of argument, language, and style, the Report is thus characterised by a curious disjunction between some important insights on the role of law in society on the one hand, and proposals on development governance on the other. The Report's recognition of the double-edged nature of law and its acknowledgement of the vexed relationship between law, politics and power are weakened, for instance, by an exclusively positive appreciation of law's functions in the policy arena. In view of its many unresolved tensions sustained in an attempt to cater to the tastes of a variety of different constituencies, the Report is likely to be less influential for development policy and practice than anticipated.

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