ANALYTICAL ESSAY

Legal Pluralism in Theory and Practice

Geoffrey Swenson

London School of Economics and Political Science

Legal pluralism has vast policy and governance implications. In developing countries, for instance, non-state justice systems often handle most disputes and retain substantial autonomy and authority. Legal pluralism's importance, however, is rarely recognized and dramatically under theorized. This article advances scholarly understanding of legal pluralism both theoretically and empirically. It proposes a new typological framework for conceptualizing legal pluralism through four distinct archetypes – combative, competitive, cooperative, and complementary – to help clarify the range of relationships between state and non-state actors. It posits five main strategies used by domestic and international actors in attempts to influence the relationship between state and non-state justice systems: bridging, harmonization, incorporation, subsidization, and repression. As post-conflict situations are fluid and can feature a wide range of relationships between state and non-state actors, they are particularly instructive for showing how legal pluralism archetypes can be shifted over time. Case studies from Timor-Leste and Afghanistan highlight that selecting an appropriate policy is vital for achieving sustainable positive outcomes. Strategies that rely on large scale spending or even the use of substantial military force in isolation are unlikely to be successful. The most promising approaches are culturally intelligible and constructively engage non-state justice networks of authority and legitimacy to collectively advance the judicial statebuilding process. While the case studies focus on post-conflict states, the theory presented can help understand and improve efforts to promote the rule of law as well as good governance and development more broadly in all legally pluralist settings.

Keywords: rule of law, post-conflict, legal pluralism

Mainstream international relations theory tends to assume a unitary state with a monopoly on the use of legitimate violence domestically; however, the reality of political and legal authority is far more complicated (Weber 1978).[1] Legal pluralism whereby "two or more legal systems coexist in the same social field" is the dominant feature of most legal orders worldwide (Merry 1988, 870). All states feature legal pluralism, and only a limited number of high capacity states have nonstate justice actors firmly under their control. Even in these states, legal pluralism thrives through alternative dispute resolution mechanisms, arbitration agreements, and

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[1] As Lake highlights, "the state is central to the study of international relations and will remain so for the foreseeable future" because it is "fundamental" to neorealist, neoliberal institutionalism, and constructivist approaches, and usually plays a key role in "critical, post-modern, and feminist theories" (Lake 2008, 41).

international treaty obligations. In the developing world, an estimated 80 to 90 percent of disputes are handled outside of the state justice system (Albrecht and Kyed 2010, 1). The role of legal pluralism is particularly vital in conflict and postconflict settings, as they tend to have weak state institutions and contested governing authority (Fearon and Laitin 2004). In states with lower levels of capacity, legitimacy, or both, seeking support from nonstate actors can serve as a conflict avoidance tactic or even a broader governance strategy that attempts to secure buy-in from powerful groups that may be skeptical of the state.[2]

While the prevalence and endurance of nonstate justice mechanisms could be seen as an indictment of the need for state justice to underpin the rule of law, nonstate justice mechanisms often have significant negative externalities. Nonstate legal orders frequently reflect cultural or religious norms unconcerned with basic human rights. Women and other vulnerable groups are particularly at risk when nonstate legal systems embrace overtly patriarchal ideals. These systems can also reflect significant bias toward powerful individuals and families, and the legal processes often lack core protections, such as procedural and substantive due process norms. As Waldorf highlights, nonstate ""judicial" elites are neither independent nor impartial, and their discretionary rulings serve community harmony not individualized justice" (Waldorf 2006, 10). Furthermore, the relationship between state and nonstate justice is often unclear, and cases may be resolved in different ways, encouraging forum shopping by parties, particularly those with more economic or political clout. The state system's predominance in itself does not guarantee a just outcome at a systemic level, as it could be a means for more effective despotism (Krygier 2011, 19–21). Nevertheless, an effective state-operated justice system is a functional prerequisite for a state capable of fulfilling the rule-of-law's requirements of being prospective, generalized, clear, fixed, and equally applied (Tamanaha 2007, 3).

While central governments prefer a monopoly on legal authority, state power is frequently contested even after violence ends. Domestically, the state's ability to function justly and effectively is a life or death matter for millions of people worldwide and dramatically impacts the quality of life for millions more. Internationally, "poorly governed societies can generate conflicts that spill across international borders" as well as facilitate criminal networks and transnational violent extremism (Krasner 2004, 86). Establishing a viable state justice sector is vital to the overall success or failure of state-building efforts (Paris 2004, 205–6).[3] As nonstate justice is the dominant form of legal order, it is important to understand its implications. State-building provides a powerful analytical lens to examine and understand the implications of legal pluralism, as situations tend to be fluid with a wide range of realistic outcomes. Little attention, however, has been paid to the unique challenges and opportunities for judicial state-building presented by legal pluralism. The rules that matter most may not stem from the state at all. Custom, tradition, religion,

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[2] These strategies are by no means limited to postconflict states. In Malaysia, for instance, the long-time ruling party has used state-sponsored Islamic Courts as an integral part of its efforts "to validate its Islamic credentials—relegitimize the party and the state—and thus co-opt, or at least undercut, both the Islamic resurgents and the opposition party" (Peletz 2002, 10).

[3] The record of international state-building efforts has been at best uneven and all too often profoundly discouraging (for example, see Doyle and Sambanis 2006; Paris 2010). Past state-building efforts have often left much to be desired, and the endeavor involves a number of intrinsic contradictions and tensions (Paris and Sisk 2009). Some scholars go even further and argue that the international state-building enterprise itself is inherently illegitimate (Bain 2006, 537–38, Chandler 2006). Jahn, for instance, contends that state building and related activities such as democracy promotion are "counterproductive . . . ultimately producing enemies instead of allies and heightening insecurity instead of enhancing security" (Jahn 2007, 212). While these criticisms deserve consideration, as Paris notes, "for all the shortcomings of liberal peacebuilding—and there have been many—most host countries would probably be much worse off if not for the assistance they received," and forsaking state building entirely would be akin to "abandoning tens of millions of people to lawlessness, predation, disease and fear" (Paris 2009, 108). Regardless of how one ultimately conceptualizes state building, the practice is here to stay for the foreseeable future. Thus, deepening scholarly understanding of what makes state building more or less successful in environments marked by a high degree of legal pluralism constitutes a worthwhile endeavor.

family lineage, powers not sanctioned by law (such as those of criminal enterprises or powerful commercial interests), and a host of other sources may have equal or even greater influence than state law.

Robust legal pluralism challenges the state's claim to a monopoly on legitimate resolution of legal disputes as well as the ideal of uniform application of the law. It enables participants to select dispute resolution forums based on accessibility, efficiency, legitimacy, jurisdiction, and cost, as well as the state and nonstate systems' respective abilities to make binding decisions and sanction individuals that choose other systems. This process leads to a sustained struggle between state and nonstate justice actors for legitimacy, resources, and authority. Apart from their adjudicatory role, nonstate justice authorities can even become "state-building spoilers" and help trigger a return to conflict (Menkhaus 2007, 76). Whether state officials can "gain[] the right and ability to make . . . rules" and whether nonstate actors can effectively resist the state has major implications for state-building (Migdal 1988, 30–31). On the other hand, seeking support from nonstate judicial actors can be an important strategy for maintaining stability and securing elite and popular support for the state.

In short, legal pluralism has major implications in all states, but the prevalence, autonomy, role, and authority of nonstate justice systems vary dramatically across contexts. It is not enough to merely recognize that legal pluralism exists; scholars and policymakers must understand how legal pluralism actually functions. The purpose of this article is to advance scholarly understanding of legal pluralism both theoretically and empirically. This is done by, first, articulating four new legal pluralism archetypes along with the major strategies for domestic and international policymakers dealing with legally pluralistic environments. Second, as these situations tend to be fluid with a wide range of realistic outcomes, this paper draws on postconflict state-building to provide an analytical lens to examine and understand legal pluralism's implications. The case studies of Timor-Leste and Afghanistan highlight how both positive and negative change in the overarching relationship between state and nonstate justice can occur. They demonstrate that when promoting the rule of law, judicial state-builders could benefit greatly from understanding the legal pluralism archetype and its programmatic implications, along with developing a credible and appropriate strategy for transforming the current environment toward a more constructive situation that ideally secures buy-in from nonstate actors or at least mitigates their opposition.

Article Overview

This article examines legal pluralism and its implications for policy through five sections. The first section demonstrates the need for new legal pluralism archetypes through a brief literature review. The second section proposes four distinct archetypes: (1) combative, (2) competitive, (3) cooperative, and (4) complementary. It likewise identifies commonly used strategies for interacting with nonstate justice actors across different legally pluralistic environments: (1) bridging, (2) harmonization, (3) incorporation, (4) subsidization, and (5) repression. Sections three and four present two divergent case studies of postconflict judicial state-building in legally pluralist settings, specifically Timor-Leste and Afghanistan. The case studies highlight how domestic and international policy decisions can help shift the overarching archetype. These decisions can help promote a change from competitive legal pluralism to cooperative as occurred in Timor-Leste or a deterioration of the situation into combative legal pluralism as happened in Afghanistan. The final section offers overarching lessons from the experiences in Afghanistan and Timor-Leste.

Current Understandings of Legal Pluralism Remain Insufficient

While important scholarly work exists, current explanations remain inadequate for understanding the form and implications of legal pluralism in all settings but particularly those in the wake of conflict. The nonstate system is usually seen as either an obstacle to progress (Farran 2006) or effective, efficient, and reflective of true community preferences (Harper 2011). For example, a major United Nations report defines nonstate justice systems as involving "a neutral third party not part of the judiciary" while also noting "custom-based systems appear to have the advantages of sustainability and legitimacy" (United Nations Development Program et al. 2012, 8). In both instances, the stark binary between the state and nonstate justice sectors is radically oversimplified.

Existing work has been largely historical or theoretical. Legal pluralism has a long historical pedigree. It is deeply embedded with the creation of the modern state. Fukuyama (2011, 245–75), for instance, contends that competition between legal systems has driven the formation of certain modern states. Legal pluralism also shaped interactions between different societies, and "dual legal systems were widespread in colonized parts of Africa, Asia, Latin America, and the Pacific" (Merry 1991, 890). Legal pluralism became a defining feature of colonial administrations that sought to harness local dispute resolution mechanisms to help legitimize and institutionalize their rule (Benton 2002). Likewise, multiethnic domains, such as the Ottoman Empire, embraced legal pluralism (Barkey 2013). Nor is the prevalence of legal pluralism largely a historical phenomenon. Currently, legal pluralism exists everywhere in forms as varied as community dispute resolution to the international system where there has been a proliferation of treaties as well as transnational regimes with veto capacity or even legislative ability (Berman 2012). State and nonstate legal systems can work together relatively smoothly or find themselves clashing frequently (Tamanaha 2008, 400).

Some noteworthy attempts have been made to understand the interactions between the state and nonstate justice sectors. Connolly (2005) proposes the approaches of abolition of nonstate systems or, alternatively, incorporation, partial incorporation, or no incorporation of nonstate mechanisms. Forsyth (2009, 202) conceptualizes the relationship between state and nonstate justice mechanisms as a seven-stage "spectrum of increasing state acceptance of the validity of adjudicative power by the non-state justice system." While stopping short of a full typology, numerous scholars have addressed the interaction between state and nonstate justice systems in postconflict settings (Mac Ginty 2008; Richmond 2009; Baker 2010). Country-specific analyses have also recognized that legal pluralism has implications for state-building in places such as Afghanistan (Barfield 2008) and Timor-Leste (Nixon 2012), but these works do not sufficiently account for different types of relationships between state and nonstate justice and the fluidity between different legal pluralism archetypes. While these approaches can help illuminate state efforts to engage nonstate justice mechanisms, they offer limited insights for understanding efforts to engage in postconflict judicial state-building in highly legally pluralist states.

Direct application of existing models to judicial state-building efforts presents serious problems because they do not recognize postconflict settings' systemic challenges. Successfully asserting and maintaining authority domestically and internationally invariably challenges even relatively high capacity states (Fukuyama 2014). As Krasner and Risse (2014, 549) note, "while no state governs hierarchically all the time, consolidated states possess the ability to authoritatively make, implement, and enforce decisions for a collectivity." In postconflict settings, state power is almost always actively contested. The archetypes and strategies proposed below help contextualize all state-building efforts regardless of whether they are undertaken

by local elites under the auspices of the state, international state-builders, or some combination thereof.

Legal Pluralism Archetypes

An alternative typology more attuned to legal pluralism's structure and implications provides for a more robust understanding of its function in all states, as well as its relationship to the rule of law. Here the concept of the rule of law is used in a "thin" rather than "thick" sense (Peerenboom 2002). At minimum, a "thin" concept of the rule of law requires that "law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone" (Tamanaha 2007, 3). While admirable, thicker conceptualizations include extensive institutional, economic, cultural, and political requirements that are unrealistic for most postconflict states in the short or even medium term (West 2003). The creation of a state and society with even a thin version of the rule of law after conflict is a daunting, time-consuming task that requires buy-in from both state officials and society at large. On the part of the state, "even the most formal, minimalist conception of the rule of law requires a normative commitment to the project of the rule of law itself" by state officials (Stromseth, Wippman, and Brooks 2006, 76). At the same time, state action alone is not enough; establishing the rule of law requires formal and informal popular accountability mechanisms. Regardless of the particular setting, "the rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as legal codes" (Stromseth, Wippman, and Brooks 2006, 310). Respect for the law largely hinges on the broad social belief that the law, at its core, is basically fair and legitimate (Tyler 2006). Thus, establishing the rule of law is inherently a dynamic, contested process that includes both top-down and bottom-up elements. These dynamics are particularly acute in postconflict settings because public trust in state institutions has almost inevitably been undermined, often severely. In practical terms, establishing the rule of law requires consolidation of popular legitimacy of new legal norms and institutions just as much as the construction of courthouses or the passage of laws.

This section posits new theoretical archetypes for understanding the fluid relationship between state and nonstate justice in a wide range of settings: (1) combative, (2) competitive, (3) cooperative, and (4) complementary. Furthermore, it proposes and examines five main strategies for understanding international and domestic judicial state-builders' engagement techniques. The strategies of: (1) bridging, (2) harmonization, (3) incorporation, (4) subsidization, and (5) repression. These strategies illuminate the main domestic and international approaches to engaging the nonstate legal sector in legally pluralist societies.

The strategies discussed here are top down in the sense that they examine how domestic and international actors can attempt to proactively influence the overarching type of legal pluralism in a given setting. In practice, however, the overarching legal pluralism archetype invariably reflects both top-down and bottom-up factors. Whether nonstate actors choose to engage the state and on what terms is decidedly bottom-up, as is to what extent and under what conditions people use the state and nonstate justice systems. As with other areas of state policy, popular mobilization and political advocacy is a potential tool to change the state's approach to nonstate justice (Jordan and Van Tuijl 2000).[4] Therefore, both the overarching archetype of legal pluralism present at a given moment and movement between different types of legal pluralism reflect a mixture of top down and bottom up elements.

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[4] For instance, bottom-up activities could include popular efforts to end repression of nonstate justice actors and institutions or alternatively through political advocacy against recognizing legal dispute systems that are seen as violating human rights.

In practical terms, the strategies help inform which activities can help foster change from one archetype to another, as well as how advances in judicial state-building could be achieved within a given archetype. Rather than viewing the process as linear, advancing the rule of law after conflict should be conceptualized as highly fluid with points of progress and regression. Even in favorable circumstances, establishing the rule of law and the inclusive institutions that underpin it is usually a prolonged, highly contingent process with both top-down and bottom-up elements (North, Wallis, and Weingast 2009; Acemoglu and Robinson 2012). Nevertheless, a well-informed understanding of the legal pluralism archetype that is present can significantly bolster domestic and international initiatives designed to influence the nonstate justice sector and minimize the risk of costly missteps.[5]

While invariably a simplification, archetypes help conceptualize the core features of the relationship between state and nonstate judicial actors. They can inform judicial state-building efforts as well as other domestic and international postconflict policy initiatives that influence or can be influenced by nonstate actors, such as economic development initiatives or broader governance endeavors. Although the case studies presented in this article focus on postconflict settings, the archetypes can also help actors understand and improve their engagement with a wide variety of legally pluralist states. Whatever the context, by understanding the dominant archetype, it is possible to constructively engage with the nonstate justice sector in a given area.[6] Constructive engagement with the nonstate justice sector requires thinking critically about how to deal with current realities while simultaneously seeking to transform the environment to one more favorable to judicial state-building.

Combative Legal Pluralism

In combative legal pluralism, state and nonstate systems are overtly hostile to one another. Where the normative underpinnings of the respective legal systems are not even tacitly accepted, the state and nonstate justice sectors seek explicitly to undermine, discredit, supplant, and—ideally—destroy the other. Combative legal pluralism can involve nonstate actors rejecting the state system's ideological foundation in a largely nonviolent manner. For instance, in the fight against the apartheid state in South Africa, there were active efforts to establish "structures of justice and policing that contested the legitimacy of their equivalent in the apartheid institution" (Nina 2000, 24). While compatible with nonviolence, combative legal pluralism flourishes in countries facing an active insurgency or separatist movement. In many instances, nonstate justice forms a cornerstone of those movements (Mampilly 2011; Arjona, Kasfir, and Mampilly 2015). Unsurprisingly, combative legal pluralism prevails where postconflict state-building has failed or is clearly trending in a negative direction. In many instances, this dynamic coincides with an active insurgency characterized by parallel antagonistic state-building enterprises (Wickham-Crowley 1992; Kalyvas 2006, 218–20). Thus, the scope for even limited collaboration tends to be minimal.

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[5] These missteps can take a wide variety of forms and can involve both domestic and international actors. Isser highlights that state policies attempting to regulate the conduct and jurisdiction of nonstate systems in Liberia and Guatemala "have undermined the effectiveness of TAs [traditional authorities] without providing an alternative outlet" (Isser 2011, 333). In Afghanistan, US-funded rule of law programs sought to establish new nonstate dispute resolution mechanisms in the hopes of rendering Taliban justice unnecessary. These new shuras, however, could be quite destabilizing to local communities by distributing large amounts of external funding as well as empowering individuals through military force who did not enjoy substantial popular support (Miakhel and Coburn 2010).

[6] The relationship may vary by geographic location as well as by religious, tribal, or ethnic group. The state may enjoy a cooperative relationship with nonstate actors in one part of the country, while facing a competitive or even combative relationship in other areas. For example, the Afghan state has a competitive relationship with many tribal and religious nonstate authorities but a combative relationship with the Taliban insurgents.

Competitive Legal Pluralism

Competitive legal pluralism, where the state's overarching authority is not challenged but nonstate actors retain substantial autonomy, characterizes many developing countries and is extremely common after conflict. Indeed, it is the default condition in postconflict settings. While a postconflict political and legal settlement has been reached, it has not yet been consolidated or institutionalized. The prospect of a return to conflict is disturbingly common (Collier, Hoeffler, and Söderbom 2008). The state invariably finds itself trying to assert a new order in places previously beyond its control or in places where that control was contested.[7] It is also common in many developing counties where societal actors retain autonomy and still exercise the right to maintain order in a way not dictated by state officials (Migdal 1988). Competitive legal pluralism features significant, often deep, tensions between state and nonstate legal systems, especially where legal norms and procedure diverge significantly (Tamanaha 2008). Yet, in these situations, clashes rarely endanger the state's formal judicial authority because the nonstate justice sector does not make a concerted effort to supplant state authority entirely. While the nonstate justice sector retains a sizable degree of autonomy, the state and nonstate systems respect each other's right to exist in some form and are willing to engage with each other, at least tactically (Baker and Scheye 2007).

Competitive nonstate legal systems are most frequently rooted in religious beliefs or shared culture, custom, or heritage. These legal systems often exist outside the state and do not necessarily share the state's values. Competitive legal pluralism also exists where criminal actors have established separate, parallel orders that rarely seek to take over the state but actively work to retain autonomy by circumventing state law (Volkov 2000). There may be collusion between political elites and criminal actors to evade the law or profit illegally; however, the activities themselves remain fundamentally opposed to state law.

In postconflict settings, the level of competition tends to mirror the success of the state-building process. For example, postconflict state-building efforts in Afghanistan and Timor-Leste both started against a backdrop of competitive legal pluralism. In Afghanistan, where state-building trended in a decidedly negative direction that helped spur renewed violent conflict, competitive legal pluralism has slipped into combative legal pluralism. Alternatively, when the state gains legitimacy, authority, and capacity, the environment and the incentives change, as occurred in Timor-Leste. Nonstate actors increasingly favor collaboration because both the advantages of partnership with the state and the disadvantages of opposing it increase. Nonetheless, as long as nonstate actors retain a high degree of autonomy, the potential for setbacks is ever-present.

Competitive legal pluralism can be prolonged and endemic, particularly when nonstate dispute resolution is seen as legitimate and authoritative. In relatively stable states, it can even be an explicit strategy.[8] These difficulties are compounded in postconflict settings where the state's legal authority and institutions have often been severely compromised.[9] While states often seek to supplant nonstate competitors over time, in other circumstances, engagement with nonstate authorities forms the basis of the governance system. Domestic judicial state-builders often rely on

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[7] This dynamic is by no means a purely modern phenomenon, as almost every successful judicial endeavor has historically required the state to suppress, outperform, or collaborate with nonstate rivals (Fukuyama 2011).

[8] For example, during the period of stability from 1923 to 1978, Afghan rulers used just such a strategy. The state demanded the allegiance of tribal leaders and the local population. Local politics and the resolution of local disputes, however, were left largely to local populations (Barfield 2010, 220).

[9] With regards to the state, legitimacy reflects "normative acceptance and expectation by a political community that the cluster of rules and institutions that compose the state ought to be obeyed" and the extent that "the state is seen as the natural provider of goods and services" (Call 2008, 14).

powerful, established nonstate actors and structures to support their rule, including but not limited to tribal or clan groups and religious authorities (Migdal 2001).

Cooperative Legal Pluralism

In a cooperative legal pluralist environment, nonstate justice authorities still retain significant autonomy and authority. Nonstate judicial actors, however, have by and large accepted the state's normative legitimacy and are generally willing to work together toward shared goals. Major clashes are far less frequent and tend to focus on social issues where values clash, such as women's rights, rather than existential issues of state judicial power. Cooperative legal pluralism tends to thrive in places where progress is being made toward consolidating legitimate state authority. This shift may coincide with meaningful advances toward the consolidation of democratic governance bound by the rule of law. However, the establishment of a high-capacity state that enjoys a cooperative relationship with nonstate authorities does not necessarily require democracy or the rule of law. This dynamic is reflected by postconflict transformations in places like Zimbabwe (Kriger 2006). Yet cooperation has its limits. In many postcolonial African states, nonstate justice actors largely backed the nascent state, but their support often waned "when the state-building project [became] too exclusivist or predatory" (Dorman 2006, 1087).

At the same time, it is important to stress that cooperative legal pluralism is cooperative only in terms of the relationship between the predominant forms of state and nonstate justice. Cooperative legal pluralism does not necessarily mean that, in terms of substance, the law is just. A legal order characterized by this archetype invariably still produces winners and losers. Under cooperative legal pluralism, the law, whether state or nonstate, can still be used to violate human rights, oppress citizens, or perpetrate systematic discrimination against certain groups.

Complementary Legal Pluralism

Legal pluralism does not disappear in a state with a high-capacity, effective legal system, but it is complementary. In other words, nonstate is subordinated and structured by the state because the state enjoys both the legitimacy to have its rule accepted and the capacity to actually enforce its mandates (Ellickson 1991; Mac Ginty 2008, 142). The United States, Western Europe, and many other countries with high-capacity legal systems choose to allow private arbitration, mediation, and other forms of alternative dispute resolution (ADR). ADR takes a wide variety of forms, but "they share the feature that a third party is involved who offers an opinion or communicates information about the dispute to the disputants" (Shavell 1995, 1). For civil disputes, state courts frequently mandate claimants' attempts to settle their disputes outside of court before being allowed to access state courts (Stipanowich 2004). However, substantively and procedurally, state and nonstate law can still clash. Arbitration agreements facilitate the evasion of state law and legal process, but the extent of circumvention depends on the policy preferences of state officials. In all instances, these processes are integrated into, and fall under the ultimate regulatory purview of, the state, exist at its pleasure, and largely depend on state courts for enforcement. ADR processes are allowed and often encouraged because the state deems them useful for addressing real and perceived "inefficiencies and injustices of traditional court systems" (Edwards 1986, 668).

This form of legal pluralism is complementary from a governance perspective because the state has effectively outsourced alternative forums, such as court-referred mediation, or at least tactically licensed dispute venues, such as binding arbitration. Complementary legal pluralism features a similarly cooperative ethos, but the nonstate justice authorities operate under the umbrella of state authority and without substantial autonomy to reject state decisions. Only complementary legal

pluralism can truly uphold that oft-stated requirement for the rule of law: that the law is applied equally to all people (Carothers 1998). Complementary legal pluralism is a worthwhile long-term goal, but it is important to have reasonable expectations about what is feasible in the short to medium term after conflict. As with cooperative legal pluralism, complementary legal pluralism refers only to the nature of the relationship between state and nonstate justice. These types of legal orders *can* uphold the rule of law, but that does not mean that states with complementary legal pluralism necessarily *do* uphold the rule of law.

Strategies for Addressing the Nonstate Justice Sector

While the predominant legal pluralism archetype is important, it is not immovable. Domestic and international state-builders have a number of strategies that have at least the potential to promote significant change. Of course, the results of those efforts will reflect domestic or international actors' ability to persuade, or in some case coerce, nonstate actors and society at large.[10] Based on the range of available options, this section identifies five main strategies for how best to understand interactions between state and nonstate systems: (1) bridging, (2) harmonization, (3) incorporation, (4) subsidization, and (5) repression. These strategies are by no means mutually exclusive or hermetically sealed, but they are, nevertheless, conceptually and functionally distinct. Success cannot be guaranteed, but certain strategies are better suited to certain environments. As will be demonstrated in the case study sections, local and international state-builders often employ these strategies with little regard for the complex relationship between the state and nonstate justice systems, which can lead to decidedly suboptimal outcomes. This need not be the case. Savvy strategic planning and pragmatic adaptation, ideally combined with a bit of good fortune, could improve the relationship between the state and nonstate justice sectors regardless of the dynamics present.

Bridging

With a bridging strategy, judicial state-builders attempt to ensure that cases are allocated between the state and nonstate justice systems as appropriate based on state law, participants' preferences, and venue appropriateness. Almost invariably, bridging asserts jurisdictional claims regarding both state and nonstate venues. Certain legal matters, most notably homicide and other serious crimes involving physical harms, must be resolved in state courts, while small, nonviolent claims are almost always left to nonstate venues. Public information campaigns are frequently undertaken to enhance understanding of the state legal system and how to access it. Similarly, training is often provided to local leaders and citizens about the state legal system and how to access it. Free or subsidized legal aid can give citizens an economically viable choice. A bridging strategy can be paired with a formal incorporation approach that seeks to provide a state legislative framework for nonstate justice, but it can also be a stand-alone initiative that seeks to increase individuals' choices without trying to resolve larger questions regarding the relationship between state and nonstate justice venues.

Bridging can work well where unmet demand exists for access to state courts or when increased awareness stimulates demand for state justice. A bridging strategy's impact also hinges on nonstate authorities' willingness to facilitate or accept

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[10] As with any other area of policy, there is no guarantee that all organs of the state are going to pursue a consistent, coordinated approach to nonstate justice. While justice policy is often dealt with at the national level, in states with a degree of decentralization, local or regional government may pursue distinct policy approaches (Benjamin 2008). In practice, decentralized units' ability to pursue distinct approaches will vary according to both their de facto and de jure level of authority. Nevertheless, state actors have the same set of strategies available whether or not they are actually able to pursue them.

referrals to the state system, which by extension decrease their autonomy. Thus, bridging is frequently a useful approach in competitive and cooperative legal pluralistic environments while offering little utility for situations where the state has a combative relationship with nonstate authorities.

Harmonization

Harmonization attempts to ensure that the outputs of the nonstate justice system are consistent with the state system's core values. At the same time, the nonstate justice system is incorporated and legitimatized to some extent. To support harmonization, states and international donors often fund activities to encourage nonstate justice practitioners to act in a manner consistent with state law in general. However, there is often at least tacit recognition that nonstate actors retain a significant degree of autonomy and independent legitimacy. Thus, there is a willingness to tolerate some normative differences in adjudication standards. As opposed to trying to get nonstate venues to act like state courts of first instance, there is a focus on changing the treatment of certain legal matters, for example, nonstate actors' treatment of women (Chopra and Isser 2012). State judicial actors also frequently discriminate against women, but usually this is done in violation of state law rather than as a matter of accepted practice (Campbell and Swenson 2016). In general, the greater the state's ability to offer a compelling and legitimate forum for dispute resolution worth emulating, the greater the prospects of successfully implementing a harmonization approach. Successful harmonization occurs most frequently in competitive—and especially cooperative—legal pluralism environments. Nevertheless, as long as nonstate actors retain a significant degree of autonomy, meaningful divergence with state policy remains possible.

Incorporation

Under incorporation, the distinction between state and nonstate justice is eliminated at least from the state's perspective. Nonstate justice, in a formal sense, becomes state justice. In practical terms, the nonstate justice systems' decisions are endorsed but also regulated by state officials. Incorporation can mean the creation of explicitly religious or customary courts with state support and regulation, the labeling of nonstate justice actors as courts of first instance, or simply offering an avenue for appeal from nonstate venues to state courts. Decisions of the nonstate system could be subject to appeal or ratification by the state system. For example, a local council's decision regarding a property dispute could be formalized through a district court or administrative entity. At its extreme, the entire nonstate justice system could be brought under the state justice system's purview (Peters and Ubink 2015). While nonstate systems are allowed to continue and perhaps even grow, in practice incorporation is a bold move to assert practical and ideological authority over nonstate actors by limiting their independence. Judicial state-builders seek to both harness the authority of the state system and control it. Once incorporated, states may further seek to regulate "customary" nonstate law by codifying it, an inherently subjective and selective process, or even by creating new nonstate law.

Incorporation strategies may also be less overt through professional regulation or the induction of elections to nonstate posts previously allocated through other means. There is no guarantee that nonstate actors will be willing or able to be incorporated into the state justice system. The state may envision itself as the principal with the nonstate judicial actors as its agent. This approach is highly problematic, however, if the nonstate actors have notably different norms and values from the state and accountability mechanisms are weak. Thus, the prospects and effectiveness of incorporation strategies track the state's ability to persuade or compel large numbers of nonstate judicial actors to engage with it. This enabling dynamic is most

likely in cooperative settings, possible but tentative in competitive scenarios, and very unlikely in combative environments.

Subsidization

Subsidization of the state system is the most common strategy, and certain key subsidization techniques tend to recur across settings, notably legislative reform, capacity building and establishing physical infrastructure used by the justice sector, supporting symbolic representation, and promoting public engagement. Subsidization has a vast number of potential targets. Unlike harmonization, bridging, and incorporation, it does not require any meaningful acquiescence by nonstate judicial actors as a prerequisite. Consequently, under subsidization approaches, the nonstate system is largely left alone or at least is not the primary target of action. The state system receives assistance to increase its capacity, performance, and appeal relative to the nonstate system. This task sounds straightforward. However, as Fukuyama (2004, 59) notes, "establishing the rule of law involves extensive construction not just of laws, but also courts, judges, a bar, and enforcement mechanisms across the country," thereby making it "one of the most complex administrative tasks that state-builders need to accomplish."

Subsidization can take an immense variety of forms and can be implemented regardless of whether the environment is marked by cooperative, combative, or competitive legal pluralism. Subsidization is by far the most common strategy in post-conflict settings, as well as for judicial state-building in general. It is also most likely to influence the overarching relationship between the state and nonstate justice systems because it is the only form of aid directed at improving the performance, legitimacy, and effectiveness of state justice.

Repression

Repression strategies seek to fundamentally undermine, and ideally eliminate, the state's nonstate rivals. Repression strategies are not concerned with persuading or incentivizing nonstate justice actors to work with state authorities. Nor does repression hinge on the state system persuading or influencing its nonstate rivals or encouraging citizens to use state courts. Repression can simply be a matter of outlawing nonstate justice forums, particularly in relatively peaceful places such as Botswana, and using the state's power to enforce its mandate (Forsyth 2009). Where the state can effectively outlaw nonstate justice, however, the state is already predominant. Almost invariably repression involves significant violence, rather than merely the threat of sanction. As the state seeks to eliminate nonstate justice actors, repression often results in reciprocal violence by nonstate actors. Alternatively, violence by nonstate actors can trigger state repression efforts.

Repression efforts are rarely paired with bridging, harmonization, and incorporation strategies because those approaches depend on constructive engagement with nonstate justice systems. However, the state frequently subsidizes the state justice system in an attempt to increase its authority and effectiveness relative to nonstate justice systems, as well as to protect state judicial authorities from insurgent attacks. While invariably unpleasant in practice, repression can be an important tool when the state faces an existential threat from nonstate justice actors, particularly when linked to an armed insurgency. Nevertheless, repression alone, even when backed by force, is unlikely to be sufficient for the state to consolidate a monopoly on legal authority since force must be paired with another form of legitimacy to be sustainable over time (Beetham 2013).

Legal Pluralism Archetypes in Practice

This article presents case studies "as an in-depth study of a single unit (a relatively bounded phenomenon) where the scholar's aim is to elucidate the features of a larger class of similar phenomena," in this instance postconflict judicial state-building in legally pluralist environments (Gerring 2004, 341). This examination relies on a structured comparison of approaches to the state and nonstate justice sectors after conflict (George and Bennett 2005). It is important to stress that the goal of these case studies is not to provide a definitive, detailed account of state-building relating to the state and nonstate justice sectors. Rather they highlight key developments and illuminate how the archetypes and strategies discussed above can offer important insights into how relationships between state and nonstate actors can change for the better or worse.

As the default condition for postconflict states and the most common arrangement in developing countries, it worth examining competitive legally pluralist states in more detail. Thus, this article focuses on the most common setting for postconflict states rather than trying to highlight examples from each archetype. At the onset of judicial state-building efforts after war, states are very rarely in a postconflict situation characterized by combative legal pluralism. After all, combative legal pluralism is usually a sign of continued or renewed conflict. In contrast, after conflict, tensions are still fresh and powerful nonstate actors often have found themselves on both sides of the conflict (Staniland 2012). Thus, it is unlikely that the nascent postconflict regime will initially enjoy a cooperative, let alone complementary, relationship with the major nonstate judicial actors. The rare exceptions tend to be places where a legitimate, high capacity state that featured complementary legal pluralism existed prior to the conflict, and one side of the conflict has experienced a clear victory that has been generally accepted by the former combatants. For example, post–World War II Germany and Japan would meet these criteria (Dobbins, et al. 2003).

Timor-Leste and Afghanistan are paradigmatic examples of postconflict, competitive legally pluralistic settings where domestic and international policy choices had major consequences. From the outset, policymakers themselves recognized that these cases would have broad significance and inform future endeavors (Chesterman 2002; Chopra 2002). Timor-Leste was explicitly envisioned as a model for postconflict Libya, though that option was ultimately rejected (Doyle 2016, 26), while policymakers are now fixated on trying to avoid replicating the state-building failures of Afghanistan elsewhere (Swenson 2017).

Other important similarities exist that further enhance the value of a comparison between states. Afghanistan and Timor-Leste both established new regimes and new legal systems in the early 2000s in contexts marked by competitive legal pluralism where the state justice sector needed to demonstrate its value, effectiveness, and legitimacy. Both states saw their infrastructures devastated by conflict and high levels of poverty. They enjoyed a period of stability, but the prospect of renewed violence remained a very real possibility. While it is now regarded as a success, state-building efforts in Timor were "punctuated by initially sporadic, and then intense, episodes of violence" (Gledhill 2012, 48). The 2006 Crisis cast serious doubt on the state-building endeavor and even the viability of the state itself as many proclaimed Timor-Leste a "failed state" (Cotton 2007). Afghanistan likewise faced a prospect of renewed conflict, but it also had a meaningful opportunity for successful state-building efforts after the Taliban regime's fall (Rashid 2008, Barfield 2010, 300–10). The country's history demonstrates that peace is possible. Prior to the 1978 Communist coup, Afghanistan had enjoyed decades of domestic tranquility, and the Taliban itself had previously established a monopoly on the use of force under even more chaotic conditions in the 1990s. Even since late 2001, Afghanistan enjoyed relative peace before the Taliban insurrection rapidly metastasized and reached the

level of "a full-blown insurgency by 2006" (Jones 2008, 7). Thus, the divergent shifts in the legal pluralist environment were not inevitable. As the subsequent section highlights, their decisions had significant consequences.

In both cases, local and international state-builders invested heavily in the state justice sector in an initially competitive legal pluralism environment where the vast majority of disputes were settled outside of state courts. The prevalence of the non-state justice sector, unsurprisingly, coincided with a history of very limited state capacity and weak central rule. Nonstate justice systems faced few jurisdictional restrictions or meaningful attempts by the state to regulate their conduct, particularly outside of urban centers.

Despite these shared circumstances, the outcomes in each country have been very different. Timor-Leste has successfully shifted to cooperative legal pluralism, while decisions in Afghanistan helped trigger a slide to combative legal pluralism. Notwithstanding the upheaval surrounding the 2006 Crisis, judicial state-builders in Timor-Leste have made significant progress toward developing the rule of law by working to build an effective state justice sector and collaborating with local nonstate authorities. In contrast, the post-Taliban regime has helped trigger a slide from competitive legal pluralism to combative legal pluralism due to state officials' lack of commitment to the rule of law and failure to engage key nonstate actors.

The case studies draw on a mixture of primary and secondary sources relating to state-building and legal pluralism generally and in Timor-Leste and Afghanistan specifically. I interviewed over 40 key stakeholders related to postconflict judicial state-building and legal pluralism in these countries in 2014 and 2015. The case studies also draw on personal insights from working on judicial state-building initiatives in both countries between 2008 and 2012. These cases possess clear temporal and spatial boundaries. The temporal boundaries result from the extent of large-scale international involvement after conflict, particularly the presence of significant military forces. The Timor-Leste case covers from independence in May 2002 through to the exit of international forces in 2012. The Afghanistan case study covers from the start of post-Taliban transitional administration in late 2001 through to the election of Karzai's successor in 2014 and the subsequent drawdown of international forces.

Timor-Leste (2002–2012): Competition to Cooperation

Legal order in East Timor has long been predicated on competitive legal pluralism. For over four centuries in East Timor, legal order hinged on tactical alliances between Portuguese colonial officials and nonstate authorities who oversaw order at the local level (Robinson 2009, 23). After the collapse of Marcello Caetano's authoritarian regime in Portugal in 1974, East Timor entered a rapid, haphazard decolonization process. Decolonization culminated in an East Timorese declaration of independence in November 1975. Indonesia invaded on December 7, 1975, and embarked on an intense twenty-five-year occupation. Despite Indonesia's brutal occupation, the vast majority of disputes continued to be settled through nonstate mechanisms (Babo Soares 2003, 267). The resistance movement combined support from nonstate authority to sustain the domestic resistance (McWilliam 2005), coupled with a compelling vision of an independent, democratic East Timor that upholds the rule of law to bolster international support (Strohmeyer 2000). Indonesian President B. J. Habibie agreed to a referendum on East Timor's status that was held in August 1999. Despite extensive intimidation efforts by militias, voters overwhelming supported independence. Shortly thereafter, pro-integrationist militias unleashed systemic destruction that ultimately led to the dispatch of international peacekeepers in mid-September 1999. East Timor was placed under United Nations' trusteeship until mid-2002 when it became the independent Democratic Republic of Timor-Leste (RDTL). During this time, nonstate authorities were

essential in maintaining order. Preexisting nonstate structures remained and became even more important under United Nations' administration. Thus, at the onset, the state faced a competitive situation as the nonstate justice system was entrenched, legitimate, and could not simply be compelled to the work with the state.

Since independence, the nascent state has faced immense challenges in the judicial state-building process. Effective postconflict state-building demands legitimacy and authority (Call 2008). The state has worked hard to enhance both. By investing in a modern state justice system and democratic elections, while drawing on the legacy of the independence struggle and a vision of a modern state committed to development, the state has harnessed nonstate authorities' power, legitimacy, and capacity to an extent far greater than Portuguese or Indonesian authorities ever achieved. The state and international community have invested heavily in the state justice sector. While the state still had limited reach and capacity, it enjoyed substantial legitimacy as the end goal of the independence struggle and due to its association with prominent independence leaders. The state's legitimacy helped transform nonstate judicial actors long skeptical of state authority into almost de facto state actors through elections and by offering a vision of the state that commanded widespread support. This section shows how the state, with significant international support, transformed a competitive legal pluralism environment into a cooperative one.

Slow but Steady Subsidization

Building a state justice system proved challenging due to the inherent difficulties arising from minimal human resources, limited judicial infrastructure, and the public impression inherited from Indonesian rule that courts were instruments of state power rather than neutral arbitrators. Thus, domestic initiatives and international assistance emphasized the creation of basic state justice institutions. This approach reflected a straightforward rationale. The state justice sector was still in an embryonic state. International aid emphasized building modern state institutions that acted in accordance with the rule of law. In other words, international assistance focused overwhelmingly on subsidization.

Since independence in 2002, procedural due process concerns were endemic along with substantial case backlogs and spotty opening hours (West 2007, 336–338). Even prior to independence during the period of UN control from 1999 to 2002, there was a focus on empowering domestic legal personnel. Yet, this strategy faced systemic problems because local judicial actors were inexperienced and needed extensive training as Indonesia had prevented the development of a professional class in East Timor. In 2005, all UN appointed Timorese court actors underwent evaluation. Subsequently, all Timorese personnel were disqualified (Jensen 2008, 133). This left the justice sector almost entirely dependent on international staff. While a difficult situation, international judicial actors mitigated the dismissal's impact and allowed time for domestic capacity to bear fruit. The most important of these institutions was the Legal Training Centre. It was established to oversee the training and professional certification of all judges, prosecutors, and public defenders. By 2012, the judicial system was staffed almost exclusively with Timorese judges, courts operated consistently nationwide, backlogs had decreased significantly, and popular faith in the justice system had increased (Marx 2013).

Enhanced reach and robustness from to 2002 to 2012 made the state justice sector an increasingly powerful force in dispute resolution. The nonstate justice sector remained dominant in 2012, but an ever-increasing number of citizens experienced a meaningful choice between the two systems. Not surprisingly, challenges remained. The quality of justice was uneven. The legal system retained a myopic focus on Portuguese as the preferred legal language. However, most people, including those with university educations, cannot understand the language and the often wholesale

importation of Portuguese laws gives them little relevance to the local context. Case resolution was time consuming, and participants did not necessarily understand the proceedings, especially when conducted in Portuguese. Nevertheless, real progress was achieved against a difficult backdrop.

Stealth Incorporation

Historically, the relationship between state and nonstate justice in Timor-Leste has been overwhelmingly competitive whereby there has been tactical engagement but also deep skepticism. One of the nascent state's greatest achievements was to facilitate a transformation into cooperative legal pluralism where state, international, and nonstate actors worked together as well as established a largely respected jurisdictional divide between courts and local (suco) councils. The state handled major issues, particularly violent crimes, while most civil matters and petty crimes were left to local dispute resolution mechanisms. Nonstate authorities continued to resolve most disputes in Timor-Leste. Nevertheless, nonstate authorities viewed the state and the state-building endeavor as legitimate and were largely open to constructive engagement because state leaders were recognized as key actors in the independence struggle.

The state has achieved this feat through a remarkably simple yet powerful mechanism: competitive local elections. Elections for suco chiefs were codified under state legislation on community authorities in 2004, with additional reforms in 2009 (RDTL, 2004a, b, 2009a). Suco elections were held during 2004 to 2005, and a subsequent set of elections was undertaken in October 2009. The legal framework is largely procedural and jurisdictional. However, its goal is transformational. The law roots the legitimacy of nonstate judicial actors in modern democratic ideas, most notably through recurring, state-administered democratic elections and a workable jurisdictional divide. Less than a decade after independence, state authorities were already able to establish democratic elections as the primary source of legitimacy— a view that has been internalized by the suco chiefs themselves (RDTL Ministry of State Administration and The Asia Foundation 2013). The state administered suco election system forms the backbone of state influence at the local level.

The suco reforms enacted in 2009 subtly changed the suco chief's role by more tightly linking it with state development through program planning and monitoring, creating an annual development plan, and submitting an annual report (RDTL 2009a). These responsibilities were paired with major state community development initiatives. Suco chiefs were thus expected to bring state developmental funds to their communities. Consequently, not only were suco chiefs active state-building agents; their constituents demanded it.

The Limits of Cooperation

However, the situation always fell short of complementary legal pluralism. There have been major harmonization efforts in the area of gender based-violence, which were backed by both state officials and international actors. Domestic violence was unequivocally a public crime under the Penal Code (RDTL 2009b: Articles 146, 154) and the Law Against Domestic Violence (RDTL 2010). However, the nonstate justice system continued to resolve most cases of domestic violence, including in many instances where the victim preferred to use state courts (Wigglesworth 2013). Nonstate authorities still retained an effective veto over state law in their jurisdiction. Thus, their willingness to be directed by the state in most matters reflected their acceptance of the state's legitimacy and persuasive authority rather than its ability to impose its will. At the end of 2012, Timor-Leste still faced a host of systematic problems that could arrest or even retract advances toward the consolidation of the rule of law in the future. Nevertheless, its accomplishments were significant and offer insights into how to transform a situation marked by competitive legal pluralism into cooperative legal pluralism.

Afghanistan (2001–2014): Competition to Combat

Afghanistan from 2001 to 2014 demonstrates how domestic and international state-building missteps can help transform an environment from competitive into combative legal pluralism. Competitive legal pluralism has long defined Afghanistan. Since the start of the constitutional era in 1923, the Afghan state apparatus has long sought sources of legitimacy that were less dependent on tribal support, external religious sanction, and individual charismatic leadership (Poullada 1973). Nevertheless, state power largely rested on its relationships with religious and tribal authority (Rubin 2002). The most effective form of legal order was not state law. Rather it was *Pashtunwali*, a nonstate legal code that served as both "an ideology and a body of common law which has evolved its own sanctions and institutions," as implemented through local dispute resolutions: jirgas for Pashtuns and shuras for non-Pashtuns (Roy 1990, 35). For nearly a hundred years, all legitimate state-sponsored legal orders in Afghanistan were grounded in a combination of state performance, Islam, and tribal approval. The system broke down, however, when Communists toppled the regime in 1978 and plunged the country into decades of civil strife.

Eventually the Taliban seized control. The Taliban imposed a harsh but effective state legal order in the mid-1990s based on religious authority in tacit agreement with prominent forms of tribal justice. Pashtunwali and other nonstate adjudication systems were largely tolerated and not seen as inconsistent with Taliban understandings of Islam. The Taliban regime was sympathetic to Al Qaeda's radical brand of Islam and harbored the perpetrators of the September 11, 2011, terrorist attacks.[11] Shortly thereafter, a major international effort was undertaken to dislodge the Taliban.

Subsidization Without Strategy

After the Taliban's defeat, postconflict judicial state-building efforts in Afghanistan started optimistically. The new, multiethnic state under President Hamid Karzai had the opportunity to prove itself a valid governing entity committed to democracy and the rule of law (Rashid 2008; Barfield 2010). While it enjoyed overwhelming international support, the new regime eschewed the traditional pillars of legitimate authority domestically. Religion was acknowledged but the state was not clothed in religious legitimacy. Karzai lacked robust religious credentials and, having dislodged the Taliban, his international backers were wary of any government that seemed too Islamic. Moreover, the international community's emphasis on human rights clashed with Pashtunwali and Islamic law as frequently understood in Afghanistan and gave the Taliban grounds to criticize the regime as unrepresentative and un-Islamic. The state's most plausible path to legitimacy was through elections and the provision of public goods, most notably a more just legal order, but it failed to deliver.

From 2001 to 2014, Karzai, with international support, worked ceaselessly to centralize authority and undermine constitutional checks and balances. While nominally tolerant of democratic competition, the regime never displayed a normative commitment to democracy and the rule of law. The state built a judiciary that had the outside appearance of a modern state legal system but instead focused on rent extraction. At the same time, international subsidization occurred on a staggering scale. The legal system and human resource base had been devastated by decades of conflict, so the needs were certainly daunting (Swenson and Sugerman 2011). During Karzai's time in office, Afghanistan's justice sector received over USD\$1 billion in aid from the United States alone, yet the Office of Special Inspector General for Afghanistan Reconstruction (SIGAR) determined that this assistance generated

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[11] Sinno (2008: 244) goes so far as to posit that the reason the Taliban refused to turn over Bin Laden was that it would violate Pashtunwali's guest hospitality requirements.

no notable improvements (SIGAR 2015). The ability of international subsidization to advance the rule of law was quite limited absent an ideological commitment by the state to those ideals. There was no progress toward the rule of law, and there were few significant gains in the reach, effectiveness, and legitimacy of the state justice system by the end of Karzai's presidency in 2014 (Singh 2015). Instead, the Karzai regime was phenomenally corrupt. Rather than seeking to promote the rule of law, it consistently functioned as a "vertically integrated criminal organization . . . whose core activity was not in fact exercising the functions of a state but rather extracting resources for personal gain" (Chayes 2015, 62). International assistance unintentionally institutionalized a rentier state. On occasions when international actors tried to "investigat[e] corruption, they were rebuked by Karzai's officials for misunderstanding the nature of patronage networks that served to support the government" (Chaudhuri and Farrell 2011, 285).

State Attempts at Incorporation, Bridging, and Harmonization
Tribal dispute resolution mechanisms continued to be the forum of choice for many Afghans, particularly in Pashtun tribal areas (Wardak and Braithwaite 2013). Nonstate justice mechanisms remained the most prominent form of dispute resolution, settling 80 to 90 percent of disputes (Barfield, Nojumi and Thier 2006, 9). Nevertheless, engaging nonstate legal providers was not a state priority. Only in 2009 did Afghan state officials express meaningful interest in the nonstate justice sector through the "Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils" (Ministry of Justice 2009). State policy, with international support, envisioned simultaneous harmonization, bridging, and incorporation strategies in relation to nonstate justice. At no point, however, was there serious outreach to tribal or religious authorities. The state policy bluntly proclaimed nonstate legal decisions must be consistent with Sharia, the Constitution, other Afghan laws, and international human rights standards. The policy envisioned voluntary jirgas and shuras, and their jurisdiction was limited to certain civil matters. Ultimately, the official policy consensus came at the expense of feasibility, as the final report was drafted in a manner designed to appease all state parties but was disconnected from reality.

   As a state policy has no independent legal bearing, a law was required to operationalize it. The "Draft Law on Dispute Resolution: Shuras and Jirgas" was produced in September 2010 (Ministry of Justice 2010). The legislation formally incorporated shuras and jirgas into the state system and asserted the state's authority to regulate all aspects of nonstate dispute resolution. The law even imposed criminal liability by stipulating that jirga participants "and parties of dispute shall be duty bound to observe provisions of this law" or face potential criminal charges. The draft law only authorized shuras and jirgas to hear civil disputes and petty juvenile crimes on referral from state authorities. The Ministry of Women's Affairs and the Human Rights Commission strongly opposed the law because they believed it endorsed dispute resolution mechanisms that violated human rights standards by legitimizing and institutionalizing jirgas and shuras (International Rule of Law Professional 2014). As the tenuous alliance among state agencies broke down, the legislation did not move forward.

Combative Legal Pluralism and the Failure of Repression
The Taliban justice system constituted the state's fiercest rival. Taliban justice exploited the widespread view that state courts were corrupt, ineffective, and culturally unintelligible in an attempt to displace state justice itself. Effective legal order rooted in religious beliefs constituted the core of the Taliban's political program. It also underpinned their claim to be Afghanistan's legitimate rulers and highlighted the state justice system's failures. By the time its insurgency had become full blown in 2006, the Taliban had established a lean, but sophisticated network of parallel

governance structures (Jones 2010). The Taliban's legal system tapped into the well-spring of legitimacy offered by religion, culture, and working constructively with tribal leaders. The Taliban justice system claimed to adjudicate based on Sharia law "strengthens their legitimacy in a deeply religious population, particularly when the codes of law used by the state are little known, misunderstood, and sometimes resented" (Giustozzi and Baczko 2014, 219).

By drawing a contrast with the highly corrupt state courts, Taliban insurgents actively contended with the state system, especially outside the capital, by offering inexpensive, expedient, and relatively fair dispute resolution. The Taliban operated "a parallel legal system that is acknowledged by local communities as being legitimate, fair, free of bribery, swift, and enduring" if brutal, and their system was "easily one of the most popular and respected elements of the Taliban insurgency by local communities, especially in southern Afghanistan" (Johnson 2013, 9). Unlike in the state system, decisions were enforced, and addressing corruption was taken seriously (Kilcullen 2011). In short, the Taliban justice system sought to provide exactly what the state justice system did not: predictable, effective, legitimate, and accessible dispute resolution.

Recognizing the profound threat to the state's authority, the Afghan state and international forces undertook a robust repression campaign against the Taliban justice system (US Mission Afghanistan 2010). It achieved little, however, as state justice remained highly inefficient, ineffective, and corrupt. Unsurprisingly, the Taliban legal order steadily gained ground (Ahmed 2015). The campaign was mutual as the Taliban sought to disrupt state court operations, targeted judges and other state officials for assassination, and denied the courts' legitimacy as a legal authority. Both sides refused to recognize the other's right to exist, let alone promulgate binding legal decisions.

The Karzai regime lacked the capacity to defeat its rivals militarily or embody a cause worth fighting for. Nowhere is this failure more prevalent than in the justice sector, where the state failed to promote, let alone provide, a just legal order. The Taliban's success at judicial state-building dispels the notion that establishing legal order was impossible in post-2001 Afghanistan. The Taliban's justice system had major shortcomings, and its human rights record was appalling, but the Taliban possessed a comprehensive legal strategy with a clear long-term vision rooted in local values and beliefs. The state judicial system decidedly did not. State legal authority could have increased dramatically if the Afghan state improved its performance and committed to fostering the rule of law. Taliban justice thrived in large part due to the Afghan state's abysmal performance.

Timor-Leste and Afghanistan in Comparison

Since the early 2000s, Timor-Leste and Afghanistan have taken sharply divergent paths as noted in Table 1. Despite initial optimism, Afghanistan has seen little progress. The Afghan legal system, as with the state more broadly, became known primarily for corruption and predation. As the case study shows, the country was once again subsumed in widespread civil conflict. In contrast, Timor-Leste saw political violence and major upheaval in 2006 but has since enjoyed domestic stability and made significant progress toward consolidating democratic governance and the rule of law.

Judicial state-building in Timor-Leste made progress from 2002 to 2012 because there was a credible and sustained effort to develop democratic institutions bound by the rule of law in a manner intelligible and compelling to nonstate actors. During the decades-long independence struggle, political leaders offered a persuasive vision of a democratic state committed to the rule of law. Even more importantly, since achieving independence, policymakers in Timor-Leste sought to create an effective, just legal order and to constructively engage with nonstate actors

Table 1. Legal pluralism archetypes

Archetype	Key Features	Examples
Combative	The state and nonstate justice sectors do not recognize each other's right to exist and actively seek to destroy each other.	Afghan state since 2004 with Taliban justice system; Iraq since 2003.
Competitive	Deep tensions exist between the state and nonstate justice sectors and there are frequent clashes between systems; however, the state's formal juridical authority is not challenged. While the nonstate justice sector retains autonomy, the state and nonstate systems respect each other's right to exist in some form.	Afghanistan from 2001 to 2003; Afghan state with tribal authorities from 2004; East Timor from 1998 to 2002.
Cooperative	The nonstate justice sector retains a significant degree of authority and autonomy; however, state and nonstate legal authorities are generally willing to work together towards shared goals.	Timor-Leste after independence, particularly since 2006; Zimbabwe after 1980.
Complementary	Both state and nonstate justice exist, but nonstate justice mechanisms operate under the umbrella of state authority.	United States, United Kingdom, Germany, Japan.

nationwide. They worked to establish an independent judiciary and inclusive governance institutions underpinned by competitive, free, and fair national elections in 2002, 2007, and 2012. Both the ability to change the government through free elections and the creation of inclusive institutions are essential for a democratic state underpinned by the rule of law (Huntington 1993, 266–67). With regards to the legal system, state officials worked to develop a sensible legal framework for nonstate actors that granted them discretion over small matters but funneled more serious crimes to the state courts. Moreover, the foundation of nonstate actors' legitimacy was transformed through regular, competitive local elections for suco councils in 2004/2005 and 2009. Local elections grounded the legitimacy of traditional nonstate judicial actors in modern democratic ideas of popular sovereignty and accountability rather than lineage or custom.

The international community's subsidization of the nascent state justice sector reinforced positive domestic trends in Timor-Leste. While not without flaws, international assistance improved state justice institutions and their auxiliaries (Marriott 2009). Furthermore, in the wake of the 2006 Crisis, international aid helped facilitate the transition to cooperative legal pluralism by offering aid to improve the performance of nonstate justice and build links between local suco councils and state courts. International efforts reinforced the domestic trends that ultimately led to a shift to cooperative legal pluralism. In short, Timor-Leste demonstrates the need for regulations that reflect shared values and institutions that make a good faith effort to translate those values into reality.

Afghanistan presents a stark contrast. Afghan policymakers offered neither a compelling ideological vision of the state committed to justice nor a serious attempt to construct legitimate, culturally intelligible institutions. The Karzai-led state squandered the opportunity to build a new, more inclusive and effective democratic state. Despite rhetoric to the contrary, Afghanistan under Karzai's leadership never displayed a normative commitment to the rule of law. Worse, the regime systematically undermined institutional, legal, and political checks on its authority, including suppressing political parties, manipulating elections, and undermining judicial independence and all institutional accountability mechanisms. Finally, Karzai's regime never seriously engaged with key tribal and religious nonstate justice actors that historically constituted the building blocks of legitimate order in Afghanistan.

Table 2. Nonstate justice sector strategies

Strategy	Key Features	Examples
Bridging	Judicial state-builders seek to ensure that cases are allocated between the state and nonstate justice systems as appropriate based on state law, participants' preferences, and venue appropriateness.	State-builders seek to ensure serious crimes cannot be resolved outside state courts regardless of the disputants' preferences by using paralegals to direct cases to state courts or offering trainings on how to access state courts. Alternatively, minor disputes may be sent to nonstate venues by state courts.
Harmonization	Judicial state-builders seek to ensure that the nonstate justice systems' outputs are consistent with the state system's core values.	Laws to outlaw discriminatory practices in nonstate adjudication and training to end discriminatory practices.
Incorporation	Judicial state-builders eliminate the distinction between state and nonstate justice. Nonstate justice, at least in a formal sense, becomes state justice.	Outcomes of the nonstate justice systems are endorsed but also regulated by the state system. In practice, incorporation could mean the creation of explicitly religious or customary courts with state support or the labeling of nonstate justice venues as state courts of first instance.
Subsidization	Judicial state-builders support the state system to increase its capacity, performance, and appeal relative to the nonstate system.	Facilitating legislative reform, establishing physical infrastructure used by the justice sector, supporting symbolic representation, capacity building, and promoting public engagement.
Repression	Judicial state-builders seek to fundamentally undermine and ideally eliminate the state's nonstate rivals.	Outlawing nonstate justice forums or seeking to arrest or kill nonstate justice actors.

Instead, state actors simply sought to impose their will on tribal and religious authorities. This failure to engage meaningfully with tribal and religious authorities helps explain judicial state-building's lack of progress in Afghanistan and the corresponding slide from competitive legal pluralism into combative legal pluralism against an increasingly potent Taliban insurgency.

Despite their tremendous influence, international actors in Afghanistan achieved little in terms of advancing the rule of law or constructively engaging with nonstate actors (Swenson 2017). International backing secured the top state post for Karzai and encouraged the immense concentration of power in the executive. Throughout Karzai's tenure, international actors retained enough sway to encourage or discourage state actions. That influence was never used effectively, however, as the Karzai regime was ultimately deemed too strategically important to fail. At the same time, the international community never recognized the legal pluralism archetype in place and, therefore, did not strategize accordingly. Massive, largely uncoordinated international subsidization efforts were continued, even when it was apparent that such programs were not improving the situation. This left the Taliban as the only major group with a credible strategy for engaging nonstate justice actors.

The case studies highlight that judicial state-builders, whether domestic or international, need an informed strategy backed by institutions, regulations, and policies that recognize nonstate legal authorities' importance. A successful, sustainable strategy must be rooted in a deep understanding of how a country's culture, politics, and history can help underpin a legitimate legal order. Strategies, detailed in Table 2, must also recognize that advancing the rule of law depends primarily on

domestic actors, and longer-term time horizons are essential, as developing the rule of law takes decades not years. While Timor-Leste has achieved admirable progress, it has yet to consolidate either democracy or the rule of law. At the same time, Afghanistan by all accounts faces a challenging future, but the fluidity of legal pluralism and Afghanistan's own history suggest that combative legal pluralism is not inevitable. In both instances, the international community can still offer incentives (or disincentives) to influence the behavior of both state and nonstate justice actors.

Conclusion

Understanding legal pluralism is important for any legal or policy intervention, including but by no means limited to state building. Without understanding legal pluralism's dynamics in a given context, interventions are likely to be ineffective. Even initiatives that enjoy short-term success are unlikely to be sustainable, as they reflect good fortune rather than an informed approach. Sound strategy requires understanding how state and nonstate actors interact systematically. This article helps build that knowledge by presenting the four main types of relationships between state and nonstate actors through a typological framework that illuminates the dynamics of legal pluralism across contexts. By understanding the archetype in which a policy is operating, an appropriate strategy or package of strategies for engaging with nonstate actors can be selected. By identifying the main strategies available to policymakers, the article illustrates how each approach works within each archetype and which strategies might be appropriate to deploy depending on the context.

Against a backdrop of competitive legal pluralism, state-builders in both Timor-Leste and Afghanistan had the chance to promote a democratic state bound by the rule of law or spark a return to conflict. Collectively, the success of Timor-Leste and the failure of Afghanistan demonstrate two key propositions. First, they illuminate the importance of strategy selection by showing how policy choices can influence outcomes. Second, they show how strategy selection, while vital for long-term success, is largely irrelevant if the policy intervention in question is not culturally intelligible and ultimately persuasive. Thus, the structure and implications of legal pluralism must be considered when creating and implementing policy.

Legal pluralism in Timor-Leste and Afghanistan ultimately offers both reasons for hope and trepidation. Legal pluralism can help form a vital foundation of state legitimacy. As the relationship between state and nonstate sectors is inherently fluid, the institutions and initiatives present can help or hinder the development of more constructive relationships between state and nonstate actors. Competitive legally pluralist relationships can be positively developed into cooperative ones. Relationships between state and nonstate justice authorities can also quickly sour as competitive relationships deteriorate into combative ones. Relationships are not static. Even situations of combative legal pluralism that seem dire are not preordained to remain that way in perpetuity. Insights from Afghanistan and Timor-Leste into judicial state-building within a competitive legal pluralist archetype offer lessons for future endeavors. However, as legal pluralism has major implications for institutional design and policy initiatives in areas such as governance and development, the theory presented here has broader applications. Future research into state and nonstate relationships in other settings, postconflict and otherwise, would be a valuable next step in enabling better policy decisions through enhanced knowledge.

Acknowledgements

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