Addressing Crises of Order: Judicial State-building in the Wake of Conflict

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ABSTRACT

Promoting the rule of law is vital for the success of domestic and international post-conflict state-building efforts. Yet in post-conflict settings, non-state justice systems handle most disputes, retaining substantial autonomy and authority. Legal pluralism's importance, however, is rarely recognized and dramatically under-theorized. This thesis demonstrates that multiple justice systems can co-exist and contribute to the development of a democratic state bound by the rule of law. Domestic and international efforts, however, must be cognizant of the overarching legal pluralism paradigm that exists when trying to build the rule of law and tailor their strategies accordingly.

By drawing on two divergent case studies, Timor-Leste and Afghanistan, this dissertation examines the conditions under which the rule of law can be advanced in post-conflict settings featuring a high degree of legal pluralism and substantial international involvement. Four distinct legal pluralism paradigms are proposed – combative, competitive, cooperative, and benign – in order to understand how legal pluralism functions in practice.

Timor-Leste successfully advanced the rule of law because the major parties remained committed to democracy and developed institutions promoting accountability, inclusivity, and legality. The state meaningfully collaborated with key non-state actors. While the process was imperfect, Timorese state-officials effectively mediated between the international community and local-level figures. This contributed to the effective transformation of a competitive legal pluralist environment into a cooperative one. The international community largely reinforced these positive trends.

Conversely, Afghanistan's post-2001 regime squandered the opportunity to build a democratic state bound by the rule of law. Simultaneously, it failed to mediate between the international community and the tribal and religious authorities essential for legitimate rule. Despite international actor's substantial influence, external aid did little good and was often counter-productive. These divergent approaches helps explain judicial state-building's failure and the corresponding slide from competitive into combative legal pluralism against the Taliban.

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ACRONYMS

AATL	Assosiasaun Advogados Timor-Leste
ACC	Anti-Corruption Commission
ADR	Alternative Dispute Resolution
AROLP	Afghanistan Rule of Law Project
ATJ	Access to Justice
CAVR	Commission for Reception, Truth and Reconciliation
CLRWG	Criminal Law Review Working Group
CNRT	National Congress for Timorese Reconstruction
CNRT	National Council of Timorese Resistance
DFID	Department for International Development
DOD	Department of Defense
Fretilin	Revolutionary Front for an Independent East Timor
ICPC	Interim Criminal Procedure Code
IDLO	International Development Law Organization
INL	Bureau of International Narcotics and Law Enforcement Affairs
JHRA	Justice and Human Rights in Afghanistan
ISAF	International Security Assistance Force
JSMP	Justice Sector Monitoring Programme
JSP	Strengthening the Justice System Program
JSSP	Justice Sector Support Program
LTC	Legal Training Centre
MOJ	Ministry of Justice
MSD	Management Sciences for Development
NATO	North Atlantic Treaty Organization
NCC	National Consultation Council
NCRR	National Council of Revolutionary Resistance
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
PAE	Pacific Architects and Engineers
PDHJ	Provedor for Human Rights and Justice
RDTL	Democratic Republic of Timor-Leste
ROLFF-A	Rule of Law Field Force-Afghanistan
RSL-Formal	Rule of Law Stabilization Program- Formal Component
RSL-Informal	Rule of Law Stabilization Program- Informal Component
SCIT	Serious Crimes Investigation Team
SCIU	Special Crimes Investigation Unit
SIGAR	Special Inspector General for Afghanistan Reconstruction
SJSA	Strengthening the Justice System of Afghanistan
SNTV	Single Non-Transferable Vote
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMET	United Nations Mission in East Timor
UNDP	United Nations Development Program

UNGA	United Nations General Assembly
UNMIT	United Nations Integrated Mission in Timor-Leste
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Authority in East Timor
UNTL	National University of Timor-Leste
US	United States
USAID	United States Agency for International Development
USD	United States Dollars
USIP	United States Institute for Peace

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CHAPTER 1
Introduction

INTRODUCTION

Post-conflict state-building now ranks as a major domestic and international endeavour with profound transnational security implications (Fearon and Laitin 2004). State-building with external support denotes 'international involvement…directed at constructing or reconstructing institutions of governance capable of providing citizens with physical and economic security' (Chesterman 2004: 5). In the wake of conflict, 'the transformation of coercion into security through the rule of law…[is] essential to building legitimacy as a part of the state building process' (Rubin 2008: 30). The rule of law exerts an almost magnetic appeal to post-conflict state-builders as the 'conflict may have devastated institutions, destroyed infrastructure, and led skilled professionals to flee the country' as well as produced 'citizens deeply distrustful of legal institutions' (Stromseth, Wippman et al. 2006: 187).

The legal system forms a foundation of the state's power and its ability to enforce a monopoly on the exercise of legitimate violence (Weber 1978). The legal system is thus vital to a high capacity state's ability to project state-sanctioned law over its territory and to secure power both domestically and internationally. In his influential assessment of state-building endeavours, Roland Paris stresses the establishment of the rule of law and institutions that support it as fundamental to the overall success or failure of state-building efforts.[1] He argues that 'particular attention needs to be paid to the justice and

[1] The meaning of the 'rule of law' and international efforts to promote it will be discussed in greater

security sectors' because they are essential to the core goals of state-building efforts centred around sustainable liberal democracy and capitalist economies (Paris 2004: 205-206).[2]

There is widespread consensus that establishing the rule of law is crucial for state-building. Little attention, however, has been paid to the unique challenges presented by legal pluralism where 'two or more legal systems coexist in the same social field' (Merry 1988: 870).[3] In other words, citizens do not necessarily have to rely on the state justice system. Non-state alternatives exist rooted in religion, custom, tribal authority or other normative structures. Nearly all post-conflict states feature extensive legal pluralism because of the weak institutions and contested authority endemic to conflict and post-conflict states.[4] Fostering the rule of law always faces serious obstacles, but

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detail in Chapter 2.

[2] 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, Fortna 2008, Paris 2010). Past state-building efforts have often left much to be desired and the endeavour involves a number of intrinsic contradictions and tensions (Jarstad and Sisk 2008, Paris and Sisk 2009, Grimm and Leininger 2012). Some scholars go even further and argue that the international state-building enterprise itself is inherently illegitimate (Bain 2006: 537-538, 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, I agree with Paris that '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 'abandon[] tens of millions of people to lawlessness, predation, and fear' (Paris 2009: 108). Regardless of how one ultimately conceptualises 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 endeavour.

[3] What exactly constitutes law and legal pluralism is inevitably ambiguous (Griffiths 1986, Tamanaha 1993, Woodman 1998), but the idea of 'folk law' is quite helpful. Tamanaha argues 'law is a "folk concept,"' that is, law is what people within social groups believe is law in a given set of circumstances (Tamanaha 2008: 396). Thus, law outside of the state can take a variety of forms including international law, customary law, religious law, natural law, the *lex mercatoria*, and commercial arbitration (Id.). My research, however, focuses on non-state justice systems that adjudicate criminal and civil matters generally handled by state courts in higher capacity states. This non-essentialist definition of law is sufficiently expansive, but it avoids the pitfalls of maximalist approaches whereby basically all forms of social control are defined as law.

[4] The rare exceptions tend to be cases of state versus state conflict, such as Germany and Japan, after

settings where the non-state justice sector retains the autonomy and authority to meaningfully challenge the state are particularly daunting.[5] My thesis asks: What are the challenges to the promotion of rule of law in legally pluralistic post-conflict settings? What accounts for the success and failure of international and domestic state-builders to meet those challenges?

Scholars have long recognised the importance of legal pluralism and its presence in even the most developed states (Woodman 1998, Tamanaha 2008). Only certain states, however, feature a non-state justice sector that presents a meaningful challenge to the dominance of the state justice system. In the developing world, an estimated eighty to ninety per cent of disputes are handled outside the state justice system (Albrecht, Kyed et al. 2010: 1). In many developing and most post-conflict countries, non-state justice systems, which 'operate outside the framework of the state or in the fringes between state and society,' often function as the primary dispute resolution mechanisms, even as the state seeks to develop and assert the dominance of the state legal system (Faundez 2011: 19). In other words, the ultimate predominance of who controls the legal order is unresolved between the state and non-state justice systems.

In developed countries, the state legal system's legitimacy and ability to resolve legal

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World War II, which have been thoroughly defeated but also have a strong pre-existing legacy of a legitimate, strong, and high capacity state (Fukuyama 2014: 80).

[5] State-builders do not necessarily promote better policy or judicial outcomes simply by attempting to strengthen the state legal system (Carothers 2003, 2006b). At a structural level, however, only by the state system reaching a workable arrangement with its non-state counterparts can the core facets of the rule of law be achieved across the country as it requires a significant level of consistency and uniformity (Tamanaha 2007: 3). The triumph of the state system 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 high capacity modern state.

claims are largely assumed. But in post-conflicts states, alternative justice systems, based on custom, tradition, religion, and a plethora of other sources, are commonplace. They generally possess a meaningful degree of independence from the state and often feature higher levels of effective authority and popular legitimacy. The relationship between state and non-state judicial systems has profound implications for post-conflict societies. Legal pluralism enables participants to select dispute resolution forums based on accessibility, efficiency, legitimacy, jurisdiction, and cost, as well as the state and non-state systems' respective abilities to make binding decisions and sanction individuals that choose other systems. This process leads to a sustained struggle between state and non-state justice actors for legitimacy, resources, and authority.

The judicial state-building process can be more accurately understood through the use of legal pluralism paradigms. I propose that there are four main paradigms: 1.) Competitive, 2.) Cooperative, 3.) Combative, and 4.) Benign. The first three refer to situations where the state system is not clearly predominant or able to assert firm control over the work of non-state justice actors. I argue that the relationship between the non-state justice sector and judicial state-building actors in post-conflict environments has important consequences for the success or failure of judicial state-building endeavours. Likewise, the strategies, policies, and programmes implemented in relation to the state and non-state justice sectors have a significant impact on judicial state-building outcomes.[6]

[6] Despite the importance of strategies, policies and programmes related to state and non-state justice actors, the relationship is not strictly linear. Broader social, economic, and political factors also have important implications and interaction effects on judicial state-building efforts.

Vibrant legal pluralism has major implications for how post-conflict judicial state-building enterprises should be conceptualised and pursued. High levels of legal pluralism and the dynamics between state and non-state systems directly influence the results of international and domestic efforts to promote the rule of law after conflict. A high level of legal pluralism alone, however, does not fully account for outcomes or explain why cases turn out differently. It is crucial to investigate the key factors and policy decisions that aid or hinder the building of the rule of law in legally pluralist societies. It matters dramatically whether state officials can 'gain[] the right and ability to make… rules' and whether non-state actors can effectively resist the state (Migdal 1988: 30-31). One of the most effective ways to achieve this is through inclusive institutions and a compelling vision for the state (Acemoglu and Robinson 2012).

Judicial state-building strategies and programmatic initiatives still matter and are often important in determining success or failure. This includes the political and legal institutions of the state as well as the broader cultural commitment to the rule of law. The choice of strategies and initiatives can also substantially impact the non-state justice sector's willingness to engage meaningfully with the state. My research will examine how judicial state-building strategies could be tailored to better promote the rule of law in legally pluralistic societies after conflict. My argument draws on two case studies of major recent judicial state-building efforts in contexts of competitive legal pluralism with decidedly different results, Timor-Leste and Afghanistan. These cases can be used to begin to isolate factors that contribute to the success and failure of establishing the rule of law in post-conflict settings with extensive legal pluralism.

Through a mixture of 'theory development' (Timor-Leste) and 'theory testing' (Afghanistan) (George and Bennett 2005: 114-120), my thesis seeks to explain, at least in part, what accounts for the success or failure of judicial state-building efforts where non-state judicial actor retain substantial authority and autonomy.

Timor-Leste has emerged as an unlikely success story. The UN's direct governance and later support of Timorese self-governance was widely criticised (Chopra 2000) and violence broke out shortly after the UN's departure in the 2006 Crisis. The Crisis saw widespread rioting and violence, the collapse of the Prime Minister Alkatiri's government and a return of UN forces to restore order. Now the UN cites Timor-Leste as a model of successful state-building, stating 'Today, Timor-Leste [is]…a place of peace, democracy, celebration and optimism, a place where new infrastructure, public investment and services are growing' (United Nations Integrated Mission in Timor-Leste 2012). Timor features prominently in the UN's discussions regarding post-conflict state-building, most notably in relation to Libya. While the process has been slower than initially hoped, Timor has made significant progress towards developing a modern state justice system. Tensions remain, but since independence the Timorese state has established a fundamentally cooperative, rather than competitive, relationship with the non-state justice sector. In cooperative legal pluralism state and non-state actors work together towards common goals, most often related to development and a workable jurisdictional divide.

In contrast, state-building efforts in Afghanistan started optimistically. The Taliban

government wilted away with minimal resistance. The new, multi-ethnic state under President Hamid Karzai had the opportunity to prove itself a legitimate governing entity (Barfield 2010: 300-301, 318). That opportunity was squandered. The Afghan state now faces a powerful insurgency that promises the law and order the state has failed to provide. Domestic and international state-building efforts in Afghanistan have failed (Barnett and Zürcher 2009, Greentree 2013). There has been no progress towards the rule of law and there have been few significant gains in the reach, effectiveness, and legitimacy of the state justice system (Singh 2015). Across much of the country, the non-state justice sector remains largely antagonistic to the state justice sector and the judicial state-building endeavour. These two cases showcase divergent institutions, strategies and policy decisions and thus offers crucial insights into understanding post-conflict state-building.

This chapter examines important research and methodological issues related to the study of how different manifestations of legal pluralism, along with domestic and international policymakers' responses to them, affect judicial state-building endeavours. It begins by specifying the key research question before discussing how my approach differs from standard academic treatments as well as clarifying a number of key concepts. Next, it explains the use of case studies, the collection of sources and data, and my analytic approach. Finally, it identifies what falls outside the purview of my research and concludes with an outline of the overall structure of the thesis.

1 KEY RESEARCH QUESTION

Establishing the rule of law is widely seen as foundational for the success of the state-building endeavour by scholars (Paris 2004: 206) and policymakers ranging from former United States President George W. Bush (Bush 2002: 9) to United Nations (UN) Secretary General Kofi Annan (Annan 2004: 3). In post-conflict states, however, the justice system entails far more than state law. Non-state justice is essential for maintaining order and resolves the vast majority of disputes in many developing countries (Albrecht, Kyed et al. 2010). For most people in these states, non-state justice is the only forum for justice. Thus, my research seeks to answer the questions: What are the challenges to the promotion of rule of law in legally pluralistic post-conflict settings? What accounts for the success and failure of international and domestic state-builders to meet those challenges?

While the answer is no doubt complex and to some extent context specific, I argue that first and foremost the state has to display a normative commitment to the rule of law. This means political and judicial leaders must take the law seriously, but also support the development of institutions that promote accountability, including free and credible elections and the creation of viable political parties.[7] Second, absent a successful effort to repress non-state justice, the state must be willing to meaningfully engage at least some non-state actors. Invariably this involves a degree of compromise on the state's behalf. Non-state justice actors vary from country to country but they are often rooted in religion, custom, geographic difference, or tribal affiliation. In extreme cases, that

[7] I follow North's seminal definition of institutions as 'the rules of the game in a society,' which include not only state sanctioned laws and rules but all 'humanly devised constraints that shape human interaction' whether state or non-state in origin (North 1990: 3).

authority can be based on force, such as warlords in Afghanistan.

Non-state actors tend to derive their authority in large part from sources beyond the state (Migdal 1988). The state therefore plays a crucial mediating role among non-state actors and the international community due to its more direct, influential relationship with non-state actors. East Timorese officials were imperfect but largely effective in mediating between the international community and local-level figures. This relationship contributed to the transformation of an environment marked by competitive legal pluralism into one of cooperative legal pluralism. In contrast, the Karzai-led state in Afghanistan never displayed a normative commitment to the rule of law and actively sought to undermine it. Likewise, the state never seriously sought to engage with non-state justice actors. Warlords formed a notable exception but, they also lacked interest in promoting the rule of law and instead constructed a regime based on predation and rent extraction. Thus, the Afghan state failed at mediating between the international community and local actors, which helps explain the alternate outcome.

The international community is far from powerless however, as they retain the ability to offer incentives (or disincentives) for both state actions and institutions as well encouraging non-state justice actors to collaborate. At the same time, non-state judicial actors must themselves be willing to productively engage with state and international judicial state-building efforts. All three actors are essential (though not sufficient) for success. Non-state actors may be more or less willing to engage with the state and international actors. Yet the willingness of non-state legal authorities to engage is

particularly vital for determining the effect of judicial state-building endeavours when they are strong enough to successfully resist state or internationally led initiatives as is generally the case in post-conflict and conflict prone settings. Thus, non-state judicial actors are frequently 'state-building spoilers' (Menkhaus 2007: 76). As Migdal explains, 'The major struggles in many societies, especially those with fairly new states, are over who has the right and ability to make the countless rules that guide people's social behaviour' (Migdal 1988: 31). State institutions and policy decisions still matter immensely. At the same time, whether non-state justice sector actors choose to constructively engage with the international judicial state-building endeavour has a very significant, and understudied, impact on international judicial state-building outcomes.

1.1 Conceptualising the Rule of Law and State versus Non-State Justice

While these key concepts will be discussed extensively in Chapter 2, it is important to clarify what is meant by the rule of law, non-state justice, and the state justice system at the outset. Given the immense challenges they face, it is most appropriate to assess post-conflict states under the criteria of a 'thin' rather than 'thick' conceptualisation of the rule of law. At minimum, a 'thin' concept, 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 according to its terms' (Tamanaha 2007: 3).[8] Establishing a minimalist understanding of the rule of law after conflict is a daunting, time-consuming task. It demands far more than passing laws and having courts

[8] Thicker conceptualisations of the rule of law also feature extensive institutional, economic, cultural, and political requirements.

adjudicate based on them; instead, it requires 'courts, judges, a bar, and enforcement mechanisms across the entire country' (Fukuyama 2004: 59). Laws and legal institutions alone are insufficient, as 'even the most formal, minimalist conception of the rule of law requires a normative commitment to the project of the rule of law itself' (Stromseth, Wippman et al. 2006: 76).

The state justice system is used here to mean the primary organizational mechanisms for implementation of state law and the adjudication of disputes in accordance with state law. It is centred around the court systems, most notably judges, prosecutors, defence and other attorneys as well as the state organs set up to directly engage with the judiciary such as a Ministry of Justice or Prosecutor General Office. This definition is broad but not unlimited as it excludes actors with important roles in the system, such as legislatures that draft the law or correction systems that oversee individuals convicted of violating it.

In conflict and post-conflict settings where state institutions are often weak, predatory, or a combination thereof, the rules and regulations that matter most may not stem from the state, but rather from custom, tradition, religion, family lineage, powers not sanctioned by law (such as the criminal enterprises or powerful commercial interests), and a host of other sources. Rule violations may lead to severe sanctions and even death. These rules may have equal or even greater force than state law, and state authorities may sometimes acquiesce in their use. Non-state justice simply refers to those legal systems that credibly structure behaviour that exists with a significant

degree of autonomy from state law. The use of non-state reflects a conscious decision to avoid terms such as 'informal,' 'traditional,' or 'customary,' which all reflect empirical and often normative claims, unless they are demonstrably accurate for a given non-state legal system.

1.2 Paradigms for Understanding the Relationship between the State and Non-State Justice Systems

As will be discussed in greater depth in Chapter 3, my thesis proposes a set of paradigms to help conceptualise the core features of the relationship between state and non-state judicial actors and judicial state-building efforts in legally pluralist settings. I posit there are four main paradigms. In particular, there are three primary paradigms most relevant to post-conflict settings: combative, competitive, and cooperative legal pluralism, while benign legal pluralism is more likely found in places where peace has been consolidated. In situations defined by combative legal pluralism, the state and non-state justice systems are overtly hostile. Unsurprisingly, combative legal pluralism is commonly found in countries facing an active insurgency or separatist movement. In many instances, non-state justice forms a cornerstone of those attempts to challenge the state's authority (Kalyvas 2006: 218-219, Mampilly 2011).

Competitive legal pluralism is the default setting in most post-conflict environments. Competitive legal pluralism features significant, often deep, tensions between state and non-state legal systems, but these tensions rarely endanger the state's overarching formal legal supremacy. Competitive legal systems most frequently take the form of

legal order rooted in religious beliefs or shared culture, custom, or heritage that do not necessarily reflects the state's values (Migdal 1988). In a cooperative legal pluralist environment the non-state judicial authorities retain autonomy and authority, but are usually open to working together towards shared goals. Major clashes between state and non-state actors are far less frequent and tend to reflect social issues, such as women's rights, rather than existential issues of state judicial power. Cooperative legal pluralism flourishes in places where progress is being made towards consolidating legitimate state authority. Benign legal pluralism thrives when state authority does not face a meaningful challenge from non-state actors throughout its territory, which is rarely found in post-conflict states.

The overarching legal pluralism paradigm has major implications for how post-conflict judicial state-building enterprises should be conceptualised and pursued as it can significantly constrain or bolster domestic and international initiatives. As the case studies demonstrate, however, the paradigms are not set in stone or determinative. Timor-Leste has moved from competitive to cooperative legal pluralism. Afghanistan has deteriorated from competitive to combative legal pluralism. Effective engagement with the non-state justice sector requires thinking critically about how to deal with current realities, while simultaneously seeking to transform the environment to one more favourable to judicial state-building.

1.3 The Relationship between Democracy and the Rule of Law

The rule of law is not apolitical or technocratic in origin. The legal order is inexorably

linked with a state's political institutions (Weingast 1997, Acemoglu and Robinson 2012). The establishment of the rule of law is deeply linked with democratic government. Still, the concepts are distant. In theory, the 'rule of law may exist without democratic forms of political will formation,' but on 'empirical grounds' the rule of law has been inexorably linked with democratic government (Habermas 1995: 12).[9] Democratic rule does not inevitably produce the rule of law (Zakaria 1997). Democracy, however, is a functional prerequisite. As O'Donnell illuminates:

> the rule of law works intimately with other dimensions of the quality of democracy. Without a vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk. Only under a democratic rule of law will the various agencies of electoral, societal, and horizontal accountability function effectively, without obstruction and intimidation from powerful state actors (O'Donnell 2004: 32).

My research recognizes the vital importance of assessing the development of the rule of law not simply as a matter of the justice sector, but also by looking at the major political institutions that underpin the transition to the rule of law over time.[10] Of course, the courts and the broader state justice system play an essential role in constitutional democracy. Courts punish public crimes, resolve private disputes, and maintain order. They can also be a bulwark again excessive executive power, contribute to a culture where state officials are bound by law and legal norms, and safeguard individual rights. Thus, the state justice sector matters immensely. At the same time,

[9] Singapore is occasionally cited as an expectation that offers both non-fully democratic governance and the rule of law, a combination Rajah dubs "authoritarian rule of law' (Rajah 2012). This view, however, conflates state performance with the rule of law. While the legal order is largely predictable, opposition is effectively sidelined and 'there is neither a free press nor an autonomous civil society, and divergence of political views is not readily tolerated' (Mutalib 2000: 316). The law does not apply equally to everyone. There is a legitimate legal order, which protects economic rights and delivers high quality governance, but it is fundamentally designed to ensure the perpetuation of the existing political regime of 'authoritarian dominance' (Slater 2012: 23).

[10] These other institutions will be discussed in the case study chapters and through the structured comparison of the cases in Chapter 8 though due to space constraints my research focuses primarily on domestic and international involvement with the state and non-state justice sector.

the structure of the executive, political party system, the election system, and the broader political and legal culture are also essential.[11] For instance, excessive executive authority can overwhelm even an independent judiciary with relative ease. Elections can help build rule of law culture both through normalizing the peaceful transfer of power and facilitating broader political participation. Competitive elections can even have major implications for the non-state justice.

Non-state justice serves as a cross cutting factor across all these areas as a major forum for dispute resolution and a potential judicial state-building spoiler. However, the influence cuts both ways as the state's institutions, level of legitimacy, and stance towards non-state justice influences not only the operations of non-state justice but the stance of non-state justice actors towards the state. These can be straightforward such as whether the state is open to a collaborative relationship with non-state actors. It can also take surprising forms. For instance, the Timor-Leste case study suggests that one of the state's most effective tools for engagement is helping to broker free, fair, and competitive democratic elections for local justice actors. Key local elections for non-state actors proved vital for establishing a cooperative rather than competitive relationship because it established clear incentives to work with the state.

1.4 Legitimacy and the Rule of Law

The existence of the rule of law presupposes a legitimate state legal order. History

[11] The importance of these factors have been widely noted: on executive authority, see Stepan and Skach (1993, Linz (1994, Tsebelis (2002); for electoral systems, Sartori (1997), Reynolds (2002), and Norris (2004); regarding political parties Lipset (2000, Diamond and Gunther (2001), and Carothers (2006a); and a rule of law culture, Harrison and Huntington (2000), Stromseth, Wippman et al. (2006), Licht, Goldschmidt et al. (2007), and Tamanaha (2011a).

suggests that the rule of law takes roughly fifty years to develop under even the most favourable circumstances (North, Wallis et al. 2009: 27). A legitimate legal order then is necessary but not sufficient for establishing a state bound by the rule of law. Legitimisation comes in a wide variety of forms (Beetham 2013). People view the political and legal order as legitimate and authoritative for a wide variety of reasons, such as military success or religion, even if the state's democratic credentials are questionable or non-existent (Mann 2012). Thus, the question is not whether the rule of law has been established in the years following conflict, but whether 1.) There is a legitimate legal order and 2.) While remaining fully cognizant that the process of establishing a state bound the rule of law is not necessarily linear, my thesis examines whether judicial state-building has facilitated progress towards the rule of law. This should not be confused with claims regarding whether the rule of law exists. Even the successful case study, Timor-Leste still falls short of even a minimalist rule of law ideal, but it has constructed a legitimate political and legal order and is making progress towards the rule of law.

1.5 Commonly Cited Explanations Fail to Explain the Divergent Outcomes

Many frequently cited explanatory factors cannot sufficiently explain the contrary outcomes of judicial state-building activities in Afghanistan and Timor-Leste. These factors include the level of international investment, the states' divergent histories and cultures, their propensity for conflict, and differing levels of state capacity. Yet upon closer examination these factors do not offer compelling explanations for the divergent outcomes. First, the level of external support alone cannot explain the different results.

While the exact figures are hard to ascertain, there is recognition that the monetary costs involved in both interventions have been enormous (Butler 2012, Greentree 2013). It is not simply that one state had significantly more assistance than the other and therefore success. While insufficient assistance may preclude success, more external assistance alone certainly does not guarantee it (Barnett and Zürcher 2009).[12]

Second, the results in Afghanistan and Timor-Leste were by no means preordained by history or culture or an inclination towards conflict. While it is now regarded as a success, state-building efforts in Timor faced fierce, sustained criticism from the outset (Chopra 2002, Richmond and Franks 2008). The transition to local governance 'was punctuated by initially sporadic, and then intense, episodes of violence' (Gledhill 2012: 48).[13] At the time, the events surrounding the 2006 Crisis cast further serious doubt on the international state-building endeavour (Richmond and Franks 2008: 48, Scambary 2009) and many even proclaimed Timor-Leste a "failed state" (Cotton 2007). There is often a fatalism present in discussions about Afghanistan, but as long-time scholars of Afghanistan Ahmed Rashid and Thomas Barfield have persuasively argued, a meaningful opportunity did exist for state-building efforts to be successful following the fall of the Taliban regime (Rashid 2008, Barfield 2010: 300-310). Moreover, for all its many faults, the Taliban's regime and the pre-war monarchy demonstrated that it was possible to establish a legitimate legal order over Afghanistan.

[12] Foreign assistance itself can be problematic as it may produce the problem of 'aid rentierism' where the state becomes overly dependant on foreign assistance. Verkoren and Kamphuis argue aid rentierism has decidedly negative implications on the prospects for democracy and stability (Verkoren and Kamphuis 2013).

[13] While the extent to which efforts in Timor-Leste were successful or unsuccessful remains the subject of debate, Tansey offers compelling rebuttal of many of the most fundamental criticisms of state-building in Timor-Leste (Tansey 2013).

Finally, differences in existing governance structures alone do not explain the outcomes. Afghanistan had experienced repeated interludes with a significantly higher capacity state prior to the Soviet invasion (Rubin 2002, Barfield 2010). After 1975, Timor had a relatively strong governance structure under Indonesian rule, but the state was seen as illegitimate and a colonial imposition rather than an organic governance structure (Robinson 2009: 21-91). Furthermore, existing state infrastructure was largely destroyed in the violence surrounding the 1999 independence referendum (Downer 2000: 8-9). Therefore, both states were extremely limited in their capacity at the outset of international state-building efforts.

2 CONVENTIONAL APPROACHES TO THE STUDY OF POST-CONFLICT JUDICIAL STATE-BUILDING AND LEGAL PLURALISM

This section puts forward two main contentions. Existing scholarly explanations are a) inadequate for understanding the legal, political, and cultural backdrops against which judicial state-building occurs, and for understanding how the policies and strategies used by domestic and international actors influence outcomes.[14] An alternative understanding attuned to legal pluralism's structure and importance would provide more robust analysis, but b) even when scholars draw on the idea of legal pluralism and judicial state-building, the analysis is incomplete.[15] My thesis addresses these weaknesses in the literature.

[14] Though there is often ambiguity as to which programmes constitute legal state-building initiatives, my focus is primarily on rule of law initiatives as defined by the projects themselves.

[15] Outside of the 'grey literature,' judicial state-building remains understudied; however, relevant literatures exist that inform the *practice* of judicial state-building in states with a high degree of legal pluralism.

The non-state system is usually seen as either an obstacle to progress that must be addressed (Farran 2006) or alternatively something that is effective, efficient, and reflects true community preferences (Harper 2011a). For instance, a major UNDP-led report "Informal Justice Systems" defines non-state justice systems as involving 'a neutral third party not part of the judiciary' while also noting that 'custom-based systems appear to have the advantages of sustainability and legitimacy' (UNDP, UN Women et al. 2012: 8). Non-state justice is often idealised as a legitimate, advantageous, and cost effective alternative order where 'law is only law to the extent that the people who follow it, voluntarily or otherwise, consider it to have the status of law' (Harper 2011a: 17). In both instances, the binary between the state and non-state justice sector in which one system is cast as either wonderful or terrible is radically oversimplified. Moreover, while it makes sense to talk about state and non-state justice systems, they are far from hermetically sealed.

Judicial state-building strategies need to take into account whether the legal pluralism environment is combative, competitive, or cooperative when determining how and to what extent to engage with the justice sector as a whole. This is in contrast to the dominant approach, which sees a generally static or at least largely independent relationship between the two systems. In other words, there is often a focus on making improvements to the state system or attempting to circumvent it without recognition of the complex interdependence of the state and non-state systems.

2.1 Current Understanding of Legal Pluralism's Implications for State-Building Remain Insufficient

Existing work is largely historical or theoretical. The recognition of competition between the state and non-state justice systems dates back to the seminal work of legal historians Pollock and Maitland (1923). They note the inevitable tension between the existence of multiple legal systems and the state's desire to expand its judicial power, at the expense of customary systems in England. Despite a very high degree of legal pluralism, they demonstrate how 'the custom of the king's court' became 'the custom of England' as over time 'the central power… quietly subsumed all things into itself' (Pollock and Maitland 1923: 184-186). Drawing on their work, Fukuyama has recently argued that competition between legal systems has driven the formation of the modern state in the past (Fukuyama 2011: 245-275). Likewise, legal scholars have noted that when legal pluralism is prevalent 'these coexisting sources of legal authority, these coexisting sources of normative ordering are poised to clash particularly when their underlying norms and processes are inconsistent' (Tamanaha 2008: 400).

In the context of Afghanistan, Barfield has argued that competition between legal systems has long been a major source of conflict as 'for over a century, successive national governments in Kabul have sought to impose centralized code-based judicial institutions upon local communities that have historically had their own informal institutions for regulating behaviour and resolving problems' (Barfield 2008: 349). While Barfield's work provides useful insights into the function of, and competition

between, differing legal systems, it does not examine the international judicial state-building initiatives that have been undertaken and how they can or have influenced the competition between legal systems. Moreover, while he acknowledges the role of competition, Barfield's work fails to sufficiently account for different types of relationships between state and non-state justice and the fluidity between different legal pluralism paradigms.

Scholars rarely examine the impact of legal pluralism on contemporary judicial state-building endeavours. Fukuyama's work, for example, does not discuss how international state-building influences the competition between legal systems (Fukuyama 2004). While scholars rightly note that international state-building efforts occur in the context of 'hybrid institutions' and can significantly influence the behaviour and incentives of local elites and other stakeholders (Mac Ginty 2008, De Waal 2010), and that legal pluralism is inherently dynamic and responsive (von Benda-Beckmann and von Benda-Beckmann 2006), there has been little discussion of how domestic and international state-building efforts influence the overarching relationship between the state and non-state justice systems. Instead, the emphasis remains on the relationship of legal pluralism to development initiatives more generally, which often entail state-building aspects but are not solely focused on state-building (Tamanaha, Sage et al. 2012) or on attempting to understand the prevalence of legal pluralism (Glenn 2011).

2.2 Transitional Justice and Judicial State-Building

Transitional justice entails 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses' (Annan 2004: 3). As it frequently becomes a pressing concern after the cessation of conflict or during regime change, transitional justice has spawned a vast literature (For example, see Orentlicher 1991, Teitel 2000, Hayner 2010, Rotberg and Thompson 2010). While its implications remain the subject of vigorous debate, in certain contexts transitional justice can have important positive or negative implications for efforts to support the rule of law and the broader state-building endeavour (Mendeloff 2004, Leebaw 2008, Tricia, Leigh et al. 2010, Reiter, Olsen et al. 2013). As Sriram notes, 'peacebuilding tools such as judicial reform, reform of the security forces and inclusion of former rebels and "vetted" former members of security forces are also often explicitly tied to processes of transitional justice' (Sriram 2007: 580-581). Non-state justice has also been recognised as a potential, though by no means unproblematic, mechanism for post-conflict transitional justice (Waldorf 2006, Clark 2010, Nagy 2013).

My research draws on the existing transitional justice literature as appropriate, particularly in relation to conceptualising state and non-state judicial actors and strategies for engaging non-state legal authorities. At the same time, my emphasis is decidedly different from the main concerns of transitional justice which is 'fundamentally backwards looking with forward looking goals' (Sriram and Herman 2009: 458). These 'extraordinary measures' surrounding regime change or post-conflict reconstruction are analytically distinct from efforts to strengthen the '"normal" criminal

justice systems through "rule of law" programmes designed to secure a fairer and more efficient delivery of justice' (McEvoy 2007: 422). While the boundary between normal and extraordinary justice is by no means absolute (Teitel 2003: 93), the distinction remains quite useful for classifying different type of post-conflict legal initiatives. Normal justice, most notably the construction of the state justice system in legally pluralist contexts, serves as the focal point of my research.

2.3 Other Relevant Literature

Despite the profound importance of legal pluralism for the actual administration of justice in post-conflict states, there is little systematic work examining its implications for international and domestic judicial state-building efforts, particularly scholarship following a process tracing approach. Nonetheless, there is a growing literature that examines related issues such as the history and expansion of legal pluralism and its role in development (Benton 1994, Grenfell 2006, Isser 2011, Tamanaha 2011b, Berman 2012). There is also a growing practitioner literature focused on how best to engage non-state justice systems to achieve ends other than judicial state-building (DFID 2004, Barfield, Nojumi et al. 2006, Wojkowska 2006, Harper 2011b, Ubink and McInerney 2011, UNDP, UN Women et al. 2012). My research remains distinct from existing work in its focus on the role of legal pluralism in the process of post-conflict judicial state-building, both domestically and internationally, and the use of process tracing.

3 CASE STUDY APPROACH

To understand legal pluralism's implications for post-conflict state-building and the influence of policymakers' responses, domestic and international judicial state-building efforts in Afghanistan and Timor-Leste will serve as case studies. The two case studies offer a mixture of 'theory development' (Timor-Leste) and 'theory testing' (Afghanistan) (George and Bennett 2005: 114-120) to generate insights into post-conflict judicial state-building in legally pluralist environments. In addition to showing how the political, legal and cultural structure of the state and relevant policies matter, the case studies will demonstrate that understanding the overarching paradigm of legal pluralism in a given environment is a useful analytical tool for understanding the context of judicial state-building and how domestic and international actors engage powerful non-state judicial actors. Thus, major non-state justice authorities have an important impact on the outcomes of judicial state-building initiatives. My research explains why, despite their substantial similarities, judicial state-building efforts have had such different results in Afghanistan and Timor-Leste. Both cases featured large scale, sustained foreign involvement including armed security forces, high levels of legal pluralism, low institutional capacity in the justice sector and the broader state, significant violence, and high potential for a return to violence. At the same time, both judicial state-building efforts had a reasonable prospect for success at the outset.

While the case study has been the subject of vigorous scholarly debate (for example, see Achen and Snidal 1989, Gerring 2007: 17-36), it falls within the methodological mainstream of international relations scholarship (Bennett and Elman 2007: 171). Case

studies are particularly useful for answering 'how' or 'why' questions regarding 'a contemporary set of events, over which the investigator has little or no control' such as outlined above (Yin 2009: 13). My research follows Gerring's definition of a case study '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' (Gerring 2004: 341). In my research, the units are the major post-conflict judicial state-building endeavours during the periods of major international involvement approached through a structured comparison.[16] My independent variables are how domestic and international state-builders sought to establish the rule of law through engagement with both the state and non-state sector. My dependent variable is the international judicial state-building outcomes.

These cases possess clear temporal and spatial boundaries. The temporal boundaries result from the extent of international involvement, particularly large stabilisation forces. In Afghanistan, the time period is from the 2001 Bonn Agreements that established a post-Taliban transitional administration through to the election of Karzai's successor in 2014 which was a milestone for the pull out of international forces.[17] For Timor-Leste, the time period is from the establishment of independent statehood on 20 May 2002 through to the pull out of UN forces in 2012 after the elections earlier that

[16] For my research, a case study approach offers compelling advantages over quantitative (large N) or purely historical approaches. First, a case study is uniquely able to capitalise on 'a full variety of evidence—documents, artefacts, interviews, and observations—beyond what might be available in conventional historical study' (Yin 2009: 11). In comparison to large N studies, case studies are better for rarer events that may nevertheless possess profound importance (Gerring 2007: 56). Post-conflict state-building initiatives against the backdrop of international intervention are relatively rare, but they tend to be in societies marked by combative or competitive legal pluralism. Moreover, they are high stakes enterprises involving staggering sums of money and effort (Call and Cousens 2008: 1-2).

[17] While most external troops had departed by the end of 2014, the removal of all international troops has been delayed until at least the end of 2016.

year.[18]

Timor-Leste and Afghanistan share broad similarities in the type of initiatives undertaken. As with other efforts, judicial state-building activities have focused on 1.) Reforming institutions; 2.) Rewriting laws; 3.) Upgrading the legal profession; and 4.) Increasing legal access and advocacy, though these international efforts have been more extensive than in other states given the level of devastation endured (Carothers 1999). They are broadly representative of their class.[19] These efforts were all led by the state but usually in collaboration with international actors.

Advancing the rule of law in highly legally pluralist settings hinges on the state's political and legal institutions and culture as well as the behaviour of non-state justice authorities. In particular, the structure of the executive, the state legal system, electoral systems, political parties, the political culture and the behaviour of the non-state justice are vital. The actions taken by the state and international community in these areas will be critically examined for Timor-Leste (Chapters 4 and 5) and Afghanistan (Chapters 6 and 7). These categories also underpin the structured comparison between the two case studies in the concluding chapter.

3.1 Causal Leverage and Case Selection

My research achieves substantial causal leverage in understanding the implications of

[18] An exit marks a meaningful decrease in the extent and nature of international involvement in state-building. Nevertheless, 'external parties may, and often will, continue to be engaged in state building long after an operation has formally ended' (Caplan 2012: 5).
[19] Moreover, it is not uncommon for international professionals to have worked in both places.

policy and programmatic responses to legal pluralism. First, though it only examines two states, the number of observations is substantial as it traces state-building efforts in Afghanistan and Timor-Leste over a number of years and from both a domestic and international perspective (Gerring 2004). Second, it provides useful evidence to support theoretical and policy claims. Policymakers themselves have recognised that these cases have broad significance and will inform future endeavours (Chesterman 2002, Chopra 2002). Finally, the use of process tracing to examine the 'links between possible causes and observed outcomes' adds further causal leverage, particularly with regards to determining key causal mechanisms and the most plausible findings (Bennett 2010: 6). A case study approach contributes to the scholarly understanding of the context in which judicial state-building occurs as well as offers insights into the process and outcomes of these endeavours. These insights are most applicable to cases of judicial state-building in which a new state is being created or re-founded in the context of competitive legal pluralism, but also to highly legally pluralistic environments more generally.

Process tracing is a well-established complementary technique to case studies though it certainly requires diligence and foresight in its design and implementation (Checkel 2006). Here it involves a close examination of clearly bounded domestic and international state-building initiatives in a legally pluralist environment. Process tracing demands extensive data. For my research, the availability of robust contemporary documentation and the ability to interview key actors makes process tracing feasible. It allows for additional methodological rigour, assists in both the generation of new

insights and in testing their plausibility as well as increasing the explanatory power of potential explanations, while helping to eliminate competing accounts (Tansey 2007: 771). Qualitative methods, including cases studies drawing on process tracing, 'can add inferential leverage that is often lacking in quantitative analysis' (Collier 2011: 823).

3.2 Evaluation Criteria

Assessing external state-building efforts is immensely difficult (Fukuyama 2004: 59) and consolidating the rule of law takes decades even under the best of circumstances.[20] Nevertheless, some international efforts to promote the rule of law have positive effects, while others do not (Stromseth, Wippman et al. 2006). An appropriate evaluation metric must recognise the complexity of promoting the rule of law after conflict and the extensive time required as well as international actors' potentially important but invariably secondary role. Therefore, my research follows the logic for evaluation articulated by Paris in his seminal work on post-conflict state-building, namely whether it has 'enhanced the prospects for stable and lasting peace' (Paris 2004: 55). As my research focuses on judicial state-building activities in highly legally pluralist states, my criteria will be whether international aid has *enhanced the prospects for developing and consolidating the rule of law*.[21] As discussed above, given the

[20] The World Bank estimates that it takes at least four decades to establish a state bound by the rule of law after conflict (World Bank 2011: 108-109). The best case scenario of North, Wallis, and Weingast is about 50 years but note 'the events leading up to these changes had taken centuries as the countries developed institutions, beliefs and organizations that could sustain a transition' (North, Wallis et al. 2009: 27).

[21] My criterion offers a significantly tougher test compared to the position articulated by Downs and Stedman. They judge activities solely on whether peace prevails when outside assistance departs (Downs and Stedman 2002: 50). Analysing state-building, however, demands a serious examination of what occurs during and after a major period of international assistance (Paris 2004: 38-39, Tansey 2013). Most peace arrangements, even without outside assistance, can provide for a brief interim of at least relative stability before a relapse into conflict. The other extreme is even more untenable. The positive peace

immense challenges they face, it is most appropriate to assess post-conflict states under the criteria of a 'thin' conceptualisation of the rule of law. This evaluation standard involves looking at the positive and negative actions of programmes and initiatives as well as their impact on the development of legal institutions and the broader rule of law culture and ability to deal with the prominent non-state justice sector. The evaluation standard fits well with highly legally pluralist societies because it does not depend upon the state's institutional strength as a proxy for success and recognises non-state actors to undermine judicial state-building efforts (Menkhaus 2007: 76). International assistance is rarely, if ever, the primary determinant of the success or failure of judicial state-building as it is invariably meditated through state institutions.

3.3 Detailed Case Studies

Numerous scholars have rightly recognized the contingent nature of politics, democratization, institutional development, and the establishment of the rule of law (Pierson 2004, North, Wallis et al. 2009, Fukuyama 2010, Acemoglu and Robinson 2012). As Call highlights, abbreviated case studies frequently:

> run the risk of failing to provide sufficient detail for a rich and contextualized understanding of the case and processes, and they surely do not capture all the casual dynamic or even all the variables that a lengthier treatment might identify (Call 2012: 16-17)

While it is tempting to gloss over history before the post-conflict judicial state-building efforts commenced, I contend this approach is insufficient. As commitment to

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paradigm, as articulated by Galtung, success requires eliminating the 'structural violence' facing ordinary people (Galtung 1969). Addressing structural violence demands tackling the harms done by 'poverty and unjust social, political, and economic institutions, systems or structures' (Köhler and Alcock 1976: 343). By this standard, no state on Earth, let alone one that has recently experienced extensive violent conflict, meets this criterion.

supporting the rule of law is cultural and depends on institutions that are based and built upon history and culture even if they are ostensibly new, it is essential to understand the foundations of legitimacy in a given setting (Fukuyama 2011, 2014). The path to inclusive rather than exclusive institutions varies dramatically by country (Acemoglu and Robinson 2012). The development of the rule of law and democracy takes time and is only intelligible in the historical context. An attempt to inaugurate a robust, legitimate state bound by the rule of law must take into account the established pillars of legitimacy in that society. The case study chapters underscore that there are multiple plausible paths to advancing democratic governance and the rule of law, but they are distinct and reflect history, institutions, culture, and the structure of the non-state justice system that existed prior to the conflict. These chapters will also serve to debunk certain key arguments regarding state-building in Afghanistan and Timor-Leste.[22]

3.4 Comparisons between and within Cases

My research generates and tests theory by comparing cases of domestic and international judicial state-building policy and programmatic initiatives in Afghanistan and Timor-Leste, but also by comparing within each case over time (Gerring 2004). As noted earlier, essential similarities exist between the cases. Both states saw their infrastructures devastated by conflict and high levels of poverty (World Bank 2003: 1,

[22] In Afghanistan, in contrast to some prominent scholars' claims, the state-building project was not predestined to fail nor did it lack a tradition of legitimate state legal order (Ottaway and Lieven 2002, Suhrke 2011). A closer examination of relevant history, however, reveals these claims are decidedly mistaken. My research also demonstrates that the commonly stated view that the trajectory of state-building and Timor-Leste's nascent institutions were foreign impositions disconnected from society are decidedly mistaken (Chopra 2002, Hohe 2002, 2003, Zaum 2007: 205-206, Richmond and Franks 2008).

UNDP 2004). Since Afghanistan and Timor-Leste established new regimes in the early 2000s, local and international state-builders have invested heavily in the state justice sector (Engel 2007, Bowles and Chopra 2008, Mason 2011). They rank among the most ambitious judicial state-building efforts undertaken in recent memory. These states also feature high degrees of legal pluralism with the vast majority of disputes being settled outside the state justice system. Dispute resolution most commonly occurred at the community level through non-state mechanisms, including *jirgas* or *shuras* in Afghanistan and *suco* councils in Timor-Leste (Barfield, Nojumi et al. 2006, Everett 2009).[23] The prevalence of the non-state justice sector, unsurprisingly, goes alongside a history of very limited state capacity and weak central rule (Tarzi 2006, Robinson 2009). Non-state justice systems faced few subject matter jurisdiction restrictions or meaningful attempts by the state to regulate their conduct, particularly outside of urban centres.

While both cases illuminate the importance of legal pluralism for state-building efforts, a key difference exists in how domestic and international state-builders attempted to construct judicial and political institutions and engage non state-judicial actors. These differences offer important insights for understanding judicial state-building under different legal pluralism paradigms. Thus each case study comprises two chapters: the first examines the nature of domestic efforts to promote the rule of law against a backdrop of significant legal pluralism; the second examines international judicial state-building initiatives.

[23] The fact that these entities are outside the state does not means that they are not potentially subject to state influence or attempts at state co-option.

The first set of factors relate to domestic judicial state-building approaches. In Timor-Leste, the domestic elite was largely committed to the vision of a democratic state bound by the rule of law as embodied in the independence movement (Robinson 2009). This vision was translated into a vibrant competitive multi-party democracy underpinned by a constitutional order. While certainly imperfect, international assistance generally reinforced domestic trends promoting the rule of law through subsidisation of the state systems and assisting constructive engagement with the non-state justice system. In post-Taliban Afghanistan, the state enjoyed a promising opportunity to establish legitimacy as well as to advance democracy and the rule of law. Yet, upon gaining power with international backing, Karzai worked to undermine democratic or legal accountability for his regime. Likewise, Karzai's government was decidedly uninterested in working with the tribal and religious authorities that had long underpinned legitimate legal order.

Each country also had a different set of international judicial state-building initiatives. International judicial assistance is designed, negotiated, and implemented. Thus, despite broad similarities in approach, each judicial state-building endeavour is unique. The individual rule of law programmes implemented differed and should be compared to better understand interactions with the non-state justice systems at a more localised level. How programmes influence the broader judicial state-building endeavour should also be examined. Aid to Timor-Leste achieved substantially more positive results as assistance predominantly reinforced domestic efforts to support the rule of law and

meaningfully engage the non-state justice system. Portuguese assistance, however, formed a more problematic exception. Aid from Portugal sought to institutionalize the Portuguese language throughout the Timorese legal system, despite the fact that over a decade after independence only a tiny minority spoke it. While the international community has frequently referenced the importance of the rule of law in Afghanistan, there was never a credible strategy for actually promoting the rule of law (SIGAR 2015b). International actors largely enabled Karzai's predatory and corrupt regime; the massive investment has produced no discernible progress towards the rule of law. Likewise, international engagement with the non-state justice sector was based almost exclusively on counterinsurgency priorities rather than an interest in promoting the rule of law. Overall, it was counterproductive.

4 USE OF SOURCES AND DATA COLLECTION

This thesis employed case studies and process tracing to examine domestic and international judicial state-building endeavours in Afghanistan and Timor-Leste. It used a mixture of primary and secondary sources relating to state-building and legal pluralism in general and efforts in Afghanistan and Timor-Leste in particular. I interviewed key stakeholders related to post-conflict judicial state-building and legal pluralism in both states. I drew on the well-established technique of triangulation that cross-references 'primary sources (interviews, published first-hand accounts; and documentary sources (published or archival)), with published secondary-source information available' to determine the most plausible explanation for understanding important decisions and events (Davies 2001: 78).

4.1 Academic and Policy Literature

State-building in Afghanistan and Timor-Leste has been the subject of extensive academic and policy study. Afghanistan's connection with the 11 September 2001 Al Qaeda terrorist attacks and major international involvement in state-building after the fall of Taliban government in 2002 have ensured that the country will be of significant international interest for the foreseeable future. Though a small state, Timor-Leste has come to be seen a major test case for UN state-building (Chopra 2002, Engel 2007). I have drawn on this extensive literature throughout my thesis.

4.2 Donor, Government, and Practitioner Materials

My research draws on primary sources produced by the states themselves, international organisations, donors, and non-governmental organisations (NGOs). Reports produced by implementers, donors, and government agencies can illuminate their strategies, activities and goals. They reflect assumptions regarding causal mechanisms as well as the link between their activities and desired change. These materials articulate clear views on the motivations of key actors and institutions, which can then be subject to investigation. Domestic and international state-builders are quite forthright about their objectives (though not necessarily their motivations). This makes it possible to trace the evolution of state-building efforts over time and how actors responded, or failed to respond, to unfolding events, as well as to critically examine the ends pursued and means selected.

A range of documents from the UN, foreign states, and NGOs are used in the analysis to illuminate the strategies, assumptions, policy choices, and narratives that drove international judicial state-building, along with paradoxes and inconsistencies. As Stoler explains, 'Scholars should view archives not as sites of knowledge retrieval, but of knowledge production' (Stoler 2002: 87). Donors, states, and implementers often portray their activities in the best possible light and thus their conclusions should not be accepted uncritically. Together these documents provide concrete empirical information, as funders tend to demand that implementing organisations provide clear data regarding programme activities, outcomes, political context, narrative framing, along with statements regarding overarching strategy and expected results.

4.3 Interviews

My research included speaking with state actors in Afghanistan and Timor-Leste. Interviewees also included representatives of foreign governments extensively involved in judicial state-building, UN officials; representatives of development agencies, and staff members of key local and international NGOs.[24] I conducted extensive interviews in Kabul, Afghanistan during January and February 2014 and Dili, Timor-Leste in March and April 2014. Additional interviews were conducted over Skype.

I undertook semi-structured interviews that combined purposive sampling and chain referral sampling, which Tansey (2007) argues constitute the 'optimal' approach for

[24] My interviews draw on insights from the elite interviewing literature. I follow Lilleker in claiming that 'elites can be loosely defined as those with close proximity to power or policymaking,' but outside of institutional state politics narrowly defined the understanding of elite can 'clearly be broadened out' (Lilleker 2003: 207). Elite can include those understood to be experts or who possess specialised knowledge (Burnham, Gilland et al. 2004).

case studies utilising process tracing (771). First, interviewees, particularly in the initial stages, were chosen through a purposive approach that selects 'respondents according to the position they have held and their known involvement in the political process,' which in this case are the domestic and international judicial state-building efforts (Tansey 2007: 770). Chain referral sampling seeks references for additional interviewees from initially identified respondents that might not be immediately apparent, as is frequently the case when dealing with NGOs and state or international bureaucracies (Farquharson 2005, Babbie 2012). The sampling of my interviewees was not random because:

> random sampling runs against the logic of the process tracing method, as it risks excluding important respondents from the sample purely by chance. When sampling interviewees in a process tracing study, the ultimate goal is to reduce randomness as much as possible, and thus non-probability sampling approaches are the most appropriate (Tansey 2007: 765).

Interviews offered a number of benefits. First, interviews contextualised reports and other written materials that tended to sidestep potentially non-flattering aspects of international policies and initiatives (Richards 1996).[25] After a programme is concluded, knowledgeable individuals tend to speak more freely. Secondly, interviews offered the chance to identify missing information or identify other key individuals for discussion.

Nevertheless, interviews have important limitations. Interviewees can be wrong or inaccurate (Berry 2002: 680). Interviewees often push an agenda that differs from a

[25] Strong incentives exist for portraying international assistance favourably. Local NGOs that receive funds want to impress international NGOs to increase the likelihood of future funding. International NGOs want to show donor agencies they are outperforming potential competitors and ensure they are competitive for future funds. Donors agencies themselves have a strong motivation to have the programmes they support portrayed in the best possible light to avoid legislative or executive scrutiny and potential budget cuts.

balanced, even-handed account and may forget or misremember key details (Kramer 1990). Furthermore, informants and other interested parties can react quite negatively to characterisations of their work that diverge from their own views (Mosse 2006). Finally, approaching the interview subject, the interview process, presentation of self during the interview, interview data coding, ethics, and the post-interview interpretation also raise significant issues (Aberbach and Rockman 2002, Leech 2002, Lilleker 2003, McEvoy 2006, Morris 2009).

These tensions are endemic to interviews and cannot be eliminated, but they can be mitigated significantly. First, extensive background knowledge and interview preparation helps produce higher quality interviews as well as enabling better post-interview analysis (Peabody, Hammond et al. 1990: 451-452). State-building practitioners are often not particularly forthcoming, but they tend to be more open to people who understand the constraints under which they operate. As a former international development professional that has managed related programmes in both Timor-Leste and Afghanistan, interviewees tended to be more comfortable discussing their work with me. Second, the questions themselves were neutrally worded to minimise personal bias and facilitate more open, forthcoming responses (Rivera, Kozyreva et al. 2002: 685).

5 WHAT IS NOT INCLUDED OR ADDRESSED

My thesis does not attempt to provide a detailed history or determine the quality of state versus non-state legal systems. Non-state justice systems may provide just or

unjust outcomes in particular cases and can potentially foster social stability at the local level. Likewise, it is wrong to assume that outcomes are more or less just simply because they stem from the state justice system or that the non-state system is more or less representative of the population's preferences. These are empirical questions beyond the scope of my research. In addition, the focus is firmly on the administration of ordinary justice rather than on the mechanisms for transitional justice or processes related to establishing a new constitution. While national initiatives will be referenced and analysed for their consequences on the primary research question, I am not seeking to conduct an in-depth study of these projects.

6 THESIS OVERVIEW

My DPhil thesis has eight chapters. The first three chapters focus on the thesis' rationale and context. Chapter 1 examines my research agenda and methodological considerations. Chapter 2, split into four sections, analyses major conceptual issues related to judicial state-building in post-conflict legally pluralist states. The first section examines how the rule of law, as part of post-conflict state-building, should be conceptualised. The second section covers practical issues related to promoting the rule of law in post-conflict states, while the third section examines a challenge to the idea of the rule of law as a major policy priority. The final section considers terminology related to legal pluralism.

Chapter 3 presents analytic paradigms for understanding state-building efforts relating to the state and non-state justice systems. First, I argue that the relationship between the

state and non-state justice sectors should be understood through a default paradigm of competition after conflict. However, the situation is fluid. Domestic and international policy choices have the potential to foster cooperative legal pluralism or trigger a descent into overtly combative legal pluralism. Second, I propose five main strategies used by the state in relation to non-state justice systems: 1.) Bridging, 2.) Harmonization, 3.) Incorporation, 4.) Subsidisation, and 5.) Repression. There is no uniform template for success, but particular strategies are better suited to certain environments. This chapter also analyses the means frequently used to implement these strategies. I contend that state-builders often employ strategies and programmes with little regard for the influence of the non-state justice sector, leading to suboptimal outcomes.

Chapters 4 to 7 are dedicated to the case studies of Timor-Leste and Afghanistan. Chapters 4 and 5 present Timor-Leste as a case study. As context is vital for understanding judicial state-building efforts, Chapter 4 examines Timor-Leste's political history and institutions as well as the state's efforts to build a modern state bound by the rule of law that works cooperatively with non-state judicial actors. Chapter 5 investigates the major policy decisions related to international judicial state-building efforts and the implementation of judicial state-building initiatives from 2002 to 2012. On the whole, they are generally positive though Portugal's focus on ensuring the Lusophone character of the justice system raises serious concerns.

Chapters 6 and 7 discuses domestic and international state-building in Afghanistan.

Chapter 6 features a brief political and legal history of Afghanistan to show there is a historical and cultural foundation for a legitimate state legal order. It examines the post-Taliban political and legal institutions and highlights President Karzai's active obstruction of all serious domestic and international efforts to advance the rule of law. Chapter 7 critically examines major policy decisions related to international judicial state-building and the broad array of internationally backed judicial state-building programmes implemented in Afghanistan from 2002 to 2014.

The final chapter reviews my major findings through a structured comparison of engagement with the non-state justice sector as well as the state justice sector. It also looks at the structure of executive authority, political party competition, electoral competition, and the broader political and legal culture. It also identifies avenues for further research. Given the immense amount of time, effort, and capital invested, learning from these endeavours is of interest to policymakers and scholars. Moreover, future interventions will almost certainly occur in places marked by a high degree of legal pluralism, such as Yemen or Syria, making this research importance for understanding future interventions as well.

CHAPTER 2
Understanding the Rule of Law in Legally Pluralist Post-Conflict States

INTRODUCTION

Legal pluralism and policymakers' responses to it have major implications for understanding and undertaking post-conflict judicial state-building enterprises. However, the rule of law and legal pluralism are complex, contested terms that demand precision in their usage. This chapter analyses some major conceptual issues related to state-building activities designed to strengthen the rule of law in post-conflict countries where the vast majority of disputes are handled through non-state justice systems.

This chapter consists of four main sections. The first section examines how the rule of law, as part of post-conflict state-building, is understood both conceptually and pragmatically in the academic and practitioner literature. It examines thinner, more process-orientated understandings as well as thicker, more substantive conceptualisations that include broader normative commitments. While both goals are worthwhile for post-conflict state-building, I argue that a minimalist conception of rule of law offers the most appropriate standard for assessing progress, at least during the initial stages of post-conflict recovery. The second section addresses practical issues related to promoting the rule of law in post-conflict states. While it is extremely difficult to promote the rule of law in any society, let alone one devastated by war, the rule of law nevertheless forms a vital component of the state-building process. Section three contends that even though current approaches to promoting the rule of law abound with practical difficulties, they remain robust conceptually, particularly in light

of weaknesses present in the alternative legal empowerment approach.

Stepping away from the discussion of rule of law and its promotion, the final section examines how legal pluralism should most accurately be understood and described. Various distinctions are commonly used in both the academic and practitioner literature. The most common include the formal and informal justice systems, the state and customary justice systems, the state and traditional justice systems, and simply the state and non-state justice systems. I argue that the state versus non-state distinction is the most accurate and logically coherent distinction for making generalisations and cross-case comparisons.

1 UNDERSTANDING THE RULE OF LAW

The idea of the rule of law is simultaneously technocratic, descriptive, and normative. In part reflecting this multidimensionality, the rule of law has retained a steadfast, though not uncontested, role as the structural foundation for stability, democracy, a market economy, and a plethora of other desirable institutions. Thomas Carothers' observation on the ubiquity of the rule of law as the proposed 'solution to the world's troubles' remains as true today as it was well over a decade ago (Carothers 1998: 95). The rule of law's enduring status stands in marked contrast to the increasing challenges seen to other once largely unchallenged concepts such as liberal democracy (Carothers 2006a) and economic neoliberalism, the so-called 'Washington consensus' (Williamson 1993). The rule of law supposedly facilitates everything from improving economic performance in well-established states to promoting good governance in post-conflict

states in need of a solid foundation. In practice, the rule of law has been seen as a means of addressing a range of ills; well-established states have attempted to reduce corruption as part of the rule of law initiatives, while less robust states often view supporting the rule of law as a means to build state capacity.

Consensus about the rule of law's importance, however, comes at the expense of conceptual clarity. The literature abounds with seemingly endless definitions as well as distinctions across both history and geography (Jensen 2003, Kleinfeld 2006). Discourses about the rule of law, or ideas analogous to it, existed in classical Athens, ancient Rome, medieval Europe, and a wide variety of historical and contemporary societies (Tamanaha 2004). This ambiguity enables radically different rule of law ideals with starkly different outcomes in practice.

Amongst these various definitions, the common distinction between thick and thin understandings of the rule of law remains helpful (Peerenboom 2002). At minimum, a 'thin' concept, 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 according to its terms' (Tamanaha 2007: 3). In practice, a minimalist understanding of the rule of law demands a 'law of rules' limiting discretion related to the law (Scalia 1989).[26] By contrast, thicker conceptualisations of the rule of law look to legal and broader political institutions, including an independent justice sector, compliance with international human rights norms, media freedom, governmental

[26] In practice, even this seemingly straightforward concept of law of rules generates substantial theoretical and practical complications (Strauss 2008).

checks and balances, separation of powers, and free and fair elections (West 2003).

As an alternative to this static dichotomy, the rule of law may be viewed as having a sequencing element. The state must first gain the capacity to enforce its legitimate mandates, while later the state can develop a more robust conception of the rule of law in which the state also restrains its own power. As such, the rule of law is better conceptualised on a spectrum, ranging from 'thin' to 'thick,' both as state institutions develop over time as well as spread geographically, for example, within a single state, rather than a binary on/off situation whereby a state either possesses the rule of law or it does not. Even states generally viewed as bound by the rule of law engage in activities that contravene rule of law ideals. For example, President Obama ordered the targeted killing of a US citizen with no due process overseas (Blum and Heymann 2010: 151). At the same time, even the most chaotic or limited states, for example the Democratic Republic of Congo, still retain a significant degree of state imposed legal order (Trefon 2009).

Despite very real differences in how the rule of law is understood, 'even the most formal, minimalist conception of the rule of law requires a normative commitment to the project of the rule of law itself' (Stromseth, Wippman et al. 2006: 76). Most notably, the rule of law entails the idea that the state itself is bound by its law and views the law as a meaningful restraint on behaviour. Thus, the literature often draws a meaningful distinction between the rule of law and rule by law, whereby the state uses law to exercises power but has no intention of being bound by it (Carothers 1998,

Ginsburg and Moustafa 2008). While a post-conflict state may decide to strive for a thicker version of the rule of law, achieving a state of affairs approximating a thin version of the rule of law certainly ranks as a major achievement. At the most basic level, a state justice system must be able to make and implement binding rules across the territory it controls and on itself to uphold the rule of law. A state without the capacity to meet this lower threshold by definition would find it impossible to uphold the more stringent or comprehensive definitions of rule of law.

1.1 Legitimacy and the Rule of Law

The rule of law presupposes a legitimate state legal order, but not all legitimate orders feature the rule of law. Even under ideal circumstances, the rule of law takes roughly fifty years to develop (North, Wallis et al. 2009: 27). The existence of a legitimate legal order then is necessary but not sufficient for establishing a state bound by the rule of law. Legitimisation comes in a wide variety of forms many of which do not require democratic government (Beetham 2013). Call contends that 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, as well as the degree to which the state is seen as the natural provider of goods and services (Call 2008: 14).

Throughout history, tradition, military success, economic development, ideology, and provision of goods and services have all helped legitimize states absent democracy. Compliance with legal stipulations reflects the popular belief that it is legitimate even if the state's democratic credentials are questionable or non-existent (Tyler 2006), but that compliance is by no means inevitable, particularly in places marked by a high degree of legal pluralism (Migdal 1988). Likewise, even states that enjoy substantial legitimacy may still face daunting capacity issues.

Thus, the question is not whether the rule of law has been established in the years following conflict. Almost inevitably, it has not. Instead, it is important to examine 1.) Whether there is a *legitimate* political and legal order, and 2.) Whether judicial state-building has facilitated *progress* towards the rule of law. This determination should not be confused with claims regarding whether the rule of law exists during the period examined in the case studies. For instance, Timor-Leste enjoyed a high degree of legitimacy (Call 2008b: 1496), but still falls short of even a minimalist rule of law ideal. Nevertheless, it has a legitimate political and legal order and is making demonstrable progress towards the rule of law.

2 RULE OF LAW AFTER CONFLICT

Broad consensus exists that the law is vital to a modern nation-state's ability to project state-sanctioned law over its territory, gain international acceptance, and secure power both domestically and internationally (Ghani and Lockhart 2009, Paris and Sisk 2009). As the state's 'authority is backed by a legal system and the capacity to use force to implement its policies' (Giddens 1993: 309), the rule of law rightly forms a major focus of both academic research and concrete state-building efforts. Praise has been coupled with serious investment as donors spent roughly $2.6 billion US dollars (USD) on rule of law initiatives in 2008 alone (International Development Law Organization 2010).

Yet, the relationship between the rule of law and state-building is often paradoxical. While the state can bolster its 'authority by acting within and on behalf of the law,'

strict adherence to the law 'can also prevent them [state authorities] from doing things… in the interest of the community as a whole' (Fukuyama 2011: 246).[27] A further paradox exists in that international efforts to strengthen a post-conflict state and facilitate the rule of law may actually weaken that state's ability to perform vital activities by relying on foreign assistance rather than supporting more locally tailored mechanisms, crowding out local approaches, or establishing counterproductive incentive structures such as large sums of foreign capital flow into pre-existing and new patronage systems and use of payments to secure the at least temporary acquiescence of potential spoilers (Mac Ginty 2008, De Waal 2010).

Regarding the promotion of the rule of law in practice, post-conflict states can have significantly different governance structures with serious ramifications for how the rule of law is pursued. At one extreme lies autonomous recovery 'through which countries achieve a lasting peace, a systematic reduction in violence, and post war political and economic development in the absence of international intervention' (Weinstein 2005: 9). Weinstein contrasts autonomous recovery with aided recovery, in which 'international intervention plays a significant role in bringing war to an end, maintaining or guaranteeing a negotiated settlement, and assisting in the recovery process' (Weinstein 2005: 9). In stark contrast to autonomous recovery is what I term a managed recovery. Most frequently, these transitions involve colonial or military rule

[27] Even in high capacity states, this tension is endemic. Societies clearly have an interest in seeing guilty individuals punished for criminal behavior, but it also has an interest preventing the state itself from breaking the law. For example, under the long established, but controversial exclusionary rule in the United States, individuals guilty of crimes may escape punishment if the state failed to followed its own rules for evidence collection as it is seen as sometimes more important to keep the state from engaging in illegal behavior (Oaks 1970, Bradley 2012).

by an outside power or international administrations with extensive direct governance authority, such as the UN administrations following the conflict in Bosnia or Timor-Leste (Caplan 2005). Each type of transitional regime presents unique challenges, opportunities, incentives, and limitations in promoting the rule of law. My case studies, Afghanistan and Timor-Leste, are both transitional states with extensive internationally supported judicial state-building projects currently undergoing aided recovery in environments initially characterized by competitive legal pluralism, although Timor-Leste initially started out as managed recovery.

Regardless of the type of transitional regime, promoting the rule of law in post-conflict states raises serious challenges. It entails far more than merely passing laws and having courts adjudicate based on them; instead, it requires 'courts, judges, a bar, and enforcement mechanisms across the entire country' (Fukuyama 2004: 59). Drawing on the organisational theory literature, Fukuyama notes that the establishment of the rule of law is 'one of the most complex tasks state builders need to accomplish' as it is very difficult to ensure accountability and involves very high numbers of transactions (Fukuyama 2004: 59). Little international interest in the tedious, rudimentary work of improving how institutions operate in practice exists, with international attention instead focused on high profile, though by no means necessarily more effective, interventions (Channell 2006, Tamanaha 2011).

In establishing the rule of law, while institutions matter, far more is required. Societal respect for the law largely hinges significantly on the broad social belief that the law, at

its core, is basically fair and legitimate (Tyler 2006). Regardless of the state, '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 et al. 2006: 310) In post-conflict settings, popular faith in state institutions has almost inevitably been shaken, often shattered. Establishing the rule of law demands constructing the popular legitimacy of new legal norms and institutions just as much as courthouses or laws. While recognising the scale of the challenge, it is equally essential not to make the assumption that these societies present 'an institutional blank slate' as even in the most devastated countries institutions, customs, norms, and at the very least memories endure (Cliffe and Manning 2008: 165).

2.1 Promoting the Rule of Law in Practice

In response to these challenges, efforts to promote the rule of law in post-conflict states generally adopt one of a menu of strategic goals. In her review for the World Bank, Kristi Samuels identifies the five major goals of efforts to promote the rule of law after conflict:

> Human security and basic law and order; A system to resolve property and commercial disputes and the provision of basic economic regulation; Human rights and transitional justice; Predictable and effective government bound by law; and Access to justice and equality before the law' (Samuels 2006: 7).

Pursuit of these goals not only requires reform of existing institutions and practices; it almost always entails the construction of new institutions or a radical paradigm shift in the mentality and operations of existing ones.

In practice, a profound disconnect exists between such large-scale ends, as identified by

the World Bank, and the decidedly modest means generally employed. This gap tends to be particularly evident in international legal development assistance, which usually involves working with a wide variety of state and civil society institutions and individuals as well as other international actors. Despite repeated calls for reform, the basic activities favoured by internationally supported rule of law initiatives have remained surprisingly static since the 1990s, though many of these activities are often repackaged, as will be discussed in section three, as innovative new "legal empowerment" or "next generation reform" initiatives rather than simply "rule of law" programmes (Kleinfeld 2012).

Carothers clusters rule of law assistance around four major areas: 1.) Reforming institutions; 2.) Rewriting laws; 3.) Upgrading the legal profession; and 4.) Increasing legal access and advocacy (Carothers 1999: 168). Carothers assumes a context of aiding existing entities, but in post-conflict states strengthening the rule of law often entails creating new institutions or re-establishing old ones in an environment 'defined by the dual crisis of security and legitimacy' (Barnett and Zürcher 2009: 28). International support, for example, may fund the drafting of legislation or creation of new institutions, the construction of buildings, fund domestic and international staff, and underwrite trainings.[28]

Donor-funded initiatives tend to be relatively short-term and focused on concrete

[28] Assistance to the legislature or executives, while usually relegated to a separate area, could quite logically also be conceptualised as rule of law work. In order to narrow the definitional scope, for the purposes of my research, the intent of the implementers will serve as the primary criteria for determining whether such assistance counts as rule of law programming.

deliverables, such as producing educational materials or holding training sessions. This emphasis on immediate, enumerable results appeals to organisations as they can demonstrate outcomes achieved with the donors' money (Carothers 2006b). However, whether that deliverable has a meaningful impact on the desired ends or makes a significant contribution to building the rule of law is another question entirely (Carothers 2003). Determining what exactly programmes have accomplished on their own terms remains fraught. Despite on-going criticisms of monitoring and evaluation approaches as ineffective, poorly designed, and uninformative (Tamanaha 2011), little progress is apparent in making high-quality monitoring and evaluation the norm rather than the exception (Cohen, Fandl et al. 2011). Through a close, critical examination of the ideas, actions, and consequences of rule of law endeavours, through a process-tracing approach within the broader context of judicial state-building in Afghanistan and Timor-Leste, my research will begin to help fill this gap.

3 A CHALLENGE TO THE RULE OF LAW APPROACH

Much of the existing literature emphasises debates about what the rule of law means. However, the current approaches to rule of law *assistance* have also been challenged, particularly from more practitioner and participant-oriented perspectives. While what is meant by a 'rule of law approach' varies according to the context and who is describing it, nevertheless, the four core aspects identified above generally apply (Carothers 1999: 168).

The most prominent alternative to this conventional view of promoting rule of law has

been the so-called legal empowerment approach.[29] In the words of one its most prominent advocates, legal empowerment '*is the use of law specifically to strengthen the disadvantaged*' (Golub 2010: 13, itallics in the orginal). Critics of rule of law initiatives contend, often quite accurately, that these initiatives have been deeply flawed in both design and implementation. They argue the dominant rule of law paradigm results in initiatives characterised by a '"top-down," state-centred approach through which development agency personnel design and implement law-oriented projects in cooperation with high government officials,' while, by contrast, the legal empowerment approach emphasises 'grassroots needs and activities but can translate that community-level work into impact on national laws and institutions' (Golub 2003a: 5).

On face, legal empowerment presents a compelling alternative to the dominant rule of law approach. Yet, legal empowerment suffers from a number of major shortcomings. Firstly, the approach remains poorly defined. Secondly, while its proponents contend it is a major new idea, a pro-poor approach is in fact already well within the mainstream of rule of law programming. Finally, the legal empowerment approach is inclusive of the very types of endeavours it is defining itself against. Overall, while a legal empowerment approach is presented as a more precise, people-centred means of establishing rule of law, on closer inspection that precision proves illusory, revealing an approach even more convoluted than the much maligned rule of law approach.

[29] Legal empowerment enjoys a number of high profile advocates such as former US Secretary of State Madeleine Albright (Albright 2006). The multiplicity of actors supporting legal empowerment, at least in the abstract, include the multilateral actors such as European Union, the G-8, the IMF, UNDP, as well as bilateral donors include USAID, CIDA, DFID, Agence Française de Développement, NORAD as well as major foundations such as the National Endowment for Democracy, Human Rights Watch, and the Ford Foundation (Palacio 2006).

Like the rule of law, legal empowerment resists a clear, uniform definition. For instance, the prominent 2008 UN Legal Empowerment Commission Report 'understands legal empowerment to be a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors' (UN Commission on Legal Empowerment of the Poor 2008: 3). Later the report contends, 'legal empowerment is the process through which the poor become protected and are enabled to use the law to advance their rights and their interests, vis-à-vis the state and in the market' (UN Commission on Legal Empowerment of the Poor 2008: 26). In practical terms, legal empowerment often serves as shorthand for activities that attempt to improve the law's ability to benefit the poor, whether supporting a farmers association, facilitating birth registration, providing access to medical services, underwriting HIV litigation, or working with 'traditional justice systems' (Golub 2010).

This focus on the poor, however, is not unique to activities labelled legal empowerment, and thus cannot serve as the *sine qua non* for distinguishing legal empowerment from rule of law and other development assistance.[30] Judicial reform with a focus on poverty reduction has been central to many development organisations and multilateral development banks since the end of the 1990s (Jensen 2003). An emphasis on empowering people also existed in rule of law initiatives, even if the

[30] As an additional example, legal empowerment proponents also stress the important role of leadership by government officials and other high-powered actors. Once again, there appears to be a distinction from the rule of law approach without a difference. Previous dominant legal reform approaches likewise placed a premium on fostering leadership from political, economic and social elites, usually in conjunction with NGOs and ordinary people.

specific term "legal empowerment" was not used. The UN Commission on Legal Empowerment recognises that 'access to justice and the rule of law are to be considered the fundamental' (UN Commission on Legal Empowerment 2008: 27). Thus, an emphasis on reducing poverty or even empowering people does not set legal empowerment apart from programming approaches that have predominated the development industry for over a decade; nor is this critique sufficient to require a substantially different approach when analysing law related initiatives in my research.

Regarding the final critique, in taking a pro-poor approach, legal empowerment calls for broad social and regulatory programmes and robust state action. Even the non-state actions it prescribes often involve using the legal system to promote the interest of the poor. Thus, it is both inherently statist in outlook and makes assumptions about state capacity that are often empirically questionable. While it recognises the interconnected nature of legal problems facing the poor and broader social and political issues, lumping activities only tangentially related to the legal system together with legal reform further complicates the idea of legal empowerment. In doing so, all problems are reduced to essentially legal problems, even though they may be more effectively addressed from other perspectives. Post-conflict states pose additional challenges for legal empowerment initiatives that seek to use the legal system to force the state and other powerful actors to behave in particular ways, as post-conflict societies generally feature particularly weak institutions and high levels of poverty (Collier 2007). While legal empowerment provides a crucial reminder to always keep in mind the consequences of large-scale institutional changes on people, particularly the most

vulnerable, it does not fundamentally challenge the idea of the rule of law approach as a foundational concept for analysing post-conflict state-building activities.

4 CONCEPTUALISING LEGAL PLURALISM

As noted in the discussion of the challenges to – and importance of – establishing rule of law in post-conflict states, the state-sanctioned legal system provides a pillar of the modern nation-state's power. The state legal system's legitimacy and ability to resolve legal claims is largely taken for granted in developed countries. Indeed, it is difficult to fathom a developed country without a state-sanctioned legal system that has achieved a near monopoly over significant disputes.

Legal pluralism, whereby 'two or more legal systems coexist in the same social field' (Merry 1988: 870), has a long historical pedigree (Benton 2002). It exists everywhere from highly localised communities to the international system (Berman 2012). The key distinction resides in the fact that these other justice systems possess a meaningful degree of independence from the state rather than in their level of effective authority, amount of popular legitimacy, or the state's stance towards these other sources of law. I thus define non-state justice as systematised quasi-legal processes not involving the state's implementation of state laws.[31] As noted in the previous chapter, competitive legal pluralism exists when the non-state justice sector presents a meaningful challenge to the state's judicial authority.

[31] State law itself may be based on custom, tradition, religion, and a plethora of other sources. Still, a fundamental difference exists when those ideas are codified in formal law and state power is harnessed to encourage and sanction behaviour.

Legal pluralism is present even in states with highly developed state legal systems. Particularly at the lower levels, courts often rely on custom (Ellickson 1991). United States federal courts, for instance, often encourage parties to litigation to settle disputes through mediation prior to being allowed to proceed in the state system (Hensler 2004). Small criminal matters and even felonies may be settled through non-state means with the blessing of state actors. Arbitration even allows parties to agree to accept outcomes from a non-state actor as legally binding and explicitly stipulate to not follow state law (Dezalay and Garth 1998). Nevertheless, a high capacity state retains ultimate control as other non-state dispute resolutions mechanisms must operate within state-sanctified confines and their existence depends on staying in the state's good graces. While relatively systematised non-state dispute resolution mechanisms exist outside the state system in even the most developed counties, the state largely retains ultimate authority (Ellickson 1991). As noted in the previous chapter, in many developing countries, particularly post-conflict societies, however, this situation is reversed with non-state legal systems handling the vast majority of disputes largely free of state interference (Albrecht, Kyed et al. 2010).

The legal pluralism literature distinguishes between state and other justice systems in various ways. The most commonly cited distinctions are between the formal and informal justice systems, the formal and customary systems, and the formal and traditional justice systems. Finally, the distinction between state and non-state legal systems also exists in the literature; I argue that this latter division is both logically sound and offers an internally coherent distinction that is useful for understanding legal

systems across states.[32] The next sub-section examines the advantages of distinguishing between 'non-state' and 'state' legal systems, after it discusses general issues with the other abovementioned pairings. The final two sub-sections delve more deeply into the problematic characterisations of non-state systems as 'informal' and 'customary,' respectively.

4.1 Non-State Legal Systems

Conceptualising legal pluralism generates immense complexities and extensive scholarly disagreement (Woodman 1998, Tamanaha 2008). Yet, there is a shared recognition that state laws are not the only meaningful constraints on institutional and individual behaviour, particularly in post-conflict states where state capacity is weak and state actors are often predatory against their own populations (Krasner 2004). In these circumstances, state legitimacy and resources are highly contested. The rules and regulations that matter most may not stem from the state, but rather from custom, tradition, religion, family lineage, powers not sanctioned by law (such as the criminal enterprises or powerful commercial interests), and a host of other sources. Violations of these rules may lead to severe sanctions and even death (Golub 2003b). These rules may have equal or even greater force than state law, and state authorities may even acquiesce in their use (Barfield, Nojumi et al. 2006).

Drawing a distinction between state and non-state legal systems offers substantial advantages. First, categorising systems based on state or non-state status offers a

[32] While my thesis makes empirical and normative claims regarding the operation of state and non-state legal systems in particular situations, this chapter seeks only to examine terminology.

meaningful and accurate distinction between different institutional mechanisms. Secondly, and equally importantly, the state/non-state distinction is value neutral regarding systemic content and outcomes. State versus non-state avoids the linguistic baggage associated with terms such as 'informal,' 'traditional,' or 'customary,' which inherently involves empirical and often normative claims. The state versus non-state distinction facilitates inquiries regarding system operations and outputs without presuppositions regarding those findings. The state/non-state distinction also avoids being drawn into highly complex and definitional questions such as "How long does a system have to be in place before it qualifies as traditional?" or "How much structure can exist in an informal system?"

The state/non-state distinction also benefits from parsimony, and renders additional qualifications, such as the specification of a 'formal state system,' unnecessary at least at a general level. For example, Wojkowska's 2006 UNDP report states 'The *formal justice system* for the purposes of this paper involves civil and criminal justice and includes formal state-based justice institutions and procedures, such as police, prosecution, courts (religious and secular) and custodial measures' (italics in original; Wojkowska 2006: 9). A particular state's justice system may be quite formal in practice or it may not be. Definitions along the lines of Wojkowska's say little more than that the formal justice system is the state system and nothing about how the system actually operates in its own right or relative to other dispute resolution forums. Thus, it makes little sense to use 'formal' as either a descriptor in its own right or as an additional qualification to 'state legal system.'

While the state/non-state distinction is not the most prevalent in the policy literature, it is certainly used widely in the legal pluralism literature (for example, see Griffiths 1986, Connolly 2005, Barfield, Nojumi et al. 2006, UN Commission on Legal Empowerment of the Poor 2008, Baker 2010, Faundez 2011). For example, a United Kingdom Department for International Development (DFID) working paper notes the comprehensive nature of the term 'non-state justice' which 'includes a range of traditional, customary, religious and informal mechanisms that deal with disputes and/or security matters' while avoiding potentially unwarranted assumptions about those systems (DFID 2004: 1). Scholars and practitioners recognise the term's utility, and while most do not use the state/non-state distinction exclusively, no one argues that the distinction is inappropriate.

Not surprisingly, reality often complicates the clear distinction between state and non-state actors. Actors and institutions often act in ways that blur the distinction, and conceptual confusion can exist both institutionally and individually (Baker 2010). For example, police in Timor-Leste often return cases to the non-state system even when victims seek to access the state justice system and even though their official role is to facilitate entrance to the state justice system (Everett 2009). Important actors may simultaneously hold positions of authority in both the state and non-state legal orders. Furthermore, the state may attempt to incorporate certain elements of non-state law into state law or even attempt to draw the entire system into the state system (Connolly

2005).[33] While these instances no doubt generate ambiguity at the border, they do not fundamentally challenge the state/non-state distinction. In contrast to the robust distinction between state and non-state legal systems described above, the following sub-sections examine some of the major overarching issues arising when using terminology other than the state and non-state legal systems.

4.2 Overarching Issues

Before moving on to the more specific issues raised by the framing of legal systems as informal, customary, or traditional, it is worthwhile to examine some common crosscutting issues relating to how legal pluralism is described in its own terms and in relation to the state.

4.2.1 Omission

Despite the centrality of legal systems outside the purview of the state, authors often fail to define the essential terms such as 'custom,' 'formal,' 'informal,' 'indigenous,' and 'traditional.' These terms are by no means self-explanatory or uncontested. Given their conceptual complexity, rigorous analysis requires an understanding of what exactly these terms mean. Arguments about legal pluralism without clear definitions lack a solid foundation. While I argue that the characterisation of legal systems as 'customary,' 'informal,' and 'traditional' is highly problematic in making comparisons

[33] For example, the Vatican City's and the Islamic Republic of Iran's legal systems are overtly predicated on religious norms. However, not all potentially religious rules are state law and the state retains discretion over which religion-based regulations are backed by state coercive power and which are left as a matter of individual or communal discretion. As such, the distinction between state and non-state legal systems holds up even in extreme cases, including when a state is expressly religious in outlook or draws expressly on custom for many of its laws.

across units, certain subsets of non-state systems may, in fact, best be described using those terms. However, it is vital to know what exactly authors mean when they are using each term to determine whether or not it is appropriate.

4.2.2 Conflation and Confusion

The scholars and practitioners frequently use the terms 'non-state,' 'indigenous,' 'customary,' 'traditional' and 'informal' interchangeably. However, each of these terms has a wide variety of possible connotations and different procedural and substantive implications. As each of those terms has problematic elements (discussed in further detail below), causally interchanging the terms magnifies the problematic aspect of each particular term.

4.2.3 Normative Smuggling

The characterisation of a legal system as 'customary,' 'indigenous,' 'traditional,' or 'informal,' almost invariably introduces normative claims regarding that system. These claims tend to be at best questionable; more often, they are misleading and, on occasion, simply wrong. The inclusion of normative stipulations in functional definitions likely stems, at least in part, from those authors' recognition of non-state justice systems' more problematic aspects. In addition, the terminology may also reflect a desire to simultaneously endorse those processes while avoiding association with their more problematic elements. A UNDP report defines informal justice systems as involving 'a neutral third party not part of the judiciary' while also noting that 'custom-based systems appear to have the advantages of sustainability and legitimacy' (United

Nations Development Program, UN Women et al. 2012: 8). Yet, there is no reason that an informal system would require a neutral actor (even if one were to grant the highly problematic assumption that decision makers can be neutral) let alone intrinsically sustainable and legitimate. Indeed, as non-state systems reflect local power structures, it is unrealistic to expect a neutral decision maker.

These terms may be used to obscure or downplay the coercive underpinnings of non-state justice systems. For example, International Development Law Organization's (IDLO) recent work on customary law gives the impression that customary law is completely consensual arguing that 'customary law is only law to the extent people follow it' (Harper 2011: 17).[34] A customary legal system cannot require consent by all parties; after all, if the system relies on total consent to make its rules binding then the system is not a legal system. Legal systems seek to constrain behaviour deemed undesirable that would otherwise occur. Legal systems, at a minimum, require authority to mediate competing interests and some capacity to enforce their rules on those who fail to comply (Raz 2009). These claims may be accurate in certain cases, but they must be proven rather than assumed. In contrast, the state/non-state distinction is value neutral and does not presuppose any normative process or output. This value neutrality prior to further analysis is a highly desirable quality for serious research.

4.3 Informal Legal Systems

Returning to issues with specific characterisations of non-state justice systems, the term

[34] Notably, support for international organizations and NGOs may help legitimize or increase the authority of a non-state justice system relative to the state system.

'informal' justice system is used frequently throughout the literature. Not surprisingly definitions vary, though distinctions are generally drawn between the 'formal' state justice systems and 'informal' dispute resolution mechanisms, existing outside the state (Benton 1994, Wojkowska 2006, Chopra 2008, UNDP, UN Women et al. 2012, Coburn 2013). For example, a major UN study defines the informal justice system as 'encompassing the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law' (UNDP, UN Women et al. 2012: 8).

Despite its frequent usage, the term 'informal' remains poorly defined. Definitions tend to focus on issues relating to the informal justice system's otherness with respect to the state. Even when authors are not doing so explicitly, they often define the informal justice system as those systems that do not fall under the umbrella of the state. The core concept seems to be that the informal system is less routinized and more flexible than the state justice system. This conceptualisation, however, is often misleading: informal systems can, in practice, be highly formalised. For example, ethnic Pashtuns in Afghanistan draw on a non-state system, *Pashtunwali*, known for its complexity, formality, and comprehensiveness (Barfield, Nojumi et al. 2006: 7-11). In contrast, a state legal system can draw upon state law while being highly *ad hoc* procedurally or in the application of substantive law. State institutions may disregard state law in practice or may not even know the relevant law. Depending on the context, state legal systems can function informally while non-state legal actors can behave with a high degree of

formality.

4.4 Customary and Traditional Legal Systems

Another frequently cited contrast is between state legal systems and customary law. 'Customary law' is used to identify boundaries based on observed behaviour within a community rather than statutory or codified law (Glenn 2011: 42) A recent IDLO report reflects common assumptions about customary legal systems, particularly that they originate from:

> customs, norms and practices that are repeated by members of a particular group for such an extent of time that they consider them to be mandatory. Customary systems tend to draw their authority from cultural, customary or religious beliefs and ideas, rather than the political or legal authority of the state. As such, provided that it has not been incorporated into state law, customary law is only law to the extent that the people who follow it, voluntarily or otherwise, consider it to have the status of law (Harper 2011: 17).

By definition, whatever else it entails, customary law requires a degree of routinized behaviour. However, this is not the case for many of the legal systems deemed customary. Paradoxically, so-called customary law tends to be 'dynamic, adaptable and flexible, and any written version of it tends to become outdated quickly' (Harper 2011: 17). It strains logic to imagine a system that simultaneously changes quickly while embodying the voluntary, well-established broad-based consensus of an entire community.

The idea of customary law relies on the normative ideas about what a community does as well as what actions communities should perform. Definitions of customary law assume legitimacy in the definition, when, in fact, the legitimacy of the law, whether state or non-state is primarily an empirical mater. Assuming customary law systems run

on voluntary acquiescence both obfuscates reality and ignores the often-extensive coercive power wielded by key actors and institutions. Customary justice systems involve power dynamics that may not reflect a broad-based social agreement in a certain community but still conflict with international norms. Even proponents of the customary justice systems recognise that decisions are often structurally biased against women, for example, and that the type of justice received often varies dramatically by status (Stromseth, Wippman et al. 2006: 334-339, Chopra and Isser 2012, United Nations Development Program, UN Women et al. 2012). Women may also face systematic discrimination within the confines of the formal court system though generally less extreme (for example, see Drumbl (2004)).

Finally, the term customary law fails to cover the broad range of non-state legal systems present in post-conflict societies. Scholars of legal pluralism have long recognised that non-state justice assumes an impressive variety of forms (Woodman 1998). By constructing a largely binary relationship between state and customary legal systems, the portrait of legal pluralism in given society is inevitably distorted.

In addition to the customary legal system, the state legal system is also often contrasted with the idea of traditional justice or traditional legal authority (Hohe and Nixon 2003, Clark 2007, Schmeidl 2011). It is less frequently used as the primary distinction with the state justice system, but is often used as a synonym of 'informal' or 'customary' (Stromseth, Wippman et al. 2006, Isser 2011). As with the term 'customary,' 'traditional' carries various implications, including that these practices have meaningful

roots within communities and enjoy certain legitimacy. There is also often an implied contrast with state structures that may be new, imported from an external source, predatory, or all of the above. However, 'tradition,' like 'custom,' inevitability involves plurality rather than uniformity. In societies subject to conflict or other significant social upheavals, structures deemed 'traditional' might take on new, innovative forms that bear only a passing resemblance to their institutional predecessors. While legitimacy is often assumed, traditional processes remain subject to both internal and external pressures that make imputing legitimacy as an inherent quality problematic.[35] For example, after the fall of the Taliban, 'political armed groups, commanders, and militias have strategically targeted traditional and customary justice systems in some parts of rural Afghanistan in an attempt to exert control over local populations'—often with a high degree of success (Nojumi, Mazurana et al. 2004: 35).

CONCLUSION

This chapter clarified some important preliminary issues regarding judicial state-building in post-conflict settings with extensive legal pluralism. First, the rule of law is both a meaningful concept, and a major goal of post-conflict state-building, against which actual efforts can be judged. Second, legal pluralism is complex multifaceted phenomenon understood and described in a wide variety of ways. However, for general cross-case comparisons, the distinction between state and non-state legal systems makes the most sense. With these clarifications in mind, we can turn to a more concrete discussion of the actual tools used by judicial state-builders and how to conceptualise

[35] The same caveat must apply to the state system but the idea of the state system lacks similar normative implications.

judicial state-building efforts in legally pluralist environments.

CHAPTER 3
Paradigms and Strategies for Post-Conflict Judicial State-building

INTRODUCTION

The prevalence of non-state justice actors with a significant degree of autonomy from state authorities and policymakers' response to this phenomenon has major implications for judicial state-building endeavours. This chapter argues that existing typologies and understandings of the relationship between state and non-state justice are generally insufficient and under theorized; it then proposes new theoretical paradigms for understanding the relationship between state and non-state justice: 1.) Combative; 2.) Competitive; 3.) Cooperative; and 4.) Benign. Finally, it proposes and examines five main strategies of how to understand judicial state-builders' engagement strategies. The strategies of bridging, harmonization, incorporation, subsidisation, and repression can help illuminate the main domestic and international approaches to post-conflict judicial state-building in legally pluralist societies. While Afghanistan and Timor-Leste will be referenced most frequently, this chapter will draw on insights from a broad variety of legally pluralist settings.

1 UNDERSTANDING STATE AND NON-STATE JUSTICE SYSTEMS

Conceptualising the relationship between state and non-state justice systems has received relatively little scholarly attention. Justice systems, however, play a vital role in the success or failure of state-building endeavours (Paris 2004: 205-206, Rubin 2008). In most post-conflict settings, non-state mechanisms resolve an overwhelming majority of disputes (Wojkowska 2006, Albrecht, Kyed et al. 2010, Baker 2010b).

There are some existing typologies for understanding the interactions between the state and non-state justice sectors.[36] Connolly proposes the approaches of abolition of non-state systems or alternatively incorporation, partial incorporation or no incorporation of non-state mechanisms (Connolly 2005: 247-249). Forsyth argues that the relationship between state and non-state justice mechanisms should be seen as a seven stage 'spectrum of increasing state acceptance of the validity of adjudicative power by the non-state justice system' (Forsyth 2009: 202). Taking a different approach, Loveman seeks to explain how the state increased their administrative capabilities and jurisdiction by looking at state strategies of innovation, imitation, co-option, and usurpation in relation to non-state actors (Loveman 2005). While stopping short of offering a full typology, numerous scholars have noted some potential permutations when state and non-state justice systems interact (Tamanaha 2008: 403-408, Baker 2010a, Isser 2011a, Schmeidl 2011). While these approaches can be quite helpful for understanding state efforts to engage non-state justice mechanisms, they offer limited insights for understanding efforts to engage in post-conflict judicial state-building in highly legally pluralist states. Moreover, direct application of existing models to state-building efforts is highly problematic as they fail to take into account the unique challenges of a post-conflict setting (Call and Wyeth 2008, Paris and Sisk 2009).

Building and asserting the state's authority over domestic and international rivals is invariably challenging for even relatively high capacity states (Tilly 1992). In post-conflict settings where there are significant international post-conflict state-building

[36] Existing accounts tend to be rooted in legal, anthropology and legal pluralism literature with far less attention being paid to the ramifications of legal pluralism in the international relations or political science scholarship.

efforts, the state's power is almost certainly contested and dramatically weakened (Krasner 2004, Baker and Scheye 2007: 504).[37] It is wrong to simply assume that the state can impose its will on non-state actors (Migdal 1988). Existing typologies overwhelmingly focus on state strategies rather than the strategies of international state-builders. State and international strategies may overlap since international state-builders often attempt to partner with state actors. In some cases, international state-builders even directly control the machinery of the state (Tansey 2009: 37) or select the local elites who will exercise power (Manning 2006). Ultimately, however, the paradigms and strategies proposed below are particularly useful as they help to contextualize all post-conflict 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.

2 PARADIGMS OF STATE AND NON-STATE JUSTICE RELATIONS

This section looks at the major paradigms for understanding the relationship between state and non-state justice systems. Rather than viewing the relationship as linear or evolutionary, legal pluralism after conflict should be conceptualised as highly fluid with points of progress and regression. Even in favourable circumstances, establishing the rule of law and the inclusive institutions that underpin it is usually a prolonged, highly contingent process (Fukuyama 2010, Acemoglu and Robinson 2012).

[37] In contrast, after the withdrawal of their armed forces from Iraq, the US, the UK and other coalition partners were not generally considered to be post-conflict states even though they had participated in a conflict that had ended. The post-conflict states that are the target of international intervention discussed in this thesis have almost invariably seen conflict as destructive, at least in terms of state capacity, rather than constructive even if the conflict has dislodged a deeply unpopular previous regime.

There are, however, three paradigms most relevant to post-conflict settings: combative, competitive, and cooperative legal pluralism. The fourth, benign legal pluralism, is common in states that are clearly predominant over non-state actors throughout its territory, a situation rarely found in post-conflict states. The structure of legal pluralism has major implications for how post-conflict judicial state-building enterprises should be conceptualised and pursued. A high level of legal pluralism alone, however, does not explain outcomes. It matters dramatically whether state officials can 'gain[] the right and ability to make… rules' and whether non-state actors can effectively resist the state (Migdal 1988: 30-31). Still, the legal pluralism paradigm present in any given state can significantly constrain or bolster domestic and international initiatives.

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

Figure 1: Legal Pluralism Paradigms

2.1 The Fluidity of Legal Pluralism Paradigms

While invariably a simplification, paradigms can help conceptualise the core features of the relationship between state and non-state judicial actors and inform judicial state-building efforts in legally pluralist settings. However, the paradigms are not set in stone or determinative. As the case study chapters highlight, it is possible to transform settings marked with high degrees of competitive legal pluralism into a cooperative environment as has occurred in Timor-Leste since independence. Alternatively, the situation can deteriorate from competitive legal pluralism to combative legal pluralism as occurred in Afghanistan during Karzai's presidency. Thus, effective engagement with the non-state justice sector requires thinking critically about how to deal with current realities, while simultaneously seeking to transform the environment to one more favourable to judicial state-building.

A degree of pluralism is inevitable even in highly developed democratic states seen as possessing the rule of law (Tamanaha 2008, Berman 2012), but in these cases the state retains the ultimate legal authority (Obuchi 1987, Ellickson 1991, Cappelletti 1993, Dezalay and Garth 1998). Thus, this form of legal pluralism is benign from a state-building perspective as the state has effectively outsourced alternative forums, such as court-referred mediation, or at least tactically licensed dispute venues, such as binding arbitration.

In contrast, in post-conflict societies, which are the focus of this thesis, non-state legal systems handle the vast majority of disputes with a high degree of autonomy from the

state (Albrecht, Kyed et al. 2010). This dynamic can have immense implications for judicial state-building endeavours. While scholars rightly note that state-building efforts occur in the context of 'hybrid institutions' and can significantly influence the behaviour and incentives of local elites and other stakeholders (Mac Ginty 2008, De Waal 2010), and that legal pluralism is inherently dynamic and responsive (von Benda-Beckmann and von Benda-Beckmann 2006), there has been little theorization of the overarching environment of legal pluralism or how domestic and international state-building efforts seek to influence the relationship between state and non-state justice systems.

2.2 Combative Legal Pluralism

In combative legal pluralism, the two systems are overtly hostile. The state and non-state justice sectors seek explicitly to undermine, discredit, supplant, and ideally destroy the other. Combative legal pluralism flourishes in countries facing an active insurgency or separatist movement. Indeed, non-state justice forms a major foundation of those movements (Kalyvas 2006: 218-219, Mampilly 2011, Arjona, Kasfir et al. 2015). The importance of justice systems is far from purely academic. Che Guevara's treatise *Guerrilla Warfare* prioritizes the creation of a competing justice system:

> In view of the importance of relations with the peasants, it is necessary to create organizations that make regulations for them, organizations that exist not only within the liberated area, but also have connexions (sic) in the adjacent areas….The peasants will sow the seed with oral and written propaganda, with accounts of life in the other zone, of the laws that have already been issued for the protection of the small peasant, of the spirit of sacrifice of the rebel army; in a word, they are creating the necessary atmosphere for helping the rebel troops (Guevara 1969: 93-94).

Unsurprisingly, combative legal pluralism abounds especially in places where the post-conflict state-building and efforts to promote the rule of law have failed or are clearly

trending in a negative direction. In many instances, this dynamic coincides with an active insurgency characterized by parallel antagonistic state-building enterprises and the scope for even limited collaboration is minimal to non-existent (Wickham-Crowley 1992, Kalyvas 2006: 218-220, Mampilly 2011). For example, in Afghanistan, the state and the Taliban run justice systems actively sought to destroy each other (Johnson 2011: 282, Coburn 2013). The state refused to recognize Taliban adjudication, while people in Taliban controlled areas were barred from accessing state courts and even faced punishment for engaging them (Johnson and Mason 2007, Giustozzi and Baczko 2014: 215).[38]

2.3 Competitive Legal Pluralism

Settings displaying competitive legal pluralism feature significant, often deep, tensions between state and non-state legal systems. Tensions can be immense as 'these coexisting sources of legal authority, these coexisting sources of normative ordering are poised to clash particularly when their underlying norms and processes are inconsistent' (Tamanaha 2008: 400). Yet clashes rarely endanger the state's overarching formal juridical authority. Unlike combative legal pluralism, with competitive legal pluralism, the non-state justice sector does not make a concerted effort to supplant or overthrow state authority. While the non-state justice sector retains a sizable degree of autonomy, the state and non-state systems respect each other's right to exist in some form. Furthermore, they are willing to engage with each other at least tactically. Addressing legal pluralism is always a challenge, but especially when the

[38] The Taliban reportedly threatened to kill collaborators with the state and their entire families (Johnson and Mason 2007: 87).

state institutions have generally been undermined by conflict (Baker and Scheye 2007).[39]

Competitive non-state legal systems are most frequently rooted in religious beliefs or shared culture, custom, or heritage. These traditions can be real or invented (Anderson 2006). These systems of order often exist outside the state and do not necessarily share the state's values (Migdal 1988).[40]

Competitive legal pluralism also exists where criminal actors have established illegal markets that rarely seek to take over the state but actively work to retain autonomy by undermining and circumventing state law to establish a separate, parallel order with enforcement capacity (Volkov 2000, Leeson and Skarbek 2010, Skarbek 2011).[41] In post-conflict settings the level of competition tends to track the success of the state-building process; where it is trending in a decidedly negative direction, such as Afghanistan, competitive legal pluralism can easily slip into combative legal pluralism. At the same time, as the state gains legitimacy, authority, and capacity, the environment and the incentives for non-state actors increasingly favour a cooperative relationship because the advantages of working with the state are greater and the consequences of working against it more dire. Nonetheless, achieving cooperative legal pluralism

[39] This dynamic is common but not inevitable. Winning a conflict can kick-start the process of establishing a legitimate state legal order that suppliants or undermines non-state actors, but this process takes time.

[40] The fact that many of those traditions or cultural beliefs may be largely invented or imagined does little to undermine their power when people share an ideological commitment to the ideas they embody (Anderson 2006).

[41] In some instances, 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 (Uslaner 2008, Rothstein 2011, Chayes 2015).

constitutes a major challenge and as long as non-state actors retain a high degree of autonomy, the potential for setbacks is ever-present.

Competitive legal pluralism tends to be prolonged and endemic. For the rule of law to develop, state law and legal institutions 'need to be seen as legitimate and authoritative, not just by ordinary people but also by powerful elites in society' (Fukuyama 2011: 247). Achieving authority and legitimacy is by no means inevitable and takes a substantial period of time under even favorable circumstances (North, Wallis et al. 2009: 27). The challenges are even greater when there are well-established non-state venues that are seen as legitimate and authoritative (Migdal 1988) and greater still in post-conflict settings where the state's legal authority and institutions have often been badly damaged and compromised (Isser 2011b). While states often seek to supplant non-state competitors over time (Fukuyama 2011), in other circumstances engagement with non-state authorities forms the basis of the governance system. As Renders notes, in many colonial settings:

> There was no way the colonial authorities could do without pre-existing traditional leaders and institutions to make their rule effective. Their exact role varied according to the rationale behind the colonization of different regimes in Africa—in a settler colony like Kenya traditional authorities were incorporated much more firmly than in British Somaliland, where London had few interests…Because colonial authorities needed traditional leaders as intermediaries, they were careful not to undermine their legitimacy in the eyes of the population by politically or legally incorporating them to the extent that would loose that very legitimacy. Traditional leaders and institutions had to be seen to protect the population for over-exploitation (Renders 2012: 26).[42]

Domestic judicial state-builders often employ similar tactics. In Afghanistan, for instance, competition between legal systems is deeply embedded. Since the state's inception as the regime, it 'sought to impose centralized code-based judicial

[42] This dynamic was not limited to Africa. Portuguese colonial rule in Timor relied on local judicial authorities but rebellions were also common (Robinson 2009: 21-39).

institutions' (Barfield 2008: 349). At the same time, the state recognized that non-state justice remained the dominant form of dispute resolution and the state required religious and tribal authorities to acquiesce in the regime (Gregorian 1969, Rubin 2002). These tensions were usually managed but had the potential to explode into open, violent conflict, such as when religious and tribal authorities cooperated to depose King Amanullah in 1928 (Poullada 1973). As highlighted in Chapter 6, even the Taliban's rapid imposition of a state legal order in the 1990s reflected a tacit agreement with prominent forms of tribe-centric justice.

2.4 Cooperative Legal Pluralism

As with competitive legal pluralism, in a cooperative legal pluralist environment the non-state justice sector retains a significant degree of authority. The major distinction is that under cooperative legal pluralism, state and non-state legal authorities are generally willing to work together towards shared goals. Major clashes are far less frequent and tend to be focused on social issues, 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 towards consolidating legitimate state authority.[43] In some instances, this coincides with meaningful advances towards the consolidation of democratic governance and the rule of law.

[43] However, the establishment of a high capacity state that enjoys a cooperative relationship with non-state authorities does not necessarily require democracy or the rule of law. As Organski and Kugler highlight, 'a high capacity state need not be free, democratic, stable, orderly, representative, participatory' (Organski and Kugler 1981: 72), as evidenced by post-conflict transformations in places such as Zimbabwe (Kriger 2003, Kriger 2006).

In post-conflict Timor-Leste, state and non-state actors pursued a common agenda focused on stability and development even as tensions over women's rights endured (Wassel 2014).[44] This constitutes a remarkable accomplishment in light of the state's limited capacity and the on-going prevalence of non-state justice (Marx 2013). This was made possible by a combination of historical factors, institutions, and strategic choices. Timor-Leste's state, with support from the international community, in large part effectively transformed a legal context long dominated by competitive legal pluralism under Portuguese colonial rule, which had become combative under Indonesia's occupation, into a legal landscape distinguished by cooperative legal pluralism. Non-state authorities now view the state and the state-building endeavour as legitimate. They are largely open to constructive engagement because state leaders were also recognized as key actors in the independence struggle. This dynamic is by no means limited to Timor-Leste. A similar dynamic emerged in post-conflict, post-liberation African states where non-state justice actors largely backed the nascent state though their support often waned 'when the state-building project becomes too exclusivist or predatory' (Dorman 2006: 1087).

2.5 Benign Legal Pluralism

Benign legal pluralism also features a cooperative ethos, but the non-state justice authorities operate under the umbrella of state authority.[45] Thus, only benign legal pluralism truly upholds that oft-stated requirement that the law be applied equally to all

[44] This is particularly true after the resolution of the 2006 Crisis over military policy and high-level political elites.
[45] Legal pluralism is 'benign' in the sense of the relationship between state and non-state systems, not necessarily in the law's substantive content.

people (Carothers 1998, Tamanaha 2007). Legal pluralism does not disappear in a state with a high capacity, effective legal system, but it is subordinated. In the United States, Western Europe, and many other countries with highly developed, effective legal systems, private arbitration, mediation, and other forms of alternative dispute resolution (ADR) are commonplace (Cappelletti 1993, Nolan-Haley 1996, Gaitis 2004, Redfern, Hunter et al. 2004).[46] 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). Substantively and procedurally, state and non-state law can still clash. Arbitration agreements are explicitly designed to circumvent state law and legal process. In many ways, avoidance of state law and state legal process is the point of arbitration, but the extent to which they can be circumvented depends on the amount of leeway provided by the state (Sternlight 2005). In all instances, these processes are integrated into and fall under the ultimate regulatory purview of the state, exist at its pleasure, and even largely depend on state courts for enforcement. ADR processes are allowed and often encouraged because the state deems them useful tools to address real and perceived 'inefficiencies and injustices of traditional court systems' (Edwards 1986: 668). Benign legal pluralism is a worthy goal to strive towards. That said, it takes a long time to establish; it is important to have reasonable expectations as to what is feasible in the short to medium term after conflict.

[46] 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).

3 STRATEGIES FOR ADDRESSING THE NON-STATE JUSTICE SECTOR

I posit that there are five main strategies of how to understand interactions between the state and non-state systems: 1.) Bridging; 2.) Harmonization; 3.) Incorporation; 4.) Subsidisation; and 5.) Repression. These strategies are by no means mutually exclusive or hermetically sealed, but they are, nevertheless, conceptually distinct.[47] There is no guaranteed strategy for success, but certain strategies are better suited to certain environments. The focus must be firmly on which strategies are best positioned to facilitate progress towards the rule of law. As will be demonstrated in the case study chapters, local and international state-builders often employ these strategies with little regard for the complex relationship between the state and non-state justice systems, which invariably leads to decidedly suboptimal outcomes. At the same time, savvy strategic planning and pragmatic adaptation, ideally combined with a bit of good fortune, can improve the relationship between the state and non-state justice sectors regardless of the dynamics present.[48]

[47] These strategies may have a stated end goal or vision, but this is not necessarily the case as the assumptions may simply be implicit.

[48] As Acemoglu and Robinson highlight in their impressive study, the development of inclusive, democratic institutions underpinned by the rule of law is highly contingent in even favourable circumstances (Acemoglu and Robinson 2012).

Strategy	Key Features	Examples
Bridging	Judicial state-builders seek to ensure that cases are allocated between the state and non-state 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.
Harmonization	Judicial state-builders seek to ensure that the non-state justice systems' outputs are consistent with the state system's core values.	Laws to outlaw discriminatory practices in non-state adjudication and training to end discriminatory practices.
Incorporation	Judicial state-builders eliminate the distinction between state and non-state justice. Non-state justice, at least in a formal sense, becomes state justice.	Outcomes of the non-state 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 labelling of non-state justice venues as state courts of first instance.
Subsidisation	Judicial state-builders support the state system to increase its capacity, performance, and appeal relative to the non-state 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 non-state rivals.	Outlawing non-state justice forums or seeking to arrest or kill non-state justice actors.

Figure 2: Non-State Justice Sector Strategies

3.1 Bridging

With a bridging strategy, judicial state-builders attempt to ensure that cases are allocated between the state and non-state justice systems as appropriate based on state law, participants' preferences, and venue appropriateness. A bridging approach is thus primarily jurisdictional in orientation. Almost invariably, bridging asserts jurisdictional claims. Certain legal matters, most notably homicide and other serious crimes

involving physical harms, cannot be resolved outside state courts regardless of the disputants' preferences. A bridging strategy can be paired with a formal incorporation approach that seeks to provide a state legislative framework for non-state 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 non-state justice venues. However, in many instances, such as post-conflict Timor-Leste, there is willingness to pragmatically split jurisdiction and ensure people can access the state system (RDTL Ministry of State Administration and The Asia Foundation 2013). These arrangements can take a wide array of forms depending on the country (Baker 2010a). Public information campaigns are frequently undertaken to enhance understanding of the state legal system. Similarly, training is often provided to local leaders and citizens about the state legal system and how to access it. In other instances, a bridging strategy involves the use of third parties such as paralegals. Paralegals are not lawyers, but have some legal background. Thus, they can potentially help address legal disputes or establish coordination or referral mechanisms between the state and non-state systems that have significant implications for the justice sector (Maru 2006).

The level of interest in state justice largely determines the relevance of the approach. Bridging can work well where unmet demand exists for access to the state systems or when increased awareness of state courts produces increased demand. A bridging strategy's impact also hinges on non-state authorities' willingness to facilitate or accept referrals to the state systems, which by extension decrease their autonomy. Thus, it 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 non-state authorities.[49]

3.2 Harmonization

While the non-state justice system is incorporated and legitimatized to some extent, efforts are made to ensure its outputs are consistent with the state system's core values. States and international donors often fund activities to encourage non-state justice practitioners to act in a manner consistent with state law in general. However, there is often at least tacit recognition that non-state actors retain a significant degree of autonomy and independent legitimacy (Menkhaus 2007). As opposed to trying to get non-state venues to act like state courts of first instance, there is a focus on changing the treatment of certain legal matters. In many instances, this means attempts to improve non-state actors' treatment of women and to end particularly discriminatory practices (Chopra and Isser 2012). Harmonization often can involve a willingness to tolerate some normative differences in adjudication standards, while attempting to eliminate certain particularly disfavoured practices. In general, the greater the state's ability to offer a compelling and legitimate forum for dispute resolution, the greater the prospects of successfully implementing a harmonization approach. Nevertheless, as long as non-state actors retain a significant degree of autonomy, meaningful divergence with state officials remains possible.

This dynamic holds true even in settings such as Timor-Leste, where a dynamic of

[49] In highly complex conflicts, the state may have different relationships with various non-state authorities. For example, the Afghan state has a competitive relationship with many tribal and religious non-state authorities, but a combative relationship with the Taliban insurgents.

cooperative legal pluralism is present. Both the central state and the international community have invested heavily in eradicating domestic and other forms of gender-based violence. The local response has varied significantly, but treatment of domestic violence cases is often a particularly acute area of tension between state and non-state legal orders because 'under the Indonesian law as well as in the traditional system, for example, domestic violence was a purely private matter' (Hohe 2003: 345). Domestic violence, however, is unequivocally a public crime under the Penal Code (RDTL 2009: Articles 146, 154) and The Law Against Domestic Violence (RDTL 2010). Despite suco chiefs' general willingness to support the state's goals and uphold state law, existing evidence suggests that domestic violence is still overwhelmingly treated as a private matter to be handled by the non-state justice system (Wigglesworth 2013). The persistence of non-state dispute resolution for domestic violence is not particularly surprisingly as the conception of domestic violence as a public crime contravened previous state and non-state practice (Corcoran-Nantes 2009, Cummins and Guterres 2012). How suco leaders address domestic violence remains largely discretionary when there is a meaningful difference between the domestic law and the suco leader's authority. This highlights that non-state authorities still retain an effective veto over state law in their jurisdiction even in settings where not-state actors are favourably disposed to the state.

3.3 Incorporation

Under incorporation, the distinction between state and non-state justice is eliminated at least from the state's perspective. Non-state justice, at least in a formal sense, becomes

state justice. In practical terms, this means that outcomes of the non-state 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, the labelling of non-state justice actors as courts of first instance, or simply offering an avenue for appeal. Decisions of the non-state 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 non-state justice system could be brought under the purview of the state justice system (Peters and Ubink 2015). While non-state systems are allowed to continue and perhaps even grow, in practice incorporation is a bold move to assert practical and ideological authority over non-state actors by limiting their independence. Judicial state-builders seek to both harness the authority of the state system and control it.[50] Once incorporated states may further seek to regulate 'customary' non-state law by codifying it, an inherently subjective and selective process, or even by creating new non-state law over time (Fitzpatrick 1984: 21).[51]

As Buur and Kyed have argued regarding post-conflict states in Sub-Saharan Africa, the state, understanding its own weakness, often recognizes non-state authorities with the aim of 'restoring state governance and reextending state governance' (Kyed and Buur 2007: 5). After all, an incorporation strategy only becomes necessary in the wake

[50] Even more developed countries have recognized the potential utility of incorporation strategies. In Malaysia for instance the longtime ruling party has used state-sponsored Islamic Courts 'to validate its Islamic credentials delegitimize the party and the state and thus co-opt, or at least undercut, both the Islamic insurgents and the opposition party' (Peletz 2002: 10).

[51] As Fitzpatrick highlights, scholars have long recognized, 'the very attempt to write down custom in a way meant to be juridically or intellectually definitive loses custom' (Fitzpatrick 1984: 21).

of the state's inability to achieve a clear position of dominance at the local level. Thus, there is no guarantee that non-state actors will be willing or able to be incorporated into the state justice system. In other words, the state may envision itself as the principle with the non-state judicial actors as its agent but this approach is invariably problematic if the non-state actors have notably different norms and values from the state and accountability mechanisms are weak.[52] Thus, the prospects and effectiveness of incorporation strategies directly track the state's ability to persuade or compel large numbers of non-state judicial actors to engage with it, which is most likely in cooperative settings, possible but tentative in competitive scenarios, and very unlikely in combative environments.

3.4 Subsidisation

Subsidisation of the state systems is the most common strategy. It is easy to undertake because there are a vast number of potential targets and it is only one of the five strategies that does require any meaningful acquiescence by non-state judicial actors as a prerequisite. Consequently, under subsidisation approaches, the non-state system is largely left alone or at least not the primary target of action. However, the state system receives assistance to increase its capacity, performance, and appeal relative to the non-state system. This task sounds straightforward as it does not directly involve the non-state justice sector. However, as Fukuyama 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

[52] Fukuyama offers a compelling overview of principal-agent issues in the context of state-building (Fukuyama 2004: 43-91).

administrative tasks that state-builders need to accomplish' (Fukuyama 2004: 59)

As discussed below, subsidisation 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. Subsidisation is by far the most common strategy in post-conflict judicial state-building as well as judicial state-building in general. There are vast numbers of ways that subsidisation occurs. However, certain key subsidisation techniques tend to recur across settings. These techniques include legislative reform, establishing physical infrastructure used by the justice sector, supporting symbolic representation, capacity building, and promoting public engagement, which are discussed in more detail below.[53]

Legislative Reform

Predicated on the straightforward idea that an improved justice system can stem at least in part from drafting new laws, and reform of existing legislation is a major focus of efforts to bolster the state justice system (Channell 2006: 144-146, Stromseth, Wippman et al. 2006, Jensen 2008). Drafting a new constitution or reforming the existing one is almost always a top priority after conflict (Lijphart 2004, Elkins, Ginsburg et al. 2007), as is crafting institutions to implement the new legal order (Horowitz 2006). These areas are given particular attention as they are supposed to structure the state's legal and political order and offer a clean break from a violent past. Yet problems cannot simply be legislated away: while states often enact legislation at a rapid pace, they have generally been slow, or unable, to implement it. The capacity to

[53] This list is by no means exclusive. For a more-detailed description of activities, see Kleinfeld (2012).

enforce law is essential to the rule of law (Raz 2009). Typically, such legislation upholds international standards and reflects principles and norms widely accepted in international advisors' home countries. It is often inconsistent, however, with the practical realities of the implementing country. Even when the state justice system produces results consistent with the codified law, the courts and other legal actors often find implementation lacking or arbitrary. However, passing legislation or international treaties alone does not necessarily have a meaningful impact on the rule of law unless the state is actually willing to be bound by the law (Hathaway 2002, Ginsburg and Moustafa 2008).

Physical Infrastructure

Prolonged conflict invariably takes a toll on the state's physical infrastructure (Cliffe and Manning 2008). Judicial state-builders frequently seek to build or repair court houses, government ministries, and other buildings related to the judicial system (Carothers 1999: 166). State-builders often prioritize physical infrastructure based on the assumption that constructing viable spaces for the state justice sector to perform its duties leads to increased use and legitimacy. While space can be helpful in and of itself, it does little to improve the actually quality of justice unless state justice officials have the knowledge, capacity, and desire to actually improve the justice system.

Symbolic Representation

As the rule of law in significant part rests on the belief of both justice sector actors and the general population in the idea that the rule of law exists, symbolism, and the

legitimacy it helps project, is vital (Přibáň 2007). Recognizing the role of symbolism, state-builders seek to enhance the representational power of the state justice system. Symbolism is deeply imbedded in any legal system, from building architecture to court procedure and decorum (Tobe, Simon et al. 2013). The foundational legal instruments are also often venerated (Elkins, Ginsburg et al. 2009). The perception of legitimacy is absolutely essential as the judiciary lacks the authority to implement its decisions alone (Tyler 2006). As Fukuyama notes, 'legal institutions need to be seen as legitimate not just by ordinary people, but also by powerful elites in the society' (Fukuyama 2011: 247). When they are effective legal 'symbols do not merely generate feelings of unity,' but also function as 'a source of political mobilization' (Smith 1997: 935). The effectiveness of symbolism hinges in large part on the underlying entity's legitimacy is as well as how compelling the symbols are for the audience. A symbolic representation that enhances the state's legitimacy to one person can be decidedly exclusionary to another observer (Scott 1998, Horowitz 2000: 216-219).

Capacity Building

Capacity building is immensely popular with state-builders, particularly with international actors, as it seeks to instil the skills and values necessary to establish the rule of law (Carothers 1999: 163-177). Technical assistance and educational investment for current or future legal professionals likewise form a core approach to state-building in post-conflict societies. Yet the actual impact of training for establishing the rule of law is notoriously difficult to demonstrate (Carothers 2003). Assistance often embodies norms that may not easily fit within existing culture and produces results that are hard

to quantify. Nonetheless, the rationale behind capacity building remains prominent even though results are mixed; improving the knowledge and capacity of those operationalizing the state justice system is necessary even if insufficient on its own.

Public Engagement

Other discrete activities include seeking to engage the public. Strategies often seek to improve people's understanding of the workings of the state justice sector and their ability to effectively use the system. Other aid is explicitly advocacy oriented, addressing issues such as political and judicial or legislative reform designed to improve the functioning of the judicial systems (Diamond 2008: 126-133). While these mobilization efforts may promote vital reforms, in other instances they can focus on areas that are of particular interest to the international community but possess limited domestic constituency.

In other instances, programmes veer into the realm of public relations by seeking to improve the public's perception of the state justice system. As highlighted by work in Afghanistan, these efforts are particularly challenging when they seek to increase traffic to state courts and improve the courts reputation when there has been no corresponding increase in quality. Both major USAID programmes in Afghanistan that focused on the state system – the Afghanistan Rule of Law Project (AROLP) and the Rule of Law Stabilization Program-Formal (RSL-Formal) – tried to enhance the justice sector's public image and increase use of state courts (Checchi and Company Consulting 2009, Leeth, Hoverter et al. 2012: 6). Improving the public's perception, however, did not fix

the judicial system, which remains among the most corrupt sectors of a dauntingly corrupt state apparatus (Singh 2015). AROLP and RLS-Formal ignored the major issues in the underlying political economy of the Afghan justice system, including the lack of judicial independence and endemic corruption and rent seeking (Jones 2010, De Lauri 2013). Pushing more people to use a predatory, highly corrupt justice system does little to improve the rule of law and threatens to further undermine faith in the judicial system.

3.5 Repression

Repression strategies are not concerned with persuading or incentivizing non-state justice actors to work with state authorities. Likewise, repression does not hinge on the state system out performing its non-state rivals or encouraging citizens to use the state system. Instead, repression strategies seek to fundamentally undermine and ideally eliminate the state's non-state rivals rending these considerations irrelevant. For Forsyth, this entails:

> repressing a non-state justice system by making it illegal for it to deal with cases (rather than by merely outlawing the use of coercive force by the non-state justice system) (Forsyth 2007).

Repression can simply be a matter of outlawing non-state justice forums, particularly in relatively peaceful places such Botswana, and using the states power to enforce its mandate. Forsyth, however, fails to include common forms of repression that can be far more overtly violent.

Settings featuring combative legal pluralism almost invariably see significant violence

by state and non-state actors because the state recognizes the threat possessed by non-state justice actors to undermine and potentially destroy them (Tilly 1992, Mampilly 2011). In Afghanistan, for example, international and Afghan forces invested heavily in attempts to destroy the Taliban justice system through targeted killings and other projections of force (Giustozzi, Franco et al. 2013, Giustozzi and Baczko 2014). The desire to repress is not solely the purview of the state. The Taliban seek 'to discredit and undermine' state claims to legal authority by impeding the work of state courts and engaging in assassinations of state legal personnel (Johnson 2011: 282). Populations in Taliban controlled areas are banned from taking their disputes to state courts and subject to punishment for engaging state authorities (Johnson and Mason 2007, Giustozzi and Baczko 2014: 215).

Bridging, harmonization, and incorporation strategies rarely coincide with a repression strategy.[54] However, the state frequently draws on a subsidisation strategy for the state justice system, seeking both to increase its authority and effectiveness relative to non-state justice systems as well as to protect state judicial authorities from insurgent attacks. For example, in Afghanistan the US has spent over a billion dollars supporting the state justice system, but also invested substantially in trying to protect justice sector personnel and infrastructure (SIGAR 2009, 2015). While invariably unpleasant in practice, repression can be an important tool when the state faces an existential threat from non-state justice actors, particularly when linked to an armed insurgency.

[54] The notable exceptions are instances where recognition of certain non-state institutions forms a key part of the peace and reconciliation process. For example, in Afghanistan, a peace deal with the Taliban, if possible, would invariably require some sort of state reorganization and a great role for religion in public life.

Nevertheless, repression and force alone 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).

CONCLUSION

Legal pluralism is inevitable, but its implications are particularly vital in post-conflict settings. It is insufficient to simply note that legal pluralism exists and has importance consequences. Rather scholars need to examine the type of legal pluralism that currently pervades the state-building context and appreciate the challenges and opportunities it provides. The strategies highlighted above have been used by domestic and international state-builders in reference to the non-state justice sector. These techniques have been widely replicated across contexts, but rarely critically examined. The following chapters begin to remedy this deficit by examining domestic and then international judicial state-building endeavours in Timor-Leste and Afghanistan.

CHAPTER 4
Domestic Judicial State-Building in Timor-Leste: From Competitive to Cooperative Legal Pluralism

INTRODUCTION

This chapter examines governance and judicial state-building in East Timor from Portuguese colonization to the final withdrawal of the UN mission at the end of 2012. Throughout its history, East Timor's inhabitants have exhibited extraordinarily high levels of competitive legal pluralism and, until recently, profound scepticism towards state institutions. Why, despite these challenges has the judicial state-building endeavour proven remarkably successful? This chapter will argue that this result stems largely from the willingness of the state and the non-state justice sector to work together with a relatively high degree of comity since shortly after independence in 2002. This constitutes a remarkable accomplishment in light of the state's limited capacity, and was made possible by a combination of historical factors and strategic choices. Timor-Leste's state, with support from the international community, has in large part effectively transformed a legal context long dominated by competitive legal pluralism under Portuguese rule, which had became combative under Indonesia's occupation, into a legal landscape distinguished by cooperative legal pluralism.

In independent Timor-Leste, non-state justice actors actively support state policy despite the state's inability to consistently impose its will on non-state actors. This transformation was accomplished by establishing competitive local elections as the foundation of local governing and judicial authority. The state also accepted a

functional jurisdictional divide between state and non-state justices that is broadly seen as legitimate while simultaneously harnessing a powerful vision of Timorese national identity to pursue a popular, broad-based development agenda. I also contend this accomplishment stems to a substantial degree from the ability of judicial state-building efforts to draw on the history, institutions, and ideals established during Portuguese occupation through to independence. This achievement, however, rests on a paradox. Portuguese rule did very little to develop East Timor or impose a uniform legal order, but this left indigenous social structures largely intact, particularly outside urban centres. At the same time, the Portuguese legacy proved a vital distinguishing feature from Indonesia, which was colonized by the Dutch, and allowed the resistance to capitalize on a compelling self-determination claim.

Statement of Theory Building

In addition to challenging the conventional wisdom that the Timorese state is disconnected from society and that non-state justice is antagonistic towards the state, I argue that Timor-Leste offers a compelling case for theory building of how a state, in the right set of circumstances, can undertake effective judicial state-building after conflict despite high levels of legal pluralism. As highlighted in Chapter 3, the default backdrop for post-conflict state-building is competitive legal pluralism. However, the situation is inherently fluid. The case of Timor-Leste shows how it is possible for competitive legal pluralism to be transformed into cooperative legal pluralism. Timor-Leste was successful because 1.) Despite fierce political competition between competing groups, all major parties remained committed to constructing a democratic

state underpinned by the rule of law; 2) There was a credible and sustained effort to develop institutions that promote democratic accountable, inclusiveness, and the rule of law; and 3.) The state engaged and collaborated with key non-state actors through successful local suco elections as well as developing strategies to facilitate suco chiefs working with the state rather than against it. While the process was imperfect, Timorese state-officials effectively *mediated* between the international community and local-level figures that contributed to the transformation of the competitive legal pluralist environment into a cooperative one. Timor-Leste's development reflected its own history as 'the outcomes of the events during critical junctures are shaped by the weight of history, as economic and political institutions delineate what is politically feasible' (Acemoglu and Robinson 2012: 110). Still, these junctions, which occur in almost all post-conflict settings, are highly relevant to other state-building endeavours. As will be demonstrated in Chapter 6, Afghan state leaders faced a very similar set of decisions yet made a very different set of choices.

Common Scholarly Assumptions about State-building in Timor-Leste

State-building in Timor-Leste has been of significant scholarly interest, much of which is decidedly critical. These critiques are clustered around three distinct though overlapping areas. First, the UN intervention was misguided and misplaced and in later work often cast as substantially responsible for the 2006 Crisis (Chopra 2000, 2002, Hohe 2002a, Butler 2012). Second, there was little room for non-state justice under the predominant governance arrangements (Hohe 2003, West 2007). Third, the state and particularly the state justice sector lacked legitimacy as it was profoundly disconnected

from the Timorese people, a claim which is often coupled with idea that the state institutions were largely a foreign imposition (Zaum 2007: 205-206, Richmond and Franks 2008). Chopra and Bowles even claim, 'An independent state did not emerge out of a collective vision of the state or a coherent national identity' (Bowles and Chopra 2008: 272).

It is important to recognize that there have often been significant policy shortcomings, both in the UN interlude and since independence. However, my research directly challenges many common assumptions. These criticisms are most plausible if the period before the referendum and after the 2006 Crisis are deemphasized, but these critiques omit crucial developments. Few scholars even mention that the independence movement advocated for a modern, democratic state predicated on the rule of law for over two decades. Those few scholars that do acknowledge the independence movement's emphasis on a modern, democratic state committed to the rule of law, tend to view it as a sort of strategic charade and assume the worst about issues such as Ramos-Horta's pardons and Gusmão's release of Bere (for example, see Grenfell 2009).

Since 2006 Crisis, Timor-Leste has not suffered a descent into disorder but rather has enjoyed stability as well as free and fair multiparty elections. As argued above, I believe a holistic review of the record casts their actions in a different light. Non-state justice actors' support for the judicial state-building process bodes well for the state's legitimacy as well as its engagement strategy. It was not a lack of setbacks that

ultimately determined the success of the judicial state-building project through to 2012, but rather how state institutions and leaders addressed setbacks. The process of establishing the rule of law and an effective courts system is immensely complicated and even under favourable circumstances takes decades (Fukuyama 2004). Likewise, it is not certain that actors will uphold rule of law ideals on every occasion, but whether a meaningful commitment to the idea exists. Timor-Leste's state-led judicial state-building progress, while still uneven, has been remarkable, particularly in light of the limited state capacity and extraordinarily high levels of competitive legal pluralism present at the outset.

Chapter Overview

This chapter consists of two parts. The first is a critical historical examination of how state and non-state legal mechanisms have developed at times in tandem with, and frequently in opposition to, dominant modes of governance prior to independence. The historical section examines the Portuguese colonial period from the early seventeenth century to the dominant Frente Revolucionária de Timor Leste Independente (Fretilin) party declaring an independent state in 1975. It argues that Portuguese rule entrenched the non-state justice system in a manner still recognisable to this day, before detailing Indonesia's occupation and East Timorese resistance. Most notably, I argue that legalism was both a cornerstone of Indonesian rule and Timorese opposition to it. The resistance effectively relied on both non-state authorities and legal argumentation regarding self-determination, human rights, and a vision of an independent democratic state bound by the rule of law. Finally, this section details Timor-Leste's emergence

from Indonesian occupation and how this process further empowered non-state authorities.

The second part examines judicial state-building since Indonesia's departure as well as post-independence efforts to resolve state/non-state justice tensions. It shows how the dual vision of a simultaneously traditional and fully modern state remained a driving force for political discourse in the UN interlude. This section also examines how the East Timorese state has effectively co-opted non-state judicial systems in the process of making significant progress towards democratization and the rule of law despite major challenges. Competitive democratic elections have been particularly effective in translating political legitimacy garnered from the independence struggle into state authority, while local elections have been an effective means of rooting local authority in democratic choice rather than ancestry. Finally, this section shows that East Timor's leaders have generally displayed a normative commitment to following the law, which has translated into a meaningful process towards consolidating the rule of law despite significant on-going challenges.

Figure 3: Map of Timor-Leste (Central Intelligence Agency 2015)

I EAST TIMOR FROM PORTUGUESE COLONIALISM TO THE INDEPENDENCE REFERENDUM

1 PORTUGUESE COLONIALISM[55]

East Timor has long been the subject of colonial and international interest far disproportionate to its landmass, population, or economic clout. European colonial

[55] The terms 'Timor-Leste' and 'East Timor' are both used in this chapter though following convention; I generally use East Timor for the period prior to statehood and Timor-Leste after independence in 2002.

influence began with the arrival of the Portuguese in the early sixteenth century. In the seventeenth century, the Dutch arrived and soon proved a strong colonial rival. Eventually, the competing colonial administrations created an enduring division between Dutch West Timor and Portuguese East Timor.[56]

Portuguese rule has proven influential for later East Timorese political and legal development. The Dutch systematically checked the influence of non-state authorities. In contrast, 'the Portuguese enhanced the power of traditional elites' albeit in service of Portuguese rule (Jolliffe 1978). Centuries later, democratic Portugal would serve as the institutional model for the institutions established in independent Timor-Leste. The ultimate result has been an effective blend of state and non-state authority underpinned by a distinctive and relatively inclusive Timorese identity.

1.1 Governance and Legal Order under Portuguese Colonialism

Legal order was predicated on competitive legal pluralism for centuries. While Portugal was the dominant colonial force in East Timor for over four hundred years, pre-existing political and social authority structures remained in place.[57] Portuguese authorities exercised little direct rule outside the capital and certain costal areas. Effective authority largely hinged on tactical alliances between Portuguese officials and non-state authorities, most notably local rulers. As Robinson explains, 'with only a tiny contingent of soldiers and officials through much of the eighteenth and nineteenth

[56] This division remained until Indonesia's forcible annexation of East Timor in 1975 and returned after Timor-Leste's independence.

[57] For instance, during Portugal's centuries of rule, officials constructed 'only 12.5 miles of paved road, opened only about 50 schools and left behind a population that was still 80 percent illiterate' (Robinson 1999: 25).

centuries, Portuguese authority was hardly overwhelming, and relied to a great extent on a network of informal alliances with friendly chiefs or liurai' (Robinson 2009: 23).

Displays of colonial power were on occasion robust, but social, political, and legal order was largely constructed around non-state authority. Most issues were dealt with locally, although certain matters, such as murder, could trigger state involvement. Indigenous East Timorese political structures featured three main administrative units: the village, consisting of several small hamlets, princedoms (*sucos*) composed of several villages, and the kingdom consisting of several sucos and headed by a *liurai* or ruler (Taylor 1991: 7). These core units remain essential to understanding both state and non-state authority through to the present day.

In the early twentieth century, the Portuguese colonists faced a sustained rebellion. The rebellion was quashed in 1913, but sparked a transformation of the governance system:

> The position of the liurais was undercut by the abolition of their kingdoms. The colony was re-divided into administration units, broadly based on the suco (princedom). A measure of administrative power was given to the level below the kingdom level on the indigenous hierarchy. This enhanced the position of the *suco*, although their election as administrators was subject to Portuguese approval (Taylor 1991: 11).

The emphasis on maintaining order through suco level administration combined with a more direct approach by colonial administrators persisted until Portugal's withdrawal in the mid-1970s (Nixon 2012: 31-35). Subsequent to this, liurais remained important but suco chiefs emerged as another district source of non-state authority. In Portugal, the authoritarian Caetano regime collapsed in April 1974, which triggered a rapid, haphazard decolonization process. In East Timor, this meant legalisation of political parties, significant internal conflict, and substantial international and domestic

manoeuvring over the territory's status. This turbulent period culminated in a declaration of independence by the majority Fretilin party on 28 November 1975.

2 INDONESIAN OCCUPATION

Indonesia invaded East Timor on 7 December 1975 in violation of international law (Clark 1980). By 1983, Indonesia controlled the entire territory though guerrillas did continue to operate. Indonesia's twenty-five year occupation would have immense consequences for Timorese society and the eventual form of the independent Timorese state. Still, despite immense brutality and widespread death and starvation, a number of core facets of Timorese society remained remarkably resilient. In total, up to 200,000 people died as a result of the occupation — a staggering amount given East Timor's population totalled less than a million people (Nevins 2005: 26). Throughout the duration of Indonesian rule, 'the East Timorese continued to live under one of the most intensive military occupations in history' (Moore 2001: 25).

2.1 Legalism as a Foundation for Indonesian Occupation

In many ways, East Timor exemplified governance in President Suharto's Indonesia writ large. Suharto's regime claimed to be 'legitimated by a proclaimed opposition to this [President Sukarno's] subordination of justices to politics' as well as a broader 'return to the rule of law' (Hart 1987: 166). In reality, Suharto's Indonesia operated as a paradigmatic example of rule by law (Hart 1987: 203), whereby the regime uses law to exercise power, supress opposition, and enhances its claim to legitimacy both domestically and internationally. Yet, the regime itself had no intention of being bound

by law (Ginsburg and Moustafa 2008: 4-6). The projection of normalcy and the rule of law formed a key component of Indonesia's strategy for dealing with the resistance (Robinson 2009: 77). Indonesia also justified its presence under international law. Indonesia claimed its motives were humanitarian and 'it could not stand idly by while a small minority in Timor, represented by FRETILIN, ruthlessly imposed its ideas by force of arms' (Republic of Indonesia 1987: 53).

Indonesia argued that East Timor had already exercised self-determination through a representative People's Assembly, which had chosen to formally integrate into Indonesia in 1976 (Republic of Indonesia: 54-57). The Suharto regime took pains to establish nominally elected local government structures in East Timor consistent with other Indonesian provinces (Dunn 1983: 301). Suco chiefs and other non-state actors were no longer trusted to maintain order, but they were expected to actively support Indonesian rule. Even so, many suco chiefs played a double game as a representative of Indonesian authority at the local level and 'clandestinely serv[ing] as the local CNRT [National Council of Timorese Resistance] representative' (Bowles and Chopra 2008: 274).

The court system formed a cornerstone of Indonesia's attempts to solidify and legitimise its rule. Courts operated in almost all districts (Babo Soares 2003: 267) and marked a clear extension of state legal power in contrast to the Portuguese colonial administration. Rather than extrajudicial killings, public trials became the norm for resistance leaders from 1983 onward, including Xanana Gusmão in 1993 (Commission

for Reception 2005, Chapter 7.6). Public trials were also the favoured mechanisms for dealing with student protesters, who rose to forefront of the resistance after the Santa Cruz massacre in 1989. Formality, however, did not equate to due process. This approach served the important strategic purposes of 'providing fewer opportunities for the accused to be raised up as martyrs,' while simultaneously demonstrating the 'far reaching authority of the Indonesian state' domestically and presenting the veneer of due process and the rule of law internationally (Robinson 2009: 70-71). The formal legal system was invaluable to sustaining the occupation.

Non-State Justice Under Occupation

The Indonesian occupation reached deep into the village level structures and sought to actively challenge pre-existing social, cultural, and political beliefs (Gunn 1997). Yet, the vast majority of disputes continued to be settled through non-state mechanisms (Babo Soares 2003). In the conflict's initial phases, Fretilin also established a parallel justice system in the areas it controlled, which was outside the state but featured a significant degree of formalisation (Commission for Reception, Truth, and Reconciliation 2005, see particularly Section 5: 12-14). After the collapse of the armed resistance, McWilliam demonstrates 'higher order structures of leadership were heavily modified or curtailed' by Indonesian authorities but the indigenous 'foundation of society, centred on clusters of interacting houses remained a vital area for everyday social life' (McWilliam 2005: 34). These pre-existing social and political networks played the predominant role in regulation of social order as well as in sustaining the resistance movement within Timor itself (Id.). Family and clan networks were thus

able to mitigate the collective action problems related to 'trust, secrecy, and organization' to both sustain the resistance and pre-existing local institutions (Roll 2014: 486). These kinship structures enabled the non-state justice system to operate effectively despite the intensity of Indonesia's occupation. Moreover, non-state dispute resolution became even more entrenched because it was widely seen as legitimate and effective in contrast to the corrupt and arbitrary state governance mechanisms (Babo Soares 2003: 267).

2.2 Legalism as a Resistance Strategy

The armed resistance's collapse in the early 1980s facilitated a fundamental strategic shift within the resistance as Xanana Gusmão assumed leadership of the political and military efforts. During the conflict's initial stages, the resistance had focused on armed struggle. Yet, from the mid-1980s onwards, the East Timorese independence movement was notable for its highly formal, legalistic nature. Under Gusmão's leadership the National Council of Revolutionary Resistance (NCRR), a resistance umbrella group, recognised that winning a physical war was impossible. Support from the intentional community would be essential to pressure the much larger and more powerful state of Indonesia to change its policy. Advocacy for self-determination emphasised Indonesia's illegal occupation and systematic violation of human rights. The resistance displayed impressive message discipline focusing on non-violent self-determination and universal human rights. These legal claims became increasingly important and, by the early 1990s, had moved to the forefront of how the resistance movement and its allies conceptualised the independence movement (Pinto 2001).

Diplomatic efforts advanced East Timor's claim that Indonesia's 'actions violated international law, specifically the norms regarding self-determination and aggression' along with numerous UN resolutions (Clark 1980: 2).[58] In December 1975, the UN General Assembly passed Resolution 3485 stating that Indonesia should 'withdraw without delay' (United Nations General Assembly 12 December 1975). The UN Security Council followed suit shortly thereafter by unanimously adopting Resolution 384 (1975), which also demanded the immediate withdrawal of Indonesian forces (United Nations Security Council 22 December 1975). East Timor's top diplomat, Jose Ramos-Horta, sought to assuage Western concerns about an independent Timor and address any lingering concerns about Fretilin's flirtation with Marxism in the mid-1970s. Ramos-Horta's efforts were equally, if not more, focused upon seeking to discredit Indonesian legal claims and prove a right to East Timorese self-determination under international law and UN resolutions (Ramos-Horta 1987).

Gusmão consistently stressed self-determination and human rights. At his trial in 1993, for instance, Gusmão repeatedly referenced the 'illegal nature of the annexation, through force, of East Timor' by Indonesia as delegitimising the proceedings (Amnesty International 1993a). Gusmão drew a strong contrast to authoritarian Indonesia by underscoring that the resistance was 'committ[ed] to building a free and democratic nation, based on respect for the freedoms of thought, association, and expression, as well as complete respect for Universal Human Rights' (cited in Webster 2003: 14).

[58] The UN General Assembly passed annual resolutions calling for Indonesia's withdrawal until 1982 and the UN Security Council passed a subsequent resolution in 1976 (Clark 2000: 80).

Gusmão also routinely emphasised that an independent East Timor would prioritise democracy and the rule of law, underpinned by 'an independent judiciary' (cited in Strohmeyer 2000: 259).[59]

2.3 Legal Activism

With approval from the central leadership, East Timorese students in Indonesia engaged in justice-based advocacy (for a first-hand account, see Pinto and Jardine 1997). Student networks, like the broader resistance, sought to promote awareness of human rights issues, form linkages with sympathetic organisations, activists, and journalists, pass on information about activities within Timor, and engage in public advocacy (Braithwaite, Charlesworth et al. 2012: 67). These networks served as the major information conduits between East Timor and the outside world. The demand for self-determination supported by international law and human rights claims was also the centrepiece of East Timorese student's asylum claims at Western embassies in Jakarta (see the petition replicated in Amnesty International 1993b).

Efforts to promote self-determination in East Timor were complemented by solidarity movements worldwide that also couched their arguments in human rights and international law rhetoric. Active links were formed with international NGOs. Amnesty International, for example, produced reports throughout the 1980s and 1990s, which helped keep international attention focused on East Timor's status (for some

[59] Even former combatants became international law advocates. Former Fretilin fighter Paulino Gama's memoirs stressed that Indonesia's 'invasion and occupation have been characterised by an open violation of international law' along with 'a flagrant disregard for the relevant UN resolutions' (Gama 1995: 103).

representative examples, see Amnesty International 1985, 1992, 1995). In sum, the independence movement correctly determined that international support was vital for any chance of success and that a focus on armed resistance was potentially counterproductive (Webster 2003). This legalistic approach, centred on self-determination, human rights, and international law, reached a far larger and more diverse audience.

2.4 Creation of East Timorese Nationalism

While the formation of a national identity is always a complex and contingent process (Anderson 2006), the Indonesian occupation, and the reaction it provoked, constructed and solidified an inclusive, broad-based East Timorese cultural identity that was deeply invested in a Timorese state—to the extent that many people, if not the majority of the population, would risk their lives for it. The East Timorese identity moulded in the crucible of occupation possessed certain key features. First, the brutal Indonesian occupation fostered a strong belief in a distinct East Timorese identity that emphasised their shared Portuguese heritage. While the Portuguese were not particularly benign or competent administrators, they were decidedly not Dutch or Indonesian. Moreover, Portugal's consistent support for East Timorese self-determination struck a positive chord. Second, Catholicism became an important cultural marker, acting as a contrast to overwhelmingly Islamic Indonesia. Church membership rose from roughly one-third of the population in 1975 to over ninety percent in 1992 (Nixon 2012: 104-105). The church also adopted Tetum as its liturgical language, which helped foster the development of Tetum as the *lingua franca* and overcome the high levels of linguistic

diversity (see Taylor-Leech 2008 for an overview of the lingusitic situation in East Timor). Indonesian authorities dramatically increased access to education for East Timorese in Timor itself and in Indonesia proper (Jones 2000). While the quality was variable and the content highly ideological, an educated class was created consisting of many individuals committed to independence. These factors made it ever more difficult to 'imagine' East Timor as just another Indonesian province and helped foster a broad-based, distinct East Timorese identity (Anderson 1993). Together these factors, along with the shared struggle for independence, would establish the ideological underpinnings of the nascent East Timorese state.

East Timor's complex reaction to occupation has prompted many commentators to reach a rather paradoxical conclusion: the occupation had a profoundly limited effect on non-state institutions, but also strengthened traditional authorities and effectively delegitimised the overarching concept of state authority in an independent Timor-Leste. Nixon, for instance, contends, 'the nature of the Indonesian administration of East Timor merely acted to undermine the legitimacy of state authority and reinforce the prevailing "traditional authority" ethic' (Nixon 2008: 183). Indonesia never succeeded in legitimising its rule, in part because of local reliance on traditional justice mechanisms that represented the regime's fundamental illegitimacy to the local population. Yet, vitally it did not undermine the concept of a state or of state legal authority, provided it was the right kind of state led by the right kind of leaders.

Resistance to Indonesian occupation pushed East Timorese political elites to articulate

a vision of an independent Timorese state that was compelling both domestically and internationally. Despite their personal differences, the Fretilin leadership, Gusmão, and the broader political class all believed that East Timor needed development, which entailed harnessing the power of a modern state while still respecting local culture. It also meant a shift away from Marxist ideals to more mainstream political views. Even people living in remote areas had been exposed to Indonesian development initiatives in areas such as education and infrastructure, and increasingly accepted that certain disputes were best handled outside of the community.[60] However, the desire for state-centred development predates the occupation; it was Fretilin's aggressively statist rural modernisation plans that underpinned their initial victory in the 1975 local elections (Taylor 1991: 32-35).

This combination of traditional values alongside a modern nation-state committed to the rule of law and human rights reflects how political elites envision the Timorese state today, even if that vision is not always reflected in practice. Society, particularly outside the urban centres, is underpinned by 'traditional' understandings of order, which are organic, legitimate, and effective for maintaining order outside the urban areas. The state's role, while consistent with the highest aspirations of the East Timorese people, is reserved for matters outside the purview of ordinary village life, and state authority is able to peacefully coexist with non-state order. At the same time, the state is expected to actively improve quality of life throughout the country in terms

[60] Having personally travelled to nearly every district while working for the Asia Foundation, it is remarkable that nearly everyone I talked to stressed the need for development and the need for the state (or international donors) to provide it.

of access to water, roads, and other development projects.[61]

During the conflict, however, these dual visions of modern-nation state and harmonious, custom-oriented society were not accorded equal weight; the resistance movement was explicitly statist developmental in its approach and rhetoric. The movement did not seek to return to an idealised, primordial East Timor. Non-state cultural practices helped sustain the domestic resistance and distinguish East Timorese culture from Indonesian, but the East Timorese resistance movement was already 'seeing like a state' long before statehood was on the horizon (Scott 1998).[62]

3 THE INDEPENDENCE REFERENDUM

At the start of 1997, despite a continued robust protest movement, there was little to suggest that the political situation in East Timor was on the brink of major change. External events proved pivotal, however. The Asian Financial Crisis devastated Indonesia's economy, and eventually led to Suharto's resignation. B.J. Habibie subsequently became president in 1998. Habibie immediately initiated democratisation in Indonesia and undertook a new approach in East Timor. After extensive negotiations between Indonesia, Portugal (which had retained the right to administer the colony under international law), and the United Nations, a referendum was agreed in August

[61] State ideology and state practice do not always correspond. This idealized vision has plenty of practical problems. Citizens often find themselves unable to access the state courts or even face sanctions from their local community for going to the state courts. This problem is particularly acute for women, most notably victims of domestic violence, and economically vulnerable people in general. While the Constitution outlines a host of individual rights, the state has so far done very little to protect those rights at the local level.

[62] Rhetorical commitment to democracy and the rule of law may simply be a strategy to secure independence (Huntington 1993: 47). Anti-occupation or colonisation can easily slide into authoritarianism after independence, as was the case in Indonesia.

1999 offering the Timorese a choice between autonomy within Indonesia or independence. The United Nations Mission in East Timor (UNAMET) would conduct the referendum. As Robinson notes, however, 'the agreement placed sole responsibility for maintaining law and order during the referendum' upon Indonesian security forces who possessed a demonstrated propensity towards violence and had little interest in a free and fair poll (Robinson 2009: 97).

3.1 The August 1999 Referendum and its Aftermath

Prior to the referendum, the Indonesian military-backed militias undertook an intimidation campaign designed to secure a vote for autonomy (Nevins 2005). Still, a stunning 98.4 percent of eligible voters participated with 78.5 percent supporting an independent East Timor. Shortly thereafter, pro-integrationist militias unleashed a 'systematic campaign of destruction and terror' (Smith and Dee 2003: 44). Jarat Chopra, who worked for UN Transitional Authority in East Timor (UNTAET), surveyed the damage:

> More than three-quarters of the country's population of 890,000 were displaced. Indonesians fled the area, and the remaining Timorese either escaped into the hills of the interior, or were forcibly removed in ships and trucks to West Timor or neighbouring islands. Main cities as well as remote towns and villages were laid waste, and 70% of the physical infrastructure was gutted. Some areas were 95%-destroyed in street-by-street burnings more precise than smart-bombing. (Chopra 2000: 27).

The violence brought international condemnation and ultimately international peacekeepers in mid-September 1999. In October, the UN Resolution 1272 established UNTAET and vested it with sovereignty over the territory during the transition to independence. Independence had been achieved, but 'the price of independence had been high—between 5,000 and 6,000 people had been killed by paramilitaries since

Habibie's announcement, thousands more had fled their homes' (Taylor 1999: xxiv).

During this chaotic time, non-state authorities were essential in maintaining order as the national political situation deteriorated from oppressive to near anarchical. As Hohe and Nixon have observed, in the wake of the post-referendum destruction, 'local mechanisms provided the only point of stability at the local level and a quick means by which normality could be re-establsihed (sic)' (Hohe and Nixon 2003: 2). While the UN asserted political sovereignty, non-state authorities maintained order at the local level. At the outset of independence, state justice was decidedly in retreat with what little infrastructure there was shattered and its human resources depleted.

II JUDICIAL STATE-BUILDING AND LEGAL PLURALISM

1 FROM INDEPENDENCE TO STATEHOOD UNDER UNTAET

UNTAET oversaw East Timor's transition from 'neo-trusteeship' to full independence (Caplan 2005). UNTAET was endowed with extraordinary powers to fulfil its mandate. UNTAET was given 'overall responsibility for the administration of East Timor' and 'empowered to exercise all legislative and executive authority, including the administration of justice' (UNSC 1999). As Tansey highlights 'the UN mission was charged with establishing the foundations of a future democratic government…but also the local capacity to use and maintain them' (Tansey 2009: 66-67). Despite the absence of antagonistic former combatants and widespread popular support for the mission and the transition to democracy, UNATET's task was daunting. State institutions present

under Indonesian rule had ceased to function or often even exist. Human resource challenges were immense because Indonesia had prevented the development of a professional class.

1.1 Transition to Local Governance

The UN directly governed East Timor from October 1999 to May 2002, but the period during which UN officials exercised power without significant input from East Timorese actors was even shorter. This period was as eventful as it was controversial.[63] Sérgio Vieira de Mello, the UN Special Representative to the Secretary General, officially possessed the broad governance power granted UNTAET, but quickly faced significant pressure to include Timorese stakeholders in the government. Indeed, UNTAET's mandate required it 'to consult and cooperate closely with the East Timorese people' (United Nations Security Council 1999). The CNRT had been an effective umbrella group during the independence movement, but the divide between Gusmão and Fretilin supporters became problematic almost immediately post-independence. This fundamental divide would shape Timorese politics from the UNTAET era through to the present.

[63] Critics deemed the UN mission a failure almost immediately. For example, Chopra's (2000) influential article 'The UN's Kingdom of East Timor' was published in Autumn of 2000. He had resigned as Head of the Office District Administration on 6 March 2000 after the mission had been established for less than six months. Chopra's was the first in a series of influential, highly negative portraits of the UN-led state-building and subsequent international efforts in East Timor (Chopra 2002, Hohe 2002a, Bowles and Chopra 2008, Call 2008c, Richmond and Franks 2008). In contrast, others, while criticizing aspects of the UN's work, have classified the mission as a success (Smith and Dee 2003, Paris 2004, Doyle and Sambanis 2006, Howard 2008). While a detailed examination and judgment on the success or failure of the UN's work in East Timor is beyond on the scope of this thesis, Tansey (2014) makes a compelling argument that the most common criticisms of the UN are wrong or misguided and that the causal chain between the UN's activities and subsequent developments cannot be sustained.

In December 1999, UNTAET established a fifteen person National Consultation Council (NCC) to 'ensure the participation of the East Timorese people in the decision making process' (UNTAET 1999). The NCC, however, faced continuous criticism for not being sufficiently representative as it was dominated by CNRT and, by extension, Gusmão (Tansey 2009: 71-72). 'Timorization' began on 5 April with the commencement of the hiring process for 7,000 East Timorese civil servants, the hiring of local administers as deputy heads of district and centralised departments, and the establishment of a Civil Service Academy (Beauvais 2001: 1143). The NCC was replaced by a larger, exclusively Timorese National Council (NC) in July 2000 (UNTAET 2000a) as well as a joint UN-East Timorese Transitional Cabinet (UNTAET 2000b), which the UN viewed as the beginning of co-government. The UN and CNRT played major roles in determining the membership of both these bodies. While formal authority still rested completely with UNTAET under its mandate, significant authority had already been devolved to local actors by the end of 2000.

1.2 Elections

The run up to the Constituent Assembly elections fundamentally transformed the political scene as sixteen political parties materialised in quick succession. In June 2001, the CNRT had dissolved and Gusmão did not run for the Constituent Assembly. Over 90 percent of eligible voters turned out for the Constituent Assembly elections on 30 August 2001 (Paris 2004: 219). The 88 member Constituent Assembly was empowered to draft a constitution, serve as a provisional legislature, and become the National Parliament after independence. Fretilin won the poll with 57.37 percent of the

vote and 55 seats, but lacked the 'two-thirds majority it needed to be able to impose a constitution unilaterally' (Chesterman 2004: 231). The constitutional drafting process was completed by February 2002. Two months later, in April, Gusmão was elected president by an overwhelmingly majority. The UN's rule officially ended on 20 May 2002 when East Timor became formally independent.

Even during this transitional period the two major forces in Timorese politics, Fretilin and Gusmão-affiliated groups, were forced to alternate in power, compromise, and build coalitions. While the UN mission had ample imperfections, the contemporary claims that either Fretilin or Gusmão had consolidated power to such an extent that the UN period effectively consigned the young country to chronic instability or a one party state miss the mark. Hohe's bold prediction, for instance, that the 2001 Constituent Assembly elections established the conditions for a binary future between a 'one party rule or violent political competition' has proven decidedly wrong (Hohe 2002b: 85).

The decision to disband CNRT and allow the formation of political parties has been criticised as a missed opportunity to establish national unity (Hohe 2002b, Scambary 2009: 267). This argument, however, ignores the substantial tensions within CNRT. Criticism of the decision to dissolve CNRT is a *de facto* proxy argument for Gusmão, rather than Fretilin, as the dominant force during the constitutional drafting process. CNRT provided an invaluable unified voice for independence, but post-independence politics were another matter entirely; there was never a unified CNRT policy agenda for governing. Political parties are essential for both consolidating and sustaining

democracy (Lipset 2000). They are invaluable for aggregating interests, allowing voters to make meaningful policy choices, and sustaining governments (Gunther and Diamond 2001: xiv). As will be discussed later, the political party system institutionalisation process has continued through the alternation of governments and the establishment of the coalition government in 2007. The ability to change the government through free elections is a necessary, though not sufficient, condition for democratisation and the development of inclusive rather than extractive political institutions (Acemoglu and Robinson 2012). UNTAET clearly succeeded in one area: allowing the East Timorese people an avenue to create an institutional framework where the outcomes, be they good or bad, would be the result of Timorese decisions rather than the consequence of UN activities (Tansey 2014).

1.3 Key Constitutional Structures

Despite criticisms that UNTAET's approach to governance and institutional design laid the foundations for a one-party state (Chopra 2002; Hohe 2002aa), a closer examination of the 2002 Constitution suggests otherwise. In reality, the Constitution marks a good faith effort to create a modern democratic state that respects the rule of law and individual rights while recognising traditional, non-state structures.[64] The 2002 Constitution establishes a 'semi-presidential' system (Shoesmith 2003) for the Democratic Republic of Timor-Leste (RDTL) that combines an independently elected president with a prime minister who is elected and supported by a majority in the National Parliament, a unicameral body (RDTL 2002) with 65 members rather than the

[64] The Constitution is consistent with the CNRT's Magna Carta, which envisioned the inclusion of 'traditional values within the new legal system and the new organisations of the State of East Timor as a state based on the rule of law' (CRNT 1998).

88 members of the Constituent Assembly.[65] Legislative power rests primarily with the National Assembly, and the Council of Ministers, appointed by the prime minister, is also empowered to initiate legislation in certain instances. The National Assembly is elected from a closed party list system (Section 65). The right to form a political party is also protected (Section 70).

The president cannot initiate legislation or promulgate regulations, but can veto a bill. Vetoes, however, can be overturned with a simple, absolute majority vote in the National Assembly. The president possesses some limited executive authority, most notably the power to pardon, but overall the role is very weak (Kingsbury 2013). The prime minister is unquestionably the dominant actor in the political system. Nevertheless, the constitutional arrangements provide for greater checks on the prime minister's power than would be commonly found under a 'pure' parliamentary system. Timor-Leste can be classified as a 'parliamentary-like semi-presidential regime with ceremonial presidents and strong prime ministers'; an arrangement which Elgie maintains tends to have a positive effect on democratisation (Elgie 2005).

1.4 Constitutional Structure of the Legal System

Reflecting the broad appeal of the rule of law and human rights among Timor-Leste's political elite, the Fretilin-led drafting process also manifested a commitment to these values. The Constitution declares Timor-Leste 'a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the

[65] The Constitution limited the Parliament to between 52 and 65 members (Section 93). The electoral law of 2006 permanently set the number of members at 65 (RDTL 2008a).

dignity of the human person' (Section 1.1). The Constitution establishes a state bound by law where the state's activities must be consistent with the Constitution and the law (Sections 2.2, 62). Protections for judicial due process and individual rights are enshrined (see Part II) as well as broader provisions relating to access to courts (Section 26).

Timor-Leste is a civil law country closely modelled on Portugal (see Merryman and Pérez-Perdomo 2007 for a succient overview of civil law systems). Structurally, courts are conceptualised as independent (Section 119), and there are protections for judges in terms of security of tenure and inability to be punished for their decisions (Section 121). The Constitution provides for a Supreme Court and a Court of Appeal as well as district courts and specialised courts (Section 123).[66] The Superior Council for the Judiciary oversees 'the management and discipline of the courts' along with the appointment, assignment, and promotion of judicial personnel (Section 128.1).[67] The Constitution also establishes a state-funded prosecution service (Sections 132-134).

Formal declarations of judicial independence do not guarantee independence. Even in consolidated democracies, such as the United States, courts may succumb to political pressure (Rosenberg 1992), and the problem is far more pronounced in developing countries without a tradition of judicial independence (Vyas 1992). While Timor-

[66] The Supreme Court has yet to be established due to a perceived lack of qualified local personnel. The Court of Appeal currently serves as the highest court.

[67] The President of the Supreme Court chairs the five-person council though the President of the Court of Appeal currently performs this role. It also features one representative selected by the President, the Parliament, the Government, and one member elected from the broader judicial community (Section 128.2). From an administrative and operational standpoint, the elected, explicitly political elements of the state have dominant voice in the judicial system's operation.

Leste's institutional arrangements may prove unable to establish or sustain the rule of law against sustained political pressure, the Constitution clearly envisions an independent judiciary.

The Constitution explicitly defines a role for non-state justice. Under Section 2.1, the Constitution declares 'The State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution' or relevant state legislation. How the state conceptualises and deals with non-state legal authority will be discussed further in subsequent chapters. Still, it is worth noting here that based on my discussions with practicing lawyers, judges, officials at the ministry of justice and the office of the president during my work in Timor and during field research, non-state justice is taken very seriously as a legitimate dispute resolution system. Non-state dispute resolution remained the dominant form of dispute resolution when the Constitution was promulgated (The Asia Foundation 2004).

While the Constitution and the state structures it established have been criticised for failing to reflect Timorese values (Zaum 2007: 205-206, Jones 2010), this critique fails to appreciate the broader political context. Whatever its strengths and weaknesses, the Constitution reflects the independence movement's aspirations. The constitutional structures are overtly modelled on democratic Portugal, which consistently opposed Indonesia's occupation. Timor-Leste's Constitution envisions a modern state underpinned by the rule of law, multi-party democracy, and fundamental rights, yet the state simultaneously recognises the importance of norms and customs, and allows non-

state dispute resolution. It is unclear whether this dual arrangement can work in practice, but the Constitution represents a good faith effort to institutionalize the independence movement's vision.

1.5 Establishment of the State Legal System

The legal sector did not escape the devastation surrounding the referendum. UN Secretary General Kofi Annan reported that 'local institutions, including the court system, have for all practical purposes ceased to function' and that 'members of the legal profession hav[e] left the territory' (Annan 1999: para. 33). East Timorese legal professionals had not been permitted to serve as prosecutors or judges under Indonesian rule (Chesterman 2004: 170). Hansjoerg Strohmeyer, who oversaw much of the UN's initial legal sector efforts, contends 'all court equipment, furniture, registers, records and archives,...law books, cases files, and other legal resources were lost or burned' (Strohmeyer 2001a: 50). While the process was by no means perfect, it did make some advances. Even critics such as McAuliffe have recognised that 'the UN was successful in improving the functionality of the courts' through a process of 'defining the applicable law, appointing judges, and creating the District Court System in which they would operate' (McAuliffe 2011: 115).

In contrast to other areas of state administration UNTAET pursued an aggressive strategy of "Timorization" of the justice sector from November 1999. The UN distributed flyers by plane asking anyone with legal experience to get in touch. Although approximately sixty people responded, 'only a few of these jurists had any

practical legal experience' and none had ever worked as a prosecutor or a judge (Strohmeyer 2001a: 54). Nevertheless, two prosecutors and eight judges were appointed by early January 2000 (Strohmeyer 2001a: 54). Despite ongoing concerns regarding their qualifications, the UN administration would continue to appoint Timorese judges, prosecutors, and public defenders throughout the UNTAET period. Despite the relaxed approach to credentialing, there remained an insufficient number of legal professionals and those that existed were often extremely undertrained (Smith and Dee 2003: 83). As Howard notes, 'There was simply not enough time before independence in May 2002 to train the numbers of people required to run an effective, efficient, and politically independent legal system' (Howard 2008: 284). By March 2000, it became clear that the number of domestic judges and prosecutors would be insufficient to address the demands being placed on the judicial system and international court actors were hired (UNTAET 2000c, d).

1.6 Overview of Non-State Justice

While always a powerful force, the transition from independence further strengthened the non-state justice system's legitimacy and reach (Nixon 2012: 117-119). Given that what exactly non-state justice entails varies dramatically from region to region and even suco to suco, it is very difficult to generalize about non-state justice. Nevertheless, certain core facets are commonly observed in places where the non-state justice system is operating along traditional lines:

> The process of applying indigenous law starts with a report of the issue to the village or hamlet chiefs (depending on the level on which the conflict or the crime occurred) by the heads of the families involved in the conflict, or the family of the victim. The 'helper' takes note and reports to the 'local legal authorities', such as the *lian nain*. The *lian nain* know the history and are in contact with the ancestors. They come from

> specific families that are the 'owner of the words'. They know the rules the ancestors have set and, therefore, they have the competence to speak the law (Hohe 2003: 343).[68]

A mutually agreeable time for the dispute resolution process would be set shortly thereafter, often by the suco chief. The process would involve a structured process of discussion, testimony, and negotiations before a final decision was reached.

Centred on small tight knit communities, non-state justice emphasises compensation and reconciliation rather than punishment—a focus that likely predates even Portuguese times (Berlie 2000).[69] Non-state justice retains a communitarian rather than individualistic character. Compensation can involve payment of money, livestock and other goods, services and land (Nixon 2012: 175-182). Once appropriate compensation has been determined, reconciliation seeks to restore harmony within the community. As Babo-Soares explains, 'past mistakes constitute the beginning of the process, and reconciliation is a standard procedure that must be highlighted in order to heal such mistakes' (Babo-Soares 2004: 23).

In order for the dispute resolution to be acceptable, the decision requires authority and legitimacy. While most disputes are quickly resolved within the suco, appeal mechanisms exist (Ospina and Hohe 2001: 114-120, Nixon 2012: 175). While this process is often cast as mediation, it is more akin to arbitration as the social pressure to accept a decision can be intense. Historically it could even involve the use of physical

[68] As non-state justice processes are notable for their rich diversity, a comprehensive discussion is beyond the scope of this chapter. For more detailed discussions of the practice of and beliefs behind non-state community-based dispute resolution processes, see for example Hohe (2003), Babo-Soares (2004), Meitzner Yoder (2007), Trindade and Castro (2007), Cummins (2010b), and Nixon (2012).

[69] Thus, even if a person is convicted of a crime by the state justice system, it does not necessarily mean the matter is resolved at the local level.

violence (Tilman 2012: 198). Certain disputes, however, are recognised as outside the purview of the non-state system, most often defined as significant crimes that involve blood.

Variants of Non-State Justice

While the localized non-state justice system is still common in many parts of the country, particularly remote areas, the reach of the non-state system is far from uniform. In Dili, for instance, traditional understandings of authority have broken down due to migration and other social and economic changes (Wassel 2014). This trend is particularly pronounced amongst younger Timorese (Scambary 2006). Authority is not the only variant. Tilman provides a useful schematic for understanding different non-state justice dynamics in contemporary Timor-Leste:

> The first category considers those *suku* in which the *liurai* no longer have any real power, but the *liurai's uma lisan* continues to be strong. The second category covers those 'new suku' that were formed during Indonesian occupation, often comprising of people from different areas, and (as a result) in which both the *liurai*'s governing power and the liurai's *uma lisan* are not present. In the third category, there are *suku* that are not new, but where for various reasons the influence of the *liurai* and the *liurai*'s *uma lisan* appear to have died out. In the final category, there are *suku* in which the power of the *liurai* and their *uma lisan* remains strong (Tilman: 2012: 1999).

The form and authority of non-state justice varies dramatically from place to place, but all variants now depend upon democratic electoral results to a significant extent and all manifestations of non-state justice support the modern state-building process.

1.7 Non-State Justice under UNTAET

Pre-existing non-state structures remained and became even more important under UNTAET's administration. The vibrancy and authority of the non-state justice system stood in stark contrast to the state justice system plagued by low capacity, a legacy of

illegitimacy, and fundamental confusion over the law to be administered. As national level political issues were addressed and the nascent state justice system was established, non-state legal structures were not prioritized.[70] Bowles and Chopra, for instance, contend, 'Neither the UN nor the first government drew on or brought existing social structures…into the nation-building process' (Bowles and Chopra 2008: 272). While this claim is slightly overstated, UNTAET's interlude largely ignored non-state justice entities from a regulatory standpoint. UN officers even sent cases to the non-state system. For instance, a UN Civilian Police Officer who worked in Baucau and Oecusse noted, 'we had to "offload" the majority of matters to a traditional resolution because we did not have the time or manpower to deal with all offenses in a formal way' (quoted in Nixon 2013: 185). As discussed in the next section, however, the non-state justice sector would experience a sustained, significant increase in state regulation once the post-independence Timorese state was able to penetrate more deeply and more successfully into traditional structures than any previous regime.

2 INDEPENDENT TIMOR-LESTE

When Timor-Leste emerged from UN trusteeship to full independence, it faced profound developmental and political challenges. While the state-building process has been rocky, the trend line has been positive overall. The state has accomplished far more progress in democratic state-building and the rule of law promotion than more critical observers concede. As this section will demonstrate, the burgeoning state has

[70] The most significant exception to this trend was the Commission for Reception, Truth and Reconciliation (CAVR) established by UNTAET (UNTAET 2001) to examine past human rights violations. The CAVR effectively incorporated indigenous structures though the initiative of the commission itself played a larger role than UNTAET authorities (Nixon 2012: 189-192).

benefited from leaders and citizens generally committed to creating a viable democracy. Furthermore, as will be discussed in detail in the next chapter, the international community and the UN remained deeply invested in a democratic Timor-Leste and played a positive role in its subsequent success. Despite serious challenges, Timor-Leste is making significant progress towards a variant of democracy and the rule of law that effectively blends modern norms of justice with more traditional, local approaches to dispute resolution. This progress is evidenced by democracy's perseverance through major crises, by regular free and fair democratic elections that have translated the independence movement's legitimacy into authority for the nascent state, increasing the reach and capacity of the state court system, and most impressively, effective co-option of the non-state justice system into a quasi-state actor.

2.1 The 2006 Crisis

To date, the 2006 Crisis has been the most disruptive event in independent Timor-Leste's short history. It resulted in 36 deaths, the displacement of 150,000 people, and the destruction of over 1600 homes (UN Independent Special Commission of Inquiry for Timor-Leste 2006: 42). The Crisis also led to renewed international intervention and the collapse of Alkatari's democratically elected government.

In January 2006, a group of soldiers, often dubbed the petitioners, submitted a series of complaints to high-ranking officials claiming that soldiers from the western portion of Timor-Leste were facing discrimination by officers from the east. The petitioners' ranks grew as time passed. In April 2006, tensions increased further after roughly one-

third of the army was dismissed for refusing to return to their barracks. The situation deteriorated further as Nevins explains:

> An additional group of military and civilian police, led by Major Alfredo Reinado, abandoned their posts in protest of the military's April 28 deployment. This group ambushed soldiers and police three weeks later on May 23, killing five. Over the next two days, violence exploded in Dili, with petitioners and elements of the police engaging in armed battle with the military. Individuals attacked the home of Army chief Brigadier General Taur Matan Ruak, killing one civilian, and set fire to Minister of the Interior Rogerio Lobato's house, killing six. The deadliest incident involved soldiers firing on unarmed police under U.N. escort, slaying nine. Large-scale clashes between "eastern" and "western" gangs also took place (Nevins 2007: 165).

UN troops returned to East Timor to restore order in July 2006. The deeper reasons behind why the Crisis occurred and how it played out are far more complex and contested (Scambary 2009, Gledhill 2014). Whatever the exact causes, the intense political rivalry between then Prime Minister Alkatiri and President Gusmão was crucial.

The Crisis severely tested Timor-Leste's emerging institutions. Some observers even claimed that East Timor was becoming a failed state.[71] Yet, the state decidedly did not fail. While international troops provided security, the political impasse at the heart of the crisis was resolved through constitutional means. Moreover, as non-state judicial authorities largely maintained order within their respective localities, the Crisis was primarily a Dili-based event.

Although Alkatiri resigned and was replaced in a manner consistent with the Constitution, the process that propelled his resignation raised significant questions

[71] For a critical examination of the "state failure" discourse with regards to Timor-Leste, see Cotton (2007).

regarding the viability of parliamentary governance. The lack of prosecutions for serious crimes related to the crisis is certainly disturbing. As the UN Independent Special Commission of Inquiry for Timor-Leste noted, a culture of impunity could 'threaten the foundations of the State' (UN Independent Special Commission of Inquiry for Timor-Leste 2006: 2).

Other developments since the Crisis have been more promising. The free and fair elections the following year resolved elite competition without violence. In 2008, Timor-Leste also handled the political upheaval related to the dual assassination attempts on the President and Prime Minister in accordance with the Constitution and without significant violence, which in turn improved the security situation in Timor-Leste (Tansey 2009: 106). As Acemoglu and Robinson have demonstrated, democratisation and social upheaval are by no means mutually exclusive (Acemoglu and Robinson 2005). Conflict can obviously be destructive to democratic state-building, but the move towards further democratisation 'generally occurs in the face of significant conflict and the possible threat of revolution' (Id.: 29). The 2006 Crisis strained the Timorese state, but it also prompted a broad-based distaste among political elites for open, potentially violent confrontation that could easily undercut progress towards the establishment of the rule of law. Since the Crisis, key political actors have shown consistently decreasing interest in extrajudicial attempts to undermine the state.

2.2 National Electoral Competition

Electoral competition is both a potential trigger for and solution to violence (Sisk

2009). Tensions were high in the wake of the Crisis. Yet, free and fair presidential and parliamentary elections were held in 2007 with the results being accepted by all major political parties.[72] Jose Ramos-Horta was elected President as an independent, but with Gusmão's backing. In the parliamentary poll, Fretilin again secured the largest percentage of seats (21 seats and 29 percent of the actual vote) but fell short of a majority. Gusmão's new party, the National Congress for Timorese Reconstruction (also dubbed CNRT), won 18 seats with 24.1 percent of the vote.[73] Despite Fretilin's strenuous objections, Gusmão formed a coalition government with support from smaller parties. At least part of Fretilin leadership initially stoked violence in the wake of the result, but within months Fretilin's entire leadership respected the result and remained committed to democratic competition rather than seeking to undermine the government. The 2007 elections marked Timor-Leste's first peaceful transfer of power with the inauguration of a new governing coalition and a strong parliamentary opposition.

Movement towards democratic consolidation continued with the 2012 national elections, which were procedurally successful, substantively open, and highly competitive. The elections were entirely overseen by national election bodies without significant external support. Taur Matan Ruak was elected president with Gusmão's backing. CNRT secured just over 36 percent of the vote, while Fretilin earned just below 30 percent. Only four parties cleared the three percent vote threshold for seats.

[72] Leach offers a more detailed dissuasion of the political and electoral changes prior to the polls as well as the 2007 presidential and parliamentary election results (Leach 2009).
[73] All references to CNRT from this point forward refer to the political party rather than the independence front.

Consequently, CNRT ended up with close to 45 percent of seats, but were still required to form a coalition for a parliamentary majority.

While democratic consolidation remains incomplete, these first three national elections mark positive steps towards democratic consolidation and party system institutionalisation. There has been a peaceful change of power, a successful non-violent resolution of a major constitutional debate after the 2007 polls, and two distinct governing coalitions with the opposition increasingly eschewing violence and respecting poll results. These accomplishments can by no means be taken for granted. In post-conflict Afghanistan, by contrast, elections have consistently been marred by large-scale fraud and other irregularities, and have shaken faith in the political order rather than bolstered it (Worden 2010, Gall 2014).

The major political parties effectively draw on the independence struggle for political legitimacy and electoral advantage. Since the Constituent Assembly elections in 2001, Fretilin has emphasised its link to the independence struggle and the party's key role in the formation of an East Timorese national identity (Hohe 2002b). The flag of Timor-Leste explicitly draws on the Fretilin flag. Indeed, following its victory in the Constituent Assembly elections, Fretilin's 'key actors, symbols and affiliations [were] "valorized" in the 2002 constitution' (Leach 2006: 227). When Gusmão formed a new political party, he 'drew heavily on images of independence and modernity with Xanana himself the prominent public face of all CNRT campaigning' (McWilliam and Bexley 2008: 69). The party name, National Congress for Timorese Reconstruction,

was explicitly designed to remind voters of Gusmão's crucial role leading the National Council of Timorese Resistance during the independence struggle. Both Gusmão's organisations share a common acronym, CNRT, to help associate the party with aspirations of unity. In some ways, electoral competition reflects competition between 'FRETILIN and former CNRT figures over the symbolic "ownership" of the resistance, and its narrative of national liberation' (Leach 2006: 233). The third largest party, the Democratic Party, highlights its role in the clandestine movement and smaller parties consistently stress their own connections to the independence struggle (McWilliam and Bexley 2008: 69-70).

While the history of Indonesia's occupation is highly contentious, the major political parties have all sought and, to a significant extent, succeeded in linking themselves to the independence struggle as a wellspring of legitimacy. This in turn makes the state's ability to govern much easier as it is not an abstract state overseeing policy but rather a collection of groups and individuals that enjoy widespread legitimacy. The divided independence movement has led to sporadic clashes. At the same time, divisions have helped lay the foundations for multi-party democracy since no one group has sole claim to the independence struggle's legacy.

2.3 The Transformation of Non-State Justice

Law and governance in Timor-Leste can accurately be described as a hybrid model where non-state mechanisms play an important role in governance (Meitzner Yoder 2007, Brown and Gusmao 2009, Richmond 2011). While suco authorities perform

some state-like functions, state officials do not consider them state actors (RDTL Ministry of State Administration and The Asia Foundation 2013). Likewise, suco officials do not view themselves as state actors and are actively opposed to formal integration of non-state justice into the state system (Id.). In 2009, the Court of Appeal rejected a claim that the 2009 Community Authorities Law was unconstitutional because the elections were non-partisan. The court's judgment reaffirmed that suco councils predated the state itself and thus occupied a sort of liminal position as 'traditional organizational structures' distinct from local government or an NGO (RDTL Court of Appeal 2009).

Suco councils are outside the formal state structure, but are still legitimately subject to regulation by the state under Timorese law as a non-state entity. Building on the precedent set during Indonesian times, at the subnational level, elections for suco chiefs were codified under state legislation in 2004 with additional reforms in 2009 (RDTL 2004a, b, 2009a).[74] Suco elections were held during 2004 to 2005 for 442 councils, and a subsequent set of elections was undertaken in October 2009 (Maia, Cullen et al. 2012: 10).[75]

State Regulation of the Non-State Law and Governance Actors

The suco election process marks the state's most significant regulation of the non-state

[74] While sucos average roughly 2000 to 3000 people, suco size can vary widely with Comoro in Dili district being the largest at 65,404 to a mere 54 people in Caicau in the Baucau district (RDTL National Statistics Directorate and United Nations Population Fund 2011).

[75] Under the changes passed in 2009, suco elections became officially non-partisan and suco chiefs and suco council are now elected as a slate rather than individually (RDTL 2009a). These changes were largely in response to the view that the previous election system had 'interpolated the polarization that characterized elite politics into the grassroots, raising levels of insecurity and undermining social cohesion' (Brown and Gusmao 2009: 67).

justice system. Dispute resolution ranks as suco chiefs' most important responsibility. Under the 2009 Community Authorities Law, suco chiefs are empowered to resolve 'minor disputes involving two or more of the suco's villages' (RDTL 2009a: Article 11.2(b)). At independence, these positions became elected posts 'through secret, free, equal and direct ballot of community members' (RDTL 2004b). The election itself is regulated and validated by the state—a system that has provoked little protest and found widespread agreement. As the inaugural regulation explicitly states, 'The election of suco chiefs and suco councils is of paramount importance to legitimise community authority and develop the basic structures of such authority' (RDTL 2004b). Older, well-established men have traditionally dominated suco councils. The regulation thus sought to promote gender equality and broader societal representation on the councils through requirements that there be two female representatives on the council and two youth representatives (one male and one female) (RDTL 2009a: Article 5).[76]

The Community Authorities Law is largely procedural and jurisdictional. However, its goal is transformational: it seeks to root the legitimacy of non-state judicial actors in modern democratic ideas, most notably through recurring, state-administered democratic elections and a workable jurisdictional divide. This concern became particularly pressing after the 2006 Crisis. As Peira and Lete Koten observe, 'Ideally…elections for local leaders transforms the relationship between community

[76] The results, however, have been mixed as the 'women's representatives, youth members, and *xefe aldeia* [are] often viewed as passive and unqualified for membership' (RDTL Ministry of State Administration and The Asia Foundation 2013: 22). Still, women have occasionally been elected suco chief.

leaders and their constituents from *authority over* the community, to *representative of* the community' (Pereira and Lete Koten 2012: 223, italics in original). It is striking how quickly and effectively state authorities have been able to establish democratic elections as the primary source of legitimacy, and how this foundation of legitimacy has been internalised by the suco chiefs (RDTL Ministry of State Administration and The Asia Foundation 2013). While many local leaders hail from the traditional elite families, elections have brought 'a substantial portion of newcomers to the positions of village and hamlet chiefs' (Graydon 2005: 69, Brown 2012).[77] Well-established and respected figures still possess electoral advantages. As Tilman succinctly notes, 'democracy does not deny opportunities for *liurai* to obtain positions of political power through a political party or as an independent candidate' (Tilman 2012: 197). Most notable is not that *liurai* or other non-state leaders seek political power through elections, but that even traditional leaders now require democratic ratification. The law even empowers the suco council to appoint the lian nian for his or her term (RDTL 2009: Article 5.3).

The state's transformation of the relationship between state and non-state judicial, and governance authority more generally, has been nothing short of revolutionary. As Migdal highlights, 'The major struggles in many societies, especially in new states are over the right and ability to make the countless rules that guide people's behaviour' (Migdal 1988: 31) These tensions can be particularly intense in a new state such as Timor-Leste where the non-state authorities are well entrenched and possess

[77] Likewise, Cummins observed a suco where candidates needed to get the blessing of the liarai before standing for election (Cummins 2010a: 902).

independent sources of legitimacy. Non-state actors formed the heart of local resistance to Indonesian rule and the Indonesian state itself lacked legitimacy. Thus, non-state actors enjoyed more or less plenary power during the transition to independence.

Non-state authorities now form the backbone of the Timorese state outside the urban areas. While the state has limited capacity, it enjoys substantial legitimacy. Call, for instance, cites East Timor as a paradigmatic example of the class of 'legitimate states with low capacity but high legitimacy' (Call 2008b: 1496). The state's legitimacy has been crucial in helping transform non-state judicial actors, who had the potential to become 'state-builder spoilers', into almost *de facto* state actors through elections, financial support, and by offering a vision of the state that commands widespread support (Menkhaus 2007). The state administered suco election system forms the backbone of state influence at the local level despite suco council members' ability to disregard directives from state authorities or act outside their legislative mandate (RDTL Ministry of State Administration and The Asia Foundation 2013). The most pressing debates do not centre on whether democratic elections are an appropriate way for allocating suco authority, but on whether suco authorities should be incorporated into existing formal state structures and whether the state's expectations of suco authorities are realistic (RDTL Ministry of State Administration and The Asia Foundation 2013).

From Competitive to Cooperative Legal Pluralism

Historically, the relationship between state and non-state justice in Timor-Leste has

been overwhelming competitive whereby there has been tactical engagement but also deep scepticism. One of the nascent state's greatest achievements has been to facilitate a transformation into cooperative legal pluralism where both state and non-state actors have worked together toward building state-led development as well as established a largely respected jurisdictional divide between the two (Wassel 2014). The state handles major issues, particularly violent crimes, while most civil matters and petty crimes are left for local dispute resolution.

While the specific form of dispute resolution varies significantly from place to place, non-state authorities continue to resolve most disputes in Timor-Leste. Police officers continue to refer cases to the non-state justice system. Since independence, non-state authorities have enjoyed consistently higher approval ratings then state judicial authorities and indeed any formal state entity, as evidenced by periodic public opinion polling (The Asia Foundation 2004, Everett 2009, Marx 2013). Nevertheless, non-state authorities view the state and the state-building endeavour as legitimate and are largely open to constructive engagement because state leaders were also recognised as key actors in the independence struggle.

A formal law on non-state justice has yet to be promulgated despite significant interest from the Ministry of Justice, the UNDP, and others. The primary attempt to regulate the non-state justice sector is the Community Leadership Law discussed above which stipulates that the community leadership's purpose is to structure 'the community's participation in the solving of its problems' (RDTL 2009a: Article 2) as well as resolve

local disputes (RDTL 2009a: Article 11.2(b)). In other words, the law already makes a formal distinction between minor crimes, which can be handled at the suco level, and more serious crimes that demand action by state authorities.

The existing regulation, while minimal, works reasonably well, because it accurately reflects prevailing social views regarding how disputes should be handled. Moreover, the state has thus far resisted temptation to over-regulate a sector that enjoys widespread legitimacy. While the state could easily impose its will on an individual community, it would have great difficultly consistently asserting effective control over the vast number of localities. In addition to the position's intrinsic status, the state offers enough inducement to make the post worthwhile, but not excessive. The suco chief receives $100 USD per month with $20 earmarked for transportation and $15 for administration (Maia, Cullen et al. 2012: 9). The state also provides an office and a Mega Pro motorbike. While suco chiefs routinely cite the need for increased compensation, these incentives are by no means trivial as 'Half the population is estimated to live below the poverty line and around two-thirds is considered food insecure' (Coordination Team of the UN System High-Level Task Force on the Global Food Security Crisis 2010: 2).

The suco reforms enacted by the 2009 legislation also subtly changed the suco chief's role by more tightly linking it with the larger state project of development. This includes working with relevant state authorities, conducting planning, programme monitoring, creating an annual development plan, and submitting an annual report

(RDTL 2009: Articles 11-12). These legislative responsibilities have been paired with major state initiatives putting funds into local communities for development projects.[78] Suco chiefs are now expected to secure state funds. On the one hand, this is unsurprising. Politicians are expected to secure funds for their constituents, particularly when directly elected (Lancaster 1986). But the results are surprising if the sucos merely wanted to maximize independence from the state or maintain pre-existing patterns of existence. After all, sucos acquiesced in state-administered elections to determine their leadership and these processes enjoy widespread legitimacy. Suco chiefs might need the right ancestry in certain areas, but even their concerns are decidedly modern and their continued tenure hinges on electoral success. Not only are suco chief active state-building agents; their constituents demand it.

Tensions in Non-State Administration

Non-state authorities are not formally state actors, but they are tasked with performing functions by the state. Therefore, suco actors raise significant principal-agent incentive issues (Laffont and Martimort 2002). Delegation involves very high agency costs because the state's control mechanisms are quite weak (Jensen and Meckling 1976). The formal Timorese state itself is incapable of undertaking the systematic monitoring and evaluation often seen as essential to mitigate agent-principal issues. Yet, despite all its capacity issues, the state has made significant strides in aligning its overarching interests with those of the suco councils. While agent-principal issues are intractable

[78] These initiatives include the Ministry for State Administration and Territorial Management's Local Development Program started in 2004, the Decentralized Development Program started in 2010 by the Prime Minster's Office, and the nationwide National Program for Village Development, launched in January 2012, to cover all sucos. Suco chiefs play a major role in determining local community priorities in all of these initiatives and state development projects more generally (Cummins and Maia 2012).

and must be managed rather than eliminated, as Fukuyama explains, 'norms can embed the interests of the principal' allowing the agent to significantly reduce the problem (Fukuyama 2004: 65). He cites the example of teachers going above and beyond their contractual requirements to provide an excellent education for their students. The same logic holds true for local leaders promoting their community's interests. Suco council members, and particularly suco chiefs, are important leaders and subject to a high level of scrutiny by the electorate. In other words, suco residents can punish bad leaders and reward good leaders through democratic accountability mechanisms. This dynamic makes state monitoring less crucial; suco chiefs largely accept the state's programme and face significant electoral pressures that tend to align with the state's development initiatives.

The treatment of matters related to domestic violence is of particular concern. Suco chiefs have been encouraged to 'promote the creation of mechanisms for preventing domestic violence' as well as protecting victims and 'punishing the aggressor, in such a way as to eliminate the occurrence of said situation in the community' (RDTL 2009a Article 11.2(c-d)). This provision touches on a major policy priority for the central state and particularly the international community, both of whom have invested heavily in eradicating domestic and other forms of gender-based violence.

The suco level response can vary significantly, but treatment of domestic violence cases is often a particularly acute area of tension between state and non-state legal orders. As Hohe notes, 'under the Indonesian law as well as in the traditional system,

for example, domestic violence was a purely private matter' (Hohe 2003: 345). The UN and the broader international community have prioritized gender equity and the protection of women's rights. Likewise, domestic political elites have been quite open to progressive reform. Domestic violence is unequivocally a public crime under the Penal Code (RDTL 2009b: Articles 146, 154). The Law Against Domestic Violence (RDTL 2010) goes even further by stipulating that victims cannot drop their claims once legal proceedings have been initiated. This paradigm shift from private to public crime went against much established state and non-state practice (Corcoran-Nantes 2009, Cummins and Guterres 2012).

The data is limited, but existing evidence suggests that despite serious investment in the state system, the non-state justice system continues to resolve most cases of domestic violence (Wigglesworth 2013).[79] How suco leaders address domestic violence remains largely discretionary when there is a meaningful conflict of law, which highlights that non-state authorities still retain an effective veto over state law in their jurisdiction. This conclusion is strengthened by the fact that women are often unable to access the formal system or state authorities simply ignore their claims (Cummins and Guterres 2012). Thus, non-state authorities' willingness to be directed by the state in most matters is reflection of the state's legitimacy and persuasive authority rather than its ability to impose its will. Moreover, the state's largely unquestioned right, through the election process, to determine who is a suco chief likewise constitutes a major

[79] Cases stay in the non-state system for a number of reasons. According to a major survey, the causes include a lack of interest by state authority, the prolonged process of going court cases, little external support for women outside the courts, little education about the relevant law, as well as 'the inability to access important rights within civil law if the situation results in separation or divorce' (Cummins and Guterres 2012: 4).

accomplishment.

2.4 The State Legal System

Building a state justice system has proven 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. Furthermore, some policy choices made by Timorese state officials have made an already difficult task more difficult. The legal system retains a myopic focus on Portuguese as the preferred legal language, which most people, including those with university educations, cannot understand, and the often wholesale importation of Portuguese laws with little relevance to the local context. At the same time, the legal sector is simultaneously over and under regulated with extremely strict protocols on how individuals may work as lawyers but with no regulation on the private universities that continue to churn out large number of law graduates with very dim employment prospects. Despite these challenges, there are important signs of progress.

The Default Legal Framework

When international forces departed Timor-Leste at the end of 2012, the legal framework had been largely localised. Indonesian law remained the default law at independence prior to the passage of new legislation, as had been the case under UNTAET. By 2013, basic laws were in place in the vast majority of areas necessary for a modern state and economy (UNMIT 2011). Legislation specific to the judiciary

included a criminal and civil code, establishment of prosecutor and public defender services, regulations for private lawyers, and a host of other relevant regulations. Legislative gaps remain. Nevertheless, the prevailing law now reflects domestic preferences rather than those of the previous regime, while still conforming to international standards.

Development of State Justice Institutions

Even prior to the 2006 Crisis, the justice sector was generally seen as 'the weakest branch of Timor-Leste's governance infrastructure' (World Bank 2006: 19). Between independence in 2002 and the 2006 Crisis, procedural due process concerns were endemic along with substantial case backlogs and spotty opening hours (West 2007: 336-338). The UNDP observed for instance '27% of the total inmate population of approximately 292 are held without valid committal warrant' (UNDP 2002: 2).

The judiciary's rapid "Timorization" during UNTAET won praise from commentators critical of what they perceived to be the slow process of bringing Timorese elites into government more generally (Beauvais 2001). Yet, this strategy also raised difficulties because local judicial actors were inexperienced and needed significant training. In 2005, all UNTAET appointed Timorese court actors underwent evaluation Based on the evaluation results, 'The East Timorese government disqualified *all* Timorese judges, prosecutors, and public defenders in 2005' (Jensen 2008: 133, italics in original). This left the justice sector almost entirely dependent on international staff and raised legitimacy issues regarding previous decisions.

Yet, even this difficult time saw progress with the appointment of the President of the Court of Appeal and the Superior Council of the Judiciary in 2003.[80] Furthermore, the number of court actors increased significantly. While many court personnel were internationals, their presences mitigated the impact of the wholesale dismissal of Timorese court actors after their failed evaluation. Increased international staff also led to a significant decrease in case backlogs as well as increased public awareness of court activities (World Bank 2006: 19-20).

In 2004, the Legal Training Centre (LTC) was established to oversee the training and professional certification of all judges, prosecutors, and public defenders (RDTL 2004c). After the passage of the Private Lawyers Law in 2008, the LTC began training private sector lawyers (RDTL 2008b). Since 2005, instruction at the LTC has been primarily directed by international staff through a UNDP project (UNDP 2013: 10).[81] The 2006 Crisis placed a renewed emphasis on establishing order by building a more professional judiciary. As of 2012, the judicial system was staffed almost exclusively with Timorese judges. The LTC has produced a significant number of prosecutors, public defenders and, more recently, private lawyers. Courts now operate consistently in Dili, Baucau, Suai, and Oeccusse. There are now fully qualified private lawyers working in Dili.

[80] The Court of Appeal had been on hiatus since November 2001.

[81] The LTC's curriculum is technically offered in both Portuguese and Tetum, but the focus has been overwhelmingly on Portuguese. Applicants are expected to have an undergraduate degree. While not an official policy, entry structurally favors UNTL graduates. UNTL is considered Timor-Leste's premiere university and generally teaches in Portuguese unlike the other universities, which tend to teach more in Bahasa Indonesian. Even by the end of 2012, admitted applicants often possessed insufficient Portuguese language skills and were assigned to a year of Portuguese language instruction before starting substantive legal study.

Not surprisingly, institutional challenges remain. The Supreme Court has yet to be established. Courts are still backlogged. Case resolution is time consuming and participants may not understand the proceedings, especially when conducted in Portuguese. While the right to an attorney is provided under Section 34 of the Constitution, legal representation can be hard to acquire particularly for those located outside urban centres or facing economic hardship. Public Defenders have been known to ask for payment and are frequently accused of being excessively interested in profit.[82] The provision of educational establishments offering degrees in law continues to grow, but outside of the National University of Timor-Leste (UNTL) the quality tends to fall between mixed and, more often, poor since the sector is very lightly regulated compared to the rest of the legal sector and most institutions are for profit. Real progress has been made, but the challenges remain significant and will remain so for the foreseeable future.

2.5 Progress and Problems in Moving Towards the Rule of Law

Timor-Leste currently fails to uphold even a 'thin' conceptualisation of the rule of law where '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 according to its terms' (Tamanaha 2007). The formal legal system's reach is limited. Impunity remains a serious issue (Kent 2012). Court proceedings are all too often opaque and take place in a language participants do not understand without translation. Procedural irregularities

[82] The Public Defender General Sergio Hornai actually defended the Minister of Justice Lucio Labbato during her corruption trial and received compensation for his services.

are still common. Most people are unaware of the laws that govern them and cannot easily access the law should they seek to be informed. As laws are often imported wholesale from Portugal, they often fail to reflect local circumstances. Laws are rarely published in Tetum, the most common local language, so most citizens cannot understand the law even if it was widely available because only a small minority can understand Portuguese. Legal education has improved but despite some recent advances students are still learning primarily Portuguese rather than Timorese law at the undergraduate level. And the LTC, at least as of September 2012, remained focused on Portuguese over Tetum. Elected legislators are often requested to vote on legislation in Portuguese that the majority of them cannot understand. This raises serious concerns regarding the legislative process and citizens' ability to understand the rules under which they live.

Presidential Pardons

One of the biggest trends that many commentators viewed as threatening to undermine the rule of law has been the liberal use of presidential pardons (Grenfell 2009). On 20 May 2008, President Horta unilaterally reduced the prison population by half 'when 94 of Timor-Leste's 179 prisoners received a pardon or partial commutation of sentence' (UNMIT 2008). Ramos-Horta proactively issued pardons throughout his term. In 2010, he even pardoned individuals associated with an assassination attempt on his life. For his part, however, Ramos-Horta has always stressed that reconciliation and healing, rather than punishment or retribution, were his top priorities.

Scholars such as Grenfell have claimed Ramos-Horta's behaviour 'diverges from common understandings of the rule of law in the West, which equate the concept with legal predictability, due process, accountability and individual rights' (Grenfell 2009: 222). This is a very stringent understanding of the rule of law and ignores the practice of states with the rule of law. For example, US presidents have enjoyed plenary power in their use of the pardon power and even attached elaborate conditions to clemency (Krent 2001). American presidents have long used the power in a controversial manner. Recent presidents are not exception. Crouch, for instance, contends both Presidents Bush have used the clemency power, 'either to help their own executive branch officials and possibly themselves to avoid judicial prosecution,' and President Clinton 'sought to excuse financial contributors and aides that, as the president himself, had been subjects of aggressive independent counsel investigations' (Crouch 2008: 722). Yet, few would argue that the US is fundamentally lawless since that power is exercised in a manner consistent with the law as commonly understood.

The rule of law is better conceptualised on a spectrum ranging from 'thin' procedural based conceptions to 'thick' understandings rather than a binary on/off situation whereby a state either possesses the rule of law or it does not (Fukuyama 2004: 59). As argued in Chapter 2, even states generally viewed as bound by the rule of law ideally engage in activities that contravene rule of law ideals. At the same time, even the most chaotic, corrupt, or limited states, for example the Democratic Republic of Congo, still retain a significant degree of state imposed legal order (Trefon 2009). The key issue is often intent and whether a normative commitment exists to the rule of law (Stromseth,

Wippman et al. 2006: 76; Fukuyama 2011: 259-260). President Ramos-Horta has long maintained that his decisions were based on promoting reconciliation, fostering stability and were not intended to interfere with the judicial process (Centre for International Governance Innovation 2011, Robinson 2011: 1015). Even Ramos-Horta's critics, such as the Justice Sector Monitoring Programme (JSMP) concede he was primarily interested in fostering reconciliation rather than seeking to undermine the law (JSMP 2009: 14) and that the president was within his constitutional authority (JSMP 2010: 5).

The presidential pardon power under existing law is plenary.[83] Ramos-Horta's actions were not an abuse of power or a fundamental denunciation of the rule of law, but they still raise serious issues. Critics fear that extensive use of pardons could side-line the judiciary as the major institution that structures and guarantees legal order. In response to Ramos-Horta's large scale pardons of those individuals involved with the 2006 Crisis, JSMP has argued, 'wholesale commutation and reduction of sentences could jeopardise efforts to ensure fair and consistent application of the laws in Timor-Leste' (JSMP 2009: 13). One may disagree with Ramos-Horta's justification of reconciliation and mercy for expansive use of his pardon power, but he was within his legal rights. In this instance, there seems to have been little long-term damage to the rule of law, and the current President, Taur Matan Rauk, has been far more restrained. Nevertheless, Ramos-Horta's actions have demonstrated how a future president could potentially undermine the judicial system. Pardon reform thus appears a necessity. Indeed, reform

[83] The pardon power is listed under the president's 'exclusively incumbent' competencies 'to grant pardons and commute sentences after consultation with the Government' (RDTL: Sec. 85(i)). While the President is required to receive the advice of the government, he need not heed it.

is particularly pressing exactly because Ramos-Horta's pardons were legal.

The Release of Martenus Bere

Prime Minister Gusmão's unilateral release of Martenus Bere is arguably the most serious evidence to support a claim that Timorese leadership is not committed to the rule of law. Consequently, it is worth examining in more detail. Bere had been a militia leader in the time around the referendum and had been linked to the deaths of 30 unarmed civilians and three priests in September 1999 in the Suai Church Massacre (Robinson 2003). Bere had been captured upon returning to Timor-Leste in 2009 and was facing prosecution. Indonesia had requested Bere's release and extradition. Indonesia also implied failure to do so could damage relations between the two countries. Gusmão sought to compel a judge to order the release but he was forced to order Bere's release on his own authority (Gusmão 2009: 12-13).

The event sparked significant domestic and international concern (Ki-moon 2009: 10, Amnesty International 2011: 6). The opposition Fretilin party lodged a no confidence motion in parliament. Gusmão accused Fretilin of hypocrisy and touted his record during the independence struggle. However, the main thrust of his argument was legal. He contended that his actions were justified because of the Constitution's mandate to 'maintain special ties of friendship and co-operation with its neighbouring countries and the countries of the region' (RDTL 2002: Sec. 8(4); Gusmão 2009: 4). Gusmão further argued that the original detention was illegal under existing Timorese law. The Prime Minister contended it was not a preventative detention, and that 'UNTAET's

Regulation no. 2000/15 on the 'creation of chambers with exclusive and special jurisdiction over serious offences', which he maintains excluded any other court from handling these matters (Gusmao 2009: 10). Gusmão pursued his legal argumentation further:

> The Penal Procedure Code, through Decree-Law no. 13/2005 of 1 December, expressly safeguards the regime created by UNTAET's Regulation no. 2000/15…Section 30.2 of the Constitution of the RDTL states that 'no one shall be arrested or detained except under the terms expressly provided for by the applicable laws'. A detention or arrest must always be submitted to the appreciation of a competent judge within the legal timeframe, which did not happen. Therefore I must ask the Honourable Members of Parliament for Fretilin: Who is violating the Constitution and the applicable laws in our Country after all?

Whatever the merits of Gusmão's legal argumentation, strikingly he casts the discussion in explicitly legalistic terms.

Notably, the Bere incident is the only significant event to date where the government has faced widespread criticism for unequivocally disregarding the rule of law.[84] The rarity of these incidents and the attention they attract suggests that the rule of law is taken seriously. A rule of law culture does not mean that there is no corruption or abuse of power by individual officials, including high-level ones, but rather that the state corruption is not systematic.

The behaviour of the larger political system is encouraging. The opposition Fretilin party choose to use the parliamentary mechanism of a no confidence vote to seek Gusmão's censure. There was a free and open debate. Gusmão survived the vote, but all indications were that Gusmão would have heeded the result if he had lost. The

[84] The performance of Gusmão's coalition governments has not been without controversy. Notably, as Timor-Leste's oil revenues increased dramatically, the government faced allegations that corruption had increased substantially at all levels (Lundahl and Sjöholm 2008).

decision still remains the focal point of much criticism, but the political crisis was effectively resolved through institutional mechanisms. The courts were consistent in condemning the action. Gusmão faced significant domestic and international condemnation. At a minimum, this demonstrated that future actions along these lines would not be without cost. Most importantly, Gusmão believed his actions were consistent with the rule of law or at least felt compelled to justify them as consistent with the rule of law because the rule of law requires a normative commitment to the idea (Stromseth, Wippman et al. 2006: 76). More generally, key leaders from Fretilin and Gusmão's coalition governments have consistently voiced support for the rule of law and largely sought to ensure their actions conform to the law's requirements. It is difficult to overstate the importance that elite political actors are increasingly willing to play by the rules of liberal democracy and face real threat of punishment for breaking the law.[85]

Inherent Tensions in the Quest for the Rule of Law

While these incidents have been used to question the commitment of Gusmão and Ramos-Horta to the rule of law, it more accurately reflects their commitment to remaining on good terms with Indonesia, their large and immensely more powerful neighbour, and the need for domestic stability. These incidents highlight a central tension between the immediate demands of state-building and the rule of law. In his seminal work on the creation of political order, Fukuyama explains:

> rulers can enhance their authority by acting within and on behalf of the law. On the other hand, the law can prevent them from doing things they would like to do, not just

[85] Indeed, former Minister of Justice Laboto was been charged and convicted of corruption in 2012.

> in their private interests but in the interests of the community as a whole (Fukuyama 2011: 246).

These issues are not limited to post-conflict or developing countries. Even in well-established states, such as the United States and the United Kingdom, commonly seen as governed in accordance with the rule of law, the temptation exists to disregard legal requirements in the service of compelling state interests, particularly when national security matters are concerned (Bingham 2011: 133-159). Given the immense challenges facing the nascent Timorese state, it is not surprising that controversial incidents such as Bere's release or Ramos-Horta's controversial use of pardons occur. Rather it is that such incidents are so rare and even then are clearly linked to plausible public policy goals. Post-Taliban Afghanistan, in contrast, has seen a predatory order quickly emerge where the 'abuse of power has become endemic and emerged as a central characteristic of the overall system of governance' (Rangelov and Theros 2012: 234). Important progress is being made in Timor-Leste. Still, longer-term democratic consolidation is by no means certain. Even in the best of circumstances, establishing the rule of law and the inclusive institutions that underpin it is often a lengthy, highly contingent process (Fukuyama 2010, Acemoglu and Robinson 2012).

CONCLUSION

This chapter examined East Timor's long struggle for independence and subsequent development. It argued that state practice and policy is notable for its consistency with the independence movement's vision of the state and state/society relations, which in turn has been a valuable source of legitimacy and authority for the state. As Call has argued, effective, sustainable state-building capable of transcending conflict demands

both legitimacy and authority (Call 2008a: 7). By drawing on the legacy of the independence struggle and a vision of a modern state committed to development, the state has been able to harness the power, legitimacy and capacity of the non-state authorities to an extent far greater than Portuguese or Indonesian authorities achieved. In other words, political groups, such as Fretilin and Gusmão's CNRT, have been able to appropriate and distribute 'the major myths and symbols, for people's everyday survival' which Migdal identifies as 'the prerequisites for effective regulation and the possibility of extensively mobilizing the population' (Migdal 1988: 261).

There are echoes of Portuguese rule in the state's reliance on non-state actors to maintain order at the local level. The Timorese state, however, can more effectively regulate non-state actors. While Portugal formed tactical alliances with non-state actors, they were invariably tenuous and the threat of rebellion remained constant. In contrast, non-state actors are now both legitimised by the state through elections and are active contributors to the judicial state-building project itself. Timor-Leste has seen an amazing transformation from competitive legal pluralism under Portuguese rule, and outright combative legal pluralism under Indonesian occupation, to cooperative legal pluralism in an independent Timor-Leste.

Timor-Leste still faces a host of systematic problems that could undermine further progress towards the consolidation of democracy and the rule of law. Nevertheless, its accomplishments are significant and offer insights into how to transform a situation marked by competitive legal pluralism into cooperative legal pluralism. Timor-Leste

did not make this transition in a political vacuum. The indigenous state-building programme operated alongside and with significant assistance from international actors.

In short, Timor-Leste offers a compelling case for theory building of how a post-conflict state, in the right set of circumstances, can undertake effective judicial state-building against a backdrop of extensive competitive legal pluralism. As I will argue in the next chapter, international involvement can hinder or potentially even derail promising state-led judicial state-building efforts. On the other hand, international support can make a significant contribution to successful judicial state-building in settings that feature competitive legal pluralism. However, the relationship between the non-state justice sector and judicial state-building actors in situations of competitive legal pluralism has important consequences for the success or failure of judicial state-building endeavours. As Tansey argues, 'Too often, domestic conditions that follow in the wake of international interventions are assumed to follow as a result of international interventions,' but 'even in the most authoritative of international missions, domestic political elites retain significant levels of formal and informal political power and can profoundly shape the direction of national politics' (Tansey 2014: 185). In other words, state officials, rather than international actors, inevitably have greatest sway.

CHAPTER 5
International Judicial State-Building in Timor-Leste: Divergent Approaches and Outcomes

INTRODUCTION

Chapter 4 argued that Timor-Leste's success in judicial state-building stemmed primarily from the decisions of key domestic political actors. These actions, however, did not occur in a vacuum. Even after achieving independence in 2002, Timor-Leste has received an extraordinarily high-level of international support. While international assistance can make significant contributions to judicial state-building, it can also be wasteful, ineffective or even counterproductive to the establishment of a democratic state bound by the rule of law (Paris 2009). In Timor-Leste, however, donor assistance from the United Nations (UN), the United States (US), and Australian funded international non-governmental organizations (NGOs) has promoted the rule of law and a transition from competitive to cooperative legal pluralism. In contrast, Portuguese bilateral assistance has produced decidedly mixed results by helping establish foundational legal institutions but in a way that renders state justice structurally inaccessible to the vast majority of the population.

Why did different types of international assistance have such divergent results? This chapter argues that international assistance from the UN, the US, and Australia followed a coherent strategy based on sustained engagement that adapted to changing and unforeseen circumstances and acted as force multipliers for the state goals. The first priority was to establish and consolidate the institutions and services vital for a functioning state justice sector, which were completely eviscerated by the

independence struggle and its aftermath. Once sufficient progress was made in the state sector, international assistance would later facilitate constructive engagement with the non-state justice sector while continuing to strengthen the nascent state justice system. In contrast, Portuguese bilateral assistance, while enjoying exceptionally strong state support, produced decidedly more mixed results as it emphasised ensuring the predominance of Portuguese language within the nascent judicial order and failed to engage meaningfully with the non-state justice sector.

Statement of Theory Building

While the state served as the primary mediating force, the international community also played a crucial role. In Timor-Leste, the state made progress towards a modern democratic state bound by the rule of law through competitive national elections and the creation of independent judicial institutions. Equally important, the state's compelling vision of a democratic state committed to the rule of law combined with competitive, local elections established a cooperative relationship with the non-state justice sector. The international community reinforced positive trends in Timor-Lese through effective use of subsidisation strategies for the nascent state justices sector and, particularly after the 2006 Crisis, working to bridge the state and non-state justice sectors. These activities largely supported domestic initiatives. While its Lusophone legal system presents real challenges, Timor-Leste constitutes a success. This chapter shows how the successful deployment of international judicial state-building assistance with a sound strategic basis can help advance the rule of law and promote a more cooperative relationship between state and non-sate justice actors.

Common Scholarly Assumptions about State-building in Timor-Leste

This chapter also serves as a corrective to some oft-repeated misunderstandings regarding international judicial state-building in Timor-Leste. First, it corrects the enduring myth that international rule of law assistance to Timor-Leste was harmful. The persuasive of this tends to be rooted in the UN interlude (Chopra 2002) or 2006 Crisis as an indicator of failure (Call 2008a) Chapter 4 has already demonstrated the Timorese political and legal elites responded to significant challenges with a high degree of success while retaining a commitment to democracy and the rule of law. Yet, negative portraits of international assistance to Timor-Leste abound (Bowles and Chopra 2008, Richmond and Franks 2008, Butler 2012). Even Tansey's compelling rebuttal of the idea that the UN bears responsibility for Fretlin's initial electoral victory or the 2006 Crisis stresses that his aim is 'not to exonerate the UN or present an apology or defense of international state-building' (Tansey 2014: 185). My argument goes further. This chapter argues that conventional judicial state-building assistance, while certainly imperfect, has been beneficial by offering crucial subsidisation support and supporting the domestic-process of developing a cooperative relationship between state and non-state.

Second, this chapter corrects the tendency to view international assistance as one overarching bundle or simply a set of disparate initiatives. Scholars tend to focus on the work of the UN. In contrast, this chapter highlights the existence of two major distinct standards of assistance, conventional and Lusophone. The conventional assistance

offered by the UN and to a lesser extent the US and Australia, has received a significant amount of attention. The large-scale assistance offered by Portugal, and strongly backed by Timorese political elites, is explicitly linked to the Portuguese language. This aid is at least as important as that offered by the UN or Australia, but it is rarely analysed. Notably none of the authors cited above discuss the role of Portuguese assistance in any detail. Yet, as this chapter will demonstrate, understanding the goals and ramifications of Portuguese assistance is a crucial part of understanding the overall role of international assistance to Timor-Leste.

Evaluating the Two Main Strands of International Judicial State-building Assistance

Assessing state-building efforts is difficult because it is an immensely complex undertaking (Fukuyama 2004: 59) and establishing the rule of law takes decades even under highly favourable circumstances (North, Wallis et al. 2009: 27). Yet, some efforts to promote the rule of law have positive effects, while others do not (Stromseth, Wippman et al. 2006). Thus, as discussed in detail in Chapter 1, my criteria examines whether international assistance has *enhanced the prospects for developing and consolidating the rule of law*. This standard allows a nuanced investigation into the consequences of international involvement without conflating engagement with causation. Through a process tracing approach (Tansey 2007), this chapter examines the two distinct standards of assistance. First, the conventional strand of judicial state-building assistance consists of aid provided by the UN and its agencies, the US, and Australia.[86] Second, there is a Lusophone strand of assistance provided bi-laterally

[86] The term "conventional" refers not to the aid's content but rather that it was not given based on historical, cultural, or linguistic affinity. As the Organization for Economic and Co-operation and

from Portugal.[87] While Portugal is not usually a major player in international development assistance, it is in Timor-Leste. In fact, until 2008 it was the largest single country donor (Portuguese Institute for Development Support 2010: 122). Portuguese aid was 'strongly focused on six partner countries with which it has historical connections, a shared language and close relationships' (OECD Development Assistance Committee 2011: 11).[88]

There are two major differences between the strands of assistance. Both programming streams seek to work with the state to develop a modern, legitimate justice sector in Timor-Leste. However, Portuguese assistance in the justice sector, and indeed throughout all of its programming, was explicitly predicated on 'reconstruction of the Education sector and the consolidation of Portuguese language' (Portuguese Institute for Development Support 2010: 121).[89] Second, Portuguese assistance remained exclusively statist, while conventional interventional assistance increasingly recognised the need to engage the non-state justice mechanisms that settle the vast majority of disputes.

Development (OECD), Portuguese assistance reflects the tight bonds at the 'government and personal levels, and in trade, migration flows and the strong presence of the Portuguese private sector' (OECD Development Assistance Committee 2011: 25).

[87] The realms of Portuguese and non-Portuguese assistance are not hermetically sealed. For instance, Portugal has been a contributor to the UN Missions and UNDP activities and has actively pushed for UNDP personnel working in the legal sector to be Portuguese or at least Lusophone. International NGOs have worked to ensure that their activities are not duplicated or opposed by Portuguese funded actors or programmes.

[88] The other major aid recipients are Angola, Cape Verde, Guinea Bissau, Mozambique, and Sao Tome Principe.

[89] The emphasis on Portuguese language has been overt and formalised. The first two bilateral aid agreements between Timor-Leste and Portugal 'place[d] as the top priority the reintroduction of Portuguese into East Timor's education system from kindergarten through university' as comprehensively as possible throughout the entire country (Fernandes 2010: 127).

The Timorese Constitution enshrines both Tetum and Portuguese as official languages (RDTL 2002: Section 13). Yet they are far from equal in practice:

> Portuguese, the de facto legal language of Timor-Leste, is spoken by only an estimated seven percent of the national public. Although Tetum is spoken by over 80 percent of the national public, many in government and elsewhere see it as a "trading" language lacking the terminology for legal settings. The result is that laws, judgments and even court orders are often handed down in Portuguese, especially by international judges. Many court actors, including national judges, private lawyers and members of Parliament are thus unable to understand, act on, or further disseminate legal information (Everett 2009: 22).

Language politics runs throughout the entire international judicial state-building endeavour. International rule of law assistance from the UN and its agencies as well as US and Australian NGOs is largely agnostic regarding the use of Portuguese and accepts the utility of Tetum, which is spoken by the vast majority of the population. In contrast, Portuguese programmes favour Portuguese citizens and those from Lusophone countries. Portuguese aid has little interest in the development of Tetum and maintains that the solution to Portuguese's limited reach is straightforward: more language instruction.[90]

Application of Criteria to the Conventional and Portuguese Bilateral Assistance

This chapter will address conventional and Portuguese assistance in turn. First, it will argue that despite inefficiencies and some underperforming projects, conventional international assistance has produced positive contributions towards building the rule of law against a backdrop of extraordinarily high levels of legal pluralism. Second, since

[90] This divide was evident in my work with the Asia Foundation's Access to Justice Program, particularly on the initiative to provide textbooks on the law of Timor-Leste in both official languages as well the working language of English. International UNDP funded-staff at the Legal Training Centre were invariably from Lusophone countries. While sceptical about Tetum as a legal language, as it lacks an extensive technical vocabulary, they were amenable to legal Tetum and to the use of texts in both official languages. In contrast, the Portuguese funded law faculty at the National University of Timor-Leste were open to incorporating textbooks in Portuguese but had no interest in using the Tetum texts.

independence, international judicial state-building support has helped strengthen and institutionalize state-lead gains by funding and supporting state priorities. Assistance has also adapted to new and unforeseen realties, which has been essential given the high degree of political and institutional fluidity. The approach taken by international donors was strategically sound, further bolstering its impact. From 2002 to 2012, external assistance broadly comported with the state's vision of a judicial system and a state committed to the rule of law. Through process tracing, this chapter will examine the major international programmes and initiatives to illuminate broader strategies that show how international support can help facilitate a transition to cooperative legal pluralism.

Second, this chapter will argue that while Portuguese aid enjoyed strong domestic political support from both major political parties, the results have been mixed. The changes have been impressive in terms of their scope. A decade after independence there is a fully functioning Lusophone justice system, training regime, and state legal order. While over ten years of efforts to establish Portuguese as a commonly spoken language nationwide has achieved little (Taylor-Leech 2013), the legal initiatives have achieved many of their aspirations. Yet, there is a fundamental distinction between rule of law programme outputs and impacts (Kleinfeld 2012: 200-201). The initiatives have achieved many of their desired outputs. However, to say their impact was an unmitigated success is more difficult. At the project level, the successes are clear. At a broader level, however, it is unclear if the nascent Lusophone legal institutions can fulfil their vital role in promoting the rule of law as they are largely disconnected from

broader society.

Chapter Overview

This chapter's examination of external judicial state-building assistance is organised thematically rather than strictly chronologically. The first section looks at the major judicial state-building endeavours undertaken by conventional international actors' and whether each programme has enhanced the prospects for developing and consolidating the rule of law on a micro-level.[91] The second section then analyses the strategy and trajectory of externally funded judicial state-building activities holistically and assesses their contribution by looking at their impact on institutions and the broader justice sector. The final section discusses Portuguese bilateral support to the justice sector and its implications for implications for the rule of law.

1 CONVENTIONAL INTERNATIONAL ACTORS AND INITIATIVES

After independence, significant international involvement continued far beyond Timor-Leste's economic or strategic importance. The UN, the UNDP as well as USAID funded programmes that were active throughout the period, most notably the Asia Foundation's Access to Justice (ATJ) Program, and Management Sciences for Development's (MSD) Justice Institution's Strengthening Program (JSIP). Australia only became a major player in the wake of the Crisis when Timor-Leste emerged as a major regional security concern. It supported the Justice Facility Program. A number of

[91] As discussed in Chapter 3, the justice sector should be conceptualised as encompassing both state and non-state judicial activities. Unsurprisingly, certain actors, most notably, suco chiefs and the police have one foot planted firmly in each camp. Nevertheless, for the sake of conceptual clarity, it is worth examining initiatives that are primarily targeted at the state and activities aimed at non-state actors separately, as determined by programmatic intent.

other actors, such as the World Bank and smaller NGOs, also played smaller roles.[92] While some initiatives proved underwhelming, such as efforts to pursue transitional justice and draft legislation that formalised the relationship between the state and non-state justice sectors in detail, overall international assistance has helped establish a functioning nationwide justice system predicated on rule of law ideals that also effectively engages with the non-state justice sector.

1.1 The UN

From 2002 to 2012, the UN remained the most visible international presence in Timor-Leste. Since independence there have been three distinct UN missions. The first, the UN Mission in support of East Timor (UNIMISET), from 20 May 2002 to May 2005, sought to support Timor-Leste's transition to democracy and the rule of law. UNIMISET's authorising resolution prioritised addressing the 'difficulties which have had a negative impact on the effectiveness of the judicial system' (UNSC 2002b: 2). Timor-Leste achieved formal independence in May 2002, but the Timorese state was initially eager to 'share[] its sovereign prerogatives with UNMISET' to minimize administrative problems, especially in the judiciary (Zaum 2007: 193).[93] This included placing UN funded international advisors directly in Timorese judicial and legal structures, including international judges and advisors in the Ministry of Justice (MOJ), as well as responsibility for security (UNSC 2002a: 4).

[92] For more information about international rule of law assistance outside the purview of this chapter, see Freedom House and American Bar Association Rule of Law Initiative (2007), UN Independent Comprehensive Needs Assessment Team (2009), and RDTL (2010).
[93] Timor-Leste assumed formal control over its own security on 20 May 2004.

The successor mission from 20 May 2005 to 20 May 2006 of the UN Office in Timor-Leste (UNOTIL) continued support but at a reduced level (Goldstone 2012: 178). Even in the context of decreased assistance, the 'rule of law, including justice, human rights, and support for the Timor-Leste police' was identified as the top priority (UNSC 2005: 1). The international advisers system was continued with UN funded experts placed throughout the judicial sector.[94] While this approach was controversial, it proved vital in preventing the complete collapse of the justice system. In 2005, all local justice sector personnel failed their examinations and were subsequently suspended. As a result, the justice system was temporarily run solely with international personnel until local personnel could be sufficiently qualified (Jensen 2008: 133).

The trajectory towards a minimalist UN presence was abandoned after the 2006 Crisis. The pattern of escalating violence and disorder was only defused by the return of international peacekeeping troops during May to June 2006 (Robinson 2011: 1013). The UN invested heavily to prevent Timor-Leste from becoming engulfed in prolonged chaos. In August 2006, the Security Council authorised a major new mission, the UN Integrated Mission in Timor-Leste (UNMIT) (UNSC 2006). UNMIT's mandate would be extended until 31 December 2012.[95]

The Crisis was widely believed to be symptomatic of failures in the justice sector. Building a viable state justice sector able to provide legitimate order soon became a top

[94] On the eve of the Crisis, it was expected that 'up to 19 international advisers' would serve in the justice sector in the successor mission to UNMISET (Annan 2005: 4). The international commitment was significantly greater after the Crisis.
[95] The UN police also assumed direct responsibility for security until 2011.

priority. This commitment translated into a continued international presence in the justice sector through international placements and the creation of an administration of justice support unit in 2007. The nine-person unit sought to help build national capacity and improve justice sector coordination by working with state officials, embassy staff, and international NGOs (UNSC 2011).

Transitional Justice

Transitional justice is often viewed as vital to promoting the rule of law and long-term stability, but its empirical consequences are subject to debate (Mendeloff 2004, Mani 2005, Reiter, Olsen et al. 2013). Regardless, after independence, the UN, and indeed much of the international community active in Timor-Leste, remained very interested in retributive transitional justice that punished perpetrators of violence. The UN's official policy has backed justice for the victims of the occupation and especially the violence surrounding the 1999 referendum. The UN Secretary General stressed that addressing 'the violations of human rights that occurred in the aftermath of the consultation process is vital to ensure a lasting resolution of the conflict and the establishment of the rule of law' (Annan 1999). Transitional justice initiatives, however, produced decidedly mixed results and highlighted the clear limits of international influence, even during the early phases when state officials were far more dependent on international assistance.

UNTAET established a Special Crimes Investigation Unit (SCIU) and Special Panels to address these issues (UNTAET 2000a, b). Funded and directed by the UN, the SCIU had four teams 'each staffed almost exclusively by international prosecutors,

investigators, and case managers' (Katzenstein 2003: 251). SCIU's work continued after independence under UNMISET until 2005, but their efforts produced minimal results. During its tenure, 101 people came before the panels and 87 received final decisions (Reiger 2006: 151). While 81 defendants were convicted, they were almost exclusively low-level domestic actors (Id.). The SCIU did little to bring those actually responsible for the planning and execution of mass killings to justice (Kent 2012).

The SCIU's performance must be understood in the context of deep scepticism from state officials. The work of the SCIU continued after independence but state authorities did not actively support its work and often hindered it (Cohen 2007). Nonetheless, the government did back the UNTAET initiated Commission for Reception, Truth and Reconciliation (CAVR). The CAVR process sought to facilitate reconciliation by establishing a definitive record of events, an opportunity to be heard, and foster social reintegration (UNTAET 2001). The CAVR was well regarded as a process, particularly for its incorporation of localised non-state justice approaches (Nixon 2012). CAVR's mandate, however, was decidedly non-retributive and its calls for prosecution were flatly rejected by policymakers (Kent 2014).

Since independence, state officials have prioritised good relations with Indonesia, which they view as a major national security issue, over transitional justice (Robinson 2011). Then Foreign Minister Ramos-Horta explained the government's stance in 2004: 'the government of East Timor does not contemplate lobbying for an international tribunal to try the crimes of 1999 because we know this would undermine the existing

relations between the two countries' (Ramos-Horta, quoted in Global Policy Forum 2004). Ramos-Horta was not alone. President Gusmão and the larger political establishment were equally uninterested in the prosecutions related to the occupation and referendum since independence (Kent 2014). After the 2006 Crisis, the UN mission established the Serious Crimes Investigation Team (SCIT). SCIT, however, met the same fate as its predecessor and failed to deliver any tangible results. SCIT's limited effectiveness stemmed from the lack of interest of President Ramos-Horta, Prime Minister Gusmão, and the political class in prosecutions.

Over a decade after independence, not a single Indonesian official has been successfully prosecuted for the violence related to the independence referendum despite continued public interest in 'accountability and punishment for perpetrators' (Lambourne 2009: 11). The prospects for future trials are bleak. Calls from the UN and the international community for transitional justice are ever less frequent. The meagre results of transitional justice efforts highlight the UN's limited ability to pursue change when powerful state officials strongly disagree. The fundamental differences were stark. The ideological underpinnings of the UN's initiatives were decidedly retributive. This approach enjoyed significant popular support. However, as discussed in the last chapter, East Timorese political elites strongly favoured a reconciliation-based approach to both the violence surrounding independence and the 2006 Crisis. This reconciliation model has been successfully utilised in certain cases, for instance Spain after Franco, though it is by no means guaranteed to succeed (Posner and Vermeule 2004). The UN was able to establish, fund, and even direct entities to pursue these

retributive transitional justice goals. There were prosecutions and even some convictions. The UN-backed CAVR process was widely considered a success for producing a definitive narrative of the conflict and allowing people a meaningful right to be heard.[96] Of course, the CAVR was fundamentally reconciliatory in nature. In a context where transitional justice was viewed as a national security threat by the highest levels of the national government, the UN's ability to pursue transitional justice was heavily circumscribed.

1.2 The UNDP

UN agencies, particularly the UNDP, have also been very active in Timor-Leste. The UNDP has been active in the justice sector since 1999, while the agency's Strengthening the Justice System Program (JSP) has supported the formal justice sector since 2003. Since its earliest engagement, UNDP support has focused on a number of areas including underwriting advisors in key legal institutions, such as prosecutors and public defenders offices, the courts, MOJ, and especially the Legal Training Centre (LTC) since 2006. It has also drafted reference guides and educational material, and provided equipment and other technical assistance to those institutions (Frigaard, Mullaly et al. 2008, UNDP 2013).

The scope of the work later broadened significantly, both in response to the 2007 mid-term evaluation and external events, most notably the 2006 Crisis and the change of

[96] While an opportunity to share their stories and hear the truth is often viewed as beneficial in and of itself, it remains unclear if this process actually fosters relief, healing or forgiveness among participants or helps the peacebuilding process (Mendeloff 2004).

government following the 2007 parliamentary elections.[97] Assistance to the LTC became a major focal point after 2006. The UNDP funded six international lecturers and a number of Portuguese language instructors at the LTC (UNDP 2011: 109). Indeed, it was not uncommon for accepted students, particularly those who did not graduate from the Lusophone National University of Timor-Leste (UNTL), to be required to undertake a year of Portuguese language training before commencing studies. While the LTC is officially under the auspices of the MOJ, the director has been deferential to the entirely Lusophone UNDP staff (International NGO Manager 2014). Moreover, the UNDP instructors were given broad leeway in the LTC's administration, curriculum, and instruction for the duration of the two and a half year course. The LTC quickly became the epicentre the legal profession. Going forward, all indigenous judges, prosecutors, public defenders, and private lawyers are required to be LTC graduates. It is an immensely important institution for the operation of the state justice and efforts to promote a rule of law culture. While there are plans for an eventual transition to Timorese operational control, the LTC depended on foreign assistance through to 2012.

Non-State Justice

The UNDP was active in the effort to determine and codify the relationship between the state and non-state justice sectors. In other words, it is a paradigmatic example of the harmonization and incorporation approaches discussed in Chapter 3. Following the 2006 Crisis, there was increasing interest in re-examining the non-state justice sector

[97] While noting that some progress had been achieved, the evaluation found that 'overall progress on the achievement of the programme outcomes has been slow, and, as yet, the programme has not made a significant impact on access to justice in Timor-Leste' (Frigaard, Mullaly et al. 2008: 5).

and its relationship to the state sector. In 2008, the Minister of Justice expressed interest in assistance to draft a 'UN proposal on traditional justice mechanisms and their relationship with the formal justice system in Timor-Leste with a view to developing a legal framework' (UNMIT quoted in Nixon 2012: 197). The UNDP was also heavily involved in attempts to construct a more detailed framework for the non-state justice system and held a series of consultations. At least two versions of a draft law were completed but not circulated outside the UN system and MOJ's upper echelons. However, the MOJ never endorsed any version of the law. The Community Authorities Law, which mandates the non-partisan election of suco chiefs and details the scope of their authority, thus remains the most important regulation of the non-state justice sector (RDTL 2009). The UNDP has since shifted away from support to legislative drafting with regards to the non-state justice system and back towards institutional capacity building (UNDP Official 2014).

1.3 Australian and US Funded NGOS

International NGOs have actively supported the state justice sector since independence, but they became even more involved after the 2006 Crisis 'and the subsequent rethink' of rule of law assistance (Government of Australia 2007: i). The biggest funders have been the US and Australia. The US has actively supported judicial state-building in Timor-Leste since independence. Moreover, US assistance to Timor-Leste, unlike Afghanistan, has benefited from the lack of competing strategic interests that risk compromising its commitment to promoting democracy and the rule of law. For its part, Australia did not begin to invest heavily in the sector until 2008, but since then it

has overtaken Portugal as the single largest funder. The three major international NGOs, MSD, the Asia Foundation, and the Justice Facility, will now be examined in turn.

1.4 MSD

Based on the premise that enhancing institutional capacity was essential for a viable state justice sector, in May 2005 MSD was awarded the contract for JSIP by USAID. Programme activities continued until 2012 (Management Sciences for Development 2012). MSD describes its work as seeking to 'build[] administrative and management capacity in Timorese justice sector institutions' with particular focus on 'training and technical support in general administration, financial management, human resources administration, good governance and anti-corruption practices' (Management Sciences for Development 2010: 2). In practical terms, JSIP supported the critical institutions of law courts, the Ministry of Justice, prosecutors, public defenders, the Provedor for Human Rights and Justice (PDHJ), and the Anti-Corruption Commission (ACC) (see Management Sciences for Development 2012 for a complete overview of institutions that recieved assistance). MSD and its evaluators have been particularly proud of its work offering financial management training for the major justice sector institutions (Chopra, Pologruto et al. 2009: 19).

MSD programming was heavily focused on state institutions. The JSIP adapted to institutional changes in how corruption was addressed, most notably the shift in emphasis from the PDHJ to the ACC. The extent of corruption is difficult to determine

with certainty, but there was widespread belief that corruption was increasing dramatically and that a more robust institutional response was required (Soares 2013). The programme actively worked with the ACC and other agencies on their core financial, administration, audit, and other technical competencies. These technical capacities are necessary though by no means sufficient for state organisations to combat corruption (Rose-Ackerman 1999).

1.5 The Asia Foundation

The Asia Foundation was actively engaged in judicial state-building since shortly after independence until 2012, when the ATJ programme concluded. The Asia Foundation was international actor most directly involved in engaging the non-state justice sector. The most significant, long-running programme was the ATJ programme funded by USAID. From its conception, ATJ focused on the provision of free legal aid in partnership with local legal aid NGOs seeking to resolve disputes 'through the formal justice sector or through alternative dispute resolution that respects human rights' (The Asia Foundation 2003: 3).[98] Ensuring access to legal aid and building legal aid providers' institutional capacity remained a major priority. ATJ consistently 'trained the legal aid organizations in substantive knowledge, legal skills and institutional strengthening, which include administrative management and financial management' (Coghlan and Hayati 2012: 15-16). Moreover, the programme sought to address gaps in the state's provision of legal services by offering mobile legal support service in rural areas as well as defending clients in state court proceedings that public defenders

[98] While outside the focus of my research, the Asia Foundation also engaged with state and non-state authorities in different capacities through its Local Governance, Elections, and Civil Society Programme as well as community policing programmes.

were unwilling or unable to represent. Over 6,500 people received assistance through the ATJ programme's legal aid activities (The Asia Foundation 2012: 28).

Non-State Justice

In the wake of the Crisis, ATJ began supporting paralegal programmes in 2008 (The Asia Foundation 2009: 24-26). Paralegals are 'lay people with basic training in law and formal government who assist poor and otherwise disempowered communities' (Maru 2006: 429). The programme marked the Foundation's most significant attempt at direct engagement in the non-state justice sector. Through its network of paralegals operating in Baucau, Manatuto, Viqueque, Los Palos, and Oeccusse, the ATJ programme sought to interact more directly with non-state judicial authorities. Paralegals served a number of key roles. They offered a referral mechanism for individuals who were unaware that the state justice existed or unsure how to access it; they resolved minor disputes themselves if the participants preferred it; or they assisted with the suco dispute resolution process (Coghlan and Hayati 2012: 32-33). The bridging role they played was vital. For instance, all eighteen suco chiefs in the remote district of Oeccusse stated that ATJ funded paralegals were their only link to the state justice system and the police (Graydon 2011: 33). During the four years of active programming, paralegals assisted with 3,110 cases (The Asia Foundation 2012: 29). Simultaneously, there was general recognition that non-state actors had very little knowledge of state laws. After a wholesale evaluation of the programme in 2010, the Foundation undertook a comprehensive training programme for paralegals to make sure they were up to date on the most important aspects of applicable state law. They also sought to help ensure that

suco dispute resolution was generally consistent with broad due process and human rights norms.

Education and Legal Civil Society

Knowledge of the law by both legal professionals and society at large is essential for the rule of law (Carothers 1998). Education also emerged as a major focus. The Asia Foundation partnered with UNTL to develop textbooks on the law of Timor-Leste in both the country's official languages in collaboration with the MOJ, the prosecutors and public defenders offices, the lawyers' association, and a number of other legal organisations. Previously, all Timorese law schools relied on textbooks on Portuguese or Indonesian law. The publication also marked the first textbooks on the law of Timor-Leste in Tetum. Likewise, the Foundation has supported the translation of certain key laws into Tetum and producing guides and handbooks on key legal issues in Tetum. The Foundation was also actively engaged in supporting public consultations in Tetum on draft legislation, in partnership with local NGOs and the MOJ, and recently enacted laws as part of a broader effort to enhance public understanding of the state justice sector.

Accountability mechanisms, including formal political mechanisms and more informal mechanisms, most notably civil society, are essential for the rule of law. The ATJ invested in a number of law related NGOs, most notably the Judicial Systems Monitoring Program (JSMP) which formed a cornerstone of ATJ programming from

2002.[99] JSMP has played a singular important role in Timorese legal civil society by closely monitoring development in the justice and legislative sectors as well as transitional justice efforts. JSMP produces reports, policy briefs, and Tetum translations of key draft law. As the state rarely publishes official figures, these are vital reference tools.

While the organization was initially expatriate-led, since November 2004 JSMP has been run by Timorese directors (The Asia Foundation 2005: 10) and its work continues despite the end of the ATJ programme. As a longstanding, respected, and local NGO, JSMP possesses the ability to shape the legal political discourse that other NGOs lack.[100] JSMP has been at the forefront of discussion about addressing impunity and gender issues. JSMP was also instrumental in drawing attention to President Ramos-Horta's extensive use of the presidential pardon power, and proposing ways to address the issue through legislation.

1.6 Justice Facility

Australia began to show increasing interest in rule of law programming in Timor-Leste after the Crisis, primarily through the AusAID-funded East Timor Justice Sector Support Facility Programme (Justice Facility) implemented by GRM International. Justice Facility began its work in 2008. The programme initially focused on the overarching goals of 'Corporate Management Support for Core Institutions' and 'Civil

[99] JSMP has enjoyed donor support from a variety of sources from 2002 to 2012. It is classified as an Asia Foundation activity as it was a major donor throughout the entire period.
[100] For example, La'o Hamutuk and Belun are recognised for doing high quality research and advocacy work, but tended to face criticism for being perceived as foreign.

Society demand for Justice' (Justice Facility 2011: 6). In 2010, the focus was shifted slightly to 'Institutional Development' and 'Civil Society Support and Access to Justice' to 'more closely align with GoTL [government of Timor-Leste] priorities' (Justice Facility 2011: 6).

Technical assistance, through expatiate advisors placed in relevant institutions, formed the major thrust of Justice Facility's early work. Justice Facility oversaw creation of a comprehensive justice sector information management system. They also supported a diverse range of legal actors through a small grants programme as well as institutional capacity building support and the development of the *Justice Sector Strategic Plan 2011-2030*.

As Daniels and Trebilcock highlight in their examination of the political economy of establishing the rule of law in developing countries, 'the legal profession plays a role in safeguarding liberties against incursions by the state' as well as in providing education to practicing lawyers and the public at large (Daniels and Trebilcock 2004: 116). As an inclusive, competent professional association is important to consolidating the rule of law, Justice Facility has been extensively involved with the Assosiasaun Advogados Timor-Leste (AATL). Upon reaching a sufficient number of fully qualified attorneys, AATL is slated to transform into the official bar association of Timor-Leste with significant gatekeeping and regulatory powers over the profession.

1.7 Programmatic Progress and Challenges

While the overarching thrust of these programmes has been positive and supportive of the domestic judicial state-building process, these initiatives faced significant challenges. The impact of UN efforts to support transitional justice has been decidedly underwhelming. The mid-term evaluation noted that while the JSP has made a 'significant contribution to the strengthening of the justice system,' progress has been slower than anticipated (Frigaard, Mullaly et al. 2008: 5). Moreover, the UNDP's approach to legislation regarding the non-state justice sector received significant criticism from both scholars and practitioners for trying to impose uniformity for the punishment of minor infractions in a highly diverse system. To the UNDP's credit, however, it abandoned those efforts once it became clear that the proposed approach was highly problematic and lacked significant state support.

While praising the small grants programme and the integrated justice sector information system, the independent 2012 review of Justice Facility featured some serious criticisms. The independent evaluation found that the programme was overly ambitious in its initial scope and therefore often failed to complete planned projects (Peake, Pearce et al. 2012: 16-20). Justice Facility was further faulted for poor internal monitoring, substantial management shortcomings, insufficient strategic planning, and programmatic sustainability (Id.).[101] Reviews of MSD and the Asia Foundation programmes were quite positive (Chopra, Pologruto et al. 2009, Graydon 2011, Coghlan and Hayati 2012). As could be expected given the fluidity of the programming

[101] Not surprisingly, the programme's implementers did not accept the evaluators' criticisms unequivocally. While they were open to some suggested changes, Justice Facility challenged the claims regarding the programme management, efficiency, and monitoring and evaluation (AusAID 2012).

environment and the inherent challenges of international development work, both programmes faced significant obstacles. The Asia Foundation suspended collaboration with numerous local legal aid partners after its internal monitoring activities discovered financial irregularities (The Asia Foundation 2012). There were thirteen distinct legal aid partners over the course of the decade long programme. MSD was forced to abruptly end their programming in Vice Prime Minister's office after his resignation (Management Sciences for Development 2012: 10).

Conventional international assistance certainly left significant room for improvement. However, it addressed real compelling needs in a way that bolstered rather than undercut domestic efforts. Most importantly from a judicial state-building prospective, the vast majority of work was strategically sound and supported the state's goals, which significantly increased its impact.[102] As the next section highlights, international assistance has proven vital for the establishment of the state justice sector and its expanded reach over the country.

2 CONCEPTUALISING CONVENTIONAL INTERNATIONAL JUDICIAL STATE-BUILDING IN TIMOR-LESTE

International support to Timor-Leste evolved between 2002 and 2012. As discussed in Chapter 4, at independence Timor-Leste was characterised by competitive legal pluralism. The state and non-state justice sector actors were open to limited engagement but remained deeply sceptical of one another as the central state was

[102] Support for the state's goals does not necessarily generate the best programming, but in Timor-Leste, state and international actors tend to share the common goal of establishing an effective justice system.

conflated with the UN. After independence, however, the state was able to transform the predominant dynamic from competitive to cooperative legal pluralism, where the state and the non-state justice sector work together towards a shared vision of a modern Timorese state. This Herculean task was accomplished by translating the legitimacy of the independence movement and the state structures it envisioned into an actual state itself committed to the rule of law, while simultaneously rooting political order at the local level based on democratic choice.

While initially focused on bolstering state justice sector institutions in a straightforward subsidisation strategy, international actors realised after the 2006 Crisis that meaningfully engaging the non-state justice sector is essential in a highly legal pluralist setting.[103] This is no easy task as the localised non-state dispute resolution mechanisms, most notably dispute resolution by suco leaders, often produced results that were deemed legitimate by local populations but fell short of international due process and human rights norms. Assistance took a flexible yet principled approach that sought to improve the quality of non-state justice and links between the two sectors while helping construct a modern judiciary. Collectively, this support helped reinforce the state-led trend towards cooperative legal pluralism rather than competitive legal pluralism.

[103] The strategic approaches undertaken by international judicial state-builders have evolved over time. As discussed in Chapter 3, there are four main approaches for international judicial state-building in highly legally pluralist societies: bridging, harmonisation, incorporation, and subsidisation. In Timor-Leste, subsidisation has been a constant theme, while bridging strategies were increasingly common after the 2006 Crisis.

2.1 Subsidisation Strategy From Independence to the 2006 Crisis

From 2002 to May 2006, international assistance emphasized the creation of basic state justice institutions. This meant support for establishing those institutions, but also helping to ensure that they actually functioned. The rationale for this tactic was obvious. The state justice sector was still in an embryonic state with compelling human resource, training, infrastructure, and material needs. International aid was focused on building modern state institutions that acted in accordance with the rule of law (Marriott 2009, RDTL 2010). While this approach has received substantial criticism, it was consistent with the views of Timorese political leaders across the political spectrum. Assistance was concentrated in Dili and the Timor-Leste's three other cities with courts, Baucau, Oeccusse, and Suai.[104] Additional assistance tried to help these organisations become more professional and operate in a manner consistent with common norms of due process, human rights and the rule of law. In other words, international assistance was focused overwhelmingly on subsidisation, which offers aid to state institutions to improve their performance but largely leaves the non-state justice sector untouched.

While international assistance has been criticised for an excessive focus on state institutions and supposedly foreign notions of democracy and the rule of law, this criticism misses the mark. State institutions were by far the area of greatest need precisely because they were new and needed to establish their legitimacy. Frustration

[104] A notable exception was the Asia Foundation ATJ Programme's mobile lawyers initiative whereby legal aid lawyers travelled the districts as well as the paralegal programme established in 2008, which was focused on local level justice (The Asia Foundation 2012). Likewise, a smaller Avocats Sans Frontieres programme worked to build local paralegal networks from 2005 to 2007 (Low 2007: 6).

from the international community over the perceived slow pace of institutional progress, while understandable, fails to recognise that building inclusive institutions underpinned by the rule of law is a daunting and time consuming process (Fukuyama 2004, Acemoglu and Robinson 2012). As previously discussed, these institutions were not some foreign imposition. Rather they were a legitimate expression of the independence movement and aspiration for development that enjoyed extensive support. The independence movement was explicitly predicated on a commitment to democracy and the rule of law. This is the type of assistance that international judicial state-builders are best positioned to offer (Carothers 1999).[105]

Unless one envisions a state underpinned exclusively by non-state law, a prospect not even the most radical critics of international efforts endorse, a functioning state justice system is required in its own right as well as to engage with non-state actors. While the initial subsidisation approach may have had significant implementation issues, it did enhance prospects for the development and consolidation of the rule of law in Timor-Leste. Other approaches may have been possible. For instance, international assistance could have promoted bridging the state and non-state justice sector from the outset, but it is extremely difficult to calculate a sustainable relationship between one highly developed system and another that is in an embryonic form.

Non-state justice was always recognised as important but was not a programmatic focus. It presents obvious programmatic challenges: non-state justice is inherently

[105] The rationale was not purely magnanimous. Codifying the dominance of Portuguese over English or Indonesian placed the Lusophone political elites and those able to successfully assimilate in a dominant position.

diffuse and highly localised. Even geographically close communities can have significant variance in how disputes are resolved and the norms of conduct (Nixon 2012). While the non-state justice system was functioning relatively smoothly and enjoyed a high level of legitimacy, many international actors believed that non-state justice violated human rights norms and discriminated against women (Hohe 2003). High-level state officials were equally uninterested in fostering state or international engagement in non-state sector, but were also swayed by the Crisis and a growing recognition that a workable state legal system required buy-in from non-state actors (Legal Adviser from the RDTL President's Office 2014).

Building an effective state judicial system bound by the rule of law takes many years, even decades, and remains contingent in even highly favourable circumstances (North, Wallis et al. 2009). Yet, by early 2006, Timor-Leste was widely seen as an international judicial state-building success story and, consequently, international aid was started to decrease dramatically (Goldstone 2012).[106]

2.2 Diversified Approaches in Conventional International Assistance Post-2006

The 2006 Crisis caused 36 deaths, widespread internal displacement and destruction, renewed international intervention, and the collapse of Alkatari's democratically elected government. The 2006 Crisis was a seminal event in Timor-Leste's domestic politics and a major influence on international judicial state-building assistance. Timor-Leste again topped the UN's agenda alongside a massive influx of new

[106] For instance, then World Bank President Paul Wolfowitz claimed Timor-Leste had 'opted for peace' and 'come together as a nation where so many other countries fall apart in factions' less than a month before the Crisis erupted (Wolowitz, qouted in Sahin 2007: 250).

international support. The rule of law emerged as a paramount concern. The UN's Independent Special Commission of Inquiry for Timor-Leste determined the Crisis 'can be explained largely by the frailty of State institutions and the weakness of the rule of law' (UN Independent Special Commission of Inquiry for Timor-Leste 2006: 2).[107]

Since the Crisis, state institutions have made significant progress, including the creation of a viable if understaffed judge, prosecutor, public defender, and private lawyer corp. By 2012, there were 31 judges, 24 prosecutors, and 22 public defenders (JSMP 2012). There is also evidence of increasing popular faith in the justice system. According to a major nationwide survey, 88 percent of the population expressed confidence in the formal system (up from 77 percent in the previous 2008 survey) while 94 percent expressed confidence in the non-state system (Marx 2013: 15). The geographic reach of state justice expanded. Regional courts in Baucau, Oeccusse, and Suai became fully and consistently operational in contrast to the immediate post-independence period when closures were common (JSMP 2004). Thus, enhanced reach and robustness made the state justice sector an increasingly powerful force in dispute resolution. The non-state justice sector remained dominant but an ever-increasing number of citizens experienced a meaningful choice between the two systems. There remained significant gaps in the system. For instance, there were not enough public defenders to meet popular demand (The Asia Foundation 2012: 16). International assistance, however, helped address this gap through free legal aid by local NGOs, provision of international public defenders, and training to ensure that there would be more Timorese public

[107] An assessment by Freedom House and the American Bar Association's Rule of Law Initiative Assessment echoed this finding (Freedom House and American Bar Association Rule of Law Initiative 2007: 15).

defenders in the future.

Expanded Scope for Subsidisation

Subsidisation remained a key strategy but evolved to include legal instruction as well as the providing legal aid and advice. Assistance was targeted at helping the broader public understand the legal system and state laws. In other words, subsidisation was expanded to include the rule of law's cultural aspects and increased attention to professional and educational institutions such as AATL, the LTC, and UNTL. Based on their comprehensive survey of international nation-building efforts since World War II, Dobbins et al. argue that 'a widely shared cultural commitment to the idea of rule of law' is essential (Dobbins, Jones et al. 2007: 88).

The 2006 Crisis sparked a renewed emphasis by the international community on passing or revising key pieces of legislation related to the state and non-state justice sectors, most notably the Private Lawyers Law, Penal and Civil Codes, and the 2009 revisions to the Community Authorities Law, which provided a domestic legal framework and ended reliance upon out-dated Indonesian law. External support underpinned legal educational institutions, support for legal professional associations, and efforts to institutionalise legal aid through the support of the government's process of drafting of legal aid bill. International aid likewise sough to socialise the general population regarding key pieces of legalisation, such as the draft laws on legal aid and land (Marriott 2012, The Asia Foundation 2012).

Emergence of a Complimentary Bridging Strategy

After the Crisis, effective international engagement of the non-state justice sector was seen as essential for long-term stability (International NGO Manager 2014, International NGO Professional 2014, Legal Adviser from the RDTL President's Office 2014). As the vast majority of disputes continued to be settled outside the courts, this approach demanded significant engagement with both the state and the non-state justice sector.[108] A bridging strategy became an important focal point, particularly for The Asia Foundation's ATJ Programme. As the programme's final report explains, since 2006 'the program's priorities shifted to serving as a bridge between formal justice sector institutions…and informal dispute resolution mechanisms' (The Asia Foundation 2012: 11). This approach emphasised improving the quality of non-state justice outputs and capacity building for its actors, ensuring access to the state system, and increasing public knowledge about the law and the legal system (Id.: 13-14).

A bridging approach funded paralegals affiliated with legal aid organisations. Paralegals were drawn from the communities that they served and performed three main tasks. First, they worked to ensure all serious criminal matters, including domestic violence, were sent to the court system and lawyers were available to handle civil matters. This was accomplished by linking paralegals with legal aid organisations and state judicial actors. Second, paralegals offered advice and technical assistance to help make non-state justice processes fairer and respectful of basic human rights norms, most notably rudimentary forms of due process and equity before the law. Finally,

[108] This conclusion was by no means obvious. Non-state justice is predominant in rural areas. The Crisis was primarily urban and stemmed for deep seeded high-level political rivalries.

paralegals acted as sources of information about state law and the state legal system for local communities. Post-2006 international assistance made a significant contribution towards people being able to access and make an informed choice regarding the state and non-state legal systems.

International assistance largely avoided the two other strategies, harmonisation and incorporation. Efforts in these directions were present in the UNDP's two draft customary laws, which sought to codify the content of non-state law. However, the efforts to standardise non-state justice quickly proved unfeasible without state support. Moreover, there was no pressing need for a non-state justice law as most serious cases were already going to state courts under the existing community authorities law.

2.3 Synergy with State Priorities

The 2006 Crisis influenced the design, intention/outputs, and delivery of international assistance. In turn, key domestic political and judicial actors increasingly recognised the need for meaningful engagement with the non-state justice sector. At the initial stages alignment with state priorities was straightforward; it simply meant establishing institutions. However, as the state legal system became increasingly sophisticated, programming options proliferated. All major international actors stressed that their programmes were collaborative and consistent with the state of Timor-Leste's goals (Government of Australia 2007, UNDP 2008, Management Sciences for Development 2012, The Asia Foundation 2012).

The increased alignment of international assistance with the Timorese government's objectives was, in part, necessitated through the discovery of petroleum resources in Timor-Leste. The early Fretilin government had a decidedly modest national budget leaving it more dependent on international assistance. Once oil revenues came online, funds increased dramatically. In 2005, the state annual budget was USD$75 million, but by 2006 it had grown to USD$330 million (Bowles and Chopra 2008: 290). In 2010, '95 per cent of the national budget [was] dependent on gas reserves in the Timor Sea' (Lothe and Peake 2010: s434), and these reserves continued to boost the state budget, which, in 2012, stood at USD$1.76 billion (RDTL 2011). This dramatic increase enabled the government to start declining projects that did not reflect its priorities, including efforts to promote retributive transitional justice.

2.4 Overall Impact of Conventional International Assistance

Despite its limitations, international judicial state-building assistance did enhance prospects for developing and consolidating the rule of law. It has also promoted a workable relationship between the state and non-state justice sector by both supporting and improving the quality of legal institutions as well as working to form linkages between the state and non-state justice sectors based on citizen choice and relevant law. Furthermore, it is to the credit of international actors that they resisted the temptation to try to seize control of the process and instead worked actively in support of state driven plans even when those plans did not exactly comport with their own views. International assistance helped promote a rule of law culture more broadly both through the support of institutions like the LTC and AATL but also by expressing concerns

when high-level state official's actions raised questions about their commitment to the rule of law, such as Gusmão's unilateral decision to release Bere (see Chapter 4).

3 PORTUGUESE BILATERAL JUDICIAL STATE-BUILDING ASSISTANCE

Portugal was the single most important external player in post-independence Timor-Leste. Timorese legal state institutions and much of the law itself are overtly modelled on Portuguese equivalents. Yet Portugal's role in Timor-Leste has received far less attention from scholars. The explicit goal of Portuguese assistance is a Portuguese speaking society nationwide (Portuguese Institute for Development Support 2010). Portugal has actively supported the selection of Portuguese as the official language and the continued prevalence of Portuguese in the legal sector and state institutions more broadly (JSMP 2012: 18). Some evidence even suggests that 'the Portuguese government has made its grants conditional on favouring the Portuguese language' (Marriott 2012: 67). Strong Portuguese language preferences have gone hand in hand with high-level government support. Portugal's goals have even shaped the UN's work as it has actively pushed for major UN funded positions to require fluency in Portuguese. This favours Portuguese candidates as well as Portuguese speakers from other Lusophone countries even if it results in the recruitment of less qualified personnel.[109]

Portuguese judicial state-building assistance was also subsidisation focused, although a particularly extreme version. Portuguese aid is a rare example of a bilateral donor

[109] While their programmes operated in relative isolation, Portuguese supported programmes were willing to work with other, non-Lusophone actors, particularly when it was clear the programme's intent was not to supplant Portuguese as the primary legal language.

reshaping an entire country's legal landscape. The Lusophone legal system, however, is Dili-centric and shows minimal interest in engagement with non-state justice authorities. There remains remarkably little concern that the Portuguese speaking legal elite is ever more disconcerted from society at large. Portuguese assistance remained largely unchanged as a result of the Crisis.[110] Portuguese assistance still envisioned a Timor-Leste that is decidedly Lusophone, but it was unwilling or unable to commit the resources to make that vision a reality.

3.1 Goals and Successes of Portuguese Judicial State-building Support

Portuguese judicial state-building is oriented around placements of Portuguese advisors or regular staff in state bodies. These actors often have a remarkable amount of influence and autonomy as they are frequently advising state officials with limited understanding of Portuguese. Since independence this has included Portuguese judges, prosecutors, and public defenders. Portuguese legislative drafters played a primary role in drafting most important legislation, including in the Parliament as well as in the legal drafting unit of the MOJ. From its inception, the Law Faculty at the University of Timor-Leste (UNTL) operated under extensive Portuguese influence (Nixon 2012: 161). The law curriculum was directly controlled by the Scientific Curriculum Commission, which is based in Portugal. The faculty consisted entirely of Portuguese instructors until the end of 2010 and Portuguese influence was still paramount through 2012.

These programmes were controversial, but they enjoyed the support of high-level state

[110] Portugal did send a small paramilitary force to supplement UN and Australian forces.

officials. Linguistic ties were very deep. During the Indonesian Occupation, as Engel notes, '83% of the first Constitutional Government's ministers had been living in exile, primarily in Lusophone countries' (Engel 2007: 13). The Constitution and the civil law legal system are modelled on democratic Portugal. The laws draw heavily on their Portuguese counterparts and are often copied wholesale. Portuguese experts are well placed to assist with the interpretation of the law. Of course, this dynamic is also a self-fulfilling prophecy as the international legal drafters in both the parliament and the relevant ministries are overwhelmingly Portuguese.

The justice system's transformation has been striking. At independence the legal system was completely devastated in physical terms and woefully lacking in human resources. The use of Portuguese was very limited. A major Asia Foundation survey conducted in December 2002 found that Portuguese was spoken by only seven percent of the population, who 'were mostly older, educated, higher income Dili residents,' and read by ten percent (The Asia Foundation 2004: 8).

By the end of 2012, much had changed. There were courts operating nationwide, a viable legal profession, and a legal training regime that was decidedly Lusophone in orientation. The 2002 Constitution formally established Portuguese and Tetum as official languages equal in stature, but even today Portuguese language and institutions continue to occupy a paramount position within the legal system and the state more generally. Laws and regulations are written in Portuguese. Reputable legal education is conducted almost exclusively in Portuguese. Court decisions are in Portuguese. The

Dili based private lawyer community is overwhelming Lusophone in orientation.

The Lusophone legal order is a remarkable accomplishment given the relatively low levels of Portuguese penetration into society prior to 1975 and the subsequent Indonesian occupation. However, it is also a world perilously disconnected from broader Timorese society. After over a decade of independence and sustained state and bilateral Portuguese efforts to promote Portuguese as a viable, commonly spoken language nationwide, less than ten percent of the population speaks Portuguese. Nor has the percentage of Portuguese speakers increased in recent years (Marx 2013: 34).

3.2 Challenges with Portuguese Bilateral Assistance

The Lusophone legal order has an internal logic and significant elite political support, but remains highly problematic.[111] Conventional international assistance highlighted the importance of state support for external aid to promote the rule of law. Portuguese assistance shows that extensive state support does not necessarily lead to positive results or make a significant contribution to establishing and consolidating the rule of law.

The problems with Portuguese bilateral assistance, and its emphasis on consolidating Portuguese, are manifold. Timor-Leste's context is radically different from Portugal's. While it has faced significant economic challenges in recent years, Portugal is a developed country with high living standards, excellent infrastructure, the rule of law,

[111] Support for the Portuguese style justice system is decidedly more concentrated amongst the political leaders who were active during the initial 1970s independence struggle.

and a consolidated democratic state (Fishman 2011). Timor-Leste has a long history of colonialism and occupation, low levels of economic development, a state legal system that is still under construction, and a democracy that remains unconsolidated. The wholesale importation of Portuguese laws and legal norms is ill suited to the country's needs.

The decision to continue to aggressively pursue a Portuguese style legal system, conducted primarily in Portuguese, isolates the vast majority of the population from the legal system and will continue to do so for the foreseeable future. The problem is nationwide. Despite limited efforts to provide for live translation, the use of Portuguese 'has continued to be an obstacle in nearly all district courts' (JSMP 2013: 27). Portuguese language and culture form a 'distinct and deep divide between the old and young leaders today' (Niner 2007: 114). Society is moving further and further away from its colonial roots and the independence struggle. As an independent evaluation put it bluntly, 'limited fluency in Portuguese is a barrier to accessing legal education and professional training' and the broader operation of the legal system, which in turn is 'hindering the effective functioning of the justice system; undermining due process and, ultimately, limiting access to justice' (Frigaard, Mullaly et al. 2008: 11). Without significant reform, a myopic focus on Portuguese law and language at the expense of the widely spoken lingua franca of Tetum risks establishing a legal system wholly foreign to most of its citizens and freezing out many promising individuals from the legal sector.

Language problems are systemic outside the court system. The two primary organs of drafting law, The National Parliament and the MOJ's legislative drafting unit, work in Portuguese (RDTL MOJ Official 2014). In both instances, the laws are drafted, debated, and passed in Portuguese. Tetum translations are rarely produced when the legislation is in draft form and when translations are made it is usually by international actors (RDTL MOJ Official 2014). Legislators, the vast majority of whom do not speak Portuguese, are expected to debate the merits of legislation that they cannot understand and most citizens continue to be bound by a legal system that is unintelligible to them. Even when the law is understood, legal interpretation is highly problematic as the law is often assuming a significantly different context. Language poses serious tensions in the basic core of the democratic process. Moreover, the entire law and justice apparatus remains overwhelmingly dependent upon expatriate support from Lusophone countries (International NGO Manager 2014, RDTL MOJ Official 2014). Thus, the use of Portuguese will continue to be a divisive issue for the foreseeable future.

3.3 Overall Impact of Portuguese Bilateral Assistance

The impact of Portuguese bilateral assistance is decidedly mixed. A civil law system has been established and operates nationwide. Portuguese ideals influence almost all laws and regulations. A functioning legal education regime is in place at UNTL, the premiere law faculty in the country, and the LTC. Both are overwhelmingly Lusophone. Portuguese is a marker of legal elite status. While some judicial proceedings are now conducted in Tetum, language skill continues to be a prerequisite for the successful completion of a LTC course. Moreover, *all* domestic judges,

prosecutors, public defenders and private lawyers are required by law to be graduates of the LTC (RDTL 2008). While the societal penetration of Portuguese remains minuscule, its consolidation over the legal profession and the formal state system is comprehensive.

Even minimal definitions of the rule of law require the law to be clear and accessible (Tamanaha 2007: 3). Clarity is structurally impossible when most parliamentarians cannot understand the laws they are voting on and only a tiny portion of citizens can understand the law that governs them. Unless there is a major change in either the level of understanding of Portuguese across society or alternatively the legal system moves towards being truly bilingual, the state justice system will remain unable to fully uphold the rule of law.

CONCLUSION

The international community has much to be proud of in its work in Timor-Leste. While its efforts were by no means perfect, they have generally been strategically sound and often beneficial. Programmes have addressed crucial needs in the nascent justice sector both in terms of establishing, maintaining and institutionalizing key organisations, such as the courts, prosecutors and public defenders. International support has also helped promote a rule of law culture with education and socialization initiatives as well as helped ensure access to the state system. There have been significant efforts to improve the state system, which have had a tangible impact in terms of the establishment, maintenance and improvement of institutions. Programming

has allowed people to access the legal system in a way that would not have otherwise been possible. International support has proved vital in enhancing important, if still tentative, links between the state and non-state justice sectors. All of these efforts have enjoyed significant state support, which helps explain why international assistance was able to make a significant contribution to advancing the rule of law.

International judicial state-building in Timor-Leste also highlights the limitations of external assistance. Timorese state officials, on the whole, have been supportive and committed to building a democratic state underpinned by the rule of law, but it is a particular vision based on the institutional model of Portugal and an ideological commitment to reconciliation rather than retribution for past crimes. International initiatives incompatible with that vision fared poorly, most notably efforts to punish perpetrators of violence that risked undermining relations with Indonesia. Furthermore, state support does not guarantee positive long-term effects. Portuguese assistance has enabled the creation of a Lusophone legal order envisioned by political elites since the independence struggle. That legal order, however, threatens to become increasingly exclusionary as Lusophone legal elites entrench themselves while the percentage of Portuguese speakers stays the same or even declines. International assistance has made institutions that underpin the rule of law possible and helped spread the cultural ideals it needs to take root. The lingering question remains whether the state justice system can transcend its current insularity and become a respected and accessible partner with the non-state system that still underpins legal order in most of the country.

CHAPTER 6
From Competition to Combat: Domestic Judicial State-Building in Afghanistan

INTRODUCTION

Shortly after the 11 September 2001 terrorist attacks, US backed Afghan resistance forces defeated the Taliban regime that had been harbouring Al Qaeda. Even before its collapse, the Taliban regime was increasingly unpopular and internationally isolated. There was a real opportunity for the creation of a state that could provide law and order as well as accountability, democracy, and economic development. These beliefs were embodied in the Bonn Agreement (Bonn Agreement 2001: Section II). A new regime was established with extensive international support (UNSC 2001).

Given the immense domestic and international demand for stability and an effective, non-predatory state bound by the rule of law, Afghanistan had an invaluable opportunity to establish a modern democratic state bound by the rule of law.[112] In light of these advantages and major international investment, why did the judicial state-building endeavour in Afghanistan achieve so little? This chapter argues that the new Karzai-led regime not only lacked a coherent strategy for the development of the rule of law based in a highly competitive legally pluralistic environment but in reality actively opposed it. Consequently, most non-state judicial actors saw little need to engage the state for any reason other than tactical gain and rent extraction.

[112] The 2002 US National Security Strategy explicitly linked the performance of the Afghan state with US national security and referenced the need to promote the rule of law multiple times (Bush 2002).

Serious challenges in the post-Taliban judicial state-building project were inevitable. Yet, a competitive legal environment does not preclude successful judicial state-building. Almost every successful judicial endeavour has historically required the state to supress, outperform, or collaborate with non-state rivals (Fukuyama 2011). The fall of the Taliban regime provided a meaningful opportunity for successful state-building and progress towards the rule of law (Rashid 2008, Barfield 2010: 300-310, Jones 2010). That opportunity was squandered. Both domestic and international actors bear some responsibility, but local actors had the preponderance of authority and power to shape the nascent political order (Tansey 2014). The Karzai regime focused on accumulating and retaining power whilst outmanoeuvring potential rivals through patronage, international support, and increasingly dubious elections.

Statement of Theory Testing

Chapter 4 argued that domestic state-building efforts in Timor-Leste achieved notable successes because: 1.) Despite fierce political competition, all major parties remained committed to constructing a democratic state underpinned by the rule of law; 2.) There was a credible and sustained effort to develop institutions that promoted democratic accountability, inclusivity, and the rule of law; and 3.) The state meaningfully engaged and collaborated with key non-state actors through successful jurisdictional division and local suco elections. The following case study chapters highlight how the Karzai-led state squandered the opportunity to build a new, more inclusive and effective democratic state. Not only did Karzai's regime fail to display a normative commitment to the rule of law, it systematically undermined institutional, legal, and political checks

on its authority, including suppressing political parties, manipulating elections, undermining judicial independence, and other institutional accountability mechanisms.[113] At the same time, Karzai's regime never seriously engaged with key tribal and religious non-state justice actors that had long constituted the building blocks of legitimate order in Afghanistan. The regime partnered with warlords, but it was a purely transactional relationship based on the exchange of rents for support. The Afghan state failed to mediate between the international community and key tribal and religious authorities. This divergent approach helps explain the failure of judicial state-building and the corresponding slide from competitive legal pluralism into combative legal pluralism with an increasingly potent Taliban insurgency.

Conventional Understandings of Judicial State-building in Afghanistan are Insufficient

Afghanistan is often cast as land characterized by a tendency towards Hobbesian anarchy (Tarzi 1993, Khalilzad 1997, Bearden 2001). This chapter demonstrates that prior to the Communist takeover, the country has been quite stable as the state was able to balance the various competing tribal and religious legal systems. Indeed, the state endured for centuries because state legal power was deeply, if volatilely fused with tribal and religious authority. Only when the Communists arose from outside the system did the country collapse into widespread conflict.

The Taliban regime and its implications for judicial state-building in Afghanistan are

[113] While the state's capacity was limited, the president faced very few constraints when determining policy or personnel.

widely misunderstood. Contrary to the contentions of some prominent scholars (Rotberg 2002: 117, Suhrke 2011) and stated US policy (Bush 2002: 4, USAID 2005), Afghanistan under the Taliban was not a failing state.[114] Rather, the Taliban regime had successfully imposed a uniform order on a heavily armed, highly contentious society by delivering law and order, and drawing on the longstanding pillars of legitimacy in Afghanistan: namely, cultural values, Islam, and the provision of public goods.

For many scholars, there is a fatalism regarding Afghanistan, which is distinct but related to the idea that Afghanistan's natural position is anarchy. Unsurprisingly, this fatalism became more and more attractive as the state-building endeavour became an ever grimmer and less promising enterprise. Referencing the 'intensely war-like, independent, and anarchic traditions of many Afghan peoples,' Ottaway and Lieven argue democratic state-building was a 'fantasy' given that previous state-building efforts relied on 'sheer coercion' due to the territory's geographic composition and the historically Pashtun-centric nature of the polity (Ottaway and Lieven 2002). Ironically, their solution, embracing regional warlords, albeit of some sort of gentler variety, bears a striking resemblance to the chaotic, discredited political order that originally spawned the Talban.

These arguments, however, conflate challenging for nearly impossible. They neglect history and, more troublingly, serve to at least partially excuse poor policy choices and institutional arrangements as manifestations of broader explanatory variables. After all,

[114] Other scholars have recognized that Afghanistan under the Taliban was not a failed state. For example, see Bøås and Jennings (2007) and Hehir (2007).

at the outset of the state-building endeavour, there was widespread popular support for the new regime. Order was certainly a possibility and indeed held for a number of years. Moreover, the Taliban had previously established a monopoly on the use of force under even more chaotic conditions. Before that, Najibullah had survived with far fewer resources and less popular goodwill than Karzai even at his lowest ebb. Moreover, before the Soviet invasion, Afghanistan had enjoyed decades of domestic tranquillity. Afghan Pashtuns have certainly demonstrated capacity for violence. At the same time, they prize order, as evidenced by the paramount role of Pashtunwali, and the fact they have willing lived under a state for centuries, albeit a limited one.

Conceptualising Legal Order in Afghanistan

There are three enduring pillars of legal order in Afghanistan: the state, culture, and Islam. These three pillars have been present from the earliest attempts to establish a modern state through to the current day. These struggles for order are foundational. Afghanistan is a paradigmatic weak state (Rotberg 2002). State, cultural, and religious authorities have consistently, ruthlessly, and often violently competed with one another 'over who has the right and ability to make the countless rules that guide people's social behavior' (Migdal 1988: 31). Non-state judicial actors have consistently retained their influence as potential 'state-builder spoilers' (Menkhaus 2007).

The history of Afghan judicial state-building is a paradigmatic example of a high-level of legal pluralism and an extraordinarily competitive legal environment. This competition has become even more intense in the post-Bonn era as two new major

clashes with the state have arisen: competitive warlord justice and the Taliban's combative insurgent justice. Against the growing insurgent justice, the Karzai regime engaged in numerous tactical alliances, which helped the regime endure but did little to build the state's legitimacy or authority.

Chapter Overview

This chapter consists of two main parts. Section one traces Afghan judicial state-building from 1747 to 2001. It starts with an examination of the foundations of state law's longstanding major competitors, tribal law and Islamic law, and how they have often worked in competition but also collaboration with state authority. It then examines the staggering number of political and legal changes Afghanistan underwent from 1978 to 2001, which largely demolished the state's political and judicial infrastructure. It concludes with the rapid rise and swift collapse of the Taliban regime. Part two examines the post-conflict legal order established by the Bonn Agreement and the 2004 Constitution with a focus on the regime of President Karzai (2001-2014) who played the most crucial role in shaping the new political and legal order, and establishing a corrupt, highly predatory state decidedly disinterested in the rule of law. Karzai completely undermined the electoral process over time and played a major role in the selection of his successor through widespread electoral fraud (Coburn and Larson 2014, Shahrani 2015). It shows how the Karzai lead state failed to capitalize on the good will of its citizens and instead pursued political institutions ill-suited to the realities of a post-conflict state defined by a high level of competitive legal pluralism. These failures help facilitate the rise of Taliban justice and an environment marked by

combative legal pluralism.

I AFGHANISTAN FROM ORIGIN TO SOVIET INVASION

1 THE PLURALIST FOUNDATIONS OF LEGAL ORDER

The origin of Afghanistan is conventionally dated to 1747. During this year, a Pashtun tribal confederation elected Ahmad Shaw as ruler. From its onset, Afghanistan's political order was 'dominated by the Afghan tribal-feudal socioeconomic framework' (Gregorian 1969: 47). The political order exemplified themes still prominent in Afghanistan: the frequent use of grand Jirga as the foundation of governmental legitimacy, the prominence of Pashtuns,[115] the paramount role of Islam, a profound divide between the centre and periphery, and a political order that relies on charismatic leadership. Before examining the historical trajectory of judicial state-building in Afghanistan, it is necessary to briefly discuss the major competitors to secular state law: religious law and tribal law.

1.1 State Law as Religious Law

Until 1923, state law and Islamic law were synonymous. Shortly after its founding, the nascent state created '*Shari'a* courts in the urban centers,' (Ghani 1978: 270). Courts operated based on religious law and religious judges enjoyed substantial autonomy from the state even as they furthered its reach (Kakar 1979). State power was overtly

[115] At roughly forty percent of the population, Pashtuns are the largest ethnic group and have been politically dominant since the emergence of an Afghan polity (Barfield 2010: 24). The other major ethnic groups are the Tajiks (thirty percent of population), Hazaras (fifteen percent), Uzbecks and Turkmen (ten percent) (Id.: 26-32).

religious. Kamali notes that 'unlike tribalism, which compete[d] with the central government for political control, the religious establishment [was] basically pro-government' until the rise of the Communist state (Kamali 1985: 8). The state has always been overwhelmingly Islamic. Currently, roughly eighty-five percent of the population are Sunni and fifteen percent are Shia (Barfield 2010: 40). Historically, the dominant form of religion was Sunni Islam of the Hanafi School—long considered a moderate brand of Islam (Lewis 1992). It was based on a literate, professionalized religious jurisprudence relying on trained clerics (*ulema*).

The official Islamic law system was deeply fused with state power, but its authority was concentrated in urban areas. Professional clerics often viewed 'the rural customary system as illegitimate, particularly when they strayed from classical religious practices' and frequently attempted to leverage their 'influence to demand the replacement of customary law practices with more standard *sharia* interpretations' (Barfield 2008: 352). Even after the introduction of secular legislation, Islamic values permeated nearly all state law.

Islamic law's universal claims were also rooted outside the tribal system (Roy 1990: 35). It was not as strict as the tribal codes, but also less egalitarian and in Pashtun areas, less culturally compelling. Islamic law mirrored the urban-rural divide in society. While urban religious elites enjoyed higher status, they could not control local religious authorities because Islam lacked a hierarchical leadership structure.[116] As Roy notes,

[116] In contrast, the world's largest Christian sect, Roman Catholicism, has a highly developed bureaucratic structure with a clear, hierarchical leadership structure and authorized representatives

'the *sharia* does not depend on any official body, church or clergy' and any decisions are subject to later reinterpretation (Roy 1994: 10). Distinctions in status among religious figures, therefore, largely hinged upon educational attainment or personal charisma rather than upon their rank within a formal religious bureaucracy (Gregorian 1969, Roy 1990: 45-46). For example, village mullahs, though less educated, still projected authority and resolved local disputes based on their religious knowledge.

1.2 Tribal Law

Islamic law enjoyed the state's endorsement but was rivalled and often undercut by tribal law whose requirements were seen as paramount for those bound by it. Throughout Afghanistan's history, the most effective form of legal order in Pashtun areas was *Pashtunwali*; 'an inclusive code of conduct guiding all aspects of Pashtun behaviour and often superseding the dictates of both Islam and the central government' (Carter and Connor 1989: 7). It was both 'an ideology and a body of common law which has evolved its own sanctions and institutions' (Roy 1990: 35). Pashtunwali structured collective decision-making, military mobilisation, conflict resolution, and social relations (Hager 1983: 83). The system was organized based on compensation and reconciliation through a straightforward set of concepts:

> 1) Honor is paramount, and the honor of women is to be protected.
> 2) Gender boundaries must be rigidly maintained.
> 3) One has a right to compensation, or *por*, when one is wronged.
> 4) Revenge is tolerated and even encouraged.
> 5) Apologies accompanied by *por* are to be accepted.
> 6) Guests are to be sheltered.
> 7) The *jirga* is to be obeyed (Ginsburg 2011: 102).[117]

While sometimes characterized as 'informal law' (for example, see Suhrke and

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worldwide (Valuer 1971).

[117] For an alternative, but similar statement of Pashtunwali, see Dupree (1973: 126).

Borchgrevink 2009), it was actually a highly formalized system with clear consequences for each violation. Pashtunwali offered a procedural and substantive legal framework underpinned by known rules and effective deterrents. There were often explicit compensation schedules for specific bodily or property harms (Barfield 2008). By sanctioning self-enforcement, it also enjoyed a relatively high degree of enforceability even without a central authority.

Pashtunwali provided a durable, effective, and legitimate legal order in a society with a weak central state. Pashtunwali, however, was a very harsh system of justice with few human rights protections. Self-help to remedy violations was notoriously difficult to extract proportionately and frequently spurred further violence. Tribal law was also systematically biased against women (Kakar 2004). As internal Pashtunwali obligations were paramount, the system would frequently clash with orders based on secular law or Islamic law and later with international law. Pashtunwali originated with the Pashtuns but its ideology resonates throughout Afghanistan to this day. The values of Pashtunwali 'modified by local custom permeate in varying degrees all Afghan ethnic groups' and thus have long helped structure non-state legal order in Afghanistan (Dupree 1973: 127).

Application of Tribal Law

Pashtunwali is applied through local gatherings known as *jirgas*. Non-Pashtuns used the *shura* process, which mirrored the operation of the jirgas (Glatzer 1998, Wardak 2003). While equity is stressed, the process is entirely male dominated. Barfield,

Nojumi, and Their describe the jirga process:[118]

> Everyone sits in a circle so that no one takes priority. All members have a right to speak and binding decisions are made by common consensus rather than voting. This may take considerable time (days, weeks or even months) or fail to come to a conclusion entirely (Barfield, Nojumi et al. 2006: 9).

Jirgas could not sanction physical punishment, but nevertheless fostered a very high degree of compliance (Poullada 1973: 22; Kamali 1985: 4). The concept of a jirga was evoked at the tribal level for matters 'central to the social order of the tribe', while *Loya Jirgas* were convened to address extraordinary important 'vital national issues and make collective decisions' (Wardak 2003: 9, 13). All but one of Afghanistan's constitutions were ratified through Loya Jirgas, and today Jirgas and shuras remain the default dominant forms of dispute resolution 'unless assistance is requested from another tribe or the government' (Carter and Connor 1989: 7, see also Wardak and Braithwaite 2013).

[118] This description is equally accurate for jirgas over the centuries (Poullada 1973: 21).

Figure 4: Map of Afghanistan (Central Intelligence Agency 2015)

2 THE STATE'S STRUGGLE TO ESTABLISH A SECULAR LEGAL ORDER[119]

From its creation, competitive legal pluralism defined the Afghan state. Roy contends 'the history of the Afghan state (*dawlat*) from 1747 to the present is bound up with the search on the part of the state bureaucracy for autonomy from the tribes' (Roy 1990: 4).

[119] 'Secular' is used here in a procedural and an administrative sense, not a substantive one. It refers to the origin of the law from state political authorities rather than religious authorities, not its normative content. The law was always explicitly religious in content and values. All Afghan constitutions, with the exception of the 1980 charter, required consistency with Islam and stressed the importance of Islam to Afghan political life.

Since the start of the constitutional era in 1923, the Afghan state apparatus increasingly looked for sources of legitimacy that were less dependent on tribal support, external religious sanction, and individual charismatic leadership. This section traces that struggle from its halting progress through the collapse of constitutionalism into full-scale civil war in 1979.

2.1 Conceptualising Constitutionalism

The major constitutional orders framed the state's judicial state-building attempts and engagements with non-state legal orders.[120] While Afghanistan's rulers never followed their constitutions to the letter, they possessed immense symbolic value and projected each regime's aspirations domestically and internationally (Alexander 2001). The constitution is 'an essential symbol of the modern state' as well as states seeking to modernise (Elkins, Ginsburg et al. 2009: 42). Not coincidently, Afghanistan's first Constitution was drafted shortly after achieving full independence in 1919 and underpinned an ambitious modernization programme (Poullada 1973).

Afghan constitutions have always fallen short of what Sartori has dubbed a 'proper', fully actualized constitution that structures and constrains political power (Sartori 1962: 861). Proper constitutions are contrasted with 'nominal constitutions' that 'describe a

[120] Finer offers a helpful definition of constitutions as:

> codes of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and officers of government, and define the relationship between these and the public (Finer 1979).

Finer's definition includes both written and non-written constitutions and reflects the dual purposes of a constitution: the organization and empowerment of the state as well as the state's responsibility to the people it governs. Perhaps most importantly when examining highly legally pluralist societies, Finer's definition uses the term 'aspire' recognising that constitutions do not always succeed in their stated aims.

system of limitless, unchecked power' and 'façade constitutions' that do not illuminate how the state works or limit its power (Id.). Still, constitutions can be an important source of legitimacy even in authoritarian regimes (Ginsburg and Moustafa 2008).

In a highly legally pluralist society with a decidedly weak state, the constitution provides key insights into the fluid relationship between state and non-state legal orders. Constitutions matter immensely to state leaders as well as tribal and religious elites. State, tribal, and religious authorities have consistently fought over the constitutional scope of state authority, sometimes even resorting to violence and rebellion. Yet, it is important not to reduce political analysis solely to legal analysis. The most fundamental struggles in highly legally pluralist societies 'are not over which laws the state should enact or how the state's laws or constitution should be interpreted' but rather whether the state can co-opt or marginalize the 'families, clans, multinational corporations, domestic enterprises, tribes, patron-client dyads—which make rules against the wishes and goals of state leaders' (Migdal 1988: 31).

2.2 The Dawn of Constitutionalism: Reform and Backlash

Prior to the reign of King Amanullah (1919-1929), all law was explicitly either tribal or Islamic. In 1923, Afghanistan's first constitution was promulgated. The foundational law, along with a number of secular laws, constituted an ambitious state-building project aimed at fundamentally transforming the state and society. The constitution envisioned Afghanistan as an independent, unitary monarchy bound by 'Islamic law and this fundamental code' (Kingdom of Afghanistan 1923: Art. 1, 4). An independent

judiciary was tasked with the uniform application of the law nationwide (Art. 51, 53). Decisions were now to be made 'under the Islamic law and the principles of civil and criminal courts' (Art. 21).[121] Secular civil, commercial, and penal codes were promulgated (Poullada 1973: 1975). The nascent constitutional legal order drew inspiration from Islam but was not bound by the clerical establishment's views. Amanullah's reforms were viewed with deep suspicion by the two pillars of monarchical rule: the tribes and the religious establishment. A major revolt followed in 1928, which was instigated by powerful Pashtun tribal interests underpinned by the moral authority lent by the religious establishment. The regime soon collapsed. In 1930, a new dynasty emerged, known as the Musahibans, founded by Muhammad Nadir Shah.

2.3 The 1931 Constitution and Tentative Judicial State-building

Nadir Shah's regime attempted to legitimize itself through a constitution. The 1931 Constitution reflected the prominence of tribal authorities and the religious establishment. Article 1 states that 'the faith of Afghanistan is the sacred faith of Islam,' specifically the Hanafi variety, and requires the King to be an adherent (Kingdom of Afghanistan 1931: Art. 1). Sharia was the basis of all law, and legislation was explicitly required to be consistent with its strictures (Art. 65). The constitution promised formal legal equality and protected certain legal rights, but emphasised that

[121] While compliance with Islam may seem to dramatically limit state power, Nadir Shah and his dynasty merged Islam and the state-building endeavour through the notion that 'to be a good Muslim and a good Afghan one had to contribute to the stability, prosperity, and progress of Afghanistan under the guidance of the monarchy' (Gregorian 1969: 292-293). The Ministry of Justice even supervised implementation of Islam (Id.: 295). In other words, as good Muslims ran Afghanistan their actions by definition were consistent with Islam.

those rights and duties existed 'under the Sharia law and the law of the state' (Kingdom of Afghanistan 1931: Art. 13). The Constitution also made important concessions to tribal authority. Pashtun tribal groups received 'exemption from military conscription and taxation' (Shahrani 1986: 52). The frequency of Loya Jirgas was limited to every three years and required that any constitutional modification or other major policy change flowed through this tribal, particularly Pashtun, dominated institution (Gregorian 1969: 305). It also established the first official representative assemblies (Art. 27-72).

While the 1931 Constitution marked a retrenchment of state authority relative to religious and tribal power, it helped solidify the remaining state authority. As Gregorian argues, the 1931 Constitution 'institutionalized the power of religious establishment' but also 'permit[ed] gradual reforms of the judicial system in keeping with the requirements of a modern state' (Gregorian 1969: 340). Nadir Shah was assassinated in 1933. When Mohammad Zhair Shah assumed the throne, the limited, tentative process of judicial state-building nevertheless continued.

2.4 The 1964 Constitution and Tentative Liberalisation (1964-1973)

The early 1960s saw the culmination of a prolonged internal power struggle between the King and his cousin Prime Minister Sardar Mohammad Daoud. The king attempted to solidify his position with a new, more inclusive constitution, which went into effect in October 1964. The Constitution was idealized then and remains so today though its actual effects were mixed.

The 1964 Constitution reconceptualised state, tribal, and religious authority. Islam remained 'the sacred religion of Afghanistan' and legislation was required to be consistent with it (Kingdom of Afghanistan 1964: Art. 2, 64). Islamic law continued to be the default rule in absence of state legislation (Art. 69). As Tarzi notes, 'by establishing the sovereignty of the people rather than of God, the 1964 Constitution was fundamentally a secular document' (Tarzi 2012: 220). The monarchy, however, never ceased in emphasising its Islamic credentials as an important source of legitimacy (Shahrani 1986: 56).

Constitutional provisions for judicial independence (Constitution of Afghanistan 1964: Art. 97) were coupled with a meaningful attempt to promote it (Kamali 1985). Under Article 88 of the Constitution, state judicial authorities claimed exclusive jurisdiction over all legal disputes and the right to settle those disputes according to state law. Ultimately, the 1964 Constitution and related reforms continued the trend of 'legal codification' and an increasing preference by state officials for law faculty graduates over Sharia graduates for the legal bureaucracy. This preference had the cumulative effect of steadily decreasing the religious establishment's power (Dorronsoro 2005: 57, see also Edwards 2002).

Tenuous Political Liberalization

Outside the legal sector, the 1964 Constitution facilitated broader political participation. Zhair Shah, however, never fully embraced multiparty democracy. The press still faced

significant restrictions. Parliament never effectively guided state policy or checked royal authority (Barfield 2010: 211). Political liberalization facilitated greater popular mobilization but not ultimately democratization. Marxist-inspired groups and Islamists both lacked a commitment to representative government.[122] Against the backdrop of growing political tensions, widespread economic malaise, and a devastating famine, Daoud seized power in a coup in 1973. He immediately disbanded the monarchy and declared Afghanistan a republic.

2.5 Daoud's Non-Constitutional Regime (1973-1978)

Daoud's seizure of power was unique in Afghanistan's history because it did not depend on 'the mobilization of the tribes or the clergy' (Barfield 2010: 212). Technically Daoud's republic initially retained the overarching legal framework, but quashed movement towards judicial independence (Kamali 1985: 240-243). Still, he continued legal reforms, such as enacting comprehensive penal and civil codes (Kamali 1985: 204-243). Daoud's regime emphasised 'centralisation of power, increased state regulation of the economy, and a whole cluster of social reforms, including equal rights for men, women and national minorities' (Saikal 2004: 176). He also ended state favouritism of Pashtun tribes and the religious establishment, which further undermined the traditional pillars of state legitimacy. In 1978, the People's Democratic Party of Afghanistan (PDPA) toppled Daoud in a coup. The PDPA, now led by President Noor Muhammad Tarki, declared the "Democratic Republic of Afghanistan", marking the

[122] While not formally political parties, they fall squarely within the phenomenon aptly described by Gunther and Diamond as 'anti-system' parties. These groups favour the replacement of the existing order 'with a regime that would be more uniformly committed to the achievement of their programmatic objectives' (Gunther and Diamond 2003: 171).

definitive end to Musahiban rule.

2.6 Non-State Order from 1923 to 1978

Through this period, the dominant legal order continued to be non-state justice, despite the state's significant gains in authority, capability, and resources. The state's goals were modest. 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). Competing political and legal authorities clashed, but these tensions did not threaten the regime's overall stability. Urban areas, in contrast, posed an existential threat to the regime. New groups, notably communists and Islamists, sought to dominate the state rather than avoid it. The Communists succeeded and Afghanistan soon exploded in open conflict between a primarily rural religious-tribal non-state order and urban communist regimes that largely annihilated the legal and political state structures built over the last half century.

2.7 The Relationship between Competitive Legal Orders

The relationship between the state legal order and tribal and religious orders maintained an unsteady truce. It was highly competitive but rarely threatened the overarching legal and political order by becoming combative. The state had a preponderance of power, but it required at least tacit tribal consent (Shahrani 1984). The state largely deferred local policy to local people. In turn, rural areas sought autonomy but not independence. Tribal leaders appreciated the state maintained certain key functions they could not.

The state leaned heavily on Islam as a source of legitimacy (Shahrani 1986: 56). The government provided ample subsidies to maintain favour with the religious establishment, while simultaneously asserting greater control through increased regulation (Canfield 1986). Professionalization served to further undermine the authority of non-state religious actors relative to the state. Religious ideology proved much more difficult to tame than religious leaders. The decentralized structure that made collective action difficult would also provide major political openings for the Islamist resistance fighters and later for the Taliban.

3 COLLAPSE OF CONSTITUTIONALISM AND THE RISE OF VIOLENT CONFLICT

While Afghanistan's state capacity remained limited, 'considerable progress towards the achievement of a national state had been achieved prior to the Marxist seizure of power in 1978' (Newell 1986: 110). The old regime could project effective force when local powerbrokers threatened to challenge the state's authority (Barfield 2010: 224). After the Communist takeover, the space for violent political entrepreneurs increased dramatically, which facilitated the emergence of another major competitor for authority: warlords.

The communist regime initially pursued an unabashedly radical leftist agenda first under Tarki and then Hafizullah Amin. The government did not initially seek support from tribal leaders or religious authorities and the results were disastrous. The Soviet Union invaded in 1979 to remove Amin, unify Afghanistan's competing Communist

factions, and 'frighten or deter the rebels' to provide the new President, Babrak Kamal, time 'to rebuild an army and re-establish control over the countryside' (Collins 1986: 77). The invasion violated international law and prompted major international support for the anti-Communist resistance dubbed the mujahedeen, particularly from the United States and Pakistan. Afghanistan was soon engulfed in a major conflict.

3. 1 Legal Order under Communist Rule (1980-1986)

Communism had been used to establish state legitimacy in numerous developing states worldwide (Huntington 2006), but it was deeply unpopular in Afghanistan (Kakar 1995). Without 'the traditional legitimacy that helped sustain its predecessors,' the regime 'was obliged increasingly to resort to coercion to maintain its position' (Maley and Saikal 1992: 15). The Communist regime did attempt to craft a legalist veneer. Organizationally, the judicial system remained largely unchanged (Kamali 1985: 242). Substantively, 'the Marxist government attempted to introduce a Soviet style judicial system, but these changes were rejected before they took root' (Wardak 2004: 319). The Karmal regime promulgated a provisional constitution in 1980 (Democratic Republic of Afghanistan 1980). The Constitution offered an olive branch to Islam by placing Islamist symbols on the flag and offered official state recognition of Islam (Id.: Art. 64-65). In practice, the Constitution was a 'facade' constitution, which neither limited state power nor offered 'reliable information about the real governmental processes' (Sartori 1962: 861). The collapse of constitutionalism coincided with the rapid erosion in state legitimacy and administrative capacity.

3.2 A Communist-Islamist Order (1986-1992)

Upon assuming the presidency in 1986, Mohammad Najibullah jettisoned the regime's Communist ideology, promoted national reconciliation, and re-established links with religious leaders and tribal authorities by emphasising his Pashtun heritage. In other words, 'the communist state began to play the traditional tribal game' (Roy 1994: 150). A new Constitution, modelled on the 1964 Constitution, was promulgated in 1987. It emphasised Islamic values and promised a more inclusive polity (Democratic Republic of Afghanistan 1987: Art. 2). Ultimately, it was a 'sham' constitution that did not bolster the regime nor achieve Islamic legitimacy (Tarzi 2012: 230). In 1988, the Soviet Union signed an agreement with Pakistan, co-guaranteed by the United States, to remove their forces by February 1989 (Jones 1990: 191-192). Unexpectedly, Najibullah retained power until 1992 when the Soviet Union itself dissolved and subsidies ceased.

3.3 The Civil War's Impact on Non-State Order

The nexus of religious and tribal power underpinned mujahedeen resistance to Marxist rule. Ideologically, Islam sustained resistance efforts (Roy 1990). Religious authorities sometimes even became resistance commanders (Dorronsoro 2005: 113-115). The longstanding non-state legal structures continued to structure local legal order albeit it often with new leadership (Roy 1994: 164). Non-state justice still functioned at the local level for ordinary people, but many resistance leaders acted with increasing impunity (Dorronsoro 2005: 210). Sinno's detailed analysis of the resistance's structure argues that '"The Afghans" attachment to Islam and their code of honor—was

evidentially a highly effective motivational force' as well as 'a necessary condition for resilience' if not a sufficient one (Sinno 2008: 134).

Rise of the Warlords' Legal Order

To project military force, the Soviet increasingly relied on militias (Giustozzi 2012a: 53-56). The civil war thus empowered a new class of non-state justice provider with an inherently competitive outlook towards state authority: warlords.[123] The relationship was competitive because these actors did engage with the state and other non-actors, but usually only did so when forced or if strategically advantageous (Mukhopadhyay 2014). In other instances, warlords can be diametrically opposed to the judicial state-building process (Reno 1998, Marten 2006). Even when warlords worked with the state, they rejected attempts to fully implement state law in their territory. Warlords demanded either exemptions from the state legal order or sought to implement their 'own (often arbitrary) code of behaviour' (Ahram and King 2012: 172). Warlords have established substantial authority, underpinned by force, patronage, and charisma over significant parcels of territory. Warlords were able to capitalize on the scope for autonomy created by the Communist governments that leaned heavily on militia proxies and a resistance that was highly factionalised (Giustozzi 2012a).

[123] I follow Ahram and King's definition of warlords as 'armed agents who wield some degree of civil power and claim some kind of local sovereignty over a defined region while paying allegiance to one or more stronger powers' (Ahram and King 2012: 172). This definition underscores the role of force in underpinning warlords' authority as well as their ability to provide some non-state order while simultaneously avoiding normative judgements. However, warlords' deference to higher authorities is often largely theoretical.

4 CLASHING ISLAMIST ORDERS (1992-2001)

4.1 Mujahedeen Fiefdoms (1992-1996)

In 1992, the mujahedeen resistance achieved victory over the Marxist government. While religion helped unify the resistance, the resistance factions lacked a shared vision for a post communist order. In April 1992, they proclaimed the Islamic State of Afghanistan, which existed until September 1996. As Rubin wryly notes, 'perhaps this entity was Islamic, but it was hardly a state, and it certainly did not rule Afghanistan' (Rubin 2002: 272). The state suffered from chronic legitimacy and economic problems as well as active insurgency from the remaining warlords. The legal system was minimal and chaotic. Each faction of the regime 'appointed their members to the judiciary, most of whom had no legal education or even professional work experience' which further undermined the state's legitimacy (Hamidi and Jayakody 2015: 20). The situation quickly deteriorated into civil war. Legal order in Afghanistan became overwhelmingly non-state and highly localized, resulting in a harsh, violent, and often arbitrary brand of combative legal pluralism.

4.2 The Taliban's Brutal Legal Monopoly (1994-2001)

Prior to the Taliban's emergence, 'the country was divided into warlord fiefdoms and all the warlords had fought, switched sides and fought again in a bewildering array of alliances, betrayals and bloodshed' (Rashid 2001: 21). Against this backdrop, the Taliban quickly transformed from a student group in early 1994 to a major military force within less than a year. They gained control of Kandahar and quickly established

order. They gained a reputation for 'religious fervor and purity' (Marsden 1998: 46). By the end of 1996, the Taliban exercised sovereignty over the capital along with roughly seventy five percent of the country (Nojumi 2002: 159).

Pillars of Taliban Rule

The Taliban's military success translated into a monopoly on the legitimate use of force (Rubin 2000). Many victories came without a significant military engagement and no viable insurgencies occurred within Taliban controlled territory. The Taliban capitalized on longstanding pillars of legitimacy. An overwhelmingly Pashtun movement, the Taliban exploited the widely held belief that only Pashtun rulers were legitimate (Goodson 2001: 125) and advocated an interpretation of Sunni Islam relatable to rural areas (Edwards 2002: 294). Since the birth of Afghanistan, association with Islam has been vital for effective rule. Yet, the Taliban were something new. Their harsh brand of Islam and commitment to uniformly imposing their belief system nationwide, diverged from Afghanistan's long history of religious tolerance (Rashid 2001: 82). The Taliban merged religious and state authority. Warlords, who proliferated under and profiteered from mujahedeen rule, were also either defeated or displaced (Mac Ginty 2010: 587). In an environment of extraordinarily combative legal pluralism, the Taliban had established a legal monopoly.

Taliban Governance and Legal Order

The Taliban regime was fundamentally legalistic. It pledged 'to bring peace to Afghanistan, establish law and order, disarm the population, and impose sharia'

(Rashid 1999: 24). It focused on 'social stability' and a 'determin[ation] to achieve law and order in society through Islamic ways' (Gohari 2000: 55). Over time, however, the Taliban regime developed greater state capacity focused on 'security, justice, and the observation of religious regulations' (Dorronsoro 2005: 278). Nevertheless, the court system featured very little institutionalization (Jones, Wilson et al. 2005: 68), but promulgated ad hoc edicts as deemed necessary. Procedurally and substantively, Taliban law violated international human rights norms (Franck 2001) and its treatment of women was particularly heinous (Moghadam 2002).

The Taliban stressed its legal system was purely Islamic, but it was deeply imbued with Pashtun tribal values. Pashtunwali and other non-state adjudication systems were largely tolerated and not seen as inconsistent with Taliban understandings of Islam. Sinno goes so far as to posit that the reason that the Taliban refused to turn over Bin Laden was that it would violate Pashtunwali's guest hospitality requirements (Sinno 2008: 244). Tribal non-state justice mechanisms continued to resolve the vast majority of disputes, although the Taliban occasionally influenced outcomes.

Regime Collapse

The Taliban harboured Osama bin Laden and Al Qaeda during the planning and execution of the 11 September 2001 terrorist attacks. Shortly thereafter, the US overwhelmingly backed the anti-Taliban Northern Alliance in a major anti-Taliban offensive. By December 2001, the Taliban regime had collapsed under the military onslaught and its leaders fled.

II JUDICIAL STATE-BUILDING AND LEGAL PLURALISM

1 FROM TRANSISTIONAL GOVERNANCE TO CONSTITUTIONAL ORDER (2001-2004)

While international intervention was necessary to dislodge the Taliban regime, it was already deeply unpopular by 2001. The country was ready for a fresh start that promised law and order as well as democratic accountability. While the state-building endeavour failed and the rule of law remains elusive, the decidedly sub-optimal outcome was not predestined. The policy decisions undertaken by the state officials and other domestic actors, most notably the regime of Hamid Karzai, played an important role in the outcome. Not only was the judiciary prevented from being independent, it was enabled and encouraged to become predatory. The executive was overpowered, unaccountable, and unrepresentative; political parties were actively undermined and suppressed; the election system was badly flawed; and elections themselves lacked integrity. On the one hand, there was an active policy of preventing anything like the rule of law from developing. At the same time, the Karzai regime never seriously attempted to engage the non-state justice actors rooted in tribal and religious authority that had long been the foundation of legitimate legal order in Afghanistan.

1.1 The Bonn Agreement

The Bonn Agreement set the trajectory for state reconstruction and efforts to establish the rule of law. The Agreement established a 30 person, six month, interim government headed by Karzai. It established constitutionalism by reinstating the 1964 Constitution,

absent the monarchy, and reintroducing all legislation not inconsistent with that document (Bonn Agreement 2001: Sec. II.1). Judicial authority was vested in the Supreme Court (Sec. II.2), while a new institution, the Judicial Commission was given the tall order of 'rebuild[ing] the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions' (Id.). There was no discussion of the non-state justice. The agreement called for disbanding all non-state military forces. There were no enforcement provisions, however, and the interim government increasingly depended upon the militias to project "state" authority outside the capital. Bonn also excluded the Taliban from the reconstruction process and laid the foundation for combative legal pluralism between the state and the reconstructed Taliban in the following years.

1.2 Emergency Loya Jirga

The Emergency Loya Jirga was held in 2002 to put state reconstruction on a firmer foundation. The roughly 1500 domestic participants ratified the 'structure and key personnel' of the transitional regime until the constitutional drafting process was completed and elections were held. Karzai remained chief executive. While the international community embraced the outcome, domestic perception was more mixed as the process was marked by extensive US and warlord influence (Wardak 2003).[124] Warlords, major non-state justice providers who quickly remerged after the Taliban fell, were already influencing the order and political institutions through 'political pressure, intimidation, and [the] spread of money' (Jalali 2003). Still, Karzai was

[124] Even in this domestic process, US influence was clear as the US envoy 'strong-armed the king into throwing his support behind Karzai' (Barfield 2010: 297).

already the dominant decision maker. The Emergency Loya Jirga allowed the state-building process to continue, but did little to promote consensus, the rule of law, legitimate governance, or establish a constructive relationship with key non-state justice actors.

2 THE NEW REGIME (2004-2014)

From the start, Karzai and his allies stressed the importance of a strong executive to bring order, peace, and stability. Even prior to the enactment of the 2004 Constitution, Karzai declared, 'In countries where there are no strong institutions, where the remnants of conflict are still there, we need a system with one centrality, not many centres of power' (Karzai, qouted in International Crisis Group 2003: 3). Yet, there was never a strategic vision as to how centralization would lead to democratic consolidation or even a non-democratic legitimate order, which in retrospect certainly does not appear to have been Karzai's goal.

Karzai further centralized power over the next decade. He undermined constitutional checks and balances through legal and electoral manipulation as well as through patronage and the application of state power. While nominally tolerant of democratic competition, the Karzai regime never displayed a normative commitment to democracy and the rule of law. While the state's institutions were consistent with democracy and the rule of law in theory, the rule of law was non-existent in practice. Centralization did not provide the promised order; rather the state's performance deteriorated. Likewise, the state's authority was increasingly contested and insurgents effectively

circumscribed the state's power.

The State's Rickety Ideological Foundations

The new state largely eschewed the traditional pillars of legitimate authority. Religion was acknowledged but the state was not clothed in religious legitimacy. Karzai himself did not enjoy any robust religious credentials and, having dislodged the Taliban, his international backers were wary of any government that seemed too Islamic. Moreover, the international community emphasised the promotion of human rights, particularly women's rights. These views clashed with Pashtunwali and Islamic law as frequently understood in Afghanistan (De Lauri 2013) and gave the Taliban grounds to criticize the regime as unrepresentative and un-Islamic. The state's tribal relationships were also tense. The new regime was too Pashtun for those who associated Pashtun rule with the Taliban, while many Pashtuns felt the government did not represent their interests. Instead, the state was forced to rely far more on the legitimacy offered through elections and its ability to provide public goods, most notably a just legal order and economic development. It failed spectacularly.

The state's institutional structure was equally problematic, but it if the state had performed well or even just substantially better people would eagerly have supported it (Rashid 2008, Barfield 2010). The new Constitution was based on its 1964 predecessor. As with the 1964, the new Constitution increased the space for political participation but failed to promote a democratic, constitutional order. Even under more favourable circumstances, it is unclear how a revised version of the 1964 Constitution would help

consolidate democracy and the rule of law in a society devastated and transformed by decades of conflict.

The Karzai state's primary interest was consolidating and retaining power rather than state-building. While the state promulgated various strategic plans backed by international donors (for example, see London Conference on Afghanistan 2006, Islamic Republic of Afghanistan 2008, 2010), the regime lacked a meaningful commitment to any particular state-building strategy (Suhrke 2008). Instead, the Karzai regime behaved like 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). The regime effectively prevented rivals from seizing control of the state and its lucrative patronage networks. However, there was no vision as to how the state would realistically improve its performance. As Chapter 7 will highlight, the international community often enabled, and occasionally encouraged, the regime's destructive behaviour. Nevertheless, the state and its failings are inescapably a reflection of domestic politics.

2.1 The 2004 Constitution

In December 2003, a Loya Jirga ratified a new Constitution, which remains in place to the present day. It envisioned a strong, highly centralized state. The Constitution strives for religious legitimacy. It proclaims 'the sacred religion of Islam is the religion of the Islamic Republic of Afghanistan' (Islamic Republic of Afghanistan 2004: Art. 2). Moreover, it includes a supremacy clause, which stipulates that 'no law shall

contravene the tenets and provisions of the holy religion of Islam in Afghanistan' (Art. 3). Religious law also provides the default rules absent relevant state legislation. The relationship of state justice to its other major competitor, tribal law, is not discussed though state law is constitutionally established as superior.

2.2 Constitutional Structure of the State

Executive Branch

Today, executive power is fully vested in the president; there is no prime minister. The Constitution provides for a strong, directly elected president who is limited to two terms (Arts. 61-62). The president directly appoints cabinet officials, legal personnel, and regional governors (Art. 64). The president enjoys veto power, pardon power, is commander in chief with the power to declare war subject to the National Assembly's approval, and has a host of other executive functions that stem from being simultaneously the head of state and head of the government (Id.). The president also possesses the power to 'establish commissions to improve the administration of the country in accordance with law' (Art. 64.20).[125]

Executive authority also impinges on and undercuts legislative authority. Only the government can propose legislation on financial and budgetary matters (Art. 95). The executive has the power within the context of 'implementing the fundamental lines of the policy of the country and the regulation of its duties' to 'devise as well as approve

[125] Constitutional accountability mechanisms are minimal and cumbersome. The president, and members of his government, cannot be tried in regular courts (Art. 69, 78). Removal of the president requires an accusation backed by one third of the Wolsei Jirga. If two thirds of that body agree, a Loya Jirga is established. If two thirds of the Loya Jirga agree with the charge, then a special court is established to hear the charges.

regulations' provided they are not 'contrary to the body or spirit of existing law' (Art. 76). Afghan presidents can claim a constitutional mandate for legislating without the existence of a particular delegation of legislative authority by the national assembly. The Constitution vests the president with significant powers to fill legislative gaps (or supposed gaps), which has allowed the president to circumvent the legislature through decree laws even in matters where the parliament clearly has spoken. Under Article 79, when the Wolsei Jirga is in recess, 'the government shall, in cases of immediate need, issue legislative decrees' provided they do not address financial or budgetary matters.[126]

Implications of Executive Authority Structure

Presidentialism does not necessarily preclude successful state-building or democratization (Mainwaring and Shugart 1997). As Fukuyama highlights, robust authority in state institutions 'allow[s] the community to deploy that power to enforce laws, keep the peace, defend itself against outside enemies, and provide necessary public goods' (Fukuyama 2014: 24). However, unchecked state power invites authoritarian rule. One of the rule of law's main functions is to 'constrain the state's power and ensure it is used only in a controlled and consensual manner (Id.: 25). An effective state bound by the rule of law demands the ability to project authority and exercise that authority within proscribed limits. There is no doubt that the Afghan state faced real challenges and the state needed authority, but its exercise of power was inconsistent with the rule of law, undermined the state's legitimacy, and helped spur the

[126] Once in session, parliament retains a 30 day window to reject the law; a tight timeframe that requires a significant amount of parliamentary collective action.

insurgency (Chayes 2015).

A presidential system concentrates authority, which makes it at least theoretically easier to exercise. But through this concentration of power, presidentialism 'introduces a strong element of zero sum game into democratic politics with rules that tend towards a "winner-take-all" outcome' (Linz 1994: 18). This dynamic can be particularly explosive in deeply divided post-civil conflict settings (Horowitz 2000) as the conflict almost inevitably deepens ethnic divisions, even ones that were not particularly salient before the conflict (Kalyvas 2006).

Legislative Branch

The legislative branch consists of a bi-cameral National Assembly. The lower house, the Wolesi Jirga, is directly elected (Art. 91). In addition to legislative powers, it also confirms all major presidential appointments. The upper house, the Meshrano Jirga, is selected through a mix of provincial, district, and presidential appointees. The National Assembly possesses some real authority but the President is unquestionably the dominant political actor. Parliamentary effectiveness is further undermined by the weakness of political parties and the electoral system. The National Assembly has not been shy about using its power, however. It has repeatedly rejected presidential nominees, refused to pass government-backed legislation and passed legislation over the President's objections, demanded investigations, and has called for the resignations of cabinet members and court personnel. Imperfect as it is, the legislature has emerged as the only state structure that has meaningfully challenged presidential authority

within the bounds of constitutional structures.

The Judicial Branch

State legal order is based on codes and legislation, and rooted in the civil law tradition. Judicial independence is enshrined in the Constitution (Art. 116). Judicial power is largely vested in a nine person Supreme Court, appointed by the president and endorsed by the Wolsei Jirga (Art. 116-117). Judicial jurisdiction covers all types of cases and cannot be removed by legislation (Art. 120, 122). The Supreme Court possesses the right of judicial review for 'laws, legislative decrees, international treaties as well as international covenants' for consistency with the Constitution (Art. 121). However, the Constitution does not explicitly mention the right to *constitutional* review.[127] Furthermore, judicial review is structurally limited because standing to challenge a law requires referral by either the government or the courts. Constitutional review is rather circumscribed as the means of acquiring review are limited and the parties themselves do not have the right of appeal.

Although the judiciary is responsible for proposing inferior court judges, presidential approval is required (Islamic Republic of Afghanistan 2005). The president has a tremendous authority in the judicial sector to ensure that only sympathetic judges ever reach the bench. The president can also mitigate or pardon criminal offenses and even retire sitting judges (Art. 64).

[127] The textual ambiguity surrounding constitutional review by the Supreme Court has sparked immense controversy (Kamali 2014).

The structure of judicial power is precarious. Even in developed democracies bound by the rule of law, independent courts can be subjected to political interference. In developing states without a strong rule of law tradition, such as Afghanistan, the problem is even more common (Vyas 1992). While judicial power is invested in an impendent judiciary with the right of judicial review, the constitution promotes ambiguity:

> The Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with provision of the law. Members of this Commission shall be appointed with the endorsement of the House the People [Wolsei Jirga] (Art. 157).

This clause lay dormant for years as the Supreme Court exercised the sole power of constitutional review, but the structure of judicial power and its relationship to executive power is unnecessarily cloudy and allows the executive to act with impunity.

3 ELECTIONS AND THE NASCENT STATE POLITICAL ORDER

Elections largely structure the formal political order. Elections can help legitimize the emerging political order, promote accountability, allow the population to set the broad parameters of state policy, and help secure the buy-in from potential spoilers. At the same time, even free and fair elections can spark renewed conflict and deepen divisions (Paris 2004: 164). The election system itself is vital as 'an inappropriate or flawed electoral system can retard democracy's progress as much as warlords, religious fundamentalists, and corrupt business leaders combined' (Reynolds 2006: 105). Local elections can also help make non-state justice actors more open to working with the state as in Timor-Leste. Election systems were particularly important in Afghanistan because there was no natural party of government stemming from a successful

independence or revolutionary movement.[128] Electoral competition has a dramatic influence on helping consolidate the rule of law by helping to ensure governmental accountability and that the judiciary does not become the tool of one particular group (Lipset 2000).

3.1 Presidential Elections

Afghanistan's first democratic election for a head of state was held in October 2004. Eight candidates ran for office. Roughly 10.5 million Afghans registered to vote, with eighty percent of eligible voters casting ballots. Karzai emerged victorious with over 55 percent of the vote. While there were concerns about security and some electoral irregularities (Coburn and Larson 2014: 53-55), Karzai's election enjoyed legitimacy both domestically and internationally (Goodson 2005). The election was a rare bright spot in a state-building process already facing major challenges. Karzai now firmly possessed the nascent Afghan state's most powerful role.

Against a backdrop of ever growing insecurity, President Karzai retained power in the 2009 elections. This election, however, further undermined state authority rather than bolstering it (Suhrke 2011: 153). The voter registration process was tainted by irregularities and the election itself was marred by large-scale fraud (Worden 2010). While many in the international community were initially reluctant to acknowledge the scope of the fraud, pressure grew and Karzai accepted a run off. His opponent, Abdullah Abdullah, withdrew before the vote actually occurred, allowing Karzai to win

[128] Leaders of the triumphant Northern Alliance were largely from minority groups and thus were not palatable to the Pashtun plurality.

another term. Electoral fraud increased further in the 2014 elections where Karzai heavily manipulated the election results despite not being a candidate himself (Shahrani 2015).

3.2 Political Parties

Political parties play a vital role in establishing, consolidating, and sustaining democracy. In Diamond's words, 'political parties remain an indispensable institutional framework for representation and governance in a democracy' (Diamond 1999: 96). Parties facilitate the representation and mobilization of diverse societal interests in state institutions. This role is particularly important in places like Afghanistan, where potentially anti-system actors, such as warlords, have built in electoral advantages due to their influence over local populations. While political parties are not inherently good or virtuous, they are a prerequisite for any 'serious attempt at democracy' (Carothers 2006: 10-11) as they serve as a check on executive authority and structure collective public choice.

Establishing robust political parties in Afghanistan presents serious challenges. Many of the political parties that remerged after the Taliban's regime collapse had been discredited by the chaos of mujahedeen rule (Bhatia 2007). Others were new with weak roots in society. As with the Constitution, the overarching structure of political competition was the result of choices made by the Karzai regime (Reynolds 2006, Giustozzi 2013, Coburn and Larson 2014).[129] Karzai proactively sought 'to prevent the

[129] US Ambassador Khalizhad favoured a strong presidential system but the final decisions reflected Karzai's regime choices (Suhrke 2011).

formation of strong national political parties and keep the influence of organized political factions within the parliament limited' (Giustozzi 2013: 328).

3.3 The Political Parties Law and its Consequences

The Karzai administration undertook a concerted campaign to undermine political parties as a potential source of opposition to the regime. The initial 2003 political parties law promoted the proliferation of weak political parties rather than strong, broad-based parties (Transtitional Islamic State of Afghanistan 2003: Art. 8-9, International Crisis Group 2005). Under the revised political party law of 2009, a total of 10,000 unique party members, verified by identification cards, were required (Islamic Republic of Afghanistan 2009). This made the process of securing legal party status quite difficult. Only five parties were able to successfully register prior to the 2010 parliamentary elections, 'which meant only 31 of approximately 2,500 candidates could advertise a party ticket' (International Crisis Group 2013: 5).

The state regulation of parties has tightened even further. Under legislative changes in April 2012, parties must establish active offices in at least 20 of Afghanistan's 34 provinces (Ministry of Justice 2012). The existence of these offices has been subject to aggressive enforcement and state officials have been quite open that the regulation aims to reduce the number of political parties (International Crisis Group 2013: 7). When the April 2013 deadline arrived, not one party had met the stringent requirements (Ariana News 2013). Parties continue to operate 'informally' (US State Department 2015: 30). This state's extensive regulation of parties, however, is inherently worrisome

as it leaves the technically illegal political parties at the whim of the state.

3.4 The Election Law and its Consequences

In 2004, the election law was promulgated. While the official electoral study commission strongly recommended proportional representation, Karzai's administration selected the rarely used single non-transferable vote (SNTV), despite serious concern at the time by international advisers (Reynolds 2006). Under SNTV, districts have multiple seats and the top vote recipients in each district receive seats. Each province has their total number of representatives allocated by population, with a total of 249 seats nationwide. The representatives allocated to each province range from 2 seats in Panjsher to 33 in Kabul.[130] Coburn and Lawson highlight:

> SNTV served a number of high-level Afghan political interests while creating chaos for local communities of which many local leaders would take advantage. SNTV made the process of choosing a candidate to vote for simple perhaps but it made the outcomes incredibly complex and easy to manipulate from above. Without any requirements of party affiliation, it discouraged organized opposition and increased the likelihood of a discouraged legislature that would not be able to counter executive decrees or decisions effectively (Coburn and Lawson 2014: 58).

The 2005 Parliamentary Elections

After being delayed for over a year, the Wolesi Jirga and provincial council elections were held in September 2005, formally completing the transitional process initiated in 2001. Approximately 6.4 million people voted. Wilder notes 'about 50 percent of registered voters [participated], a sharp decline from the 70 percent that voted in the Presidential elections a year earlier', a decline he attributes to widespread popular

[130] SNTV is a 'semi-proportional' electoral system that allocates seats based on votes with a method 'somewhere between the proportionality of PR and the majoritarianism of plural-majority systems ' (Reilly 2001: 17).

dissatisfaction with Karzai's government (Wilder 2005: 32).

Parliamentary elections posed serious administrative, logistical, and security issues. Candidates were not required to have a party affiliation to run for parliament and party affiliations, when applicable, were not listed on the ballot. Given the large number of candidates and parties, ballots were sometimes pages long, particularly in more heavily populated provinces. In the 2005 election, it was impossible for voters to support a candidate based on their political party without advance knowledge.

Even in established democracies, SNTV disfavours large, broad-based parties and promotes party fragmentation (Lijphart, Pintor et al. 1986). In Afghanistan, the system produced widely erratic results as small vote differentials could separate winners from losers and 'some candidates won with tens of thousands of votes while others scraped through with as low as 1,500' (Coburn and Larson 2014: 58). This produced resentment among candidates who were close to being elected and the electorate saw an extraordinarily high rate of 'wasted' votes for candidates who were ultimately not elected (Id.: 58-59).

The 2010 Parliamentary Elections

These trends continued during the 2010 elections. The growing threat of violence by the Taliban impacted voter turnout and parliamentary candidates were targeted for assassination. Through an expansive and legally dubious use of the presidential decree power, the president unilaterally reformed the election law prior to the parliamentary

polls (Coburn and Larson 2014: 197-200). Karzai actively worked to undermine the Electoral Complaints Commission that 'had invalidated over 1.3 million fraudulent votes cast in the 2009 presidential poll' by replacing most members with presidential appointees (Maley 2011: 86). Unsurprisingly, fraud was rampant. There were also significant delays in the certification of winners leading to speculation of vote rigging. The electoral system continued to promote a high level of volatility, with over half the sitting Wolsei Jirga members losing their seats (Ginsburg and Huq 2014: 117). Once again, the result was a highly fragmented Wolsei Jirga, feckless political parties, popular dissatisfaction, and no discernable progress towards the rule of law.

4 THE LEGAL SYSTEM

After the Taliban's collapse in late 2001, the state legal system was in shambles. While there has been some progress is rebuilding at least the institutional components of a viable justice system, it is decidedly underwhelming given the level of investment in the sector. A legal structure exists for the judiciary. The organization of the Court Law centralizes power in the Supreme Court (Islamic Republic of Afghanistan 2005). The law envisioned appellate courts in each province and hundreds of district level courts. There are now hundreds of courts in operation and a few notable achievements. As Wardak highlights:

> significant work has been done on legislation; several hundred judges, prosecutors, and prison wardens, and thousands of police personnel have been trained; some justice institutions have been refurbished; and several new ones have been built from scratch. Progress has also been made with regard to building administrative capacity within the existing justice institutions and the publication and distribution of a large body of law to legal professionals. Progress in rebuilding Afghanistan's state justice system has included the establishment of the Independent Bar Association of Afghanistan, legal aid departments in Kabul and in three provinces, the Independent National Legal Training Centre (INLTC) in Kabul, and a committee for the simplification of judicial

bureaucracy (Wardak 2011: 413).

From the beginning, there was a very high degree of competition with powerful non-state authorities, which displayed little interest in deferring to the state's prerogatives. The state, however, was equally uninterested in establishing the rule of law. The judiciary's poor quality and its lack of authority caused the vast majority of the population to avoid it. The legal system was viewed as immensely corrupt, ineffective, expensive, and arbitrary. The legal system mirrored the authority of the larger state apparatus in that it was most powerful in Kabul and some other urban areas, while largely non-existent in more rural parts of the country. It was not uncommon for participants to use the threat of formal legal adjudication to help facilitate non-state dispute resolution (Local NGO Professional 2014, NGO Legal Specalist 2014). The state judiciary's authority appeared to be waning rather than growing even as its personnel and institutions proliferated.

4.1 Conceptualising the State Judiciary

The judiciary is not independent. The judiciary has consistently upheld executive authority, including in conflicts over the scope of executive power, election administration, the removal of presidential appointees (Hamidi and Jayakody 2015). The Supreme Court is widely seen as a tool of executive power rather than an advocate for the rule of law. As one judge explained, even if a judge personally wanted to follow the law, the incentives are wrong as judicial posts are routinely bought and sold.[131] Judges barely make enough to live and they are expected to recoup the costs of buying the post in the first place (Former Afghan Judge 2014). Judges are rarely stationed in

[131] The selling of state posts is by no means limited to the judiciary (Goodhand 2008).

their home area, which means they frequently do not speak the local languages or understand the local context. Adjudication is often corrupt, time consuming, and enforcement capacity is lacking in most areas. Prosecutors routinely refuse to prosecute well-connected individuals but are willing to use the threat of prosecution to extract rents (Afghan International Rule of Law Program Staffer 2014, Chayes 2015). Likewise, the subsidiary institutions designed to support the judicial branch, most notably the legal education system, consistently leave graduates unprepared to practice the law (Swenson and Sugerman 2011).

Under conventional judicial review theory, the judicial branch determines what is legally permissible as well as prevents executive and legislative overreach (Kramer 2001, Merryman and Pérez-Perdomo 2007). In Afghanistan, the Supreme Court and state judicial courts have bolstered presidential power in a paradigmatic example of rule by law. Presidential appointments do not necessarily follow the law even for the Supreme Court. Karzai made the first judicial appointments unilaterally under the authority granted by the Bonn Agreements. These appointments were subsequently entrenched by Article 127 of the 2004 Constitution. The first Chief Justice was the conservative Islamist Fazi Hadi Shinwari.[132] After parliament rejected Shinwari's renomination in 2006, Abdul Salam Azimi assumed the post. The Wolsei Jirga initially approved the appointment. After Azimi's term expired in 2010, Karzai retained him, with the extra-constitutional title 'acting chief justice', along with two other judges

[132] The constitutionality of Shinwari's 2004 Supreme Court appointment was also questionable. The then controlling 1964 Constitution stipulated all judges must be under sixty years old (Kingdom of Afghanistan 1964), yet at the time of appointment, Shinwari was 80 years old.

'through a legally dubious decree' (International Crisis Group 2012: 14).[133] The appointment power is coupled with the retirement power and the host of other executive powers noted above to reinforce executive power over the judiciary.

4.2 State Attempts to Regulate the Non-State Justice Sector

Non-state justice remains the dominant form of dispute resolution in Afghanistan, but the relationship among state and non-state legal providers were not a state priority. The judiciary preferred for almost all cases to be processed through the state justice system, even if those cases were later referred back to non-state actors. On one hand, the state's minimalist approach made sense. After all, state capacity to enforce court judgement or regulate non-state actors was limited, particularly outside urban areas. Moreover, a poorly designed regulation had the potential to do far more harm than good. Unfortunately, inaction also created a legal grey zone. For contested issues such as land or property, it leaves matters settled but unsettled as the agreement has no status and thus can be subject to further litigation in state courts.

In 2009, the state first expressed serious interest in the non-state justice sector but never seriously engaged major non-state justice actors. In fact, all attempts by the state to formally regulate the non-state sector were negotiations between various state actors rather than between state and non-state actors. All major state justice sector institutions, including the Ministry of Justice, the Supreme Court, the Human Rights Commission, and the Ministry of Women's Affairs, supported the 2009 informal dispute resolution policy. It also garnered the backing of key international actors and NGOs. However, the

[133] Once Karzai left office, Azimi resigned in October 2014.

policy had limited scope and sought to encompass a number of diverse goals that were often in tension with each other. The policy on 'informal dispute resolution' only covered shuras and jirgas (Ministry of Justice 2009). While recognizing shuras and jirgas as 'critical components to the establishment of long-term peace, security, and rule of law,' it stressed that non-state legal decisions must be consistent with Sharia, the Constitution, other Afghan laws, and international human standards (Id.). Only decisions that upheld these criteria would be considered valid. The policy called for the elimination of all practices violating human rights, mandated gender equality, and made participation in non-state justice processes completely voluntary. Jurisdiction was sharply curtailed to only civil cases that did not concern the government. Ultimately, consensus on an official non-state justice policy came at the expense of feasibility and recognition of how non-state justice actually worked. The policy assumed the state could simply impose its mandates and that non-state actors would actively seek to engage with a state judicial system, which was widely known to be predatory, corrupt, and ineffective. In other words, the state policy envisioned simultaneously harmonization and incorporation strategy towards non-state justice without actually engaging those actors.

As a policy has no legal bearing, a law was required to operationalize it. The draft law, produced in September 2010, contained extensive detail concerning who could serve on a jirga, their jurisdiction, operations, and decision making as well as jirgas' relationship to state courts (Ministry of Justice 2010). The law staunchly asserted the state's authority to control and regulate all aspects of non-state 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 despite the fact that jirgas were only empowered to hear civil disputes and petty juvenile crimes on referral (Id.).

The law, however, was met with fierce opposition from the Ministry of Women's Affairs and the Human Rights Commission who felt that the law would lend credibility to traditional dispute resolution, which they viewed as antithetical to human rights standards and women's rights in particular (International Rule of Law Professional 2015). Ultimately, the legislation did not move forward. State efforts to regulate the non-state justice sector were dormant through 2013. Since 2014, there has been renewed interest within the Afghan state, particularly by the MOJ. Another draft law focused on civil matters was produced in 2015, but there are no indications that the law will be in place anytime soon (Ministry of Justice 2015).

5 JUDICIAL STATE-BUILDING COMPETITORS AND COMBATANTS

Poor governance and the lack of the rule of the law are necessary though not sufficient conditions for the rise of anti-state insurgencies (Fearon and Laitin 2003, Hironaka 2009). During the relative peace after the Taliban regime's collapse, little was done to establish a legitimate state bound by the rule of law. Instability spread quickly and by 2006 the resurgence 'had developed into a full-blown insurgency' and state authority has steadily eroded since then (Jones 2008: 7). This trend is due in part to the challenges of establishing the military and civilian authority structures necessary to

maintain order. It also reflects the regime's policy choices. A neo-Taliban insurgency may have been inevitable, but many fighters were initially willing to join the new regime (Johnson 2011: 259).

The Karzai regime lacked the capacity to defeat its competitors militarily or embody a cause worth fighting for. Nowhere is this failure more prevalent than in the justice sector where the state has failed to promote, let alone provide, a just legal order. The Karzai regime's unwillingness to establish the state legal system as a legitimate, fair, and effective forum for dispute resolution has had major consequences. Tribal dispute resolution mechanisms continue to be the forum of choice for many Afghans, particularly in Pashtun tribal areas (Wardak and Braithwaite 2013). Non-state justice mechanisms settle an estimated 80 to 90 percent of disputes (Barfield, Nojumi et al. 2006: 9).

5.1 Warlords

The Bonn Agreements and the political party law envisioned the disarmament of warlords. In practice, the Karzai government and international forces relied on 'pro-government or more accurately "anti-Taliban" warlords to maintain order at the local and regional level' (Jones 2010: 130). Efforts to break up the military underpinnings of the warlords' power failed. This is hardly surprising. As Sedra highlights, 'A DDR program has never been successfully implemented without the support of a state or external security force to assist its work' (Sedra 2003: 8). Warlords, however, focus on structuring the political and legal order in their areas, but do not seek to take over the

state itself.[134] A network of warlords, who oversee the legal order in their area of influence, appeared to be a permanent fixture of the Afghan political scene as 'warlords retained their local status and power and increased their presence in the national government' (Peceny and Bosin 2011: 612). To date, the situation remains fluid, but it is unlikely the state will dislodge the warlords anytime soon. Rather, the biggest threat to warlords' continued existence seems to be the growing strength of the Taliban's non-state order.

5.2 The Taliban

The Taliban constitutes the state's fiercest and most effective judicial competitor. While the warlords are parasitic of the state and the international community's largess, they do not seek to displace the state itself. In contrast, the Taliban seeks to displace the state. The Taliban established a lean, but sophisticated network of parallel governance structures. Once territory started falling under the Taliban's control in 2003, provincial governors were almost immediately established, and 'By 2010, 33 provincial governors and about 180 district governors were said to be in existence' (Giustozzi 2012b: 72).

Effective legal order constitutes the core of the Taliban's political programme.[135] It also underpins their claim to be Afghanistan's legitimate rulers as well as serves to highlight the state justice system's failures. Taliban insurgents actively contend with the state

[134] Autonomy should not be confused with isolation. Warlords, such as Atta Mohammad Noor in Balkh, Gul Agha Sherzai of Nangarhar, and Ismail Khan of Herat frequently engage the state and even hold state posts when it suits their interests (Mukhopadhyay 2014).

[135] The Taliban emphasis on legalism is also evident in its published codes of conduct (Layha), which started in 2006. These edicts sought to regulate appropriate behaviour for Taliban fighters in both military and political matters. While rarely followed to the letter, Clark contends the code is not purely 'propaganda: it is a rule book that is also aspirational' (Clark 2011: 2). The Taliban has even established military courts in an attempt to implement the code (Giustozzi 2014).

system, especially outside the capital, by offering inexpensive, expedient, and relatively fair dispute resolution. The Taliban operates 'a parallel legal system that is acknowledged by local communities as being legitimate, fair, free of bribery, swift, and enduring' and their system 'is easily one of the most popular and respected elements of the Taliban insurgency by local communities, especially in southern Afghanistan' (Johnson 2013: 9).[136] Unlike in the state system, decisions are effectively enforced (Ledwidge 2009, Kilcullen 2011). Mitigating corruption is a top priority. There is even an ombudsman system in place where citizens can make complaints. As Peters observes, 'the Taliban's willingness to punish their own' is a major reason the general population sees them as 'more fair—even if strict and ruthless—than the notoriously corrupt Afghan government' (Peters 2011: 108). In short, the Taliban justice seeks to provide exactly what the state justice system does not: predictable, effective, legitimate, and accessible dispute resolution.

Taliban Justice System and the State Justice System

The Taliban aimed for a monopoly on the provision of justice in the areas it controls. The Afghan state and international forces actively sought to disturb and undermine the Taliban justice system (Coburn 2013). At the same time, these actors realized the popular appeal of Taliban justice constituted a profound challenge to state authority. Even North Atlantic Treaty Organization (NATO) officials have begrudgingly recognized the Taliban judiciary's relative effectiveness:

> While Afghans disagree with the harsh punishments of the Taliban, they often find this 'extreme justice' their sole recourse for injustice. The redress of grievances is one of

[136] For more detailed discussions of the Taliban judiciary's operations and evolution, see Giustozzi, Franco et al. (2013) and Giustozzi and Baczko (2014)

> the few areas where the insurgency continues to compete with legitimate governance (NATO 2011).

The Taliban sought 'to discredit and undermine' state claims to legal authority (Johnson 2011: 282). They tried to disrupt the operations of state courts and targeted judges and other state officials for assassination as well as denied the courts' legitimacy as a legal authority. Populations in Taliban controlled areas were banned from utilizing state courts and faced punishment for engaging state authorities (Johnson and Mason 2007, Giustozzi and Baczko 2014: 215). Thus, the relationship between the state and Taliban justice systems was a paradigmatic example of combative legal pluralism.

The Taliban were equally committed to destroying their warlord competitors (Mac Ginty 2010). The process was equally combative though there is perhaps less emphasis on quality of services and more emphasis on battlefield victories. Nevertheless, the political and ideological portions of the Taliban's justice strategy remained important in all areas it controlled as well as those it aspired to control (Rashid 2008: 362- 363).

The Taliban's Engagement with Tribal Authority

Unlike the state legal system, the Taliban has effectively tapped into the wellspring of legitimacy that it used so effectively in the mid-1990s: the provision of order backed by religion and tribal identity. The Taliban justice system emphasizes its religious piety in contrast to the Kabul regime. The Taliban judiciary's claim 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). Religion also underpins efforts to

undermine the state's legal authority and Taliban attempts to mobilize popular opposition to the state (Jones 2010: 230-237).

The Taliban stress their respect for local values, traditions, and realities. They are simultaneously pragmatic. While focused on religion, the Taliban are also deeply imbued with Pashtun tribal values and often work constructively with tribal leaders:

> the Taliban judges often co-opt the elders into their trials, allowing them to represent the parties and to negotiate a settlement. In practice, the system adopted by the Taliban has made the functioning of customary justice increasingly dependent on the Taliban's support, without which communities would often not be able to enforce decisions (Giustozzi and Baczkp 2014: 212).

As an armed insurgent group, Taliban strategy couples the promise of legal order with the threat of force. Johnson and Mason offer a vivid description of Taliban threats:

> By night, Taliban mullahs travel in the rural areas, speaking to village elders. They are fond of saying, "The Americans have the wristwatches, but we have the time." The simple message they deliver in person or by "night letter" is one of intimidation: "The Americans may stay for five years, they may stay for ten, but eventually they will leave, and when they do, we will come back to this village and kill every family that has collaborated with the Americans or the Karzai government." Such a message is devastatingly effective in these areas, where transgenerational feuds and revenge are a fabric of the society (Johnson and Mason 2007: 87).

The Taliban's success at judicial state-building dispels the notion that establishing legal order was impossible in post-2001 Afghanistan. Despite extensive efforts to suppress it, the Taliban legal order continues to gain ground and popularity (Ahmed 2015). The Taliban offer a compelling strategic vision for many Afghans. The Taliban legal order blends overt coercion with a serious attempt to ground proceedings in the cultural and religious basis of legitimacy. Coercion can be deeply unpleasant and provoke resentment. At the same time, judgement enforcement constitutes the core of an effective legal system. This is manifested in the belief that the law will be applied to all. All effective legal systems, at a minimum, require authority to mediate competing

interests and some capacity to enforce their rules on those who fail to comply (Raz 2009).

Coercion alone cannot sustain a legal, or political, order in the long run as stability requires a degree of cooperation (Beetham 2013). Societal respect for the law largely hinges significantly on the broad social belief of the law's basic fairness and legitimacy (Tyler 2006). The Taliban's legal order follows a template that has already proven effective historically: namely a guarantee of order backed by respect of religious and cultural beliefs. The Taliban's legal order is further bolstered by at least a limited willingness to police itself and be bound by their own law (Johnson and DuPee 2012).

The Taliban's justice system still faces major shortcomings. Moreover, it is decidedly at odds with the human rights and cultural requirements embodied in thicker version of the rule of law (West 2003). But the Taliban possesses a comprehensive legal governance strategy with a clear long-term vision rooted in the values and popular beliefs. The Afghan judicial system decidedly does not. The Afghan people, quite correctly, see it as an 'extractive institution' that collects rents from society at large and redistribute them to a narrow elite largely free of meaningful political constraints (Acemoglu and Robinson 2012: 81). Equally compelling through a mixture of force and provision of a vital public good, legal order, the Taliban has been able to transform environments defined by competitive legal pluralism into cooperative legal pluralism where local authorities are willing to work with them; or, at a minimum, not actively oppose them. In contrast, the state system in most areas lacks coercion and legitimacy

as well as uniformity and accountability. Of course, the Taliban's relative success remains tenuous. Taliban justice remains under pressure from the Afghan state's efforts to repress the system, which still enjoy immense international support. That pressure could increase dramatically if the Afghan state were able to improve its performance, bolster its legitimacy, and display an actual commitment to fostering the rule of law. The Taliban regime thrives in a large part due to the Afghan state's abysmal performance. Moreover, it is unclear if the Taliban justice system has internalized the lessons of the regime pre-2001. The Taliban initially rose to power promising fair, accessible, and legitimate dispute resolution, but popular support waned as the system became ever more harsh and unaccountable.

CONCLUSION

This chapter has focused on the immensely important role of Karzai's regime since 2001 in creating the new political and legal landscape in Afghanistan. The regime made a conscious choice to eschew the longstanding pillars of legitimacy for state legal orders, notably tribal and religious non-state actors. The Karzai regime initially promised a new beginning but the state is now thoroughly corrupt, highly predatory, and fundamentally illegitimate (Paris 2013: 538). Afghanistan underwent a major transition following the election of President Ashraf Ghani in late 2014. Unfortunately, Afghanistan's first peaceful transfer of power was compromised by industrial-scale election fraud conducted on Ghani's behalf by outgoing President Karzai (Shahrani 2015). Ghani has pledged extensive political, legal, and electoral reform, but has achieved little to date. The Karzai system remains firmly entrenched and Karzai

himself remains a key player (Rasmussen 2015). The Taliban's territorial control continues to grow; the Taliban now control roughly fifty percent of Afghanistan (Almukhtar and Yourish 2015). Taliban justice likewise continues to proliferate (Ahmed 2015). While Afghanistan's recent history certainly shows that rapid political and legal change is possible, there is presently little cause for optimism.

The Karzai regime deserves most of the responsibility for Afghanistan's decline since 2001. As the next chapter will highlight, however, the international community not only helped install and consolidate the Karzai regime, it enabled many of its abuses. While well over one billion USD were spent ostensibly strengthening the rule of law, this funding has achieved little and often made the situation worse.

CHAPTER 7
Reinforcing the Slide towards Combative Legal Pluralism: International Judicial State-Building in Afghanistan

INTRODUCTION

Chapter 6 argued that the failures of judicial state-building resulted largely from the decisions of key state policymakers, most notably the Karzai administration. The Karzai established a highly centralized, personalized regime antithetical to the rule of law. However, the state did not act alone. The rebuilding effort in Afghanistan received an extraordinarily high-level of international support. In fact,the Afghan state depended on international support to undertake even its most basic of functions (US Government Accountability Office 2013: 25-26). In the justice sector, roughly 90 percent of funding came from foreign sources (Suhrke and Borchgrevink 2009b, Leeth, Hoverter et al. 2012: 4).

Unsurprisingly, international assistance can have major consequences for judicial state-building. In Timor-Leste, it made a significant positive contribution in a competitive legal pluralist environment. Aid, however, can be ineffective or even counterproductive to the establishment of a democratic state bound by the rule of law (Paris 2009). This chapter argues that, on balance, donor assistance has done little to promote the rule of law or a cooperative relationship between state and non-state justice in Afghanistan. At best, assistance has produced decidedly mixed results. It has established key legal institutions and built human resource capacity that *may* in the future provide the foundation for legitimate, fair, and effective dispute resolution. At the same time, aid has often been ad hoc, ineffective, predicated on widely optimistic assumptions and, at

worst, has helped enable predatory state practices (Verkoren and Kamphuis 2013).

Progress towards the rule of law in Afghanistan has proven elusive despite billions in aid, the international community's seemingly immense leverage given the state's donor dependence and, after 2009, an increased willingness to engage non-state judicial actors. Today, the quality of state justice continues to deteriorate and the Taliban's rival justice system continues to thrive. This chapter examines the key question: why despite major international investment in judicial state-building has the quality of the justice sector not improved?

This chapter argues that assistance from the international community, particularly Italy, the UN, and the US, initially followed a strategy-based on subsidisation that largely ignored the non-state justice sector. When non-state justice was engaged it was often in the service of security and stability, and produced decidedly counterproductive results. Since 2009, the Obama administration increasingly sought to use rule of law assistance as a cornerstone of its counterinsurgency efforts. International actors used a wide variety of strategies to support the rule of law in Afghanistan, but such undertakings were almost always secondary to security concerns and ultimately achieved little.

Statement of Theory Testing

In Afghanistan, high-level state officials, particularly President Karzai, both mediated international assistance and determined the overarching trajectory of judicial state-building. In the early years, the international community, however, exercised

tremendous influence over the nascent Afghan state's institutional structure. International backing secured the top state post for Karzai initially and encouraged the president's concentration of power. Foreign actors retained significant ability to influence state officials because the state was highly aid dependant. Yet, international judicial state-building activities did little good. Worse still, it was often counter-productive to the process of building the rule of law and hindered constructive engagement with non-state actors. Most notably, the US never truly sought to engage with non-state justice as a means to promote a more just legal order, but rather saw non-state actors as mere cogs in a deeply flawed counterinsurgency approach.

Conventional Understandings of Judicial State-building in Afghanistan are Insufficient

Despite massive expenditure, international assistance has not promoted the development of the rule of law or even mitigated the predatory nature of Karzai's regime. Yet, many scholars contend the result was basically inevitable. Ottaway and Lieven explicitly stated: 'The international community's immediate aim for the Afghan government should therefore not be the impossible fantasy of a democratic government technocratically administering the country' (Ottaway and Lieven 2002: 6). Acemoglu and Robison posit that the failure of assistance to Afghanistan 'should not have been a surprise, especially given the failure of foreign aid to poor countries and failed state over the past five decades' (Acemoglu and Robinson 2012: 451). Perhaps the most forceful and eloquent indictment of the international state-building endeavour comes from Astri Suhrke. Many of Surkhe's specific criticisms are correct is correct, but her

overarching premise is shaky. Ignoring the vital role Karzai played in the construction of Afghanistan's predatory rentier state, Suhrke contends 'Karzai was essentially a product of the system erected in the post-Taliban years; another leader would be subject to similar constraints' (Suhrke 2011: 221).

Despite serious challenges, the failure of international judicial state-building efforts was far inevitable. The above arguments do not account for the recent Afghan history as well as the transformative potential of institutions and established practice over time. There were clear policy and programmatic choices that had profound consequences. This chapter makes a significant contribution to the literature because it looks at judicial state-building holistically and at a programmatic level. While the end result is always too difficult to prove and counterfactuals are a tricky endeavour in any circumstances, a critical examination of how international aid could have been done better both in relation to how the state justice sector was supported and how the non-state justice sector was engaged (Lebow 2000).

Evaluating International Judicial State-Building Assistance

As with the earlier evaluation of international judicial state-building assistance in Timor-Leste, my criteria for success is whether international aid *enhanced the prospects for developing and consolidating the rule of law* through a process tracing approach.[137] Chapter 6 demonstrated that the Karzai administration actively undermined domestic efforts to promote state-building based on the rule of law.

[137] This criteria follows the logic of Paris' work on international post-conflict state-building, which examines whether state-building efforts has 'enhanced the prospects for stable and lasting peace' (Paris 2004: 55).

Karzai's regime effectively undermined domestic checks and balances and the separation of powers. Perhaps most troublingly, the regime compromised the electoral system through which the population exercises sovereignty as well as limited the development of representative political parties. The state also never meaningfully engaged with the crucial religious and tribal non-state justice actors that have long underpinned legitimate legal order in Afghanistan.

As the international community viewed security as its top priority, the rule of law often fell to the background. The emphasis on security has been present from the start (Wolfowitz 2002). Lakhdar Brahimi, the chief UN representative at the Bonn Conference and head of the UN mission in Afghanistan from March 2002 to January 2004, explicitly stressed that 'security is more important than justice' (Brahimi, cited in Larsen 2010: 21). Thus, the international community's ability to promote the rule of law has been heavily circumscribed by its commitment to bolstering the regime and an emphasis on security over justice. Karzai's administration sought to retain power and was exercise authority unconstrained by the rule of law. In contrast, the international community wanted a polity that embraced liberal democratic ideals, but consistently compromised those aspirations.

Paradoxically, despite the justice sector's extreme aid dependence, international actors' ability to promote the rule of law has been quite limited. In theory, aid dependence should increase the state's reliance on the continued aid flows and, therefore, allow major donors meaningful influence over state behaviour (Boyce 2002, Knack 2004).

Most donors want to avoid being seen to be directly influencing state behaviour. Many major donors trumpet the banner of 'local ownership' as the cornerstone of their engagement (for example, see USAID 2005, UNDP 2009a, US Mission Afghanistan 2010). The Karzai regime has correctly recognized that the Afghanistan state-building project is effectively too big to fail. Due to a deep fear of Taliban resurgence, the international community, particularly the US, were not prepared to allow regime to fail because of a deep fear of the Taliban's resurgence. Over time, the state's endemic, profound weakness actually gave the regime greater ability to operate with independence from its international backers.

Programme implementers faced structural constraints that hindered their ability to promote the rule of law in the face of state opposition. Donors assess implementers based on their ability to execute stipulated programming deliverables, which almost always involves working with state institutions. This dynamic demands state consent regardless of whether officials are actually committed to programmatic principles. Programmes that fail to execute are viewed poorly by donors and endanger future contracts (Cooley and Ron 2002). Programme implementers have strong incentives to collaborate with deeply corrupt states institutions provided their leaders are willing to at least pay lip service to rule of law ideals. These problems are further compounded by the steadily deteriorating security situation, which limits the areas and types of work that can be done at an acceptable risk level.

Chapter Overview

This chapter's analysis of external judicial state-building assistance is organized thematically. The first section looks at the major judicial state-building endeavours undertaken by international actors and whether each major programme enhanced the prospects for developing and consolidating the rule of law. Given the staggering number of outside initiatives, it is impossible to offer a detailed examination of each programme. The State Department's Inspector General explains the inherent challenges in disentangling even just US assistance:

> ROL funding is difficult to identify and to quantify. Funding for the ROL program in Afghanistan is split among several U.S. government agencies. There is no one place where all funds spent specifically on ROL can be identified. ROL program funding is often multiyear and is combined with other programs such as police training and correction facilities, which often make identification of specific costs difficult. ROL programs are also funded by the United Nations, other bilateral donors, and a variety of NGOs. The result is that there is currently no way to readily identify ROL funding and subsequently to identify duplicate programs, overlapping programs, or programs conflicting with each other (US State Department Office of the Inspector General 2008: 23). [138]

Nevertheless, the most important programmes can still be identified and evaluated. The first section surveys the work of the most important international actors. It begins with an examination of Italy's performance as the 'lead' donor nation for the justice sector. This is followed by an evaluation of major US funded efforts. Finally this section concludes with a discussion of UN and UNDP initiatives. Section two holistically examines the strategy and trajectory of externally funded judicial state-building projects, before assessing their broader contribution through a critical examination of activities' impacts upon institutions and the broader justice sector.

[138] Strategy, implementation, and coordination problems remained endemic throughout the period of engagement despite consistent claims they were being addressed (SIGAR 2015b).

1 INTERNATIONAL ACTORS AND INITIATIVES

A wide variety of countries and international actors have supported judicial state-building in Afghanistan since 2001.[139] Unlike in Timor-Leste where a significant portion of international judicial state-building assistance was rooted in cultural and linguistic affinity, nearly all of the international assistance to Afghanistan has been conventional assistance seeking to develop a modern, legitimate justice sector. The main international actors were the US, the UN, the UNDP and, at least initially, Italy, which was the lead nation charged with 'providing financial assistance, coordinating external assistance and overseeing reconstruction efforts in the rule-of-law sphere' (Tondini 2007: 336).[140]

1.1 Italy

Italy was formally the lead nation for the justice sector from 2002 to 2006.[141] It had the predominant role in providing financial aid, overseeing external assistance, and coordinating projects.[142] Italian-led efforts focused overwhelming on reforming and expanding the state legal system as well as legislative drafting. Italian aid sought to re-establish the state justice sector in a manner similar to what existed prior to the Communist takeover as well as to promote human rights norms. In particular, this meant a focus on '(*i*) legislative reform, (*ii*) training and capacity building, and (*iii*) rehabilitation of infrastructure' (Tondini 2010: 48). Initially, Italy implemented this

[139] For an overview of the Afghan institutions and initiatives that received international support see Afghanistan Research and Evaluation Unit (2015).
[140] Germany has also funded rule of law work in Afghanistan through the Deutsche Gesellschaft für Internationale Zusammenarbeit (GTZ) since 2003 (GTZ 2014).
[141] The other lead nations were: the United States, armed forces; Germany, police; Japan, disarmament; and the UK, counter-narcotics.
[142] The lead nation approach was formally eliminated after the 2006 London Conference on Afghanistan.

work through state agencies, most notably the Italian Justice Project Office and the International Development Law Organization (IDLO).

The initial post-intervention years offered 'maximum possibility' (Dobbins, Jones et al. 2007: 15). Yet, Italy 'took a reactive, almost passive position', while it supposedly waited for guidance from relevant Afghan judicial authorities (Suhrke 2011: 188). When assistance commenced in earnest during February 2003, it was very technocratic. Support focused on locating legislation lost during decades of conflict and on drafting of new legislation. Italy was heavily involved in the legislative drafting process for the Juvenile Code, the Law on Prisons and Detention Centres, and particularly the Interim Criminal Procedure Code (ICPC).

Italy determined that war-ravaged Afghanistan's most pressing judicial need was crafting the new ICPC, despite an extant code from Daoud's era. The end result was a 'brief version of the Italian civil procedure code' (Suhrke 2011: 189). Italian officials stressed the ICPC was 'a simplified text designed to make the work of the criminal police and judges easier and compliant with international human rights' (cited in, Ahmed 2005: 101). Under intense political pressure, Karzai promulgated the ICPC in early 2004 (Miller and Perito 2004).[143] The law, however, generated immense domestic opposition within the Ministry of Justice (MOJ) and the broader legal community. The ICPC was deeply flawed in terms of the drafting process and the substantive content as it basically replicated Italy's criminal procedure code (Hartmann and Klonowiecka-

[143] Italy apparently threatened to withhold development assistance worth millions if the ICPC was not approved (Hartmann and Klonowiecka-Milart 2011: 276).

Milart 2011).[144] The law was a decided failure (Röder 2007: 309) and a new law was eventually drafted to replace it.

Italy's performance has been rightly criticised for its initial inaction followed by an ill-conceived, heavy-handed approach. As noted by a major RAND study, 'Italy simply lacked the expertise, resources, interest, and influence needed to succeed in such an undertaking' (Dobbins, Jones et al. 2007: 1).[145] Italian assistance did little to bolster the rule of law and squandered a crucial window of opportunity.[146] Moreover, it failed to constructively engage with the pillars of judicial legitimacy, most notably tribal and religious authority, when the timing was most auspicious for collaboration.

1.2 United States

Even when Italy was still the 'lead nation' for the justice sector, the US was a major player. After Italian assistance scaled back, the US more than filled the void. Since 2003, the US funded a slew of major initiatives through various government agencies, most notably USAID, the State Department, and later the Department of Defense (DOD). A recent major study has found that the 'DOD, DOJ, State, and USAID have spent more than $1 billion on at least 66 programs since 2003 to develop the rule of law in Afghanistan' (SIGAR 2015b: 1). As with the broader US nation building effort in

[144] Afghans saw the ICPC as an outside intervention that failed to constructively engage with the existing legal framework or have a credible implementation plan. The law stipulates that 'any existing laws and decrees contrary to the provisions of this code are abrogated' without identifying those laws or if the ICPC repeals or supplements the pre-existing code (Islamic Republic of Afghanistan 2004).
[145] Scholars have generally echoed Rand's negative assessment. For examples, see International Crisis Group (2008: 6), Sherman (2008: 323), Hartmann and Klonowiecka-Milart (2011), and Suhrke (2011: 186-192).
[146] IDLO continued to be engaged in the justice sector even as Italy became a less important player (Reed, Foley et al. 2008, SIGAR 2014a, IDLO 2015).

Afghanistan, each agency involved pursued its own programmatic priorities that were not necessarily coordinated or even broadly consistent with other efforts (Keane and Diesen 2015).[147]

Key USAID Initiatives[148]

USAID - Afghanistan Rule of Law Project (AROLP), (2004-2009)

The $44 million USD AROLP was USAID's first foray into judicial state-building in Afghanistan (SIGAR 2015b: 34).[149] Implemented by Checchi Consulting, AROLP ran from October 2004 to July 2009, focusing on five key areas:

> 1) strengthening court systems and the education of legal personnel; 2) law reform and legislative drafting; 3) access to justice/informal sector; 4) support for commercial court reform; and 5) human rights and women's rights under Islam (Checchi and Company Consulting 2006: 3).[150]

The Supreme Court was AROLP's most important partner; its consent was essential for most programming.[151] The programme also worked with law schools and occasionally other justice sector institutions, such as the MOJ and the Attorney General's office. Capacity building formed a cornerstone of programming. AROLP 'trained more than 1,161 of Afghanistan's 1,371 sitting judges' as well as 60 law professors and 100 university administrators (Checchi and Company Consulting 2009b: 3). AROLP printed and distributed legal materials, including laws, legal textbooks, and reference

[147] The US has consistently revamped and reoriented its official approach to coordination in the hope that restructuring inter-agency organizational authority would improve performance. Improvement, however, always remained illusive (SIGAR 2015b: 14). Unsurprisingly, coordination and prioritization issues among various international donors and implementers compounded these problems further.
[148] See SIGAR (2015b) for an overview of all 14 USAID programmes related to the Afghanistan's justice sector.
[149] In total, USAID invested over $13.3 billion in Afghanistan reconstruction efforts, of which rule of law efforts formed only a small subset (SIGAR 2014c).
[150] For a comprehensive description of all work carried out, see Checchi and Company Consulting (2009b).
[151] AROLP also worked with lower courts but under the direction of the Supreme Court, which has constitutional authority over all judicial administration.

guides. AROLP also sought to improve the courts administrative capacity, most notably through the Afghan Court Administrative System (ACAS).[152]

In the later years, AROLP displayed some interest in the non-state justice sector. Programmers believed that 'the linkage between the formal and informal justice sectors [is] essential to improving the rule of law in Afghanistan' (Checchi and Company Consulting 2009b: 33). AROLP sponsored research on non-state justice and tried to increase citizen's awareness of the state justice system and 'their legal rights and responsibilities under the Constitution of Afghanistan' (Id.). AROLP also advocated for 'a national policy on state relations with informal justice mechanisms' (Id.: 34).

On balance, however, AROLP did little to address structural problems in the Afghan justice sector or constructively engage the non-state sector. This is evident based on its chosen evaluation criteria: 1.) A 'national policy on informal justice sector was developed,' and 2.) The population became more favourably disposed 'toward the formal justice sector, based on the percentage of Asia Foundation survey respondents who said they went to state courts to resolve disputes' (Checchi and Company Consulting 2009a: 25).[153] A non-state justice policy was developed. It reflected broad agreement at the ministerial level and marked the first official recognition of non-state justice authorities (at least those not associated with the Taliban). The national draft

[152] While the ACAS system was 'virtually complete' when AROLP ended, the system was beset was obstacles and it was unclear whether there was any meaningful demand (Checchi and Company Consulting 2009b: 4).

[153] The Asia Foundation publishes an annual donor funded survey of Afghan popular opinion, for example see Rennie, Sharma et al. (2008). It is highly influential internationally, largely due to the shortage of public opinion polling.

policy, however, was deeply problematic. It was not drafted in a consultative manner and was highly regulatory. Furthermore, it did not reflect a real consensus among ministries as it relied on ambiguous language to paper serious differences, and did not involve any significant engagement with non-state judicial actors (International Rule of Law Professional 2015).

The second evaluation criterion was equally problematic. Projects was predicated on the simplistic and inaccurate belief common to many rule of law programmes that simply informing people about the state courts and their rights will somehow improve the rule of law (Carothers 2003). Second, the programme sought to channel people into the formal court system without regard for the quality of justice. At best, the courts were under-resourced, low on human resource capacity, slow, expensive, and possessed limited enforcement capacity. All too often, they were corrupt, predatory, and rent seeking (Jones 2010, De Lauri 2013, Singh 2015). It made little sense to channel cases into the state justice system regardless of the quality and capacity of its courts.

USAID Rule of Law Successor Programmes (2010-2014)

As AROLP concluded, USAID interest in promoting the rule of law spiked. By 2009, promoting a just, effective legal order was seen as a key weapon in the fight against an increasingly powerful insurgency in part fuelled by the Afghan state's immense corruption (Chayes 2015). USAID funded two related rule of law programmes. [154] Rule of Law Stabilization-Informal sought 'to "promote and support the informal justice

[154] Following a controversy over initially awarding the entire successor rule of law programme as a 'no bid' contract to Checchi, USAID decided to split its rule of law support programmes into two major strands: formal and informal with two separate implementers (Coburn 2013: 41).

system in key post-conflict areas" as a way of improving stabilization' (Scope of Work, Annex A in Dunn, Chisholm et al. 2011: 34). Rule of Law Stabilization-Formal shares a similar premise: 'developing a justice system that is both effective and enjoys wide respect among Afghan citizens is critical to stabilizing democracy and bringing peace' (Tetra Tech DPK 2012: 1).

Rule of Law Stabilization Program-Formal Component (RLS-Formal), 2010-2014

Tetra Tech DPK implemented the over USD$47,500,000 RLS-Formal Program from May 2010 to September 2014 (SIGAR 2015b: 34).[155] The programme focused on: 1.) Judicial capacity building; 2.) Building the capacity of court administrators; 3.) Expanding the availability of quality legal education; and 4.) Increasing public awareness of legal rights and the broader legal system (Leeth, Hoverter et al. 2012, Tetra Tech DPK 2014).[156] Despite, the difficulties of its predecessor AROLP, RLS-Formal's objectives were strikingly similar. In practical terms, this involved extensive training initiatives. Tetra Tech DPK estimates that 80 percent of judges received training from the programme (Tetra Tech DPK 2014: 8, 12). Judges from each of the 34 provinces received training as well as a wide range of court personnel, law professors and students and women's rights activists. RLS-Formal offered technical assistance, developed training and educational materials, and worked on strategic plans for judicial training. There were also public information campaigns and attempts to

[155] While both the formal and informal programmes ran from 2010 to 2014, there were three distinct phases as USAID did not immediately approve a four-year programme. Rather there were two one-year programmes and a two-year programme. The objectives remained the same, but it did have a negative impact on programme planning and continuity.
[156] The programme also undertook activities to promote gender justice and other social goals.

bolster the public outreach capacity of the Supreme Court and MOJ.[157]

The positive results were decidedly modest, particularly compared to expenditures. The programme certainly gave many Afghan stakeholders the opportunity to acquire relevant skills and most participants viewed the trainings positively (Leeth, Hoverter et al. 2012). The programme also increased public knowledge about the court system (Id.). However, RLS-Formal faced chronic difficulties. RLS-Formal 'tasks DPK with trying to improve the public image and use of the formal judiciary' (Leeth, Hoverter et al. 2012: 6). Improving the public's perception alone does not fix the judicial sector, which continued to be among the most corrupt sectors of a dauntingly corrupt state apparatus. RLS-Formal ignored the major issues in the underlying political economy of the Afghan justice system, including the lack of judicial independence and endemic corruption. Public service announcements encouraging more people to use a highly corrupt justice system does little to improve the rule of law and threatens to further undermine faith in the judicial system.

Programming depended on consent from the institutional actors responsible for many of these problems. DPK's final report is strikingly forthright. After noting major challenges with corruption and 'weak political support for rule of law reforms' in general, the report explains:

> The most difficult barriers to overcome during project implementation, and the barriers that threaten the sustainability of project initiatives, are a lack of willingness among counterpart institutions to support and adopt reforms, and a failure to allocate sufficient funds to maintain quality trainings for current and future justice sector personnel. Leadership at counterpart institutions continues to demonstrate a lack of commitment to justice sector reforms by delaying the approval of tools and technologies that will

[157] For a detailed discussion of all programme activities, see Tetra Tech DPK (2014).

increase the efficiency and transparency of courts (Tetra Tech DPK 2014: 3).

The Supreme Court was particularly problematic. Frequently, 'when the Supreme Court was asked to approve new initiatives or reforms, the institution tended to make approval contingent on future events that never happened' (Tetra Tech DPK 2014: 3). Tetra Tech ultimately determined that these attitudes reflected a clear 'reluctance to embrace new processes and procedures that increase the efficiency, transparency, accountability, and fairness in the justice sector' (Id.). While the Supreme Court tolerated most initiatives, it was never invested in them. Thus, most activities underwritten by RLS-Formal had little prospect for sustainability or potential to foster meaningful institutional change. While DPK certainly had issues as a contractor, USAID deserves the most stringent criticism. It designed the programme and continually displayed almost wilful blindness to political reality. As SIGAR notes, 'USAID nearly doubled funding, even though it knew the Afghan Supreme Court was not interested in funding or otherwise sustaining those activities' (2015: 21).[158]

The legal system faced serious legitimacy issues. Yet, programming never meaningfully engaged with the longstanding pillars of legitimacy in Afghanistan: religion, cultural norms, and provision of public goods. Instead, the focus was on improving the image of the judiciary based on the mistaken idea that the potential court system lacked sufficient information about state courts. In reality, Afghans recognized

[158] The lack of interest in meaningful reforms was not unexpected. For instance, the 2012-2014 RLS-Formal Performance monitoring plan noted there was 'High' risk of 'resistance to training activities' and lack of capacity to absorb program technical assistance' (Tetra Tech DPK 2012: 5). It also identified a 'Medium-High' risk regarding 'cooperation and productive relations with counterparts' (Id.). US rule of law assistance has showed little interest in changing its approach to dealing with institutions decidedly disinterested in the rule of law. The latest major USAID rule of law programme, known as "Adalat", has a major goal of 'combatting corruption by empowering relevant Afghan Government agencies/institutions' (USAID 2015: 9). The irony is presumably unintentional.

that courts are not credible dispute resolution forums. Neither judicial performance nor public perception of the judiciary has improved (De Lauri 2013, SIGAR 2015b: 19, Singh 2015). Avoidance of the courts was entirely rational. Even if the quality of justice had improved by training or administrative reform, nothing in the programme addressed the judicial system's inability to enforce its judgments or prevent outside interference with its proceedings.

Rule of Law Stabilization-Informal Component (RLS-Informal), 2010-2014

The Checchi administered RLS-Informal Program operated from 2010 to 2014 in 48 districts at a cost of over USD$39,700,000 (SIGAR 2015b: 34).[159] RLS-Informal sought:

> to enhance access to fair, transparent, and accountable justice for men, women, and children by (1) improving and strengthening the traditional dispute resolution system, (2) bolstering collaboration between the informal and formal justice systems, and (3) supporting cooperation for the resolution of longstanding disputes (Checchi and Company Consulting 2014b: 1).[160]

The programme had two major goals. First, RLS-Informal sought to improve the quality of non-state justice and to strengthen linkages between the state and non-state justice systems. Second, it aimed to supplement and consolidate US-led counterinsurgency efforts. RLS-Informal seeks to fill the 'justice vacuum' in territories that have 'been "cleared and held" by the military and the Taliban "courts" removed'

[159] See Coburn (2013) for a broad overview of international engagement with the non-state justice sector.
[160] These objectives evolved over time during the pilot stages from 2010 to 2011. Initially the programme had 5 objectives: '1) Informal Justice Support in Pilot Districts, 2) Mapping community based dispute resolution (CBDR) and the State Justice System, 3) Legal Defense, 4) Public Outreach and Education, and 5) National Policy Development' (Checchi and Company Consulting 2010: 1). From 2011, the programme had a tight focus on the three objectives highlighted above.

(Dunn, Chisholm et al. 2011: 17).[161] As the Afghan state could not perform this role due to insufficient capacity, localized non-state justice mechanisms had to be strengthened, or in some instances created, to prevent "'teetering" areas from reverting back to Taliban justice and influence' (Id.).

RLS-Informal engaged with key non-state judicial actors in targeted areas. As with most rule of law programmes, training was a major focus for elders and other informal justice actors. Assistance took the form of substantive training on the content of state and Sharia law as well as on administrative matters, including referral processes and judgement recording techniques. Beyond training, RLS-Informal sought to 'encourag[e] women's participation in TDR processes, implement[] a program of public outreach, and build[] networks of elders' (Checchi and Company Consulting 2012b: 1).[162]

While RLS-Informal's goals were portrayed as mutually reinforcing, they are not necessarily complimentary. Local actors that had been empowered after the US military's operations were not those who had been in power prior to Taliban control. Thus, these goals are distinct and it is worth evaluating the programme's two main goals independently.

[161] The United States Institute for Peace (USIP) also implemented a State-Department funded programme which sought to bring stability by bolstering the capacity of non-state justice actors. USIP received $10,209,990 from the State Department for programmes focused primarily, but not exclusively on non-state justice (SIGAR 2015b: 31). RLS-Informal marked the overt militarization of rule of law assistance as it explicitly sought to enhance the ability of non-state justice systems to effectively compete with Taliban justice as part of military counterinsurgency efforts. The programme had, at best, uneven results and displayed all of the problematic elements discussed below. For detailed critical assessments of USIP programming, see Gaston, Sarwari et al. (2013) and Wimpelmann (2013)

[162] For detailed accounts of all RLS-Informal programming from 2010 to 2014, see Checchi and Company Consulting (2011, 2012b, 2014a).

Regarding its impact on the quality of non-state justice, there were some positive signs. The programme was lauded for a localized approach tailored to each setting.[163] Unlike its formal counterpart, RLS-informal did not attempt to push people into the corrupt, predatory state justice system. Many participants saw the benefits of being more knowledgeable, which translated into greater social standing and, perhaps, better quality of justice. Indeed, evidence these changes sometimes occurred (Checchi and Company Consulting 2014a, Schueth, Naim et al. 2014). Training alone may not change behaviour, but it is a first step in encouraging non-state justice actors to follow state law or Sharia law is providing access to relevant information.

RLS-Formal was grafted onto disinterested state-institutions. In contrast, many non-state justice actors were eager to collaborate with RLS-Informal. At the same time, the plurality of actors also raised significant challenges. The programme made a good faith attempt to engage with the longstanding pillars of legal legitimacy. It sought to work within the tribal system and capitalize on participants' desire to increase their social standing through greater knowledge of Islam (and to a lesser extent state law), and the ability to access international assistance to bolster their status in the community. This could potentially enhance their standing in the community and allow them to more effectively provide order. Moreover, the external evaluation supports the claim that the behaviour of some non-state justice actors did actually change due to outside assistance (Schueth, Naim et al. 2014).

[163] Before engaging in programming, detailed assessments of local justice dynamics were undertaken.

The second component of the first goal, increasing linkages between state and non-state justice, reflects the state justice system's deeper shortcomings. While more cases flowed to the non-state system after the RLS-Informal programme, there was no increase in the number of cases being referred to state courts (Schueth, Naim et al. 2014: 32-34). This dynamic reflects the citizenries' continued low regard for state courts (De Lauri 2013, Singh 2015).

Strengthening Non-State as a Legal Order

RLS-Informal faced real challenges. First, the selection of participants was inherently fraught. While the programme genuinely attempted to understand local dynamics, it was beyond its technical capacity to really understand localized dynamics and how the infusions of international assistance would subsequently influence communal relations. While reports cast participants as motivated solely by a desire to help the broader community, often times they simply want greater access to international funds and other assistance to enhance their local influence (Coburn 2013). Second, the programme lacked a clear, coherent approach for navigating the tensions between state law, including international human rights norms, and Islamic law. Thus, programme decisions were inevitably somewhat ad hoc and based on short-term calculations. While RLS-Informal reflects some knowledge of local realities, insurgents almost invariably knew areas better. Moreover, international intervention in local matters all too often made local tensions worse and resolution of longstanding disputes more difficult (Coburn 2013: 37).

Non-state Justice as Counterinsurgency

Strengthening the non-state justice sector to undercut the Taliban's justice system proved deeply challenging and often counterproductive.[164] First, RSL-Informal laid the groundwork for counterinsurgency efforts on a foundation that did not previously exist rather than meaningfully linking to religious and tribal authorities. Therefore, any short-term advances inherently depended on outside support and quickly evaporated once international support is gone. Second, even while RLS-Informal's short-term approach meant by definition a pressure for short-term quick wins and demonstrable metrics, even these were often in short supply. This is evident in the final report. Notably, the report utilizes extensive quantitative analysis with a wide variety of metrics, while reflecting very little demonstrable progress (Checchi and Company Consulting 2014a).

Third, it assumed a non-existent "justice vacuum". If there was truly a void, then RLS-Informal's efforts to strengthen or in some cases create new non-state dispute resolution mechanisms would have had a far greater likelihood of succeeding. In reality, warlords, the Taliban, or the communities themselves invariably underpinned order at the local level. RSL-Informal's approach to strengthening non-state justice was fraught as the designated local representatives often were not the most prominent community members prior to the arrival of assistance. Thus, whatever authority these individuals had largely reflects international assistance rather than pre-existing standing in the community. Shuras set up by international actors could be quite destabilising to the

[164] Many of these problems were similar to those faced by militarily-led efforts. The specific issues raised by military clearing an area so "authentic' non-Taliban traditional authorities can reassert order will be discussed later in this chapter.

local communities by distributing large amounts of external funding as well as empowering individuals through military force that may not enjoy substantial popular support (Miakhel and Coburn 2010).[165] Alternatively, there was often a lack of participation among local authorities. This was particularly true in the areas where the Taliban continued to enjoy strong influence; the so-called "teetering" districts (Marlowe 2010). Moreover, the distribution of aid itself can be destabilizing (Fishstein and Wilder 2012).

Second, RLS-Informal failed to understand the deep challenges inherent in an environment characterized by highly combative legal pluralism. Providing an alternative justice venue alone was insufficient. Taliban justice was generally well regarded; a viewpoint particularly prevalent in the Pashtun heartland (Johnson 2013: 9). The Taliban actively sought to prevent local communities from using the state justice or US-backed dispute resolution forums (Giustozzi and Baczko 2014). Taliban issued "night letters" threatened to kill all individuals and the entire families of those that collaborated with the international programmes or the Afghan government (Johnson and Mason 2007). In instances, where villages were under the protection of international military forces, the Taliban promise to retaliate when those troops leave, regardless of the duration (Id.). As Johnson highlights, these threats are both 'devastatingly effective' and help 'keep NGOs and reconstruction activities out of areas controlled by the Taliban' (Johnson 2007: 328). Nothing in RLS-Informal's programming was able to effectively counter the Taliban's creditable threats of

[165] Interviewers suggested it was not uncommon for individuals with access to international support using aid and the threat of US military force to pursue personal vendettas (International NGO Professional 2014, NGO Legal Specalist 2014).

immediate and long-term violence.

Implementation versus Programme Design

While this section has criticized programme implementers, these issues reflect larger more profound fundamental problems in the USAID bureaucracy. Invariably, USAID seeks to control defining the scope and content of projects as well as their implementation. [166] As Carothers highlights, this micromanaging tendency is particularly acute in contracts that 'specify precisely what the U.S. contracting partners are to do at every step of the way throughout a project' (Carothers 2009: 26).[167] The level of micromanaging in the Afghanistan RLS-Informal contracts is stunning, particularly given the fluidity of the situation and the need for a nuanced, localized approach. In addition to USAID's inherent power to modify programming under their contract, Tetra Tech and Checchi, for instance, generated elaborate performance monitoring plans that had to be submitted to, and approved by, USAID (Checchi and Company Consulting 2012a, Tetra Tech DPK 2012).[168]

US State Department Initiatives

Justice Sector Support Program (JSSP), 2005-2014

The US State Department was a major funder of judicial state-building activities

[166] Grants to implementing partners, often structured under "co-operative agreements" rather contracts, were awarded to NGOs rather than to for-profit contractors. However, USAID still retains a large degree of control over non-profit implementers.
[167] Stanger (2009: 109-135) provides an overview of the rise of for-profit USAID contractors and the consequences this had for US international assistance.
[168] USAID's drive towards ever great quantification of results stems largely from the need to establish to Congress exactly how funding is spent and what has been achieved. Thus, USAID increasingly micromanages programmes. At the same time, its in-house capacities have been largely 'hollowed out' (Carothers 2009: 20), while the extensive demands of contracting in Afghanistan have generated a general shortage of qualified contractors (SIGAR 2013b: 15).

through its Bureau of International Narcotics and Law Enforcement Affairs (INL).[169] It was also the 'lead' US agency tasked with coordinating US rule of law assistance. Since mid-2005, INL had engaged the for-profit contractor, Pacific Architects and Engineers (PAE) through the JSSP. The initial programme ran from 2005 to 2010. There was a continuation of JSSP from 2010 to 2014. The JSSP was the 'primary capacity building vehicle of INL's criminal justice assistance' to the government of Afghanistan (US State Department 2015).[170] The JSSP reflected grand ambitions and a large scope. The programme expenditures were USD$241 million from 2003 to 2014, making it the largest single rule of law programme (SIGAR 2015b: 9).

The programme was oriented around three major components. Component one focused on providing a wide array of trainings for regional justice sector officials, such as judges, prosecutors, and defence attorneys.[171] Component two focused on establishing and distributing a case management system 'designed to track criminal cases from investigations through sentencing, appeal, and release from prison' (SIGAR 2014a: 1). The third component emphasized institutional capacity building focused on building the

[169] The State Department has funded 49 programmes related to Afghanistan's justice sector (SIGAR 2015b: 31-33). The State Department also partnered with the US Department of Justice to implement the Senior Federal Prosecutors Program. The programme ran from February 2005 to September 2014 at a cost of USD$22.7 million (SIGAR 2015b: 9). Despite coming from different legal traditions, the programme sent senior US prosecutors to Kabul 'to provide legal mentoring and training to build investigatory and prosecutorial capacity to combat corruption, drug trafficking, and other serious crimes' (Wyler and Katzman 2010: 32). The programme also supported legal drafting similar to Italian efforts to draft the ICPC. In particular, DOJ attorneys took the lead on counterterrorism and extradition laws, the counternarcotic law, military courts legislation, and other legislations in a manner largely autonomous from the relevant Afghan actors. As with Italian drafting efforts, the results were largely unsuccessful and ill suited to local realties (Hartmann and Klonowiecka-Milart 2011).

[170] In 2006, a separate PAE implemented Correction System Support Program was spun off from the JSSP.

[171] In January, IDLO, rather than PAE, became the implementer of regional training activities under JSSP component one in January 2013. It was known as the USD$47.7 million Justice Training Transition Program (SIGAR 2014a: 2). This decision generated a significant amount of controversy as SIGAR claimed it undermined the monitoring and evaluation of component one (IDLO 2013, SIGAR 2014a).

administrative and technical capacity of relevant ministries.

As with AROLP and RLS-Formal, JSSP focused on state institutions. However, it was notably broader in scope. JSSP offered training, capacity building, and technical assistance to the Attorney General's Office and the Ministry of Justice. The Ministry of Women's Affairs, the Interior Ministry, the Independent National Legal Training Center, and the Supreme Court likewise received assistance.[172] Staff numbers were quite large. In 2011, for example, JSSP employed '93 Afghan legal experts, 65 American advisors, and over 100 Afghan support staff' (US Senate Foreign Relations Committee 2011: 38). The programme was designed to cover the entire country, particularly through component one. However, as it focused on the national institutions, the programme was invariably Kabul-centric.

The programme claimed some notable outputs. Training was undertaken on a massive scale with 'a grand total of over 300 JSSP courses training over 13,500 students' (SIGAR 2014b: 2). Training occurred in all 34 provinces for judges, prosecutors, defence attorneys, and other legal personnel. By the end of 2014, JSSP had developed and implemented a comprehensive case management system active in 18 provinces featuring data on 104,000 cases (SIGAR 2015a: 137). The programme provided assistance with legislative drafting and law implementation. For example, JSSP supported the drafting of the 2009 draft policy on non-state justice (SIGAR 2014b: 3). JSSP also created new institutions, notably the Attorney General's Anti-Corruption

[172] See US State Department Office of the Inspector General (2008) for more details regarding US programming priorities and activities in each Afghan state institution.

Unit, the Afghanistan Independent Bar Association, and the Ministry of Justice's Planning Directorate (Id.).

Despite the JSSP's broad reach and substantial funding, comprehensive audits have shown no demonstrable evidence that the programme advanced the rule of law in Afghanistan or even met its own programmatic objectives (SIGAR 2014b, 2015b). Despite extensive training and the passage of new laws, but there have been no notable progress towards a rule of law culture. None of the key justice sector institutions displayed a meaningful commitment to uniform application of the law or a willingness to follow it. Admittedly, certain political actors have been more willing to engage the international community. For instance, the Ministry of Women's Affairs was more receptive to programming than the Supreme Court but it also had less influence. All major justice-sector institutions remained firmly under the control of 'one of the most corrupt regimes on the planet' (Paris 2013: 538). Indeed, the State Department was fully aware of this problem though it was often cast simply as a matter of 'political will'.[173]

JSSP consistently faced major management, oversight, and implementation issues (SIGAR 2014a, b, 2015b). SIGAR notes that JSSP suffered from a series of 'poorly designed deliverables,' which in turn led to the actual deliverables produced being 'useless' (SIGAR 2014a: 5). For instance, in partnership with the Ministry of Woman's Affairs, JSSP wanted to promote 'gender mainstreaming' but did not define

[173] For instance, according to a SIGAR report 'State said the Attorney General's Office (AGO) lacks the political will to prosecute high-level, corrupt officials' (SIGAR 2013a: 135).

the term, state the issue to address, or outline which justice institutions should be targeted (Id.). Under the 2010 initiated programme, there were no performance metrics for the first two and a half years of programming. When they were established, the performance metrics 'lacked baselines against which to assess progress and targets to which PAE could be held accountable' (SIGAR 2014a: 6).

US DOD Initiatives

Rule of Law Field Force-Afghanistan (ROLFF-A), 2010-2014

The United State Military became directly involved in efforts to promote the rule of law in Afghanistan through the ROLFF-A initiative.[174] ROLFF-A operated from September 2010 to February 2014. DOD spent 'at least $24 million on its program activities' primarily focused on subsidisation and improvement of the state justice sector (SIGAR 2015b: 10).[175] ROLFF-A sought to:

> provide essential field capabilities and security to Afghan, coalition and civil-military rule of law project teams in non-permissive areas of Afghanistan, in order to build Afghan criminal justice capacity and promote the legitimacy of the Afghan government' (Department of Defense Centeral Command 2010).

Operating in ten provinces, the programme had four key priorities:

> (1) Developing human capacity, (2) Building sustainable infrastructure, (3) Promoting awareness of the legal rights of citizens and access to state sanctioned justice actors and public trials, and (4) Facilitating justice sector security (especially for provincial level judges) to ensure that judges can make fair and transparent decisions based on the law without fear of violence or other reprisals (Department of Defense 2012b: 75).

ROLFF-A attempted to strengthen the state justice system by working primarily with

[174] Operationally the initiative was under the auspices of the Combined Joint Interagency Task Force-435.

[175] The NATO International Security Assistance Force (ISAF) also collaborated on rule of law efforts with DOD from 2011 to 2014. While ISAF was formally the lead actor, in reality DOD continued to be the dominant actor.

the Supreme Court, the Ministries of Justice and Interior, and the High Office of Oversight for Anti-Corruption (SIGAR 2011: 93). The programme proclaimed its neutrality with regards to non-state justice 'provided that dispute resolution is not administered by the Taliban or other insurgent groups' (Department of Defense 2012a: 113). Though the national government had yet to formalize its relationship with non-state justice, the programme sought to engage 'Afghan Justice Sector actors to build linkages between the two systems' (Id.).

ROLFF-A was fully integrated within larger stability and counterinsurgency efforts (Nachbar 2011). It reflected the dominant US counterinsurgency doctrine under which 'establishing the rule of law is a key goal and end state' (Amos and Petraeus 2008: 360). As the programme's commander, Brigadier General Mark Martin, explained, ROLFF-A sought to help the Afghan state 'establish rule-of-law green zones' (Martins 2011: 25). Over time a 'hub-and-spoke linkage between green zones in key provinces and districts' would emerge, which in turn would help 'create a system of justice at the subnational level' (Id.: 27). In other words, the rule of law was conceptualised as a cornerstone of broader efforts to build the state from the bottom up, while failing to acknowledge just how ambitious and optimistic this belief was. After all, why would non-state actors who have long been sceptical of the state legal system all of a sudden embrace it absent major change in the state and at the potential cost of their lives in the face insurgent retaliation? The US military interventions never grappled with the fact that a hub and spoke system makes little sense if the state justice failed to improve simultaneously.

Even by its own standards, the programme's accomplishments were modest (SIGAR 2015b: 11).[176] Most notably, evaluators cited improved security at certain justice sector facilities due to improved physical infrastructure, enhanced the capacity of legal personnel, and improved professionalization of certain judicial proceedings (Id.).

ROLFF-A faced a multitude of serious issues. Programming assumed stabilization and rule of law programming were natural allies. In reality, stabilization and justice were often in tension. The programme faced the same issues as RLS-Informal. ROLFF-A sought to build stability on a very uncertain foundation, favoured quick wins and demonstrable outputs, and assumed a non-existent "justice vacuum" rather than an on-going, fierce combat over the provision of legal order.

As with other rule of law initiatives, due to insufficient and inconstant performance monitoring, the programme's achievements remain unclear (SIGAR 2015b). A baseline set of indicators against which to measure progress was never established. DOD does not even know how much money had been spent on ROL programmes. Ironically, as it was a military-based programme, insecurity undercut programme effectiveness. DOD's own assessment determined that insufficient security arrangements 'severely limited engagements with key Afghan leaders and meant that ROLFF-A was unable to provide security staff at the national or provincial level' (SIGAR 2015b: 11). Military intervention was fraught as they were often unable to provide effective security against

[176] The programme and evaluation reports for ROLFF-A are not publicly availably. However, ROLFF-A shares information with SIGAR that routinely reports on these activities as well as cites from the non-publicly available documents.

Taliban attacks in the short-term, let alone once programming ceased. The mere presence of the military could incite violence. As Miakhel and Coburn note, 'military negotiations with tribal elders have in some places incited violence between local groups, particularly when groups feel as if funds and power are not being distributed equitably' (Miakhel and Coburn 2010).

Additional difficulties, however, stemmed from the overt militarization of rule of law assistance and its use in counterinsurgency. First, it was by no means clear that the assumptions underpinning counterinsurgency operations are accurate. Indeed, reports by leading experts on the relationship between development and effective counterinsurgency have surmised there is a 'surprisingly weak evidence base for the effectiveness of aid in promoting stabilization and security objectives' (Thompson 2010: 1, see also Böhnke and Zürcher 2013). Moreover, the strategy reflected a unilateral decision by US decision-makers rather than a real cooperative strategy between the international community and the Afghan state for defeating the insurgents. Indeed, the international stabilization plan consistently lacked buy-in from the upper echelons of the Afghan government (Fishstein and Wilder 2012: 62).

There were also notable misunderstandings and misperceptions about DOD ROLFF-A's proper role by both state and non-state actors. DOD consistently stressed that the non-state actors it engaged were authentic, traditional, and organic. In reality, 'authority over life and death was simultaneously located in other institutions and actors, namely external interveners' rather than non-state justice actors, who were largely dependent

upon external forces for their authority (Wimpelmann 2013: 419). Alternatively, the "rule of law green zones" hub and spoke system relied on external force. State courts had little ability to implement their will outside of the capital and a few urban areas. Even more troubling, the thoroughly corrupt state judicial institutions simply could not provide stability and there was no evidence that the Karzai regime was sincere about advancing the rule of law. Even if all areas were cleared and if the military somehow defeated every insurgent, the state would still lack a legitimate legal order. ROLFF-A starkly highlights external actors' limited capacity to advance the rule of law even when backed by military force.

1.3 The UN

The UN had been involved in Afghanistan since the 2002 Bonn Accords negotiations. The United Nations Assistance Mission in Afghanistan (UNAMA) was established in March 2002 (UNSC 2002).[177] UNAMA supported programmes in a wide variety of areas, including electoral administration, provision and coordination of foreign aid, and efforts to increase security.[178] Under UNAMA, there was a Rule of Law unit and a Human Rights unit. The Rule of Law unit sought 'to establish a fair, impartial, accessible and accountable judicial system' through technical support, advocacy, and research (UNAMA 2015b). UNAMA's rule of law unit has chaired the Criminal Law Review Working Group (CLRWG) since 2009; a major coordinated effort amongst international donors and national stakeholders to revise the country's criminal codes. Notably, the criminal procedure code was revised and passed in 2014 and the CLRWG

[177] UNAMA's mandate was for one year, but it has since been renewed annually.
[178] For an overview of the UN's work in Afghanistan, see Saikal (2012).

is currently revising the penal code (International Rule of Law Professional 2015). UNAMA's Rule of Law unit also chairs the Rule of Law Board of Donors forum that seeks to coordinate rule of law promotion efforts led by major donors and programme implementers. The Human Rights unit 'analyzes and reports on the human rights situation in Afghanistan and engages in protection, advocacy and capacity-building activities' (UNAMA 2015a). These units work both independently and in partnership with state institutions. The UN, however, was rarely a major player in the justice sector, at least in terms of influence or resource allocation.

1.4 UNDP

UNDP was a significant international player in the Afghan justice sector for over a decade.[179] UNDP launched its first major justice sector project in 2003 called Rebuilding the Justice Sector of Afghanistan (2003-2005). As the name implies, it was focused on the state justice sector. This focus would remain consistent among its successor projects: Strengthening the Justice System of Afghanistan (SJSA) (2006-2009)[180] and Justice and Human Rights in Afghanistan (JHRA) (2009-2015).[181] While programming evolved, there was always a focus on the three most prominent justice sector institutions: the MOJ, the Attorney General's Office, and the Supreme Court (for

[179] The UNDP, however, never implemented programmes as large as the major US initiatives. For instance, the JHRA phase 1 from 2009 to 2012 was a USD$12 million programme (UNDP 2012: 25).
[180] Coinciding with the SJSA was the Access to Justice at the District Level (AJDL) Project. This project focused on the helping state courts project their authority more effective at the district level. AJDL sought simultaneously to strengthen citizens' capacity to claim their rights and enhance justice personnel's to 'deliver justice in compliance with the rule of law and human rights standards through capacity building, technical assistance, and provision of infrastructure' (UNDP 2009a: 11). AJDL activities were subsumed into the JHRA in 2009. The UN and UNDP also implemented the Provincial Justice Coordination Mechanism Project to try to improve donor coordination in the provinces (Id.).
[181] The JHRA programme was broken into three phases: 1.) 2009-2012, 2.) 2012-2014, and 3.) 2014-2015 (Rawkins and Hashmi 2014: 9). Thus, it is possible to assess the programme through to the end of phase two.

example, see UNDP 2005, 2009b, 2012).[182] Aid emphasized building technical capacity through the standard activities such as advice, training, and material assistance. For educational institutions, there was a focus on developing materials and curriculum as well as on capacity building (Tondini 2010: 57-58, Rawkins and Hashmi 2014). Programming also supported the creation of judicial infrastructure. In the JHRA's most recent incarnation, there were also attempts to support legislative drafting and reform. The programme was particularly concerned with ensuring compliance with 'international standards as set out in international conventions to which Afghanistan is a signatory' (Rawkins and Kamawi 2012: 27).

UNDP has made some modest contributions and its work has been tightly linked to the state's official rule of law development plans. It has conducted a large number of trainings for judges, legal personnel, state employees, law students, along with community and religious leaders (Tondini 2010: 57, UNDP 2011: 66-67). UNDP established a unit within the MOJ to review legislation for consistency with international standards that was responsible for 'improvements to several pieces of legislation including the Civil Code, the Criminal Procedure Code, the Child Act, as well as the Law on Elimination of Violence against Women' (UNDP 2013: 30). At the government's behest, UNDP funded the construction of much need judicial infrastructure outside the capital. Even here the results were mixed. Citing a litany of management, staffing, security, and land rights issues, programme implementers frankly admitted, 'UNDP lacks the professional and technical capacity to undertake

[182] Assistance was also provided to a number of secondary institutions from 2003, such as the Judicial Reform Commission, the National Judicial Training Centre, and the Afghanistan Independent Human Rights Commission.

infrastructure work directly' and advised against future building projects unless major changes and a notable increase in the capacity of UNDP Afghanistan (UNDP 2012: 24).

UNDP programming had major structural and implementation issues that dramatically undermined its impact. These include major security challenges, which are especially pronounced outside the capital. While management issues are commonplace in foreign assistance, the scope of UNDP's issues are staggering (for example, see Rawkins and Hashmi 2014: 20-38). UNDP focused on collaboration with state institutions. Thus, its work hinged almost entirely on the goodwill of its state counterparts, which at the highest levels remained uncommitted to rule of law ideals. As with the other programmes discussed, the limits of change that can be achieved by donors are stark. While ensuring Afghanistan's formal statutory compliance with its international obligations, legislative changes make little difference when the state's effective judicial authority is so heavily circumscribed. Worse, even where state courts predominate they were largely predatory. Thus, it makes little difference whether laws are reformed to be consistent with human rights treaties if the laws are not followed.

UNDP's ability to implement and sustain programmes was invariably dependant on high-level officials. In 2011, evaluators noted that all three of its main project partners, particularly the MOJ, viewed the programme as an 'external' project 'distant physically and in terms of direct management and involvement,' which substantially undermined programme effectiveness (Rodriguez and Anwari 2011: 35). UNDP consequently made

a concerted effort to improve relations with the MOJ. It achieved notable success in securing buy-in from 'senior figures in the ministry, including the Minster' (Rawkins and Hashmi 2012: 13). As a result, JHRA activities were integrated into MOJ activities and 'viewed as MOJ activities supported by UNDP, rather than as UNDP activities taking place in the Ministry' (Id.). Indeed, UNDP's work with the MOJ was lauded as a model of constructive cooperation (Rawkins and Hashmi 2012: 13, UNDP 2012). However, in May 2014, the acting Minister of Justice issued a formal complaint about the project and programme staff, and 'many managers and staff [were] instructed to cease their cooperation with the project' (Rawkins and Hashmi 2014: 13). Given the fluidity of Afghanistan's political situation and security environment, programmatic achievements, however modest, can quickly evaporate.

1.5 Programmatic Progress and Challenges

While the overarching thrust of each of these programmes achieved at least a few minor tactical gains, no international effort meaningfully advanced the rule of law. Each of these initiatives faced significant challenges in a complex environment with serious security concerns. However, the biggest problem was that key state actors were not committed to the rule of law and there was little real demand for the assistance. Until high-level state officials get serious about reducing corruption, improving judicial performance, and engaging with non-state actors, judicial state-building assistance will inevitably achieve little regardless of expenditure levels or programme design.

2 CONCEPTUALISING INTERNATIONAL JUDICIAL STATE-BUILDING IN AFGHANISTAN

When the Taliban regime collapsed the legal system was marked by a high degree of legal pluralism. Indeed, the entire foundation of the initial security arrangements outside the capital was predicated on alliances between the state and one set of armed non-state justice sector actors, the warlords, who would benefit from the regime change. In places outside state or warlord control, the justice system was based on tribal codes. International assistance reflected the optimistic and ultimately unrealistic idea that these tacit alliances would become less necessary as the state courts gained capacity and authority. Unlike Timor-Leste, where the post-independence state transformed the predominant dynamic from competitive to cooperative legal pluralism, the Afghan state was never able to achieve that legitimacy. At best, its relationship remained competitive with non-state judicial actors, but often the situation was marked by overt violent combat between systems, most notably the Taliban justice system.

While focused on bolstering state justice sector institutions in a straightforward subsidisation strategy for over half a decade, international actors eventually realized subsidisation alone was insufficient in an environment of combative legal pluralism. However, international assistance invariable remained largely ad-hoc and driven by overarching policy concerns that bore little resemblance to the grandiose claims about ensuring the rule of law and promoting access to justice for the ordinary Afghan.

2.1 Subsidisation Strategy From Bonn to the Afghanistan Surge (2002-2008)

Once they began in earnest in 2003, rule of law promotion efforts overwhelmingly focused on subsidisation. The vast majority of judicial infrastructure had been destroyed during the conflict. Qualified legal professionals were scarce and their training needs were daunting (Armytage 2007). The international community sought to support the reestablishment of many pre-existing legal institutions as well as the creation of new ones, such as the Judicial Training Centre and the Afghanistan Independent Human Rights Commission. International assistance was a prerequisite for enabling most justice sector organizations to function at all. Subsidisation thus reflected a clear, compelling rationale: The state justice sector desperately needed improved human resources, training, infrastructure, and material needs. International aid was focused on building modern state institutions that acted in accordance with the rule of law. Subsidisation support is also the type of support international actors are best positioned to offer (Carothers 1999). Notably, subsidisation remained the key strategy both during and after the lead nation approach (London Conference on Afghanistan 2006: 8, Tondini 2007).

While there were consistent calls for more aid and for subsidisation efforts to be improved (for exmaple see Bassiouni and Rothenberg 2007), the subsidisation approach was deeply embedded in nearly all judicial state-building efforts. With regards to the rule of law, the 2005-2010 USAID-Afghanistan Mission's strategic objectives explicitly endorsed and emphasised a subsidisation approach focused upon 'build[ing] capacity of the formal justice sector' by 1.) 'Decreas[ing] obstacles to

citizens accessing the formal justice sector; 2.) 'Increas[ing] professionalism of judicial sector personnel'; and 3.) 'Strengthen[ing] the institutional capacity for lawmaking and technical drafting' (USAID 2005: 17).

The initial international efforts faced substantial criticism. First, many observers claimed that insufficient resources were allocated to state reconstruction (for example, see Paris 2004: 226-227, Weinbaum 2006: 131, Barfield 2010: 315-320). However, Afghanistan received an immense amount of support in comparison to other contemporary peacebuilding missions. Moreover, Afghanistan's aid absorptive capacity was limited (Suhrke 2011: 119-141). While lack of support undoubtedly negatively impacted some areas, most notably security, merely increasing assistance does not guarantee improvement and often produces significant negative externalities. Building the rule of law takes decades and there is no clear area where more rule of law assistance would have clearly translated into better quality of justice or a state more committed to the rule of law.

Second, rule of law efforts were slow to start. Once assistance commenced, it was initially focused on non-essential areas. Legal drafting was heavily criticized because it involved wholesale importation of laws, despite Afghan stakeholders' objections (Hartmann and Klonowiecka-Milart 2011). These criticisms were well founded. Certainly it is hard to justify Italy waiting during the crucial early period and then prioritizing the production of a criminal procedure code that lacked any local demand or constituency.

As an overarching approach subsidisation makes sense, yet it ultimately underperformed due to a mix of a slow start, poor strategic choices, and state disinterest. These choices included failing to establish nationwide security during a period of relative calm, outsourcing security to warlords, and allowing corruption to flourish (Chayes 2006, Peceny and Bosin 2011). State officials generally cared little for the legal modernization plans envisioned by internationals.[183] Moreover, the programmatic initiatives were decidedly uninspired. Assistance to Afghanistan constitutes a paradigmatic example of a 'breathtakingly mechanistic approach to rule-of-law development' focused on replicating 'institutional endpoints' – an approach that has been widely discredited (Carothers 2003: 9). The pattern Carothers described neatly describes Afghanistan's situation, donors assessed:

> in what ways selected institutions do not resemble their counterparts in countries that donors believe embody successful rule of law—and then attempting to modify or reshape those institutions to fit the desired model. If a court lacks access to legal materials, then those legal materials should be provided. If case management in the courts is dysfunctional, it should be brought up to Western standards. If a criminal procedure law lacks adequate protections for detainees, it should be rewritten. The basic idea is that if the institutions can be changed to fit the models, the rule of law will emerge (Id.).

Unsurprisingly, outside investments in the state justice sector produced minimal progress towards the rule of law.

Over time, international actors expressed increasing interest in the non-state justice sector, although this did not translate into actual investment. Ideas included

[183] This dynamic was particularly apparent with the Supreme Court under conservative Islamist Chief Justice Fazl Hadi Shinwari. However, the Supreme Court remained a problematic partner regardless of leadership.

incorporation by shifting cases from the non-state sector into the state courts, harmonization through attempts to ensure that non-state courts act in manner consistent with state law, and incorporation efforts to establish some sort of overarching systems where jirgas and shuras would function akin to courts of first instance (Bassiouni and Rothenberg 2007, Center for Policy and Human Development and UNDP 2007, Tondini 2010, Wyler and Katzman 2010). These concerns about non-state justice were invariably secondary, and often fleeting. In reality, programming largely left the non-state justice sector untouched until the dramatic shift in policy triggered by the election of President Obama.

2.2 A Comprehensive, but Inchoate Approach (2009-2014)[184]

After Barack Obama was elected US President, Afghanistan ranked as a top foreign policy priority. Yet it was a priority based on a deep paradox: the Obama administration was determined to defeat the insurgency and stabilize the Afghan state, while avoiding an open-ended commitment. Nearly all development aid, including rule of law assistance, emphasized these objectives. The top US Military Commander in Afghanistan, General Stanley McChrystal, argued that effective counterinsurgency involves bolstering the quality and access to both state and non-state justice mechanisms 'that offer swift and fair resolution of disputes, particularly at the local level' to disrupt the Taliban and their justice system (McChrystal 2009: sec. 2, pg. 14). Furthermore, McChrystal believed the international community 'must work with GIRoA [Government of the Islamic Republic of Afghanistan] to develop a clear

[184] As noted above, the UNDP continued to be active in Afghanistan during this time. However, the comparatively modest UNDP judicial state-build programmes operated in relative isolation from US efforts and retained a clear subsidisation focus.

mandate and boundaries for local informal justice systems' (Id.).

After a comprehensive policy review, Obama ordered an 'Afghan surge' modelled on similar efforts to stabilize Iraq against insurgent advances. Obama authorized 30,000 additional ground troops to stabilize the country, but these troops would begin to be withdrawn after 18 months. In addition to ordering a substantial troop increase, Obama ordered 'a dramatic increase in our civilian effort' including efforts to promote rule of law (Obama 2009b). In addition to a vast increase in funds, there was a notable spike in external human resources that roughly 'tripled the total U.S. government civilian presence in Afghanistan from 300 to 1,000, overseeing additional thousands of contracted civilian implementing partners' (Brown 2012: 3). These additional resources would allow international and Afghan state forces to make progress against the Taliban insurgency, 'while building the Afghan capacity that can allow for a responsible transition of our forces out of Afghanistan' (Obama 2009a).[185] Even after the drawdown, the rule of law programmes received dramatic funding increases into 2014 (SIGAR 2015b).

In practical terms, the Obama administration drastically increased subsidisation of the state justice sector. It also demonstrated a willingness to try any strategy that might help defeat the Taliban insurgency, however implausible. Despite mounting evidence to contrary, the US doubled down on what could be described as the 'vacuum' theory of judicial state-building. This view forms the core of the US government's rule of law assistance approach in the 'Afghanistan and Pakistan Regional Stabilization Strategy':

[185] For a critical examination of broader counterinsurgency efforts in Afghanistan, see Eikenberry (2013).

> Justice and rule of law programs will focus on creating predictable and fair dispute resolution mechanisms to eliminate the vacuum that the Taliban have exploited with their own brutal form of justice (Office of the Special Representative for Afghanistan and Pakistan 2010: ii).

The US strategy was largely agonistic as to whether citizens used state or non-state justice provided they eschewed Taliban courts. On one hand, this approach is admirably pragmatic compared to earlier efforts that largely tried to replicate a western style judiciary wholesale. Yet, flexibility alone does not guarantee success. With so many moving, highly contingent, and largely uncoordinated parts, the strategic end point was never clear. Non-state justice mechanisms were viewed as instrumentally important to the overarching goals of counterinsurgency and stabilization. However, there was never a serious attempt to engage with the three main pillars of legitimacy: cultural affinity, Islam, and government performance.

2.3 Simultaneous Judicial State-building Strategies

The US's transformative plans for Afghanistan were crystalized in the unified civil-military US Foreign Assistance plan for 2011 to 2015.[186] The report explains:

> The principal focus of the U.S. rule of law effort is to reverse the public perception of GIRoA as weak or predatory by helping the Afghan government and local communities develop responsive and predictable dispute resolution mechanisms that offer an alternative to the Taliban shadow justice system. Assistance will be provided in support of Afghan efforts to strengthen the formal state justice system, stabilize the traditional justice system, and build a safe, secure, and humane civilian corrections system (US Mission Afghanistan 2010: 5).

The emergence of informal justice was explicitly linked to the 'support of

[186] My focus is on the joint plan as it explicitly had unified approval across the US government; however, there are a number of other similar plans. For example, see US Department of Defense and US Department of State (2009), and Office of the Special Representative for Afghanistan and Pakistan (2010).

counterinsurgency efforts' (US Mission Afghanistan 2010: 4).[187] The US was interested not only in engaging pre-existing non-state actors, but also 'in re-establishing traditional dispute mechanisms' as part of broader effort to counter the Taliban's parallel justice system. This involved doing extensive local research to understand non-state systems and how they could be utilized to defeat the Taliban. Thus, each strategy was designed not only to promote goals in the legal sector but also to support counterinsurgency efforts. Each strategy is examined in turn below.

Subsidisation

Regarding the state justice system, the US government renewed its pledge to 'support capacity development of the formal state courts' (US Mission Afghanistan 2010: 5). Thus, the core of the new strategy was, in reality a subsidisation strategy albeit one funded on a much larger scale. For example, the State Department's INL bureau's funding for rule of law assistance in Afghanistan went from USD$26.5 million in 2006 to $328 million in 2010 (Wyler and Katzman 2010: 27). Yet, massive funding increases failed to transform the Afghan justice sector or even produce notable improvements (SIGAR 2015b). It demonstrated the limits of what subsidisation could achieve absent an ideological commitment by the state to the rule of law. As discussed extensively in the previous chapter, the executive was hostile towards efforts to strengthen the rule of law, which could undermine both its freedom of action and its patronage system. The Supreme Court and other key judicial organs were open to receiving aid, but only on their terms and never in a way that ultimately threatened the overarching system.

[187] Aid and counterinsurgency were fully fused outside the law sector, with the vast majority of funds going to support counterinsurgency efforts with a focus on the 'restive south and east' (US Senate Foreign Relations Committee 2011: 2).

Harmonization

A harmonization push sought to make the non-state justice system operate on principles akin to the state system or, more accurately, on an idealized conceptualisation of state justice that effectively protects human rights and upholds the rule of law. It involved both supply and demand-side activities. On the supply-side, 'tribal elders/religious leaders who conduct shuras would receive training on relevant state and religious law' (US Mission Afghanistan 2010: 4). On the demand-side, US assistance would support public information campaigns to increase awareness and popular approval regarding the 'legal rights under the constitution' and other state legislation to allow the population to assert those rights (US Mission Afghanistan 2010: 4). Assistance would thus help align the behaviour of state and non-state actors, but also bolster non-state actors' willingness to support the state.

In fact, there was no significant progress towards harmonization. Moreover, there was very little evidence that significant behavioural change occurred among citizens with regards to how state law was conceptualised or that the conduct of non-state justice mechanisms operated more procedurally or substantively like state courts. Neither was there any increase in the 'enforcement of the rights of women and other traditionally marginalized groups' (US Mission Afghanistan 2010: 4).

Bridging

Bridging between the state and non-state became a more prominent strategy. The US

sought to 'establish[] linkages, as appropriate, between the informal and state systems' (US Mission Afghanistan 2010: 5). The strategy envisioned a version of cooperative legal pluralism wherein citizens would be able to have free access to both systems as appropriate predicated on an effective jurisdiction divide. For example, while a judge may refer a property theft to a local Jirga, state courts would retain exclusive jurisdiction over major crimes such as murder. In reality, however, the state lacked the capacity to compel most non-state justice actors to use state courts. Likewise, the quality of state justice remained poor, thus there was no demand. RLS-Informal, the largest USAID rule of law programme, witnessed no discernable increase in popular demand for state courts (Checchi and Company Consulting 2014a). While activities likely increased public awareness and perhaps even access, it was a proverbial bridge to nowhere as the public demand for state justice remained sparse.

Incorporation

Incorporation envisions a partnership 'with the Afghan Ministry of Justice (MOJ) to formalize links between the two systems to maximize the benefits of both systems and to reduce the weaknesses' (Id.: 4). There was some initial progress. These ambitious ideals are prominent in the 2009 draft policy. The non-state justice policy had been promoted and signed by various state representatives and international backers.[188] After recognizing the potential benefits of non-state justice, the policy demanded that 'informal dispute resolution decisions need to be consistent with Shariah, the Constitution, other Afghan laws and international human rights standards' (Ministry of

[188] There was little consultation with tribal non-state justice actors nor was there a clear vision of how the authority of warlords to act as legal authorities in the areas they controlled would be addressed.

Justice 2009: 3).

The September 2010 draft law envisioned non-state justice actors as part of the state system. Consequently, it heavily regulated their jurisdiction, operations, and decision-making as well as their relationship to state courts (Ministry of Justice 2010). The law stanchly asserted the state's authority to control and regulate all aspects of non-state 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 'prosecut[ion]' despite the fact jirgas were only empowered to hear civil disputes and petty juvenile crimes on referral (Id.).[189] The state was open to engagement with the non-state justice sectors but only on its own, quite stark, terms. The central government's internal divisions prevented the law from being promulgated, even one that endorsed an unrealistic degree of authority for the state system. Even if a law had been enacted, it is unlikely it would have meaningfully altered the operation of dispute resolution at the local level.

2.4 Deeply Problematic Assumptions

The expansion and diversification of assistance, however, has not produced the results hoped. Behind the transformative rhetoric, the bold vision for rule of law assistance was underpinned by a set of wildly optimistic 'critical assumptions':

> 1. The Afghan government will implement its reinvigorated plans to fight corruption, with measures of progress toward greater accountability.

[189] The law, however, was not passed as it met fierce opposition from the Ministry of Women's Affairs and the Human Rights Commission who feared that the law would lend credibility to 'traditional' dispute resolution, which they view as antithetical to human rights standards and women's rights (International Rule of Law Professional 2015).

> 2. Justice and rule of law programs will focus on creating predictable and fair dispute resolution mechanisms to eliminate the vacuum that the Taliban have exploited.
> 3. USG programs will successfully address local officials' lack of education, experience, and limited resources.
> 4. GIRoA action will counter obstruction from local powerbrokers whose activities are sometimes inconsistent with the Afghan constitution (US Mission Afghanistan 2010: 9).

Each one of these assumptions was clearly unrealistic. The Karzai administration never sought to eliminate state corruption. The justice system had displayed few signs of improvement, lacked a commitment to the rule of law, and was subject to the president's influence. Moreover, years of human resource development produced little progress and efforts to bolster the performance of state institutions faced consistent challenges (Suhrke and Borchgrevink 2009a, Mason 2011). The assumption here was that it was simply a resource issue. As evidenced by the serious challenges faced by AROLP and other programmes aimed at state institutions, resource restraints were rarely the reason activities produced relatively little impact. Finally, the Karzai regime and the US government were in league with powerbrokers that actively opposed to advancing the rule of law (Peceny and Bosin 2011). Indeed, many 'local powerbrokers' held high-level government posts (Mukhopadhyay 2014). While the US found warlords unsavoury, policymakers were more than willing to work with them to try to defeat the Taliban and there was never a serious attempt at disarmament (Mac Ginty 2010). Unsurprisingly, Afghanistan's rule of law situation had shown very little improvement by the time that Afghans elected a new president in 2014. The lack of progress towards the rule of law was evident by the fact these elections were, as before, marked by immense fraud and widespread controversy (Shahrani 2015).

CONCLUSION

As international assistance is invariably mediated through the state institutions and officials, Karzai's regime bears the majority of responsibility for the lack of progress towards the rule of law and the increasingly tense relationship between the state and non-state justice sectors. Yet, the international community also bears responsibility. Assistance was initially lacking during the crucial early interval and then focused on unneeded and unwanted legislative reforms. Once funding began to dramatically increase, there was no plausible strategy as to how the assistance would actually achieve progress towards the rule of law.

The vast majority of aid served to prop up fundamentally compromised institutions, while little thought was given to the constructive engagement of the tribal and religious actors who had long formed crucial pillars of legal legitimacy. Engagement with the non-state justice sector was little better. International actors accepted the Karzai regime's increasing dependence on warlords who lacked any interest in the rule of law. Over time, the Taliban and its justice system grew in strength and popular legitimacy, in large part due to the Karzai regimes' corruption and reliance on warlords. International interest in engagement with the non-state justice, however, was focused primarily on counterinsurgency rather than justice. International assistance ultimately produced very few benefits and in many instances was decidedly counterproductive. The nature of Karzai regime was a clear limiting factor. However, as highlighted by the structured comparison of Timor-Leste and Afghanistan in Chapter 8, the international community made a series of policy choices. Outcomes were by no means inevitable.

CHAPTER 8
Conclusion

INTRODUCTION

This chapter seeks to systematically examine and unpack the implications of robust legal pluralism for post-conflict state-building as evidenced by the two cases studies. It consists of five main parts. The first part reviews the thesis' key questions, theory and argument. While the two case studies have been compared and contrasted implicitly throughout my thesis, the second part examines the domestic and international actions through a focused, structured comparison based on key variables. The third section examines the study's significance, while the fourth highlights overarching policy implications. The fifth section details the study's limitations and the final section illuminates areas for further research.

1 RESTATEMENT OF THE KEY QUESTIONS, THEORY, AND ARGUMENT

Advancing the rule of law is vital for the success of post-conflict state-building (Fukuyama 2004, Paris 2004: 206) but in post-conflict states, legal order hinges on non-state justice systems that handle most disputes and retain substantial autonomy and authority (Albrecht, Kyed et al. 2010). Unsurprisingly, there are frequently intense, protected struggles over determining rules that govern society (Migdal 1988: 31). The state's legal order is by no means guaranteed to triumph. This is true even if the state receives a substantial amount of international assistance, including the presence of armed forces. My research sought to determine: What are the challenges to the

promotion of rule of law in legally pluralistic post-conflict settings? What accounts for the success and failure of international and domestic state-builders to meet those challenges?

1.1 Overview of the Cases

My thesis draws on two case studies that offer a mixture of 'theory building' (Timor-Leste) and 'theory testing' (Afghanistan) (George and Bennett 2005: 114-120) to generate insights into post-conflict judicial state-building in legally pluralist environments. More specifically, I argue Timor-Leste was successful because 1.) Despite fierce political competition between competing groups, all major parties remained committed to constructing a democratic state underpinned by the rule of law; 2.) There was a credible and sustained effort to develop institutions that promote democratic accountable, inclusiveness, and the rule of law; and 3.) The state meaningfully engaged and collaborated with key non-state actors through successful local suco elections as well as developing strategies to facilitate suco chiefs working with the state rather than against it. While the process was imperfect, Timorese state-officials effectively *mediated* between the international community and local-level figures that contributed to the effective transformation of a competitive legal pluralist environment into a cooperative one.

While the state served as the primary mediating force, the international community also played a crucial role. In Timor-Leste, the state made progress towards a modern democratic state bound by the rule of law into reality through competitive national

elections at the national level and creation of independent judicial institutions. Equally important, the state's compelling vision of a democratic state committed to the rule of law combined with competitive, local elections established cooperative relationships with the non-state justice sector. The international community reinforced positive trends in Timor-Lese through effective use of subsidisation strategies for the nascent state justice sector and, particularly after the 2006 Crisis, working to bridge the state and non-state justice sectors. These activities largely supported domestic initiatives. While its Lusophone legal system presents real challenges, Timor-Leste constitutes a surprising success.

Afghanistan served as a theory testing case. The case study chapters highlight how the Karzai-led state squandered the opportunity to build a new, more inclusive and effective democratic state (Rashid 2008, Barfield 2010). Despite rhetoric to the contrary, Afghanistan under Karzai's leadership never displayed a normative commitment to the rule of law. Instead, Karzai built a 'vertically integrated criminal organization' focused not on exercising the functions of the state but rather extracting resources for personal gain' (Chayes 2015: 62). Second, Karzai systematically undermined institutional, legal, and political checks on its authority including suppressing political parties, manipulating elections, undermining judicial independence, and all institutional accountability mechanisms.[190] Finally, Karzai's regime never seriously engaged with key tribal and religious non-state justice actors that have long constituted the building blocks of legitimate order in Afghanistan. The

[190] While state capacity was limited, President Karzai faced very few constraints when determining policy or personnel.

regime partnered with warlords but it was purely a transactional relationship based on the exchange of rents for support. The Afghan state failed to mediate between the international community and local actors particularly the tribal and religious authorities that in the past have proven essential for legitimate rule. This divergent approach helps explain judicial state-building's failure and the corresponding slide from competitive legal pluralism into combative legal pluralism with an increasingly potent Taliban insurgency.

The international community exercised tremendous influence over the nascent Afghan state's institutional structure and its leadership. International backing secured the top state post for Karzai and encouraged the immense concentration of power in the executive. Even after the initial period, they retained significant ability to encourage or discourage state actions. Afghanistan has consistently ranked as 'an extreme outlier in terms of dependence on aid' and one of the world's most aid dependant states (Hogg, Nassif et al. 2013: 52). Despite this influence, international involvement did little good and was often counter-productive to the process of promoting the rule of law as well as constructive engagement with non-state actors. The international community never sought to engage with non-state justice as a means to promote a more just legal order, but rather saw them as cogs in a deeply flawed counterinsurgency approach.

2 STRUCTURED COMPARISON OF CASE STUDIES

Both Afghanistan and Timor-Leste featured large scale, sustained foreign involvement including armed security forces, a legal landscape initially dominated by competitive

legal pluralism, low institutional capacity in the justice sector and the state more generally, significant unrest, and high potential for a return to violence. Equally important, judicial state-building efforts had a reasonable prospect for success at the outset. Thus, as demonstrated in the case study chapters, the actions undertaken by the state and international actors had profound influence on the outcome.

From a theory building perspective, it is useful to examine the differences between the cases through a structured comparison (George and Bennett 2005). As discussed in Chapter 1, it is worth breaking them down in five key areas: 1.) Executive authority; 2.) State justice systems; 3.) Elections and electoral systems; 4.) Political parties; 5.) Legal culture; and 6.) Non-state justice. In each section the domestic actions will be examined first followed by a look at whether international actors help or hurt progress towards democratization and the rule of law. Timor-Leste will be examined first, followed by Afghanistan.

2.1 Executive Authority

Despite the inherent contentiousness and unpredictability of politics, the selection of institutional arrangements allows state-builders to influence politics and overarching political culture that develops. The executive tends to be the most powerful state office. Consequently, it has immense sway over whether the rule of law develops and how the state engages with non-state actors. As Tsebelis notes, despite some lingering questions about regime type's influence on behaviour, 'there is one result in the literature that is collaborated in all analyses: democracy survives better under parliamentarism then

under presidentialism' (Tsebelis 2002: 75). Moreover, recent quantitative analysis suggests the 'survival of a post-civil war transition is likely to increase with the adoption of the parliamentary system of government by almost 76%' (Joshi 2013: 761). Parliamentarism also has the added advantage of facilitating the entry of non-state groups into mainstream politics by lowering the barriers to mobilization and access to at least a degree of political power within the state.

Timor-Leste: Domestic Policy Choices

Timor-Leste's Constitution constituted a good faith effort to create a modern democratic state that respects the rule of law while recognizing non-state structures. As a 'parliamentary-like semi-presidential regime', Timor-Leste's executive structures favour the development of democracy (Elgie 2005). These arrangements are notable for a strong prime minister and relatively weak president, which is exactly what has occurred in practice. Rather than providing a threat to democratization, the presence of a relatively weak but not purely ceremonial president provides additional checks on the Prime Minister's executive power and limits the potential for authoritarianism. Parliamentary governing coalitions have become commonplace. Political competition is open and vibrant with high-profile turnover in office, including an incumbent governing political party in 2007 and an incumbent president in 2012. Likewise, many non-state leaders have themselves sought political office.

Timor-Leste: International Policy Choices

The international community made a positive contribution to the creation of Timor-

Leste's executive institutions; most notably by exercising restraint. Absent international influence key domestic constituencies were able to engage in constitutional drafting largely free of international influence. Unlike Afghanistan, Timor-Leste's voters had the opportunity to elect the country's first leadership without undue influence for the incumbent or international actors.

Afghanistan: Domestic Policy Choices

Despite clear warnings, at Karzai's urging, the Constitution established an extremely strong presidency. While robust authority in state institutions can underpin progress towards the rule of law and good governance (Fukuyama 2014: 24) presidentialism, 'introduces a strong element of zero sum game into democratic politics with rules that tend towards a "winner-take-all" outcome' (Linz 1994: 18)—a particularly explosive combination in deeply divided post-civil conflict settings (Horowitz 2000). How a regime exercises its authority depends on presidential decisions and those that serve under his authority because power is heavily concentrated 'not just in a single *party* but in a single *person*' (Lijphart 1991: 74, itallics in orginal). Once Karzai secured predominance he ruthlessly undermined, co-opted, or eliminated all major rivals within the state.

Afghanistan: International Policy Choices

The international community, and particularly the US, bear a significant degree of responsibility for these poor institutional choices. The international community, most notably the UN and US, strongly backed Karzai as interim leader and then the

presidency based on the flawed assumption that it would ensure stability and smooth bilateral relations (Suhrke 2011). The UN and UN also agreed to deny any meaningful power for provincial governors and allowed the president plenary power over their appointment (Barfield 2010: 297-299). Despite popular discontent over the Karzai regime emerging as a major driver of insurgency, the international community consistently acquiesced in Karzai's corruption and ever-expanding authority.

2.2 The State Judicial System

The state justice system is the cornerstone of state authority domestically and more broadly its capacity to exercise legitimate violence (Weber 1978). Consequently, establishing and strengthening a state justice system committed to the rule of law is vital for successful state-building endeavours (Paris 2004: 205-206). However, it is an immensely complex and time-consuming process to build an effective state judiciary (Fukuyama 2004: 59). Courts are the primarily point of comparison with non-state justice. The judiciary's performance directly influences not just people's experience when utilizing state courts but their willingness to engage them in the first place. It also directly impacts non-state authorities willingness to work with the state.

Timor-Leste: Domestic Policy Choices

Timor-Leste's judicial state-building process has faced real challenges. At the end of Indonesian rule, there was no meaningful judicial infrastructure or legal professional class. Citizens had long viewed courts as an instrument of oppression. When Timor-Leste gained independent statehood in 2002, a fully domestic, impartial, high capacity

judiciary remained a long-term goal rather than a reality. Yet, overarching trends are positive. Crucial domestic legal and educational institutions have been established and are now producing qualified legal personnel. The reach and capacity of state courts have increased steadily over time. State courts are staffed almost exclusively with local personnel. Equally important, state courts and non-state justice actors by and large work proactively together to ensure that major cases reach state courts. This is not to overstate the progress or minimize the problems. Timor-Leste is not yet a state bound by the rule of law. Even the institutional framework is incomplete. There is no Supreme Court, procedural problems are common, public awareness is still limited as is provision of legal services, particularly in outside urban centres or for those facing economic disadvantage. The dominance of Portuguese as a legal language, which only a small portion of the population understands, has compounded the state legal system's challenges (Marx 2013: 34).

Timor-Leste: International Policy Choices

While not without missteps and waste, international aid helped build and improve state justice institutions and their auxiliaries (Marriott 2009, RDTL 2010). In extreme instances, such as when all existing RDTL actors failed their examinations in 2005, international actors kept the justice system in operation. A decade after independence there is a fully functioning justice system, training regime, and state legal order. Training efforts have produced a small, but growing qualified legal professional class. International efforts have also supported an effective bridging strategy through free legal aid in partnership with local legal aid NGOs seeking to resolve disputes in either

the state justice system or the non-state system (The Asia Foundation 2003: 3). Again, the success of international efforts largely rests on reinforcing domestic trends that has helped to create an environment characterized by cooperative legal pluralism. However, the myopic focus has produced few results as Portuguese is spoken by only a very small portion of the population (Taylor-Leech 2013). Lusophone assistance has effectively excluded the vast majority of people and also failed to engage with non-state justice actors.

Afghanistan: Domestic Policy Choices

Afghanistan's judiciary is notable for its immense corruption, predation, and ineffectiveness. The president plays the dominant role in selecting candidates for the bench and judicial appointments do not necessarily follow the law even for the Supreme Court (International Crisis Group 2012: 14). The appointment power is coupled with the retirement power and the host of other executive powers noted above to reinforce executive power over the judiciary. The judiciary lacks independence and has consistently upheld executive authority regardless of how dubious the exercise of that authority (Hamidi and Jayakody 2015). The Afghan state and judiciary is rightly criticized as predatory (Singh 2015). The judiciary's human resource base has improved little and posts owe more to payments or patronage then capacity. The population generally seeks to avoid the state court system and when cases do find their way to court the decision making process is often corrupt, expensive, time consuming, and without enforcement capacity.

Afghanistan: International Policy Choices

At the onset of a post-conflict state-building operation international judicial state-builders have maximum influence (Doyle and Sambanis 2006: 132). Unfortunately, the lead nation Italy did little until 2003 (Suhrke 2011: 187-192). Italian aid then focused on the revision of existing laws for which there was virtually no domestic constituency (Hartmann and Klonowiecka-Milart 2011). Since then Afghanistan's justice sector has received over a billion USD in aid from the US alone (SIGAR 2015b). Justice institutions have now been established nationwide, but the immense amount of training and technical assistance produced few results. International efforts lacked a feasible strategy for how their activities would promote a state bound by the rule of law. Vast sums were poured into state institutions staffed by officials decidedly uninterested in advancing the rule of law. Equally questionable were the sustained efforts by USAID and other donors to channel citizens into state courts or promote the image of judiciary. These initiatives can work well when the state courts provide decent quality service, but it makes little sense to funnel people into corrupt courts more interested in rent extraction then justice. A myopic focus on 'security' meant that international community acquiesced in Karzai's effort to assert executive authority over the judiciary. On occasions when international actors tried to get involved in 'investigating 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).

2.3 Elections and Electoral Systems

Elections and electoral systems determine who is elected and influence how officials behave once in office (Norris 2004). As Sartori has observed, 'not only are electoral systems the most manipulative instrument of politics; they also shape the party system and spectrum of representation' (Sartori 1997: ix). Electoral choices are particularly stark in post-conflict settings as it influences whether states progress towards democratic rule underpinned by the rule of law as well as whether they return to conflict (Reilly 2001, Dunning 2011). As Reynolds highlights, 'an inappropriate or flawed electoral system can retard democracy's progress as much as warlords, religious fundamentalists, and corrupt business leaders combined' (Reynolds 2006: 105). Proportional representation, while not without some negative externalities, is generally seen as the best choice for post-conflict states as it encourages broad-based regimes and makes consolidation of authoritarian power more difficult (Reilly 2002). Proportional representation also helps ensure that the interests of non-state actors are represented in the political system. Thus, they are more likely to support the overall political order or at least not actively seek to destroy it.

Timor-Leste: Domestic Policy Choices

In Timor-Leste, the use of a closed party list, proportional representative system has proved to be a wise choice. Elections have occurred in 2002, 2007, and 2012—the last without any meaningful international support or oversight.[191] These elections have all been deemed to be fair and credible even during the tense post-Crisis environment of

[191] List proportional representation is the type of electoral system most frequently used in post-conflict settings (Reynolds and Wilder 2004: 15).

2007. Equally important they have been accepted by all the major parties. There was also a peaceful transfer of power between Fretilin and Gusmão's CNRT. 2007 also saw the first coalition government and the emergence of a strong but loyal parliamentary opposition. In each election, the major political parties sought the support of suco chiefs and other key non-state actors. Movement towards democratic consolidation continued with the 2012 national elections, which were procedurally successful, substantively open, and highly competitive. While democratic consolidation remains incomplete, these first three national elections mark positive steps towards democratic consolidation and party system institutionalisation. The ability to change the government through free elections is necessary, though not sufficient, condition for democratisation and the creation of inclusive institutions that are essential for developing the rule of law (Huntington 1993: 266-267, Acemoglu and Robinson 2012).

Timor-Leste: International Policy Choices

The international community has played a productive role regarding elections. The elections in 2001, 2002, and 2007 were both conducted under the security and stability provided by international forces. UNTAET organized Timor's first elections in 2001 and international actors provided training and technical support for election officials. In 2012, limited election monitoring was undertaken, but the entire process was organized domestically (UNMIT and UNDP 2012). Thus, international assistance helped establish domestic capacity and ensure integrity at a crucial time, but stepped back as time went on and let domestic actors take over what is fundamentally a domestic process.

Afghanistan: Domestic Policy Choices

Despite the initial enthusiasm, elections in Afghanistan have failed to structure public choice or promote accountability. First, electoral design was deeply flawed and ill suited to promoting democracy, accountability or a state bound by law. At Karzai's insistence, parliamentary elections were conducted by single non-transferable vote (SNTV) system despite clear contemporary warnings about the system's dangers (Reynolds and Wilder 2004).[192] SNTV disfavours large, broad-based parties, sharply limits candidate accountability, and promotes party fragmentation (Lijphart, Pintor et al. 1986). Yet, the system did serve the purpose of helping consolidate Karzai's authority by facilitating electoral manipulation and making it difficult for parliamentary opposition to organize. Electoral administration, heavily influenced by Karzai, has been deeply problematic. Polls have consistently been marred by large-scale fraud and other irregularities, and have shaken faith in the political order rather than bolstered it (Coburn and Larson 2014, Shahrani 2015).

Afghanistan: International Policy Choices

The international community has acted indecisively and contradictorily with regards to elections. International support has been crucial to organizing all presidential and parliamentary elections in Afghanistan. There has been a vast amount of technical assistance offered. The results, however, have produced steadily declining legitimacy and accurate representation of popular preferences. Electoral fraud and manipulation have been commonplace and ever growing since 2004. By the 2014 presidential

[192] SNTV allocates seats according to the top individual vote getters in certain districts, which can vary substantially in size.

elections, electoral fraud was perpetrated on a massive scale. In each case, international actors valued stability and ultimately ended up validating deeply flawed results as they had in 2009. International involvement did ultimately help broker a extra-constitutional compromise deal between the two leading candidates but the fact that a compromise deal was necessary in the first place shows how badly the electoral system was broken.

2.4 Political Parties

Political parties play an essential role in establishing, consolidating, and sustaining democracy by offering an 'institutional framework' to aggregate interests, structure public policy, and promote accountability (Diamond 1999: 96, Lipset 2000). Strong legislative parties can serve as a check on executive authority. While imperfect, they are a prerequisite for large-scale democratic governance (Carothers 2006: 10-11). If they decide to engage in state politics, political parties are a primary means by which non-state actors can participate in state legislative institutions and directly shape state policy.

Timor-Leste: Domestic Policy Decisions

Timor-Leste's closed list proportional representation election system, with a three percent vote threshold, encouraged broad based strong political parties while limiting party fragmentation (RDTL 2006: Art. 13). A sensible electoral system, combined with a well-constructed law on political parties, an open political competition and well-executed credible elections have helped to build a democratic culture in Timor-Leste. Despite Fretilin's initial organizational advantages, there has been the development of

another major party, CNRT, focused around Gusmão as well as a number of smaller parliamentary parties. The failure of one party to gain a majority in the 2007 or 2012 polls has led to coalition governments and a growing cultural of political compromise, but there has not been a huge proliferation of parties or a destabilizing amount of fragmentation.

Timor-Leste: International Policy Decisions

While political parties can receive useful international assistance, political organization is primarily a domestic matter. The international community however, deserves credit for helping to create a political environment from the UNTAET era and beyond where multiple political parties could be established and vibrant multi-party competition can thrive. Notably, it avoided picking winners or providing major institutional advantages to Gusmão or Fretilin, a choice that would have distorted political competition.

Afghanistan: Domestic Policy Decisions

Afghanistan's political parties faced a challenging landscape. Many pre-existing parties had been discredited while new ones had weak societal roots. Rather than seeking to strengthen political parties, Karzai proactively sought 'to prevent the formation of strong national political parties and keep the influence of organized political factions within the parliament limited' (Giustozzi 2013: 328). In addition to an election system known to disincentivise strong political parties, Karzai's administration has consistently made the legal requirements far more strenuous with the intent to limit political parties (International Crisis Group 2013: 7). Under ever tightening state regulations, by mid-

2013, there were no legal parties (Ariana News 2013). Parties now operate 'informally' fully dependent on the regime's good graces to continue operations (US State Department 2015: 30).

Afghanistan: International Policy Decisions

With regards to the development of political parties, international actors did little and largely left the matter to domestic actors. This in effect gave Karzai's regime carte blanche to pursue an openly anti-party agenda from the onset. While election administration and execution received at least sporadic condemnation, even if the parliamentary elections were implanted fairly and flawlessly the electoral system would still disfavour broad-based political parties. The UN had offered technical support for an Afghan-led commission on voting, which recommended closed list-PR (Reynolds 2006: 106-107). As Larson highlights, 'The selection of the SNTV electoral system by Afghan and international actors was a deliberate choice intended to exclude parties' (Larson 2015: 3). Since then, a clear pattern of increasing state hostility to parties has emerged alongside international apathy towards those decisions. Even as the negative externalities of their decision became increasingly clear, the international community remained committed to executive centralization, which meant largely turning a blind eye to the suppression of parties.

2.5 Legal Culture

Regardless of the legal and political institutional arrangements, the rule of law cannot develop where the regime refuses to be bound by the law (Carothers 1998). The

creation of a rule of law culture is essential (Stromseth, Wippman et al. 2006: 76). A commitment to the rule of law requires state officials, even those at the pinnacle, to see the law as a meaningful restraint on behaviour. This culture manifests itself in routinized bureaucratic interactions, which form the heart of how the law operates in practice. At the same time, in developing countries, 'the role of political leadership in each case emerges as an important factor' in the success or failure of efforts to promote democracy and the rule of law (Diamond 1989: 8). It also increases the pressure on non-state actors to improve their performance. Ideologically, a society bound by the rule of law can be appealing to non-state authorities, as it ensures they will receive fairer treatment from the state. The development of a rule of law culture also it makes citizens more likely to want to choose state adjudication and less likely to seek to actively undermine the state.

Timor-Leste: Domestic Policy Choices

Timor-Leste's independence movement was built on a commitment to the rule of law in contrast to Suharto's authoritarian Indonesia. Under UNTAET, domestic state builders drafted an inclusive Constitution that sought to institutionalize democratic governance and the rule of law. Since achieving independence, the state has achieved notable, if sometimes rocky, progress towards democratic consolidation and the rule of law is evident through open political competition, constitutional handling of the 2006 Crisis and the 2008 assassination attempts on the president and prime minister, a peaceful change of power, a court system with a growing capacity and reach, and a commitment by most senior state officials to being bound by the law. The new state enjoys a high

level of legitimacy and is headed by leaders with legitimacy stemming that struggle (Call 2008: 1496). This has been coupled with sensible regulation of the non-state justice sector, which has left a significant amount of autonomy with local suco leaders, while helping ensure serious crimes get to state courts (RDTL Ministry of State Administration and The Asia Foundation 2013). Equally important, the law has granted, and voters have exercised, the right to select the suco chiefs who have authority over non-state justice (Id.). Despite the state's limited capacity, the state's legitimacy and progress towards the rule of law have allowed it to establish a cooperative relationship between state legal officials and suco chiefs.

Timor-Leste: International Policy Decisions

International actors cannot unilaterally change domestic political or legal culture but they can modify the incentive structure. In Timor-Leste, international aid helped reinforce domestic progress towards to the rule of law. Subsidisation assistance, most notably from the UN, UNDP, Australia, and US, assisted in the creation, operation, and the improvement of state justice sector institutions and produced tangible results. Unlike standard assistance, Portuguese judicial state-building assistance emphasized 'the consolidation of Portuguese language' and exclusively focused on state institutions and a refusal to engage with the non-state justice sector (Portuguese Institute for Development Support 2010: 121). Timor-Leste now has a functioning, overwhelmingly Lusophone justice system. It, however, remains linguistically inaccessible to the vast majority of the population. Thus, it is unclear if the nascent Lusophone legal institutions can ultimately underpin a legal order that upholds the rule of law.

Afghanistan: Domestic Policy Choices

Since its inception, the Karzai regime has consistently flouted the law; growing ever more brazen with time (Chayes 2006, 2015). The justice system is particularly corrupt and predatory (De Lauri 2013, Singh 2015). Likewise, the Karzai regime, with US support has long depended on predatory non-state justice actors, most notably warlords, to try to project state power outside the major urban centres. The end result is a culture defined by rent extraction, patronage, and a deep legitimacy void. Most tribal and religious justice actors will at most engage with the state tactically. Moreover, the state's predation, lack of vision, and utter lack of commitment to the rule of law have helped spawn a combative legal order. The Taliban have achieved a remarkable resurgence backed by a vision of order promulgated on the basis of intelligible religious and cultural norms backed by a harsh, but credible, inexpensive, and effective justice system (Johnson and Mason 2007, Giustozzi and Baczko 2014).

Afghanistan: International Policy Choices

While the international community stressed the rule of law's importance, their actions helped consolidate Afghanistan's culture of impunity. International security forces were initially minimal, which made the Kabul regime's alliance with regional warlords expedient and perhaps inevitable. As the US became increasingly focused on defeating the growing Taliban insurgency, any lingering qualms about partnering with warlords largely evaporated despite the significant negative externalities. As with the state itself, US assistance proved invaluable for warlords seeking to consolidate their authority

(Peceny and Bosin 2011, Bojicic-Dzelilovic, Kostovicova et al. 2015). The international community has spent extraordinary sums on international aid to Afghanistan. During the period this thesis examines, the US alone, excluding military expenditure, has 'provided about $100 billion to Afghanistan since the fall of the Taliban' (Katzman 2015: i). This aid has not been coupled with meaningful accountability measures and organized corruption has run rampant. Indeed, the judiciary had become an epicentre of corruption (Singh 2015). By the time he left office in September 2014, Karzai had established 'one of the most corrupt regimes on the planet' based largely on steady flow of international funds combined with highly organized domestic rent extraction (Paris 2013: 538, Chayes 2015). Despite a rhetorical commitment to promoting the rule of law and rooting out corruption, international assistance has played a major rule in the creation of a predatory rentier state (Verkoren and Kamphuis 2013).

2.6 Non-State Justice

Last but by no means least, the states took divergent approaches to non-state justice. Non-state justice forums handle the vast majority of disputes in post-conflict settings and Afghanistan and Timor-Leste are no exception. Moreover, non-state actors have the capacity to undermine or strengthen all of the processes discussed above. Success requires that non-state judicial actors must be open to productively engaging judicial state-building effort, especially when they retain enough autonomy and authority to be 'state-building spoilers' (Menkhaus 2007: 76). Whether non-state justice sector actors choose to constructively engage with the post-conflict judicial state-building endeavour

has a very significant, and understudied, impact on the outcomes and the legitimacy and capacity of the state itself (Migdal 1988).

Timor-Leste: Domestic Policy Choices

The independence struggle drew heavily on a vision of a modern democratic state bound by the rule of law. Non-state authorities, however, were also key to sustaining the resistance within Timor-Leste itself (McWilliam 2005). Political elites across the political spectrum recognized the value of non-state actors and worked to build a collaborative relationship with them. The Constitution explicitly recognized the importance of non-state justice and the value system that underlies it (RDTL 2002: Section 2.1). Translating that commitment into reality, state officials worked to develop a sensible, minimalist framework for non-state actors which grants them discretion over small matters but funnels substantial crimes to the state courts (RDTL 2009). A shared vision of a state committed to development and the rule of law, the successful introduction of the local elections of suco chiefs further reinforced a cooperative relationship between the state and non-state actors.

Timor-Leste: International Policy Choices

Initially the non-state justice sector was not a major focus for international assistance. After the 2006 Crisis, international aid helped facilitate the transition to cooperative legal pluralism by offering aid to improve the performance of non-state justice and building sensible links between local suco councils and state courts. International engagement is notable as it by and large sought to help suco councils operate in areas

where there was a shared commitment to improving performance and capacity as well as following the law.

Afghanistan: Domestic Policy Choices

Despite the fact that all reasonable successful Afghan legal orders have relied heavily on religious and tribal non-state judicial authorities, the new regime was decidedly uninterested in non-state justice. In 2009, state authorities gave legislative consideration to regulations on non-state justice, but no law was ever produced. The state has relied on warlords to maintain order at the local and regional levels—a fundamentally destructive policy towards efforts to produce law and order. Indeed, the state's inability to work constructively with religious and tribal authorities to improve the overarching law and order situation helped to facilitate the resurgence of the Taliban, who placed a return to a fair, effective legal order at the core of their political programme by bolstering their claim to be Afghanistan's legitimate rulers and highlighting the state justice system's failures. Taliban insurgents actively clash with the state system, especially outside the capital, by offering inexpensive, expedient, and relatively fair dispute resolution (Johnson 2013: 9). The Taliban has been far more proactive about building a constructive relationship with tribal and religious leaders. Thus, the Afghan state appears destined to be locked in an intensely combative relationship with the Taliban's justice system for the foreseeable future.

Afghanistan: International Policy Choices

The international community mirrored the state officials' ambivalence towards the non-

state justice sector. Tribal and religious authorities were viewed sceptically in light of the Taliban's previous association with Pashtun culture and a stringent brand of Islam. International aid focused almost exclusively on the state. Since 2009, the US became increasingly interested in the non-state justice sector as a means to stabilize the security situation and bypass Karzai's corrupt regime. While many non-state leaders were willing participants, international intervention in local matters all too often made local tensions worse and resolution of longstanding disputes more difficult (Coburn 2013: 37). Short-term advances hinged on foreign support and soon evaporated once international support ceased. Moreover, international efforts to engage the programme lacks a clear, coherent approach for navigating the tensions between state law, including international human rights norms, and Islamic law. Assistance to the non-state justice sector simply assumed that a "justice vacuum" existed in places where the state's writ did not extend. International engagement failed to understand the deep challenges inherent in an environment characterized by highly combative legal pluralism. The Taliban actively seek to prevent local communities from using the state justice or US-backed dispute resolution forums (Giustozzi and Baczko 2014). Programming has not countered the Taliban's threat of immediate and long-term violence nor established forums that meaningfully rival the Taliban.

2.7 Summary

Post-conflict judicial state-building against a backdrop of substantial legal pluralism is invariably challenging. Even in favourable environments, setbacks are inevitable. Yet, domestic and international stat-builders have far more influence than is often

recognized. Choices matter and making poor choices have predictably poor results. The relative success of the judicial state-building endeavour in Timor-Leste compared to Afghanistan reflects that state and international actors have consistently made better policy choices in each of the areas above.

3 SIGNIFICANCE OF THIS STUDY

Contrary to the view of scholars who reject the underlying premise of state-building (Bain 2006, Chandler 2006), state-building choices matter immensely and can have positive effects that reflect domestic preferences. Constructing the rule of law is vital for the long-term success of state-building endeavours. This study has sought to make a significant contribution to scholars' understanding how that process can more likely succeed in environments marked by a high degree of legal pluralism. At the same time, it should be of substantial value to policymakers seeking to better conceptualise and respond to the challenges posed by judicial state-building in a legally pluralist society. While there has long been a recognition that these environments are characterized by hybrid structures (Boege, Brown et al. 2008, Mac Ginty 2011) and that state and non-state authorities often fight for predominance (Migdal 1988), the consquences of legal pluralism for domestic and international judicial state-building have rarely been examined systematically.

This thesis offers useful and novel conceptual paradigms for understanding the dynamics of legal pluralism in post-conflict settings. It also identifies and critically examines the major strategies that judicial state-building can use as well as their

strengths and limitations. This study also has implications for theory building by highlighting the importance of policy decisions as well as the overarching legal pluralism environment. The thesis also serves as a corrective to enduring, misleading, and potentially dangerous ideas about Timor-Leste and Afghanistan for policymakers (Stone 1989). Judicial state-building in Afghanistan was not predetermined to fail. Timor-Leste has made significant progress with respect to promotion of the rule of law and democratic consolidation –outcomes that were not inevitable.

Successfully establishing the rule of law and democracy takes decades and the process is highly contingent, and consequently, only intelligible in the historical context. The case studies chapters demonstrate that there were feasible, though admittedly challenging paths towards consolidating democracy and the rule of law in both instances, but they are distinct and reflect history, institutions, culture, and the structure of non-state justice. The Timor-Leste case study demonstrated that the oft-cited views that the trajectory of state-building and the shape of the nascent state's institutions were foreign impositions disconnected from society were decidedly mistaken (Chopra 2002, Hohe 2002, 2003, Zaum 2007: 205-206, Richmond and Franks 2008). In contrast to some prominent scholars' claims that the state-building project was doomed from the outset, that the country lacked any substantial tradition of legitimate state legal order (Ottaway and Lieven 2002, Suhrke 2011), Afghanistan had a meaningful opportunity to start building a state bound by the rule of law rooted in longstanding legal traditions. In Timor-Leste and Afghanistan, while it is impossible to predict alternative histories with certainty, it is clear that institutional, political, and legal choices had an immense

impact and different choices likely would have led to significantly different outcomes.

4 IMPLICATIONS FOR PUBLIC POLICY

This thesis' primary focus has been on enhancing scholarly understanding of post-conflict state-building in legally pluralist societies. My research, however, has significant policy ramifications. First, it highlights the importance of recognizing that judicial state-building is not occurring against a blank slate. Progress towards the rule of law hinges after conflict on a sensible approach towards strengthening the state justice system but also on constructive engagement toward non-state justice actors. Rather the overarching legal pluralism paradigm dramatically influences policy options. Furthermore, there are distinct strategies that domestic and international state-builders can use, each with distinct advantages and drawbacks. For instance, the decision to outsource local dispute resolution to armed non-state actors in Afghanistan, warlords, allowed the international community to limit the scope of its initial engagement. However, it increased popular discontent with the state and helped give rise to an environment characterized by combative legal pluralism with the Taliban. In Timor-Leste, Portugal explicitly linked its assistance to the development of a Lusophone legal system. This aid helped to establish a Lusophone state legal order that enjoyed high-level domestic elite buy in. At the same time, the legal system remains structurally closed to most Timorese who do not speak Portuguese.

Equally important, judicial state-builders must recognize the inevitability of policy trade-offs. The illusion that promoting the rule of law and fostering a more constructive

relationship with non-state justice can be done successfully while simultaneously accommodating a predatory regime or downplaying widespread electoral fraud needs to be abandoned. The rule of law cannot simply be tacked on to other international priorities. In Afghanistan, the international community consistently touted its commitment to strengthen the rule of law, consolidating democracy, and improving the quality of governance. In reality, the international community was focused on stability and security, which translated into largely uncritical support for Karzai's regime and what criticism that did occur was verbal scolding, not reduction in support.

Judicial state-building in highly legally pluralist settings must make a good faith effort to work constructively with existing pillars of legitimacy. Even in the judicial sector, success is context specific and would likely bear little resemble to the justice sectors of donor states. In Afghanistan, any state justice systems that is able to project authority and possess legitimacy over wide swaths of the country would require tapping into religion and tribal sources of legitimacy, improving the quality of justice, and creating partnerships with tribal and religious non-state justice actors. Most likely, a workable state justice, at least in the short to medium term would share more with Taliban's justice systems ideological foundations than those embodied in the liberal democracies. This tension is inherent. This is true even in Timor-Leste; where the state enjoys genuine legitimacy and popular support for building a modern democratic state underpinned by the rule of law. Most notably, issues related to the treatment of women in suco forums remains contentious. Domestic violence cases are still overwhelmingly resolved in the non-state forums despite domestic violence's unequivocal status as a

public crime. The environment of cooperative legal pluralism still helps to facilitate on-going progress by state, international, and non-state justice, but it is a slow process.

Policymakers need a realistic judicial state-building vision that recognizes the role of non-state actors as potential spoilers. They must accurately determine the overarching legal pluralism paradigm and its programmatic implications. Ideally, they should also have a credible strategy for transforming the current environment towards a more constructive environment. That strategy must be rooted in a deep understanding of a country's culture, politics, and history along with a keen understanding of the potential foundations for a legitimate legal order. The idea that post-conflict Afghanistan would soon resemble a secular legal order that wholeheartedly endorsed gender equality and international human rights norms was optimistic to the point of negligence.

International actors must be particularly careful in the early stages where their decisions have the most impact and a tendency to set enduring precedent, particularly regarding the state's chief executive. Individuals who reach the top spot first have a disproportionate advantage going forward and can even use their position to effectively undermine future democratic competition (Paris 2004: 164-165). International actors need to be cautious with their support as well as push for institutional mechanisms such as free elections, political parties, and political accountability mechanisms to ensure that the people themselves have a real decision regarding who leads their country. This worked well in Timor-Leste where international actors initially worked most closely with Gusmão, but shifted the focus to Fretilin's Alkatiri after the 2001 elections.

Equally important, policymakers must be aware that even programmes with ostensibly good intentions can be unhelpful or counterproductive. For example, in Afghanistan, the international community has remained almost wilfully blind as it spent immense sums without any plan for how more funding would not simply replicate previous failures (SIGAR 2015b). International actors work with institutions known to be highly corrupt without hesitation and in many ways enabled their corruption, which has facilitated the creation of a predatory rentier state with the judiciary as one of its most corrupt appendages. The damage can be even worse where non-states actors are merely pawns to international intervention in local matters can easily make local tensions worse and resolution of longstanding disputes more intractable.

Finally, it is essential to have a sense of historical context and understanding that developing the rule of law takes time, particularly in places marked by a high degree of legal pluralism. Even in situations like Timor-Leste where progress occurred, day-to-day progress often looks decidedly underwhelming. It is important not to overarch and assume that programming is a failure because the state justice sector still has significant flaws. Post-conflict judiciaries are not going to look like those found in most liberal democracies in years or even decades, but notable progress can be achieved through thoughtful and pragmatic initiatives in even the most daunting settings.

5 LIMITATIONS OF THIS STUDY

The study focuses on judicial state-building in settings with sustained, large scale international state-building operations. However, most judicial state-building against a

backdrop of competitive, cooperative, or combative legal pluralism usually occurs absent long-term sustained international troop involvement. The presence of international peacekeepers not only influences the domestic security situation, but also has major economic and political ramifications.

The study has clear temporal limits. Politics is fluid by nature and invariably more so in post conflict settings with weak institutional frameworks. In Timor-Leste, incumbent Prime Minister Gusmão resigned in February 2015. With Gusmão's backing CNRT entered into a collation with Fretilin and Rui Maria de Araújo became Prime Minister (Kammen 2015).[193] This political realignment has at least temporarily ameliorated the partisan divisions that so threatened the country in 2006. However, it also co-opted the major opposition party. Thus, consensus-based politics threatens to eliminate the effective partisan political competition that has been so crucial for democratization, political accountability, judicial independence, and the rule of law.

Afghanistan underwent a major transition with the election of President Ashraf Ghani in 2014. It was Afghanistan's first peaceful transfer of power. This achievement was marred by immense election fraud conducted on Ghani's behalf by outgoing President Karzai. Ghani has pledged that meaningful political, legal, and electoral reform is a priority. These reforms have delivered little so far. While it is certainly possible that a law on non-state justice will be passed relatively soon, it is a purely Kabul driven process and seems unlikely to mark the start of a new approach by the state predicated

[193] In addition to his immense personal authority and leadership of the largest political party in parliament, Gusmão determined the membership of the new cabinet, and stayed in government as the influential, new Minister of Planning and Strategic Investment.

on developing a more constructive relationship with tribal and religious affiliated non-state actors. However, recent developments show few positive signs. The Taliban's territorial control continues to grow with some estimates that it exerts effective control over half the country (Almukhtar and Yourish 2015). The Taliban justice system appears ever more popular (Ahmed 2015). Like the former Soviet regime, the Afghan state is ever more reliant on militias and warlords with all of the negative externalities that this encourages (Mashal, Goldstein et al. 2015). Moreover, former President Karzai remains a potent and growing force in Afghan politics (Rasmussen 2015). Given Afghanistan's recent history of profound and rapid political and legal changes, a more positive trend line is certainly not impossible. Sadly, it is highly unlikely.

6 AREAS FOR FURTHER RESEARCH

My research suggests some promising avenues for further research. First, it would be worthwhile to expand the number of case studies to see to what extent the findings from this study are demonstrated in other contexts. For instance, it would be particularly interesting to see if these results hold true in other geographic contexts. Second, it would be worthwhile to increase the types of comparison across different types of legally pluralist environments such as comparison of various types of cooperative, competitive, and combative settings. Third, as overarching legal pluralism paradigm is so vital to the judicial state-building endeavour it would be worthwhile to explore in more detail how exactly transitions to cooperative legal pluralism can best be facilitated and how to prevent competitive legally pluralism from exploding into combative legal pluralism. Finally, it would be useful to probe more deeply into how

state-builders can most effectively influence the behaviour of domestic political elites to promote a rule of law culture. In Timor-Leste, international actors worked constructively with a domestic political elite because there was pre-existing commitment to democracy and the rule of law. In Afghanistan, the international community found it increasingly difficult to influence Karzai's behaviour despite the state's immense aid dependence.

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