

Abstract

By and large, in the study of the rule of law and in programmatic efforts in the field to develop it, sufficient heed has not been paid to the central lesson that legal pluralism has laid bare, which is that in any social field, there is more than one legal system in operation. Thus, state law invariably operates together with other legal systems in the same social field, each of which is "semi-autonomous" in its workings and none of which enjoys a monopoly on the maintenance of order. Indeed, there is much evidence that the role of the state as a global matter is evolving in a fashion that might very well decrease its influence in this complex system. Until and unless rule of law reformers grow acculturated to these realities, efforts to institute the rule of law are likely to fall well short of expectations.

This involves more than merely understanding how different legal systems operate in the broader social matrix. It even involves more than making the obvious concession to reality that any rule of law program operating in the developing world must, and often does, make—namely, that there are functioning nonstate systems, that they tend to dominate the legal landscape, and that they must therefore be a matter of premier concern. More centrally, it requires a form of decolonization of the mind. Specifically, rule of law policies and programs must come to realize that legal systems that are autonomous of state law will invariably exist, irrespective of what type of rule of law society ultimately emerges.

This chapter explores the deficiencies associated with the legal centralist assumption in the context of rule of law efforts, and the means by which rule of law as an operational matter could be better deployed once we deacculturate ourselves from that unjustified assumption. While the lessons are intended to be universal, the reference used to illustrate the point is the Islamic world, particularly Shi'i-dominated central and southern Iraq.

4 Decolonizing the Centralist Mind: Legal Pluralism and the Rule of Law

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Introduction

By and large, in the study of the rule of law and in programmatic efforts in the field to develop it, sufficient heed has not been paid to the lessons that legal pluralism has laid bare. These are that in *any* social field, there is more than one legal system in operation (Griffiths 1986, 38), and that state law by no means reigns supreme over all.¹ Of course, state law often plays a role, and in some cases that role is quite significant. Yet invariably it operates together—in coordination or competition, as the case may be—with other legal systems in the same social field, each of which is “semi-autonomous” in its workings and none of which enjoys a monopoly on the maintenance of order.² Indeed, there is evidence that the state’s influence in this complex system of multiple sources of order is actually decreasing as a global matter (Patterson and Afialo 2008, 13–14). Until and unless rule of law reformers grow acculturated to these realities, internalize them, and incorporate them into their operations, efforts to institute the rule of law are likely to fall far short of expectations.

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This involves more than merely understanding how different legal systems, including the state system, operate in the broader social matrix, a point that has been made eloquently by Erik Jensen (2003, 362–63), among others. It even involves more than making the obvious concession to reality that any rule of law program operating in the developing world must, and often does, make³—namely, that there are functioning nonstate systems, that they tend to dominate the legal landscape, and that they must therefore be a matter of premier concern.

More centrally, it requires a “decolonization of the mind,” to adopt a helpful phrase that Rachel Kleinfeld proposed during Harvard Law School’s 2013 workshop on the international rule of law movement. Specifically, rule of law policies and programs must come to realize that legal systems that are autonomous of state law will invariably exist, *irrespective of what type of rule of law society ultimately emerges. That is, if the rule of law is supposed to represent a system where all law is state law—or at least where all legal systems operate in harmony in accordance with rules set forth in a foundational state law document, constitution or otherwise—then the rule of law is a fantasy.* It knows no existence on this earth, and if it did exist in such a pristine fashion, I surmise few would find it salutary. To quote Marc Galanter (1981, 4), one of the premier legal pluralist scholars of our era, “We know enough about the work of courts to suspect that such a condition would be monstrous in its own way.”

Indeed, the very suggestion that law should ultimately derive from or be delegated by the state is so contrary to the reality of any social field that to advance it in the developing world is often a thinly disguised form of legal orientalism.⁴ To take one example, three prominent scholars have indicated that not all societies share a commitment to the rule of law as it is found in the United States, and to illustrate, they offer a story, “perhaps apocryphal,” of Arab camel herders whom a government sought to domesticate by building specially furnished homes for them. The camel herders took the homes, but instead of living in them, they let the camels roam through the homes while the herders remained in the desert tents to which they were so accustomed. After a short time, the camels had ruined the homes, and the nomads resumed roaming the desert. This “baffled” and “irritated” government officials, who had been trying, among other things, to provide the nomads with clean water, good education, and decent health care (Stromseth, Wippman, and Brooks 2006, 76–77). In this rendition, state law is analogous to modern health care, while informal adjudication beyond state control is akin to the hysterical and incoherent ranting of a medicine man in a drug-induced hallucinatory state.

Extending the analogy to modern rule of law operations as they often end up working in the field, a medical professional might argue that, in some

circumstances, she must find a way to deal with the drug-crazed medicine man if there is no other way to penetrate the relevant social field. Through her interactions with him, she might be able to convince him to use slightly better medical techniques. Most modern competent medical professionals would certainly regard this as an improvement over the existing situation. Yet there can be no doubt about the ultimate goal of any medical program of Western origin committed to the improvement of health care in the developing world—the marginalization and ultimate disappearance of witches and medicine men, and their replacement with modern medical professionals working in well-appointed facilities. Whether such a position is justified or justifiable in the context of medicine is not a question explored in this chapter. Yet it is apparent that for rule of law operators to regard nonstate tribal and religiously based forms of adjudication in the same manner that modern medical professionals regard medicine men has been and continues to be a tragic mistake.⁵

Indeed, the selfsame analysis respecting the necessary central and near exclusive role of the state in managing legal disputes would appear deeply unsatisfactory when extended into the society the three authors above describe as culturally committed to the rule of law: the United States. In the private high school I attended years ago in Columbus, Ohio, the mother of a twelve-year-old child chose to address a serious physical injury done to her son by another boy by calling the school's principal and the other boy's mother. The matter was settled with a suspension, prolonged detention during which the boy did chores for his victim's family, school-ordered community service, a much-desired apology, and a school assembly on the problems associated with school violence. No money—the one remedy the victim's mother might have been able to obtain in state court—changed hands. She recoiled at the notion of filing a lawsuit against the boy and his parents, finding such an approach dramatically inappropriate and instead preferring the private resolution that was actually reached. I dare to presume that few would describe her refusal to seek redress in the court system as in any way similar to refusing her child a good education, clean water, or reliable health care. Fewer still worry about the state of the rule of law in Columbus upon hearing this story. Indeed, the suggestion that our Columbus mother should have been *required* to pursue a remedy in state court or to point to a state law permitting alternative means of resolution sounds, to use Galanter's phrasing again, positively "monstrous."

So, then, it is important to avoid the orientalist trap wherein one group's decision to resolve matters outside the court system and without reference to state law is a judicious deference to collaborative and customary forms of dispute resolution, while another group's decision to do so is demonstrative of their broadly uncivilized condition. And to avoid that trap, we must do

away with the preposterous assumption that in a properly functioning society there is a natural legal gravity that pulls human beings toward the state as the supreme source of order in all contexts as moths to a flame.

This chapter explores the deficiencies associated with the legal centralist assumption in the context of rule of law efforts, and the means by which the rule of law as an operational matter could be better deployed once we deacculturate ourselves from that unjustified assumption. While the lessons are intended to be universal, the reference used to illustrate the point is the Islamic world, particularly Shi'i-dominated central and southern Iraq.

The next section examines the depth of the legal centralist assumptions that dominate rule of law discourse as a matter of both theory and practice. The section after that discusses three plural sources of legal order in Iraq—the state, the *shari'a*, and the tribe—and describes the extent to which each is used in particular contexts. Finally, the last section illustrates the need to decolonize the legal mind away from legal centralism and reacculturate the rule of law community to the realities of legal pluralism. It also explains why such a decolonization and reacculturation process is salient in light of the weakening role of the state in the international order.

Before proceeding, however, it is necessary to make two clarifications. First, I do not wish to romanticize indigenous forms of ordering, whether religious or tribal in origin. Common criticisms of indigenous law are generally sound and correct, even if the advantages of indigenous law are not praised as often as they should be. Hence, rule of law authors are not wrong when they point out that access to justice is often denied to women and minorities in customary tribunals (Stromseth, Wippman, and Brooks 2006, 336). Nor are these tribunals necessarily free of corruption and capture by elites, as some excellent fieldwork has demonstrated (Jensen 2003, 363). To this may be added other ills. Indigenous law tends to preserve existing structural inequalities (McMillan and Woodruff 2000, 2423), privilege members of certain subcommunities, and impose costs on broader society (Ellickson 1991, 249–50). If its means of resolving disputes tend to be quicker and less formal (Galanter 1981, 25), punishments exacted and forms of compensation demanded can be brutal and arbitrary (Stromseth, Wippman, and Brooks 2006, 336).

Still, while pointing this out, it is helpful to balance the picture; for the advantages of local tribunals extend far beyond the fact that they “command substantial loyalty and may offer useful models for more formal institutions” (ibid.). They command substantial loyalty for a reason. Indigenous law is familiar and accessible to its participants. Indigenous tribunals generally do not require one who wishes to make use of them to enter intimidating and

strange courtrooms far from one's home. There are no lawyer-intermediaries speaking a language that participants can barely understand (Galanter 1981, 25). This is nearly impossible to achieve in any state tribunal that resorts to the use of "modern and effective legal institutions and codes" (Stromseth, Wippman, and Brooks 2006, 78). The costs of doing away with the informal processes are not insignificant.

The point, in any event, is not to engage in a preposterous mission of finding an "authentic" local, communal law that operates on an ideal plane and in contrast to alternative sources of order that would be disrupting and intrusive.⁶ This merely replaces the fantastical claims of legal centralism with equally fantastical ones relating to cultural essentialism. The point, instead, is simply that indigenous law *does* exist and that it will not disappear into irrelevance if the mechanisms of state law manage to improve through extensive rule of law reform.

Second, I am not interested in engaging in the debate that has obsessed legal pluralists for decades respecting what forms of normative order other than those of the state can truly be considered "law."⁷ The fact that the participants in these alternative systems think they are involved in a legal system is good enough to render it law in my view.⁸ Yet to the extent that a critic seeks to describe alternative systems of order based on *shari'a* or tribal rules as not being "legal" but rather "normative," this will suit just fine.

Whatever these systems might be called, their existence is no less real, and their effects on state legal order no less felt. Nor can these alternative systems be wished away, even if many times and in many states, the state law actors themselves (from judges to lawmakers) tend to articulate such a desire, casually dismissing nonstate law as the backwaters province of the ignorant. The fact is that millions make use of such systems, and millions will continue to make use of them. Their interaction with state law in the social matrix is likely to be complex and multifaceted, and we cannot expect state law to reign supreme. In fact, if anything, state law is losing its relative force in the contemporary world, in developing and developed states alike. If any rule of law effort is to succeed, it cannot ignore this.

The Fallacy of the Dominant Approaches to Nonstate Law

The social fact of pluralism, first described decades ago by scholars such as John Griffiths (1986), Sally Falk Moore (1972), Marc Galanter (1981), and Sally Engle Merry (1988), has been demonstrated time and again in a variety of social fields. Whether the subject is land ownership in Tanzania (Moore

1972, 729–42), housing communes in England (Henry 1985), blood feuds in Egypt (Ben Nefissa 1999, 145–57), or even the maintenance of security in modern-day Japan (Milhaupt and West 2000), the ability of actors to circumvent state law—indeed, to operate in contravention of it—has been extensively researched and documented. The research demonstrates that in none of these instances was state law an irrelevancy, and yet in all of them it was not the only normative system in operation. This limited the ability of state law to control outcomes, though in most cases state law certainly influenced outcomes. Such rich lessons of legal pluralism have helped spawn an entire literature in the American legal academy known as “private ordering,” which highlights instances where commercial actors in particular choose to adopt an alternative legal system that appears to meet their needs more effectively than state law does. Such actors regard state law as “destructively adversarial” and for this reason shun it (Feldman 2006, 315).⁹ Similar lessons have also led some scholars to conclude that a great deal of economic development can be obtained without state-directed or state-controlled dispute-resolution mechanisms.¹⁰

Hence, in the world as it exists, the vast majority of disputes that are capable of reaching court, even in a developed society such as the United States, are not resolved by a court, and a sizable number of them are handled by institutions unaffiliated with the state according to norms that are different from state law (Galanter 1981, 19–21). Parties often prefer this. Rather than base their contracts or property rights on state law, social actors in many circumstances deliberately avoid doing so, with the hope of minimizing the possibility of ever having to litigate these rights in court.¹¹

Yet much rule of law work—in both theory and practice—clings to the unjustified assumptions of legal centralism. Hence, it is often stated as axiom, disputes are settled in accordance with “universally applicable rules.” This in turn necessitates the existence of “modern and effective legal institutions and codes”—created, of course, by the state (Stromseth, Wippman, and Brooks 2006, 78). Property and contract rights are too often assumed to be “founded on the law” (Carothers 2006, 5); indeed, the very notion of such a right existing independently of the state does not exist in this shackled conception of law and social order. This is so contrary to fact that it is better described as ideology rather than descriptive reality (Griffiths 1986, 4).

So enamored are rule of law theorists with the primacy of state law that they often do not seem to recognize the extent to which their models fail to address nonstate law in a satisfactory fashion. One might consider, for example, Kleinfeld, whose work on defining the rule of law has been praised, with

much justification. I should therefore stress that I do not focus on Kleinfeld's work because it is particularly deficient in considering nonstate law. On the contrary, it is the best I have been able to find. Too many others are quick to castigate customary tribunals for their faults (as if the state's processes have none of their own), and concede, seemingly grudgingly, the need to work with them because they are the only justice mechanism available (Stroms-eth, Wippman, and Brooks 2006, 336–37). In the end, such scholars offer three alternatives regarding the future of customary tribunals: the state, as the supreme source of legal order, must restrict them, absorb them (by incorporating some of their practices into the state system), or abolish them (*ibid.*, 337). Any other solution, it seems, would not accord with the rule of law.

Kleinfeld, by contrast, engages customary law in much greater depth and nuance. It is the fact that she does this and yet is still unable to incorporate customary law into a broader rule of law theory that makes her work such a compelling demonstration of the discipline's problems in addressing non-state law. For example, in one section, Kleinfeld points out that a village elder might dispense justice sitting under the shade of a palm tree just as well as an elaborate court with Internet access and oak panels. Elsewhere, she indicates that the notion that contracts require effective judicial enforcement might be overstated. In a third section, she describes a rule of law idyll in British Columbia that seems to operate well without a court or police force in sight (Kleinfeld 2012, 33, 53, 80).

Yet, curiously, despite these and other instances, the considerations of nonstate law never seem to penetrate her definitional parameters, which are plainly directed at the state's role in the normative order. In this respect, the mind remains colonized, and the presumptions of legal centralism unmoved. Hence, precisely at the point where she insists that a trusted village elder might dispense justice efficiently, she turns to define the rule of law as having something to do with a relationship between a *state* and its society (*ibid.*, 33). It is not clear why the state would need to be involved in adjudication by a village elder at all. The village surely knows its trusted elders better than the distant state could. Requiring that such a system be incorporated into the state's adjudicatory system could be costly, for it would require that elders be appointed as judges, appeals processes be organized, and formal rules of evidence be introduced. It could also prove perverse, both in limiting access to justice and leading to the creation of rules that destroy more effective informal systems that exist.¹² This is not necessarily so, and I do not deny that there may be sound reasons to involve the state in such adjudications. Yet it is not clear that the state must be involved—and if it is not, then either the nonstate law has

nothing to do with the rule of law, or the rule of law involves considerably more than a relationship between a society and a state. Kleinfeld's definitions appear to anticipate neither of these possibilities.

The confusion deepens when Kleinfeld describes the "idyllic rule of law" as it exists on Salt Spring Island in British Vancouver. Nobody guards the boxes where the money from purchases is collected and stored over the course of the day. A buyer who likes an item simply takes it and leaves the appropriate amount in the unguarded cash box before walking out. The buyer could just as easily fail to pay, or even take money out of the cash box on her way out of the door. Yet when the possibility of theft is raised to islanders, they meet it with gentle derision (Kleinfeld 2012, 80).

To find a relationship between this social state of affairs and the state requires us to presume that the only reason citizens do not steal from one another is because the state has told them it is a crime to do so. More likely, the residents of Salt Spring Island are only vaguely familiar with the state's laws on larceny, but they all know that stealing is wrong. Also likely is the fact that they manage, in many cases, to effect this system through the enforcement of nonstate norms rather than the application of state law. It is possible that a sixteen-year-old resident of Salt Spring Island who steals finds himself in court because the police are called; it is more likely, however, that the offender is taken to his parents and that his family is sufficiently shamed to prevent a recurrence. After all, if the state were the effective deterrent and source of order, one would expect considerably more theft to occur when the police are not around. Plainly, there is much work to do concerning the role of nonstate law in maintaining order in a rule of law society.

In rule of law operation as opposed to theory, the matter is even worse. By and large, efforts to deal with nonstate law seem to consist of attempts to tame it and subject it to state restriction and control. Amnesty International is the most explicit in this regard. Distressed by the manner in which courts appear to haphazardly decline jurisdiction and in which nonstate tribunals engage in frequent and abusive violations of human rights, Amnesty concludes that an important component of the solution is to "regulate the informal justice system." Specifically:

The competence of informal justice systems must be clearly set out in the law in order to remove any ambiguity regarding the role of Afghan informal justice mechanisms. The relationship between informal systems and the formal judicial system must be set out by law. In order to fulfil its obligation to exercise due diligence in protecting human rights, the [Afghan government] must ensure that *jirgas* and *shuras*, if they are allowed to continue to function, fully conform to international human

rights law. If this cannot be ensured then these informal justice mechanisms must be abolished. All cases in which there are indications that a *jirga* or *shura* has perpetrated human rights abuses must be thoroughly investigated and all those participating in them must be brought to justice. (Amnesty International 2003, 62)

Amnesty's obsessions with legal centralism are clear from the above passage. We may all share Amnesty's distaste in the human rights abuses committed by customary tribunals in Afghanistan, and we may all seek to put an end to such abuses, without embracing the state and state courts as a panacea. Surely Amnesty is aware that the greatest killing institution in the history of humanity is the state. When it comes to the adjudication of death, even the most brutal and arbitrary customary tribunals are not in the same league as courts administered, operated, and directed by regimes, from Nazi Germany to Ba'ath Iraq. It takes a mind colonized in the assumptions of legal centralism to presume that customary tribunals are so incorrigible, and state courts so capable of massive reform, that the only possible solution to abuses by the former is the exercise of control by the latter.

This rigid adherence to legal centralism is hardly limited to one (large and influential) human rights organization. Even the United Nations Human Rights Committee—the body responsible for monitoring states' compliance with the International Covenant on Civil and Political Rights—has expressed the same view. In its General Comment 32, which interprets article 14 of the covenant, the committee states:

Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.¹³

The distrust of and contempt for nonstate tribunals is unmistakable. Not only must state courts oversee the customary tribunals, and not only must they delegate to these tribunals only the most menial of matters—but even

with regard to those minor matters, there must be a mechanism allowing parties to challenge their merits in a state court. The model is hardly one of cooperative pluralism. Instead, it is one of direct subjugation, with the tribal court playing the role of magistrate judge to a supervising court rather than exercising any meaningful authority of its own.

More measured, and more mature in its analyses and observations, is the United States Institute of Peace (USIP), which has an entire program focused on incorporating nonstate law into rule of law activities in postconflict states. In describing its efforts, USIP indicates that it intends "to provide guidance to . . . policymakers on the potential role of customary justice systems in post-conflict states." This includes the following measures:

[E]xamining such issues as the potential allocation of jurisdiction between formal and customary systems of justice, approaches to adapting customary practices that may contravene international human rights standards, possible limits and problems in the use of customary justice mechanisms, ramifications for the distribution of political and economic power, and the facilitation of dialogue and information-sharing between formal and informal systems. (United States Institute of Peace 2013)

There is much to like in this formulation, and yet there are also some points to question. Surely helping policy makers "understand the role of customary justice systems" is useful, and there is nothing wrong with considering approaches that might ameliorate the brazen assaults on international human rights that occur in any tribunals, whether state or nonstate. Yet USIP also lists the "allocation of jurisdiction," as well as "facilitation of dialogue and information-sharing." The two taken together suggest a particular formality to the division between state and nonstate adjudicative mechanisms that assumes state supremacy and legal centralism, for it is hard to see who or what could "allocate jurisdiction" between the tribunals save a legal rule of the state, memorialized perhaps in its foundational document. "Allocation of jurisdiction" is a phrase deeply imbued with a legalist hue. It requires the use of lawyer-intermediaries to convey its meaning to laypeople. State supremacy is presumed when "jurisdiction" is "allocated."

The same is true when USIP proposes "dialogue" between formal and informal systems. It is no secret that legal centralism permeates the mentality of local state actors at virtually all levels and in all jurisdictions. As a result, dialogue between state and nonstate systems is possible only to the extent that the customary adjudicatory systems are subservient to the broader state structure, proceeding where jurisdiction has been "allocated" to them by the state. It is difficult to believe that a state judge anywhere would make it a practice to

share information with a tribunal that was not recognized by the state, or that state rules would make the judge do this. Hence, subtly but unmistakably, the broad demand is one of legal centralism, where the only law is that made by the state or specifically allocated to others by the state. That USIP (2013) has this in mind is betrayed amply in its more detailed description of the organization's work in Afghanistan, where it insists that Afghan state courts "retain an important role in ensuring that cases [adjudicated under customary law] are resolved equitably and in accordance with the law." The state tribunal, in other words, sits in review of the customary one.

I will not discuss at length the less than pragmatic assumptions that appear to attend to such formulations. It is difficult to believe that state legal systems broadly described within and beyond the rule of law community as effectively nonfunctioning will be able not only to establish themselves but to entrench themselves with such vigor that they can control, and abolish if necessary, any alternative legal systems that do not comply with their demands. Particularly incredible is the idea that such poorly functioning systems will be able to sensibly allocate jurisdiction by legal rule and then meaningfully adjudicate that necessarily elusive jurisdictional border with the type of complexity and nuance that is characteristic, for example, of courts in the United States administering the "minimum contacts" rules of *International Shoe* and its progeny.¹⁴ Jurisdictional chaos and a broad disregard for whatever claims of jurisdictional exclusivity the state makes are far more likely results than any clarification of proper authority. But let us assume these problems away and imagine what such a world might look like if these legal centralist aims could be achieved—not in Afghanistan but rather in Shasta County, California, with specific reference to a seminal gem of private ordering literature, the work of Robert Ellickson (1991).

According to Ellickson, farmers and ranchers in Shasta County rarely litigate their disputes, at least not with regard to damage caused by trespassing animals and responsibility for building and repairing fences. In fact, most of the time, they do not even know the underlying law particularly well, and state officials seem to know it even less (Ellickson 1991, 49–50, 69–70). The community has instead developed its own norms and forms of policing, used with restraint in order to avoid feuding (*ibid.*, 57–59). At times, the community pays heed to state legal rules—motor vehicle accidents, for example, are routinely addressed under state law. However, in their "workaday" affairs, residents manage their disputes without involving state legal processes or even invoking state legal rules about which they know so little (*ibid.*, 69).

For example, if trespassing cattle cause damage to a landowner's fence, the landowner asks for help in rebuilding the fence. If this does not work, the

landowner gossips, relying on reputational sanctions. In extreme cases, the landowner may threaten to kill or maim trespassing cattle that are deliberately left uncontrolled and for which the cattle owner does not offer to bear some responsibility (*ibid.*, 58). Ellickson even reports that one landowner threatened to castrate a menacing bull that had repeatedly caused trouble, and that a law enforcement officer had informed the landowner that he would ignore the offense given the circumstances. Thus, though the castration would, if carried out, surely constitute a crime under state law, the actual state prosecution of such a matter seems highly improbable in light of the stated position of law enforcement on it.

This state of affairs appears to run almost directly contrary to that which Amnesty and the Human Rights Committee demand, and USIP suggests, should be the objective of rule of law efforts in Afghanistan. After all, in Shasta County, there is no "allocation of jurisdiction," at least not in any explicit sense. The law does not "clearly set out" the "competence of the informal justice systems." Rather, the decision regarding when state tribunals are used and when they yield to informal justice systems is left to custom and localized practice, presumably as it is in Afghanistan.

Moreover, in Shasta County, the informal justice system is not making its decisions "in accordance with the law"; in fact, no attempt is made to comply with the law given that nobody appears to know what it is. Not only does the state fail to "bring to justice" purported criminals for their participation in informal schemes that lead to the potential castration, kidnapping, or killing of cattle; it even implicitly endorses the scheme at times by turning a blind eye. Again, we might fairly assume that something similar occurs in Afghanistan.

In the legal centralist's world, none of this would occur. A rancher whose livestock trampled a neighbor's fence would not receive a friendly call and an offer to handle the matter using norms that have nothing to do with state law. Instead, he would be faced with a subpoena, or at least a call that initiated "bargaining in the shadow of"¹⁵ established legal rules of which the participants would be made aware through lawyers. If the rancher refused to compromise, the next step would not be to initiate the informal reputational sanctions to which Ellickson refers, beginning with negative gossip. Rather, it would be to file a lawsuit, resulting in an even greater reliance on the lawyer-intermediary. Failing success at this stage, there would be no threatened killing or castration of livestock but a lengthy court proceeding over the costs of mending a broken fence.

One could debate whether the realization of this legal centralist fantasy would be preferable to the reality that exists. The broader point, however, relates not to its *desirability* but to its *plausibility*. *This scenario has no actual*

existence on this earth. It fails to describe accurately the internal order of Shasta County, California. It also fails to properly account for the maintenance of order in the private school of Columbus, Ohio, referred to in this chapter's introduction.

Perhaps the sweetest irony of all is that it does not even fully account for the manner in which order is maintained in the most prestigious universities of the United States, *including its law schools, where the state law is taught to aspiring students who then expect to enter the world to practice it.* Ellickson points out that academics, including legal academics, routinely flout copyright law by copying large portions of their colleagues' works for students to read in seminars and other limited-enrollment classes. Those who manage copy rooms within universities and law schools, and commercial copy centers nearby, do little to prevent this practice. And as with the farmers and ranchers in Shasta County, those engaged in the practice rarely seem to understand the law. Ellickson (1991, 260) points to one example where a commercial copy center refused—out of supposed compliance with copyright law—to copy more than 10% of a book, but permitted the patron requesting the service to use the center's equipment to make the copy himself. Suffice it to say, a commercial photocopy center does not avoid a claim of infringement by delegating the task of performing the copying to a willing volunteer.

It would be a mistake to describe the system at universities (including the one where this work is being published) as lawless with respect to copyright. Rules do exist—just rules that bear no resemblance to the actual state law. Copying an entire chemistry textbook and distributing it to the five hundred students enrolled in the class would be regarded by all as a copyright violation and a breach of academic norms (*ibid.*, 262). However, copying journal articles or portions of books is widely practiced, and even encouraged by the authors themselves. For my own part, I know that large portions of my law review articles are routinely distributed by my colleagues to their students in Islamic law seminars around the country without advance permission having been sought either from me or from the publisher, in plain violation of copyright law. Yet, as an academic, I am flattered rather than offended by the violation—and I suspect many of my own colleagues feel similarly. Surely the publisher is aware that many of its articles are being copied illegally, and yet it makes no effort to find the violators and seek compensation from them. This, to reemphasize the point, is the manner in which America's leading universities, and its leading law schools, administer order within their ranks.

This is not to compare Afghanistan's *shuras* to Shasta County's resolution mechanisms, or to suggest that nothing is amiss in Afghanistan merely because the actual rules regarding copying at Harvard seem to work reasonably well

while bearing no resemblance to state law. Obviously, there is a difference between a landowner castrating another person's bull, a professor copying a colleague's article for distribution, and a tribal leader offering young girls to rival tribes as compensation for an injury done to them by his tribe. My point is instead a more modest one: there must be better ways of addressing the severe justice deficits in Afghanistan, or Iraq, than demanding the establishment of a form of order that is entirely dependent on state law, in a manner that knows no existence on this earth.

State and Nonstate Legal Order in Iraq

Bringing the experiences of the Islamic world into sharper focus demonstrates the extent to which the assumptions of legal centralism are problematic not only generally, as described above, but in particular in regions where much rule of law work takes place. Of course, the region often described as "the Islamic world" is vast and varied, with as many differences as similarities among its many states. Generalizations are a mistake, and the notion that each Islamic state fits within an irreducible Islamic essence equally applicable to other Islamic states is preposterous (Abu Odeh 2004, 790). Yet even if this is so, it can be said with some justification that a number of Islamic states—and in particular those that are operational targets for rule of law programs—share similar characteristics that prove salient for the purposes of this chapter.

The first of these is a commitment to *shari'a* as a form of legal order, whether operating within the state or outside of it. This is hardly a surprise, as in virtually every Islamic state the *shari'a* plays some role, even if in some states that role is a highly reduced one. The history of the *shari'a* as the supreme source of legal order in Islamic states for centuries, as well as the religious commitments of countless Muslim citizens, renders the *shari'a* impossible to ignore entirely (Hamoudi 2008, 86–87). This is broadly recognized, and if there is a problem with regard to the way that outsiders tend to approach *shari'a*, it is not in granting it too little importance but in granting it too much. Just as state law does not govern in each instance where it may be applicable, the same might be said of *shari'a*, which is obsolete in any number of areas (Hamoudi 2010, 311).

A second, and less frequently discussed, source of legal order in many Islamic states is the tribe. There often seems to be a presumption that tribes apply *shari'a*, at least at times (Amnesty International 2003, 46). Much scholarship, however, points to a substantial divergence in fact between the rules

of the Pashtun tribes, known as *pashtunwali*, and the *shari'a*, even if the tribes claim adherence to both.¹⁶ Certainly, my own extensive work with Iraqi tribes does not reveal any real connection between their resolution mechanisms and the *shari'a*, despite rhetorical insistence otherwise.¹⁷

The final, and in many ways most obvious, form of legal order is the state, whose legal system, like the *shari'a*, plays a greater or lesser role in virtually any Islamic society, depending on the state in question. State law tends to betray more vestiges of *shari'a* than tribal rules do. However, the influence often appears only at the margins, at least beyond the area of personal status (which comprises family law and inheritance). In the overwhelming majority of Islamic states, state law mostly derives either from a European transplant or, in cases such as Malaysia and Pakistan, from the adoption of the common law (Weiss 1998, 188; Abu Odeh 2004, 790–91).

While these are not the only sources of order that exist in an Islamic state, it is fair to say that in a considerable number of Muslim majority states, there are semi-autonomous social fields within the state where these three sources of order—the state, the *shari'a*, and the tribe—play a primary role. This is the case in much of the Shi'i-dominated areas of Iraq, where tribal affiliations run deep, where fealty to the *shari'a* as pronounced by the Najaf jurists is widely proclaimed, and where the state is hardly an irrelevancy, even if its role is reduced in particular contexts.¹⁸ The rest of this section draws on the context of southern Iraq to explore these three sources of order and the complementary manner in which they interact.

Shari'a and Personal Status

Application of the *shari'a* proves most salient to Iraqis with regard to matters of personal status. The Personal Status Code takes advantage of the fact that the *shari'a* is not itself a uniform legal code. Rather, it is a broad corpus of overlapping and oft-conflicting norms and rules derived by medieval and modern jurists from Islam's sacred foundational texts—the Qur'an, the received book of God; and the Sunna, or the actions and utterances of the Prophet Muhammad (Hamoudi 2012, 431–32).¹⁹ The code is therefore largely an enacted amalgam of rules from the Ja'fari (Shi'i) school of thought and the four classical Sunni schools, with the rules generally having been selected for enactment by the code drafters on the basis of how progressive they happened to be. Hence, for example, the code adopts the Shi'i rules respecting the inheritance rights of a daughter without brothers, which are more favorable than those of the Sunni schools.²⁰ At the same

time, it adopts the Sunni Maliki rules respecting a woman's right to obtain a court-ordered marital dissolution, which are more favorable than those of the Shi'a and the other Sunni schools.²¹

For this reason, the code has long been resented by the Shi'a, and the Shi'i juristic classes, who view it as an imposition on the prerogative of the jurists to determine the rules of personal status (Stilt 2004, 751–52). Even more traditionalist Sunnis balk at the notion of state judges administering such fundamental religious rules as those of personal status. In light of this, it is not unusual for marriages in Iraq to be concluded by clerics instead of by judges in state courts. Technically, a husband who marries outside the personal status courts is committing a crime under the Personal Status Code,²² though that fact seems to have done little to limit the prevalence of the practice. While urban elites tend to quickly follow religious marriages with legal ones concluded in court, the urban poor and rural populations usually do not bother to do so, often for a period of years.

Much the same can be said of marital dissolution. A man is obligated to register his divorce in court—unless it is infeasible to do so, in which case he must register it in court at a later date—and the legal effects of the divorce are attained only upon registration.²³ However, this requirement does not seem to concern many Iraqis, particularly the urban poor and rural populations, who rarely register their divorces in court until and unless there is some specific need to do so.

It should be emphasized that resort to religious mechanisms is not because of imperfections in the formal justice system, imperfect as it may be. As mentioned above, Iraqi couples *do* end up conducting formal marriages in a court eventually, in many cases long after their religious marriages have been concluded. Moreover, litigants in urban areas use the personal status courts often enough that a substantial body of jurisprudence has developed concerning the administration of marriage, divorce, alimony, child custody, inheritance, and other matters. The courts are thus sufficiently reliable and predictable to be used at times.

The problem, instead, is one of *legitimacy*. While the judiciary is not deemed illegitimate in all instances, it is deemed illegitimate with regard to matters of marriage and divorce, where Iraqis overwhelmingly vest their trust in religious authorities.

Tribal Resolution of Private Wrongs

Concerning matters of tort, the *shari'a* has long slipped into obsolescence. High jurists such as Sistani (2008, II:226–51) continue to pronounce extensive

rules for such matters as the historic Islamic tort of *ghasb*, which involves “the hostile taking of the property of another, or a right therein.” Yet, in reality, few among the laity even know what the Islamic rules are, much less show any interest in applying them. Commitment to the *shari’a* in this area is more rhetorical than real.

State courts, on the other hand, issue many decisions in tort disputes each year, as is the case with personal status.²⁴ Yet, at the same time, again similarly to the personal status courts, few Iraqis outside of the cities use the state courts. My own fieldwork suggests that this is because tribal members regard tribal resolution as a system that works well enough for its members. The process involves a series of escalating steps not unlike those taken by the farmers and ranchers of Shasta County, California. A tribal member who feels that a member of a rival tribe has perpetrated a compensable wrong against him informs his tribal leader, who then issues a notification. The allegedly offending tribe can demand arbitration of the dispute, conducted by one of several recognized elders throughout Iraq, if there is some question about who is at fault for whatever injury is alleged. If the offending tribe does so, at this stage or any other, the matter is referred to arbitration, and all further tribal resolution processes are suspended pending a determination by the arbitrator.

If the offending tribe ignores the notification, then begins the confrontation, or the *guama*. In the confrontation, several members of the injured tribe go, in public view, to the offender’s home to demand compensation. This visit serves both to initiate negative gossip against the offenders and to threaten more severe action.

Usually, the dispute is resolved at this stage. The tribes are what are described in the private ordering literature as “repeat players”—they deal with each other frequently, and they know that a failure to answer for a wrong in one case will redound to their detriment when one of their own needs to make a claim in the future (Richman 2004, 2339). Tribes therefore do not take lightly wrongs that a tribal member has committed. Still, in the event that the tribe does not respond to the confrontation, the injured tribe initiates a striking, or *degga*, wherein it sprays the offender’s home with bullets at a time when either nobody is home or all are asleep and the risk of injury is assumed to be low. The striking, which can be repeated several times, serves not only as a threat but also as a source of negative gossip about the resident and his tribe.

Disputes are almost always resolved after one or perhaps two strikings, as no offending tribe wishes to suffer the reputational consequences of numerous strikings. Traditionally, in the rare cases where the dispute is not resolved by this point, members of offending tribes might be kidnapped and held pending resolution. However, as the Iraqi state has taken a more strident position

against kidnapping, even handing down the death penalty to those who commit the crime,²⁵ this procedure has been reduced to near extinction. In a two-year span, I learned of only one case that involved a kidnapping; and in this case, state intervention brought the tribal process to a halt when the tribe of the kidnapped member went to the police to complain.

In any event, once the offending tribe agrees to recognize its responsibility to compensate for a particular harm, a small number of its members pay a visit to the victim and request a respite, or an *atwa*, to pay a more formal visit in the future involving larger numbers of individuals of higher prominence. This will include, most importantly, an outsider respected by both sides who acts as a mediator and who is a *sayyid*, or a direct descendant of the Prophet. The only matter left is the payment of the appropriate compensation, which is determined in the final formal meeting, known as the *fasl*.

The State as Criminal Enforcer and Source of Largesse

As noted earlier, it would be a mistake to describe the state as completely absent in this complex semi-autonomous social field. Leaving aside the fact that much of the urban elite and even middle classes can and do make use of state court processes to marry and resolve disputes, imperfect as those processes are, virtually everyone in Iraq feels some need to interact with the state. This is most often because state-provided benefits require official documentation, and in a rentier state such as Iraq, such benefits are not insignificant.

Hence, for example, clerics unaffiliated with the state routinely perform marriages out of court, in violation of the law, and sometimes, though not usually, involving the marriage of minors. Initially, this presents no particular problem for the couple themselves, who can live perfectly happily without the state knowing or even caring about their violation of the law. However, it begins to present a problem when they seek to register their children in free public schooling, claim the food rations the government distributes monthly, or take advantage of whatever other largesse the state might distribute from time to time, whether it be land, free gasoline, or another item.

Inevitably, virtually all Iraqis appear in court at one point or another to "marry," even if the vast majority have already been religiously married. And the state does not enforce its provisions regarding the obligation to marry only in state court, even under circumstances where the violation is obvious. A judge in the Kurdistan region of Iraq, for example, married three couples—each of whom had at least two children with them—before me in a single morning. When I asked her about the legal violation, she shrugged and asked

what good I expected it might do if she referred these cases to the criminal courts to imprison the husbands for three to six months, as the law requires.

The state's propensity to distribute largesse has caused the state's legal mechanisms to become more significant in other contexts as well. In the Ba'ath era, the state had a national insurance scheme pursuant to which a state-owned company, the National Insurance Company, would generously compensate anyone injured in an automobile accident, irrespective of fault.²⁶ The state practice brought tribal resolutions over such accidents virtually to a halt, as injured parties pursued their claims using state processes. Rather than resist this, the tribes encouraged it, and for good reason. As repeat players, the tribes preferred not to claim against one another—thereby running the risk of being claimed against in the future—if they could be compensated from an external source in a manner that cost them nothing. Hence, for a long period, the state determined compensation for automobile injuries almost exclusively, until the insurance scheme floundered along with the rest of Iraq's economy after the First Gulf War. At that point, the tribal role in addressing such disputes resumed.²⁷

The criminal-enforcement aspect of state order is also important to note. While tribes and individuals violate certain laws with impunity (a fact that can be said of individuals in the United States as well), there are crimes, among them kidnapping and honor killing, with which the state is comparatively more concerned. This is not to suggest that the state manages to eliminate all occurrences of such crimes—plainly, it does not. Yet the public airing of a particularly gruesome honor crime in 2007 did lead to state intervention (Clark 2007), and the problem of kidnapping, particularly for ransom, has led the state to amend its penal code to render the crime a capital offense.²⁸ Tribes prefer to avoid conflict with the state, and thus they take its criminal laws seriously enough to avoid major confrontations when they can.

Also important to note is that tribes *use* the state's criminal processes for their own purposes. In some cases, tribes manipulate the judicial process by, for example, inducing a young man to "confess" to slander and spend time in jail as recompense for an honor crime prior to marrying the young woman who is his paramour. At other times, however, they work with the state. When a tort involves a serious crime, such as murder, the injured tribe often does not find the compensation sufficient recompense. Killing the offender only invites state attention, for the police do not ignore dead bodies, even in Iraq. In such cases, then, the resolution often involves the payment of a sum of money *and* the perpetrator's confession in state court, which allows the state to determine the appropriate punishment.

In this respect, the state's legal machinery can be thought of as working alongside that of the tribes. At first glance, the dominant modality seems to be one of competition in that both systems have different rules for dealing with the same matters of compensation for private wrongs. However, in reality, the state largely and implicitly delegates to the tribes the ability to administer an entire tort system on their own, without significant state interference, even when the torts committed also constitute criminal offenses. This benefits the state by relieving it of the duty to investigate such wrongs and address them in an underfunded and overburdened court system. It also permits the state to avoid intervening in affairs that social actors might regard as none of the state's business. At the same time, the tribes benefit from a broader state criminal-law system that not only can be used as a source of punishment for egregious wrongdoings but also prevents feuds from jeopardizing the public order. While negative gossip and reputational sanctions are remarkably effective tools for limiting public violence, they are imperfect ones. The willingness of the state to intervene and use criminal sanctions when feuds escalate uncontrollably enables the tribal system to function more smoothly.

The Withering of State Power and the Decolonization of the Legal Centralist Mind

The state is thus not supreme in Iraq, nor Afghanistan, nor even the most developed of societies. But equally importantly, the global trend concerning adjudication has broadly been *away* from state control—and even away from meaningful state monitoring of nonstate adjudication—primarily through the mechanism of arbitration. States have endorsed this trend. Thus, rather than increasing the level of judicial monitoring of arbitral tribunals as such tribunals proliferate, states have been acting to decrease it. Most telling in this regard is the ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards by the vast majority of the world's nations.²⁹

Under the rules of the convention, courts of member states are required to honor arbitral awards obtained abroad. Courts may set aside foreign arbitral awards only on narrow enumerated grounds. Among these are that the arbitral agreement was invalid under the law that the parties chose to govern their agreement,³⁰ that one or more of the parties lacked the legal capacity to contract,³¹ that the arbitral procedure did not afford one party a meaningful opportunity to present a case,³² or that the award violated public policy in the state in question.³³ However, most saliently for the purposes of this chapter, courts may not overturn an arbitral award because of legal or factual

error—in other words, because a ruling was not “in accordance with the law.” This is precisely the basis on which USIP claims that Afghan courts have an important role to play vis-à-vis customary adjudication. The convention also does not require that only “minor” disputes be subject to arbitration. In fact, arbitral awards in the billions are not uncommon.³⁴

Bolstering this legal regime is the model law on international commercial arbitration developed by the United Nations Commission on International Trade Law in 1985 and revised in 2006 (United Nations Commission on International Trade Law 2008). The model law prohibits courts from hearing international commercial disputes where the parties to the dispute have agreed to arbitrate it by contract (*ibid.*, art. 8[1]). Instead, it requires such courts to stay the proceedings and refer the parties to arbitration (*ibid.*).³⁵ Courts are also obligated to enforce the substantive award, again without looking to the merits of the dispute and with exceptions on only the narrowest of grounds (*ibid.*, sec. 4). The result of these developments has been the acceptance of arbitration as the preferred method of resolving international commercial disputes (Strong 2013, 502–3).

Nor is this trend of adjudication away from state courts limited to the international commercial context. Much domestic law has developed in the same direction. Under prevailing US Supreme Court precedent, for example, the United States’ Federal Arbitration Act *obligates* an employee to use arbitration for disputes concerning the violation of antidiscrimination laws so long as the employment agreement contains an arbitration clause.³⁶ As in the international context, the grounds for overturning an arbitral award are narrow and do not include ordinary legal error, as opposed to such matters as fraud or corruption.³⁷

The weakening of nation-state sovereignty extends far beyond the narrow confines of adjudication. In fact, many theorists have argued that the traditional Westphalian state is not likely to last much longer. Evidence for this includes the increased power of multistate alliances such as the European Union, the international use of force to prevent domestic human rights violations under the theory of a “responsibility to protect,” and the loss of effective control over trade-related matters to transnational organizations such as the World Trade Organization (Patterson and Afilalo 2008, 13). Regardless of whether this means that the state is dying, is undergoing a fundamental paradigm shift, or is merely readjusting to a new international order, what is obviously occurring is a significant transfer of power away from the state.

It is striking to contrast this evolving set of facts with the rigid adherence of groups such as Amnesty International and the United Nations Human Rights Committee to legal centralism and classical models of state suprem-

acy. Within these prominent members of the rule of law community, neither the state's diminishing power nor its limited ability to effectively manage adjudications seems to have penetrated the legal consciousness. The mind remains thoroughly colonized in the legal centralist mold. Under this framework, the state is considered the supreme adjudicator over all competitors. Religious and customary tribunals must be thoroughly subjugated, the jurisdiction delegated to them must concern only "minor" civil or criminal matters, and the ultimate judgment by the nonstate tribunal of that "minor" matter must be subject to challenge and review in state court. Anything else would be a violation of the right to a fair trial as guaranteed by article 14 of the International Covenant on Civil and Political Rights.³⁸ To say that this is not the rule regarding arbitration is to understate the matter considerably. A different approach is adopted, it seems, when a person with a suit, as opposed to one with a turban, happens to be the nonstate official doing the adjudicating.³⁹ This is hardly a surprise—the colonized mind might well be expected to be orientalist in its biases and presuppositions. Still, it is problematic.

Moreover, it is profoundly unhelpful. If we unshackle ourselves from this colonized conception of state centrality that has permeated our legal consciousness, in the rule of law field more than any other, we might be able to imagine a different and more salutary set of solutions to address problems related to the rule of law. Those solutions, to be clear, would be no more tolerant of human rights violations than any other. Nobody, including me, expects or wants state courts to enforce orders of nonstate tribunals—be they arbitral, tribal, religious, or any other—that result in human rights violations. The question, rather, is whether the solution to brazen human rights violations in any semi-autonomous social field is to limit our imagination to an increasingly ridiculous and patently counterfactual scenario where it is the *state* that will necessarily bring about the change we seek.

Instead, beginning with Kleinfeld's estimable wisdom that the rule of law is the pursuit of particular ends rather than the means deployed to reach them (Kleinfeld 2012, 13–15), we might ask what "end" we seek concerning the operation of personal status rules and norms in Iraq. If it relates to the eradication of forced marriage or child marriage, then that is not a reason to ban all nonstate marriage, as the Personal Status Code currently does, complete with jail terms for the husbands who engage in them. Not only does that lead to the law being largely disregarded by state officials themselves, but it also presumes that state judges will be more effective than tribal or religious authorities at policing forced marriage. This is a suspect position given that

the populace does not trust the state to officiate marriages in the first place. In fact, precisely because of this lack of trust, the state judiciary is probably the worst possible institution to use to address this justice deficit regarding forced marriage and child marriage.

Naturally, the legal centralist mind might conceive of other solutions that are less dramatic than prohibition and imprisonment. Many might involve education initiatives whereby rule of law experts are sent into the field to convince recalcitrant Iraqis that state-court marriages are better for them. There is no *a priori* basis on which to conclude that such an initiative would be successful, much less beneficial to individuals preferring nonstate adjudications. After all, multinational international commercial actors across the globe have broadly and dramatically rejected state adjudication as less than ideal, and states have accepted diminutions of their own adjudicatory powers as a result. It is hard to understand why ordinary citizens cannot be trusted to reach similar conclusions regarding the benefits and detriments of state adjudication in particular circumstances.

Thus, in the place of these state-centric solutions, we could decolonize our minds and start to take religious and customary tribunals more seriously. We could conceive of them as the primary mechanisms for justice delivery. We could then work with them not to coordinate their functioning with the state, as USIP has suggested, nor subject them to strict state oversight, as Amnesty International and the Human Rights Committee have suggested, but rather to improve them on their own account, *without regard to the role of the state*. We might even seek a diminution of state authority in the area of marriage, a result no more problematic than the diminution of authority of state courts in the presence of arbitral agreements. The end, after all, is a reduction in the numbers of children forced into marriage—not the strengthening of a particular adjudicatory mechanism at the expense of another.

The same might be said regarding tribal dispute resolution. And in working with these institutions, we might even identify trends within the tribal networks (perhaps even transnationally) that could be expanded on or limited. If, as a purely hypothetical situation, the Jordanian wing of the Rabi'a tribe does not engage in the trading of women to compensate for injury, and the Iraqi wing does, this information might be put to good use in Iraq in particular. That there is no formal legal relationship between the state judiciaries of Jordan or Iraq, or the states of Jordan or Iraq for that matter, is of no moment.

This is not to say that the state should always be absent from rule of law considerations, for clearly it has a role to play. Although problems related

to marriage formation might be addressed without considering state courts, surely we need to at least consider the use of state resources if the problem is one of the systemic commission of honor crimes across the national spectrum. And although a goat herder may be able to get a loan using nonstate mechanisms, no Arab entrepreneur in need of financing to develop a new globally desired piece of software is likely to be able to succeed without some state legal infrastructure in place.

The matter is admittedly complex and requires a great deal of contextual study. Yet we must dispense with the fantasy that at the center of order in any social field is, or should be, the state. Instead, we should view the state as one of many players in a multifaceted and multidimensional system. Legal centralism is not the reality in our world, and it is becoming increasingly less so. Until or unless we free ourselves from this conceptual prison and acculturate ourselves to a broader global reality, efforts to expand the rule of law are likely to fail.

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Notes

1. For example, Galanter (1981, 1) quotes Griffiths to the effect that "the state has no more empirical claim to being the center of the universe of legal phenomena than any other element of that whole system does."
2. The phrase "semi-autonomous social field" was coined by Moore in a highly influential 1972 article wherein she maintains that the appropriate subject of study for the interaction of law and other normative ordering is a "semi-autonomous social field" capable of making its own rules but also set in a larger social matrix that affects its operation (Moore 1972, 720).

3. An excellent example of such work is provided by the United States Institute of Peace, which has an entire program dedicated to working with nonstate adjudicatory tribunals, as discussed in the next section.
4. In his pathbreaking work on the subject, Ruskola (2013) describes the phenomenon of "legal orientalism," wherein the decision of what is and is not considered law is often the subject of narratives, Western in origin, to distinguish the West (particularly the United States, presumed to enjoy the rule of law) from the Orient (particularly China, where the rule of law is deemed absent). The matter is not altogether different from the example provided in the main text.
5. Even in more nuanced treatments of nonstate adjudicatory mechanisms, the conception that dominates is one where the state is central to the maintenance of order in the relevant social field, with alternative systems occupying a secondary, inferior role at best. In such a conception, the analogy might be not to a medicine man but to an imperfectly trained nurse-practitioner—legitimate in the conducting of her activities but not to be trusted with anything terribly consequential if it can be avoided. In either case, and as explored below, legal centralism dominates the collective imagination of the rule of law community.
6. Dupret (2004, 158) notes this regrettable trend in some legal pluralist literature.
7. The central problem with which legal pluralists have grappled is how to define "law" once it has been determined that law is not limited to state institutions (Tamanaha 2008, 391). Merry's (1988, 878–79) indication that "the literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law" is as true today as it was when she wrote it in 1988. Some have argued that even attempting such a distinction is impossible (Ferrié 1999, 21).
8. I am not the first to develop indicia of this sort to distinguish between law and nonlaw. Tamanaha (2008, 396) offers a definition of law in the context of non-state systems wherein law is that which is socially recognized as such. In an interesting article on legal pluralism in Egypt, Dupret (2004, 160–61) elaborates on (and to some extent criticizes) Tamanaha's rather straightforward idea by giving more robust recognition to the practical and temporal context in which social actors may choose to deploy the term "law" to refer to a particular normative system.
9. Feldman (2006, 316 n.8) later (rightly) castigates the literature for what he describes as "norm centralism," in which the state is described as an inefficient and bumbling monstrosity, and private means of ordering are seen as necessarily superior. It certainly is not my position that the state is inherently incapable of resolving disputes efficiently in any context. I merely posit that the state is not, and has never been, the sole referent to which parties turn to administer disputes,

and it is not, and has never been, the sole source of rules. In making this claim, which in many circles would be modest and uncontroversial, I find myself at odds with significant parts of the rule of law community.

10. Upham (2006, 94–98), for example, demonstrates the extent to which Japan managed economic development by avoiding extensive use of the formal legal system, instead resolving disputes informally.
11. This is a point wisely made by Kleinfeld (2012, 53), among others.
12. Kranton and Swamy (1999) provide an excellent example of how the introduction of state law disrupted credit markets in colonial India. Concerned about the fact that lenders were exercising monopoly power over borrowers with whom they had long-term relationships, the state introduced formal contract rules, which created competition among lenders and a market among borrowers, thereby driving down interest rates, as was expected. However, it also severed the long-term relationships between lenders and borrowers, making lenders less willing to extend a borrower's repayment period given that the borrower might not return to the lender for future business. This resulted in economic shocks and widespread rioting when borrowers proved unable to pay in times of hardship (ibid.; Stephenson 2006, 208–9). Though Kranton and Swamy attribute the problem at least partially to a failure to develop a proper insurance market, one wonders whether this attribution is yet another example of the colonization of the mind in favor of legal centralism. Perhaps the problem is instead excessive faith in the state's ability to organize order. After all, the analogy of the Indian story to modern home financings in the legally mature United States is not hard to make. Mortgage securitization in the United States both lowered interest rates and rendered banks far more willing to foreclose rather than renegotiate mortgages when conditions turned sour.
13. United Nations Human Rights Committee, General Comment 32, UN doc. CCPR/C/GC/32 (2007), para. 24.
14. In the United States, courts in a given state generally have personal matter jurisdiction over a defendant only to the extent that the defendant has "minimum contacts" in the state in question. See *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945). The test for determining whether such minimum contacts exist has evolved and been refined over the course of decades. See *Corpus Juris Secundum (Courts)* 21 (updated December 2013), secs. 53–70. To describe court systems in most of the developing world as incapable of policing a jurisdictional line in this manner would be a serious understatement.
15. The term "bargaining in the shadow of the law" was coined by Mnookin and Kornhauser (1979) in the context of divorce disputes. According to the authors,

- much bargaining takes place outside of courtrooms. However, the bargain ultimately struck is affected by the background law, which would of course apply should negotiations fail. While this is true in many instances, it is not true of the actors of Shasta County, who are not even aware of what the background law is.
16. As Rashid (2000, 112) notes, "The line between Pashtunwali and Sharia law has always been blurred for the Pashtuns. Taliban punishments were in fact drawn largely from Pashtunwali rather than the Sharia."
 17. A notable example is in the respite offered to a tribe when it admits fault for an injury and plans for a resolution. Tribal leaders I interviewed insisted that the origins of the respite are from the Prophet Muhammad's ceasefire with the non-Muslim tribes in Mecca. The analogy is strained and difficult to support. The Prophet's ceasefire was between warring parties who saw mutual advantage in a break from fighting that both intended to continue at a later time (Emon 2012, 88 n. 24). The respite in this context is one that effectively acknowledges a surrender of sorts, as the main text makes clear below. The difference between the two can be demonstrated by the period of time set for the ceasefire alone. The Prophet's ceasefire expired after ten years (*ibid.*). This is unthinkable long in the context of an injured tribe offering a respite to an offending tribe prior to a final resolution. This is not the only tendentious reference to Islamic history in support of the almost unsustainable claim that the tribal compensation system is based largely on *shari'a*.
 18. In the spring of 2013, I spent a great deal of time in Iraq interviewing tribal leaders and observing tribal resolution processes with two professors from Basra University School of Law, Wasfi al-Sharaa and Aqeel al-Dahan. Most of my time was spent among Shi'i tribes located in Baghdad, particularly Sadr City, though inevitably members of those tribes had relocated from elsewhere. The fruit of our research will appear in a chapter of a book entitled *Negotiating State and Non-State Law: Challenges of Global and Local Pluralism*, edited by Michael Helfand of Pepperdine University School of Law and to be published by Cambridge University Press. The three of us hope to expand our research into a book-length study in the future.
 19. The more technically correct term for this corpus is probably *fiqh*, which refers to human understandings of divine law, with the term *shari'a* being reserved exclusively to the unknowable divine law itself (Vogel and Hayes 1998, 23–24). Yet both in the West and among Arab lawyers, the broad use of the term *shari'a* to refer to the corpus rather than to an unknowable divine will has become deeply ingrained. Hence, I use it here to avoid extensive exposition on a matter tangential to the thesis of this chapter. Quraishi (2011, 203) offers a more nuanced and detailed explanation of the terminology.
 20. Personal Status Code of Iraq, art. 91(2).

21. *Ibid.*, art. 43.
22. *Ibid.*, art. 10(5) (“Every man who concludes a marriage contract outside of a court shall be punished by prison of not less than six months and not more than one year, or by a fine of not less than 300 dinars, and not more than 1000 dinars. The punishment shall be jail for a period of not less than three years, and not more than five years, if he concludes a marriage contract outside of court while already married.”)
23. *Ibid.*, art. 39.
24. Iraqi court cases are not systematically collected and organized as they are in the United States. Nevertheless, each year, a number of cases, particularly those of the highest appellate court, the Court of Cassation, are assembled and published in books widely available in Baghdad bookstores. Al-Ujayli (2011) provides a recent illustrative compilation.
25. Penal Code of Iraq, No. 111 of 1969, art. 421.
26. Law for the Mandatory Insurance for Car Accidents, No. 52 of 1980, as amended, art. 2.
27. Formally, the national insurance scheme remains in effect, but as a matter of practice, it does not exist. The payments made under its aegis dwindled during the hyperinflation of the 1990s brought about by United Nations sanctions. Eventually, the relevant offices and institutions were shuttered, rendering the law one of many Iraqi laws whose existence extended no further than the paper it was printed on.
28. Penal Code of Iraq, No. 111 of 1969, art. 421.
29. According to the convention's website, www.newyorkconvention.org, nearly 150 states were signatory to it at the end of 2013.
30. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), art. V(1)(a).
31. *Ibid.*
32. *Ibid.*, art. V(1)(b).
33. *Ibid.*, art. V(2)(a).

34. To take an example, in November of 2013, an arbitrator awarded Mondelez International, Inc., US\$2.23 billion in damages against Starbucks Corporation for the latter's termination of a distribution agreement (Stynes 2013). Under no reasonable conception can a dispute of this magnitude be deemed "minor."
35. Naturally, exceptions exist when there are challenges to the validity, enforceability, or practicability of the arbitration agreement. Therefore, a party could maintain in court that it never in fact signed the arbitration agreement in question or that its signature was procured under false pretenses.
36. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26.
37. 9 United States Code sec. 10. The ability to arbitrate employment disputes is more controversial in Europe than it is in the United States, Canada, or Australia, where it is more widely practiced (Tarasewicz and Borofsky 2013, 349).
38. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN doc. A/6316 (1966).
39. The natural argument might be that arbitration is consented to while religious or customary tribunals are not. Yet such a position fails upon the slightest introspection. An employee in the United States desperate for work has not "consented" to an arbitration clause in her employment agreement; or, perhaps better stated, her consent is no more meaningful than the consent of a wealthy wife of a tribal leader to have her marriage governed by Islamic law, administered by an out-of-state tribunal. In any event, General Comment 32 nowhere suggests that the concerns respecting customary or religious tribunals relate to the possibility that parties appearing before them are under duress. If this were the concern, there would surely exist better ways of dealing with it than demanding the full subjugation of these tribunals and their decisions to the monitoring and control of state courts.