

## 2. Thinking about areas of limited statehood and the rule of law

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### 2.1 INTRODUCTION

Can the rule of law exist, in any meaningful sense, in areas of limited statehood (ALS)? As seen in this volume, the question is a salient one not only for reasons purely in the realms of legal or political theory. Modern democratic States combine and balance three sets of institutions – the State, rule of law and democratic accountability – and when one or more of these constitutive elements is either weak or absent, the expectation is that political order decay or break down.<sup>1</sup> Normatively, if the rule of law is entirely co-dependent on consolidated statehood, then we are compelled to conclude that alternative (i.e. non-state) governors cannot, as a general rule, live up to the rule of law conditions we have come to expect from reasonably consolidated States. Similarly, from a policy perspective, if the rule of law can effectively exist only in consolidated functioning States, then any rule of law promotion efforts – from transitional administrations and post-conflict reconstruction missions to softer forms of transformative engagement<sup>2</sup> – must, by definition, either strive to create or restore modern statehood, or forego the rule of law. If no substantial

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<sup>1</sup> Francis Fukuyama, ‘Why Is Democracy Performing So Poorly?’ (2015) 26(1) *Journal of Democracy* 11; Daron Acemoglu and James Robinson, *The Narrow Corridor: States, Societies, and the Fate of Liberty* (Penguin 2019).

<sup>2</sup> Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace 2006); Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford University Press 2004); Deval Desai and Michael Woolcock, ‘Experimental Justice Reform: Lessons from the World Bank and Beyond’ (2015) 11(1) *Annual Review of Law and Social Science* 155; Amichai Magen, ‘The Rule of Law and Its Promotion Abroad: Three Problems of Scope’ (2009) 45(1) *Stanford Journal of International Law* 51; Susan Rose-Ackerman, ‘Establishing the Rule of Law’ in Robert I Rotberg (ed), *When States Fail: Causes and Consequences* (Princeton University Press 2004); Tansey Oisín, *Regime-Building: Democratization and International Administration* (Oxford University Press 2009);

feature of the rule of law is capable of being established and sustained over time in territories where central authorities are unable or unwilling to ensure a monopoly over legitimate use of violence (*Gewaltmonopol*) and authoritative rule (*Herrschaft*), then the rule of law cannot exist in ALS. Conversely, if some or all of the constitutive features of the rule of law are capable of taking root, perhaps even thriving, in conditions of limited statehood, then the idea and ideal of the rule of law need no longer be wedded, *stricto sensu*, to the modern sovereign State, and we can legitimately consider the decoupling of the rule of law from that particular governance configuration. Rule of law building, consequently, need no longer be understood as inherently dependent on State-building.

This chapter considers the rule of law-statehood nexus in two main, somewhat dialectical sections. The first highlights the longstanding, varied and enduring intertwining of the concepts of the state and rule of law in modern political and legal thought. It also illustrates that, empirically, a strong correlation does exist between statehood and rule of law measures. As state fragility increases, rule of law indicators decline, whereas stronger government effectiveness is matched by improvements in rule of law indicators. The purpose of this exercise, beyond providing some historical and empirical moorings for the State–rule of law imbroglio, is to demonstrate just how State-centric our notions of the rule of law remain, and to provoke the conclusion that the State–rule of law gordian knot is both genuine and justified. A contrarian perspective is then offered in the second half of the chapter. Is our enduring bundling of statehood and the rule of law an unnecessary artifice of our present conceptual limitations, a by-product of a lingering ‘methodological nationalism’,<sup>3</sup> or a failure of our socio-legal imaginations? Focusing on a conceptual shift from institutional features to standards and private ordering in non-State modes of governance, the latter part of the chapter explores contexts and means in which the State–rule of law bundle can be unbundled, as well as some of the limits of that unbundling.<sup>4</sup> The outcome sought is a useful meditation on the relationship between two sets of concepts that are at the core of modern political and legal thought, but which are seldom placed side by side.

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Laura Grenfell, *Promoting the Rule of Law in Post-Conflict States* (Cambridge University Press 2013).

<sup>3</sup> Andreas Wimmer and Nina Schiller, ‘Methodological Nationalism, the Social Sciences, and the Study of Migration: An Essay in Historical Epistemology’ (2003) 37 (3) *International Migration Review* 576.

<sup>4</sup> This section should be read in conjunction with Benedetta Berti, ‘Rebel Justice? Rule of Law and Law Enforcement by Non-State Armed Groups’, Chapter 6 in this volume, which explores the character and limitations of non-state justice services provision by armed groups.

## 2.2 THE STATE–RULE OF LAW NEXUS

Although the notion of the rule of law has ancient roots in Babylonian, Hebraic, Hellenic, Roman<sup>5</sup> and, in some respects, Chinese political thought,<sup>6</sup> for nearly four centuries it has been fundamentally intertwined with the idea and construct of sovereign statehood, and with the essential questions about coercion, authority, legitimacy and accountability intrinsic to the modern State. Indeed, the dye of the rule of law has become so deeply soaked in the wool of the State, and vice versa, that in the main continental traditions – in the German *Rechtsstaat*, French *Etat de Droit*, Italian *stato di diritto*, Spanish *estado de derecho* and so forth – the term itself emerged in the middle of the eighteenth century as a neologism combining the words ‘law’ and ‘State’.<sup>7</sup>

If we go back a century further, taking Thomas Hobbes’s monumental *Leviathan* (1651) as our starting point, the story of the rule of law, in the Western tradition at least, is essentially one in which the sovereign State is first proposed as the unavoidable remedy to violent chaos and later understood to constitute the chief danger to human liberty, thus necessitating the restraint of State power by its subjection to certain abstract rules. In either case, the State is the axis around which discourse about the rule of law revolves. Hobbes provided a powerful negative impetus for the emergence of the modern State–rule of law imbroglio by rejecting the notion that sovereign authority could be subject to any manufactured legal limitations, although he did concede that the sovereign would be bound in conscience by natural law. ‘The untied hands of that Man, or Assembly of men that hath the Sovereignty’,<sup>8</sup> according to Hobbes, cannot be restrained by law as a matter of both logic and practicality. Logically speaking, if the sovereign is the ultimate source of all law, how can it possibly be limited by a thing it is free to make and unmake at will? The notion of a government founded on a rule, a constitution or contract between ruler and ruled, Hobbes maintained, was a logical impossibility. The rule of law, his scheme provides, is nothing more than the rule of the sovereign’s

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<sup>5</sup> Michael Walzer, ‘The Legal Codes of Ancient Israel’ in Ian Shapiro (ed), *The Rule of Law* (New York University Press 1994); Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004); Simon Chesterman, ‘An International Rule of Law’ (2008) 56(2) *The American Journal of Comparative Law* 331; Ricardo Gosalbo-Bono, ‘The Significance of the Rule of Law and its Implications for the European Union and the United States’ (2010) 72(2) *University of Pittsburg Law Review* 229.

<sup>6</sup> Eric W Orts, ‘The Rule of Law in China’ (2001) 34(1) *Vanderbilt Journal of Transnational Law* 43.

<sup>7</sup> Gosalbo-Bono (n 5) 241.

<sup>8</sup> Thomas Hobbes, *Leviathan* (first published 1651, CB Macpherson ed, Penguin 1968) 231.

will, to be altered purely at the sovereign's command. As a matter of practical politics too, Hobbes's conception of sovereign-authority and the political order it establishes ('the Commonwealth' to use his term) raises acute arguments against the possibility of the rule of law. The notion of the rule of law is senseless, even pernicious to humankind, Hobbes proposes, for two main reasons. First, political society is established and maintained by human beings, not abstract rules. It is people, not rules that formulate, interpret and enforce laws. It is people and the institutions they create and deploy that give meaning to the very idea of rules and ultimately decide what these rules actually are.<sup>9</sup> Without the institutionalized mechanisms of sovereign authority, in other words, rules are inherently powerless and therefore meaningless. And second, anything short of absolute sovereign power would, as Brian Tamanaha puts it: 'perpetuate the uncertainty of the state of nature by encouraging challenges to authority',<sup>10</sup> thus defeating the purpose of the covenant between governing and governed, dissolving the political order established by the sovereign and plunging humankind back into *bellum omnium contra omnes* – the war of all against all. The same rationale underpins Hobbes's rejection of the separation of powers. An internally divided sovereign, he argued, would be thwarted from realizing its very *raison d'être*, namely, to guarantee social order.<sup>11</sup>

From the middle of the seventeenth century onwards the Western rule of law tradition crystalized gradually into modern form in an itinerant, nonlinear, often haphazard manner, fed by multiple sources and shaped by multiple influences. Yet, throughout this time, it was the rule of law's relation to, and place within, the modern State that framed and defined the debates surrounding the concept. This can be illustrated with reference to three cardinal questions pertaining to the State–rule of law nexus, each of which has preoccupied some of the most luminous minds in political and legal thought over the past four centuries.

### 2.2.1 What is the State For?

Recoiling from Hobbes's vision of a Leviathan endowed with absolute, untrammelled power, the liberal tradition spearheaded by John Locke's 'Second Treatise on Government' (1690) and developed subsequently – particularly by Montesquieu (1784), in 'The Federalist Papers' (1787–1988) and, in the twentieth-century, by Friedrich Hayek (1944, 1960, 1973), Robert Nozick (1974) and John Rawls (1993) – offered a radically different interpre-

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<sup>9</sup> Jean Hampton, 'Democracy and the Rule of Law' in Shapiro (n 5) 16.

<sup>10</sup> Tamanaha (n 5) 47.

<sup>11</sup> Hampton (n 9) 18.

tation of the purpose and nature of both State and law.<sup>12</sup> Rejecting Hobbes's central tenet of a social contract based on fear and submission, Locke and his successors insisted that legitimate government could only be grounded in popular consent, and that law was the indispensable means by which that consent would be granted, demonstrated or withdrawn. Law, in other words, would guarantee individual and communal freedom, not curb them. In Locke's own words: 'The end of law is, not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of laws, where there is no law there is no freedom.'<sup>13</sup>

Since governments existed to serve society, moreover, the exercise of sovereign power could not be arbitrary. The rulers must themselves be subject to clear rules, ideally contained in charters and constitutions articulating the will of the people and the terms of the covenant between governing and governed. In this regard, the liberal tradition's chief preoccupations involve warning against the tyrannical inclinations of executive, legislative, judicial (and later bureaucratic) power; providing philosophical justifications for the restraint of State power in the service of individual liberty; and devising various mechanisms by which the State could be tamed by law – from the prohibition of *ex post facto* laws and the writ of *habeas corpus*, to separation and balance of powers among different branches of government, to property, civil, political and later international human rights.<sup>14</sup>

### 2.2.2 Where Can the State Not Tread?

A second central preoccupation of the liberal tradition which contributed greatly to the tightening of the State–rule of law Gordian knot was the idea that individual freedom required that there be private spheres which the State could not enter or violate, and that these spheres would be defined and protected by law. For Locke, the central objects to be protected were property rights – which he interpreted broadly to include life and limb, but especially material possessions – and which he saw as the key rationale for the formation

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<sup>12</sup> Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974); John Rawls, *Political Liberalism* (Columbia University Press 1993).

<sup>13</sup> John Locke, *The Second Treatise on Government* (first published 1690, Thomas P Peardon ed, Prentice Hall 1997) 32.

<sup>14</sup> Helena Rosenblatt, *The Lost History of Liberalism: From Ancient Rome to the Twenty-First Century* (Princeton University Press 2018); Amichai Magen, 'Liberal Order in the Twenty-First Century: Searching for Eunomia Once Again' (2020) 139(1) *Journal of Contextual Economics* 2–4 (forthcoming).

of States.<sup>15</sup> Indeed, for Locke the State itself is ‘a society of property owners’<sup>16</sup> and the rule of law is essentially the establishment of the principle of the supremacy of the law by property owners to guarantee the preservation of their property. For their part, anti-liberal critics, from both the far right and far left, have castigated modern democratic State and law as instruments of privilege and oppression, with the rule of law serving dominant elites to safeguard their political and economic interests.<sup>17</sup>

Hayek took the notion of private spheres further. For him individual freedom itself depended on the existence of strong private domains into which the state would not encroach ‘Since coercion ... can be prevented only by enabling the individual to secure for himself some private sphere where he is protected against such interference’.<sup>18</sup> Accordingly, for Hayek a central rule of law challenge is to define and protect individual, familial and corporate spheres immune from State encroachment, which is why he extrapolated a series of principles that he believed would guarantee ‘freedom under the law’, including that laws must be general, abstract rules and must apply equally to everyone.<sup>19</sup> Fast forward to the digital age, the same essential notion is central to our contemporary fear of endemic, and increasingly sophisticated and intrusive, social surveillance.<sup>20</sup>

### 2.2.3 What Kind of State Will Uphold the Rule of Law?

A third development that serves to illustrate how the idea and ideal of the rule of law became so deeply intertwined with the modern State stems from the question of whether certain types of States are inherently more amenable, or hostile, to the rule of law. Early glimpses of this debate can already be observed in Montesquieu, who warned that both ‘[d]emocratic and aristocratic states are not in their own nature free’,<sup>21</sup> and thus prescribed the separation of

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<sup>15</sup> John Locke (n 13) 71.

<sup>16</sup> Harold J Lasky, *The Rise of European Liberalism* (Transaction 1997) 156.

<sup>17</sup> Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (Yale University Press 2003); Tamanaha (n 5) 51.

<sup>18</sup> Fredrich A Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) 139.

<sup>19</sup> *Ibid* 153.

<sup>20</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs 2019).

<sup>21</sup> Charles Montesquieu, *The Spirit of the Laws* (first published 1748, Prometheus Books 2002) 150.

powers, including judicial independence, as the bulwark against the corrupting influence of power.<sup>22</sup>

However, it was the ideological struggles of the late nineteenth and twentieth centuries that turned the question: ‘what kind of State is capable of ensuring the rule of law?’ into a grand debate. Once more, the impetus came from Britain and was driven by elite fear, this time that the liberal State – built on *laissez faire* individualism, the sanctity of contract and property rights and deep suspicion of government for any except the most limited ends – would be undone by the rise of collectivist ideology and the welfare state.<sup>23</sup> Published in 1885, Albert Dicey’s ‘Introduction to the Study of the Law of the Constitution’ not only contained the first explicit definition of the term ‘the rule of law’, it also argued that it was a fundamental feature of the liberal State. Dicey sought to preserve, and lamented what he saw as the demise of, the rule of law owing to the rise of socialism, a huge expansion in legislation and the growing arbitrary powers of an administrative class in an increasingly bureaucratized welfare State.<sup>24</sup> Five decades later, as the iron curtain was about to split the States of Europe, Hayek again wielded the concept to defend capitalist democracies against what he perceived to be the creeping authoritarianism imbued in collectivist economic planning and State socialism.<sup>25</sup> As the Cold War set in, Western scholars asked: ‘How, if at all, can the values associated with the rule of law be achieved in today’s welfare state?’<sup>26</sup>

#### 2.2.4 State-Centric in Thought and in Practice?

Given the longevity, visibility, internal variety, and ideological acerbity of these debates it is small wonder that the State–rule of law imbroglio is commonly perceived as immutable and indissoluble, if it is thought about as potentially severable at all. Consider this rather typical statement about the rule

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<sup>22</sup> Similarly, the authors of the *Federalist Papers*, Hamilton, Madison, and Jay, expressed concern that unbridled competition between factions in democracy threatened contract and property rights and argued that direct democracy had to be tempered by various mechanisms – including representation, separation of powers, a federal structure of government and judicial review.

<sup>23</sup> Harry W Jones, ‘The Rule of Law and the Welfare State’ (1958) 58(2) *Columbia Law Review* 143; John Micklethwait and Adrian Wooldridge, *The Fourth Revolution: The Global Race to Reinvent the State* (Penguin Press 2014).

<sup>24</sup> Bernard J Hibbitts, ‘The Politics of Principle: Albert Venn Dicey and the Rule of Law’ (1994) 23(1) *Anglo-American Law Review* 1.

<sup>25</sup> Friedrich A Hayek, *The Road to Serfdom* (University of Chicago Press 1944) 80–96.

<sup>26</sup> Jones (n 23) 143.

of law, made in this case by one of the late twentieth-century's leading political theorists, Michael Oakeshott:

The rule of law is a common expression. It is often used, somewhat capriciously, to describe the character of a modern European state or to distinguish some states from others. More often it appears as a description of what a state might perhaps become, or what some people would prefer it to be.<sup>27</sup>

At no point is there a hint of evidence that Oakeshott considered the possibility that the notion of the rule of law could exist, or even be meaningfully thought about, beyond the confines of the State.

Similarly, almost three decades later, the 'Declaration on the Rule of Law at the National and International Levels', adopted by the United Nations (UN) General Assembly in September 2012 – the culmination of nearly two decades of inter-governmental and professional examination of the topic across the main committees of the UN – considers the rule of law as operating strictly within two State-centric spheres, defined by the Declaration as the 'national level' and 'international level'.<sup>28</sup> Another prominent example is provided by the European Commission's 2014 definition of the concept, where the rule of law is defined as a shared constitutional feature of the Member States of the European Union (EU),<sup>29</sup> one that includes: 'legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law'.<sup>30</sup>

This deeply statist ontology of contemporary conceptions is of course a reflection of State sensitivities about the principles of sovereign equality and non-interference in internal affairs, but it is also derivative of fundamental assumptions about the nature of law itself. As Gunnar Folke Schuppert observes, the emergence of the modern State can be understood as the crystallization of three essential monopolies – of legitimate violence, taxation and

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<sup>27</sup> Michael Oakeshott, 'The Rule of Law' in his *On History, and Other Essays* (Barnes and Noble 1983) 129.

<sup>28</sup> UN General Assembly 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (30 November 2012) UN Doc A/RES/67/1.

<sup>29</sup> Amichai Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) 54(5) *Journal of Common Market Studies* 1050.

<sup>30</sup> Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM(2014) 158 final 4.



Table 2.1 *Independent analysis of the effect of State fragility on rule of law*

Predictors	Rule of law			
	Estimates	Standard error	CI	<i>P</i>
(Intercept)	1.21	0.07	1.07 to 1.36	<0.001
Fragility	-0.02	0.00	-0.02 to -0.02	<0.001
<i>Random effects</i>				
$\sigma^2$	0.02			
$\tau_{00}$ Country	0.38			
ICC	0.95			
$N_{\text{Country}}$	179			
<i>Observations</i>	2277			
Marginal $R^2$ /conditional $R^2$	0.336/0.968			

legislation – so that in the modern era law itself has essentially come to mean State-law or, in the international system, State-made law.<sup>31</sup>

Is the powerful statehood–rule of law linkage assumed by political and legal theorists corroborated by empirical evidence? To answer this question, we tested a leading rule of law index – that of the World Bank Worldwide Governance Indicators (WGI)<sup>32</sup> – against three separate measures of statehood: the Fragile State Index ranking (Fund for Peace 2019) and two proxy measures of State-capacity in the WGI index itself, one for Government Effectiveness and the second for Regulatory Quality. Our dataset covered all countries of the world for which data is available for each year between 2006 and 2018. Using multilevel linear regressions analysis (with the rule of law serving as the dependent variable and state-fragility, government effectiveness and regulatory quality as the independent variables), we observe the following results.

First, as State fragility increases, rule of law scores decrease (controlling for all other independent variables,  $p < 0.001$ , 95% confidence interval, CI [-0.012, -0.009]).

Second, as government effectiveness increases rule of law scores increase (controlling for all other independent variables,  $p < 0.001$ , 95% CI [0.31, 0.38]).

<sup>31</sup> Gunnar Folke Schuppert, ‘Law Without a State?’ in Thomas Risse (ed), *Governance Without a State? Policies and Politics in Areas of Limited Statehood* (Columbia University Press 2011) 65.

<sup>32</sup> Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi (*The Worldwide Governance Indicators*, 2018) <https://info.worldbank.org/governance/wgi/Home/Reports>.

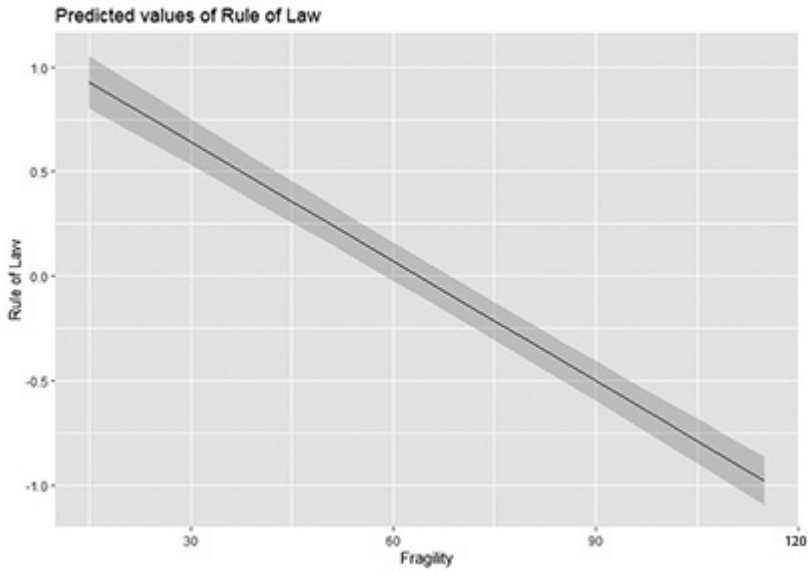


Figure 2.1 *The effect of state fragility on the rule of law*

Table 2.2 *Independent analysis of the effect of government effectiveness on rule of law*

Predictors	Rule of Law			
	Estimates	Standard error	CI	<i>p</i>
(Intercept)	-0.00	0.03	-0.06–0.06	0.906
Government effectiveness	0.64	0.02	0.61–0.67	<0.001
<i>Random effects</i>				
$\sigma^2$	0.02			
$\tau_{00}$ Country	0.19			
ICC	0.89			
$N_{\text{Country}}$	212			
Observations	2721			
Marginal $R^2$ /conditional $R^2$	0.653/0.963			

Third, as regulatory quality increases, rule of law scores increase (controlling for all other independent variables,  $p < 0.001$ , 95% CI [0.32, 0.39]).

Looked at comparatively, the statehood–rule of law linkage is empirically robust and consistent both positively (i.e. indicators of high State capacity correlated strongly with high rule of law scores) and negatively (i.e. weak

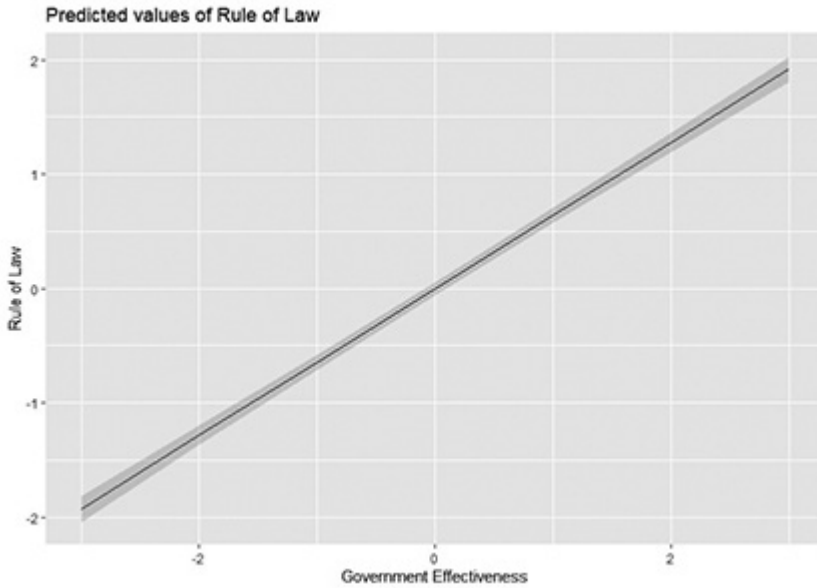


Figure 2.2 The effect of government effectiveness on the rule of law

Table 2.3 Independent analysis of the effect of regulatory quality on rule of law

Predictors	Rule of law			
	Estimates	Standard error	CI	<i>p</i>
(Intercept)	-0.00	0.04	-0.08–0.07	0.918
Regulatory quality	0.55	0.02	0.52–0.58	<0.001
<i>Random effects</i>				
$\sigma^2$	0.02			
$\tau_{00}$ Country	0.29			
ICC	0.92			
$N_{\text{Country}}$	212			
Observations	2720			
Marginal $R^2$ /conditional $R^2$	0.485/0.960			

State capacity and State fragility correlate powerfully with weak rule of law conditions).

The State-centred prism has been largely carried over to the twenty-first century, with major statements on the rule of law, such as the 2012 UN

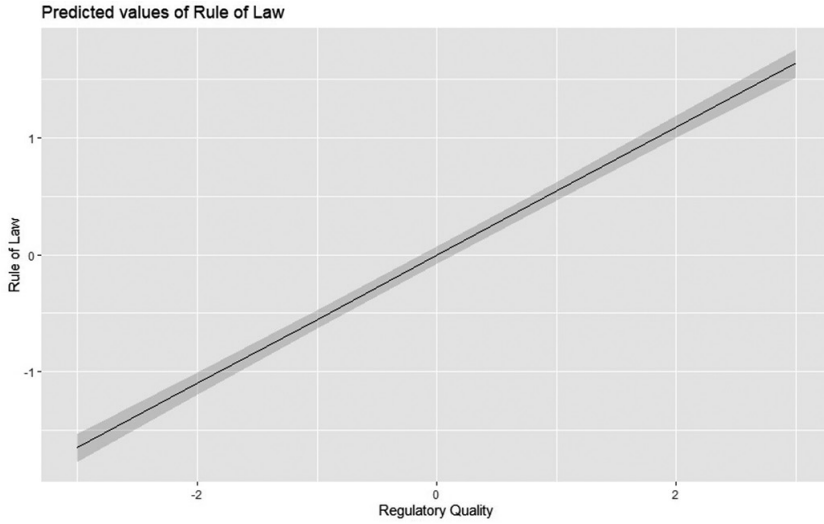


Figure 2.3 The effect of regulatory quality on the rule of law

Table 2.4 Analysis of the effect of government effectiveness, State fragility and regulatory quality on rule of law

Predictors	Rule of law			
	Estimates	Standard error	CI	<i>p</i>
(Intercept)	0.47	0.05	0.37–0.58	<0.001
Government effectiveness	0.35	0.02	0.31–0.38	<0.001
Fragility	–0.01	0.00	–0.01 to –0.01	<0.001
Regulatory quality	0.35	0.02	0.32 to 0.39	<0.001
<i>Random effects</i>				
$\sigma^2$	0.01			
$\tau_{00}$ Country	0.07			
ICC	0.85			
$N_{\text{Country}}$	179			
Observations	2277			
Marginal $R^2$ /conditional $R^2$	0.895/0.984			

Declaration, exhibiting vigorous ‘methodological nationalism’<sup>33</sup> whereby the

<sup>33</sup> Wimmer and Schiller (n 3).

boundaries of State-based political and constitutional organization define the unit of analysis and delimit the way in which we approach the social world.

The rule of law is no longer the exclusive purview of political philosophers and constitutional lawyers<sup>34</sup> and scholars have, over the past decade in particular, expanded their lenses to examine its application in the EU,<sup>35</sup> the UN<sup>36</sup> and the international system more broadly.<sup>37</sup> Yet we have so far generally struggled to systematically consider the application of the notion of the rule of law to alternative governance configurations not grounded in consolidated modern statehood. At most, we have begun to identify the challenge. Indeed, at the very end of the seminal report on the rule of law adopted by the Council of Europe's Venice Commission in 2011, under the ancillary sub-heading 'New challenges', we find an appeal to extend the substance of the rule of law not only to international organizations and to areas of cooperation between state and private actors, 'but also to activities of private actors whose power to infringe individual rights has a weight comparable to state power'.<sup>38</sup> A challenge for the future, the Commission concludes: 'is how the achievements of the rule of law can be preserved and further developed under circumstances where individuals are increasingly influenced by and linked to new modes of governance'.<sup>39</sup> This is the challenge to which we now turn.

### 2.3 THE RULE OF LAW WITHOUT THE STATE?

Unpacking the State–rule of law nexus begins with the conceptual decoupling of statehood from governance. This then permits us to explore the rule of law within governance configurations not inherently dependent on modern consolidated statehood. Recognizing that in the twenty-first century traditional

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<sup>34</sup> Magen, 'The Rule of Law and Its Promotion Abroad' (n 2).

<sup>35</sup> Laurent Pech, "'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6(3) *European Constitutional Law Review* 359; Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34(1) *Yearbook of European Law* 74; Magen, 'Cracks in the Foundations' (n 29).

<sup>36</sup> Clemens A Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Nomos/Hart 2016).

<sup>37</sup> Chesterman, 'An International Rule of Law' (n 5); Palombella Gianluigi, 'The Rule of Law Beyond the State: Failures, Promises, and Theory' (2009) 7(3) *International Journal of Constitutional Law* 442; Ian Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28(1) *Ethics and International Affairs* 39; Christopher May, *The Rule of Law: The Common Sense of Global Politics* (Edward Elgar Publishing 2014).

<sup>38</sup> Council of Europe Venice Commission, 'Report on the Rule of Law' (4 April 2011) CDL-AD(2011)003rev para 66.

<sup>39</sup> *Ibid.*

modes of political and legal steering by nation-States and international institutions are increasingly inadequate for capturing the realities of governance – as well as for the effective management of global challenges – leading scholars of contemporary politics have, over the past several years, carved out novel conceptual space that can be used for this purpose.<sup>40</sup>

Three main insights define this new conceptual space. The first is the empirical observation that from a global perspective, let alone an historical one, the consolidated modern State represents the exception rather than the rule. ‘Outside the developed OECD world’, as Thomas Risse puts it, a broad range of areas of limited statehood are to be found, ‘from developing and transition countries to failing and failed states in today’s conflict zones and – historically – in colonial societies’.<sup>41</sup> Limited statehood, in other words, far from being a temporary phenomenon or an accidental anomaly correctable by external State-building interventions or the inexorable diffusion of modernity, is a pervasive and perennial feature of global reality, one that political and legal scholarship must acknowledge, account for and grapple with.<sup>42</sup>

A second, complementary insight highlights the presence of political and legal steering institutions and practices where the state is dysfunctional or essentially absent. Far from being ‘ungoverned spaces’, as some of the literature on failed and fragile states proclaims,<sup>43</sup> areas of limited statehood are typically complex non-Weberian political formations<sup>44</sup> characterized by dispersion of authority, fragmented, hybrid and overlapping governance networks where both state and non-state actors are involved, and where governance can occur with or without government.

A significant weakness in the existing failed and fragile states literature, in other words, is that it typically conflates governance and statehood, neglect-

<sup>40</sup> Thomas Risse, ‘Governance in Areas of Limited Statehood: Introduction and Overview’ in Risse, ‘*Governance Without the State?*’ (n 31); Stephen D Krasner and Thomas Risse, ‘External Actors, State-Building, and Service Provision in Areas of Limited Statehood: Introduction’ (2014) 27(4) *Governance* 545; Tanja A Börzel, Thomas Risse and Anke Draude, ‘Governance in Areas of Limited Statehood: Conceptual Clarifications and Major Contributions of the Handbook’ in Thomas Risse, Tanja A Börzel and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (Oxford University Press 2018).

<sup>41</sup> Risse, ‘Governance in Areas of Limited Statehood’ (n 40) 2.

<sup>42</sup> In the same vein, see Linda Hamid and Jan Wouters, ‘Rule of Law and Areas of Limited Statehood: Introduction and Perspectives’, Chapter 1 in this volume.

<sup>43</sup> Anne L Clunan and Harold A Trinkunas (eds), *Ungoverned Spaces: Alternatives to State Authority in an Era of Softened Sovereignty* (Stanford University Press 2010).

<sup>44</sup> Sukanya Podder, ‘Mainstreaming the Non-State in Bottom Up State-Building: Linkages between Rebel Governance and Post-Conflict Legitimacy’ (2014) 14(2) *Conflict, Security and Development* 213.

ing the possibility that the provision of binding rules and regulations, rule enforcement and dispute-resolution services, do not necessarily depend upon the existence of functioning state institutions.<sup>45</sup> In practice, there is no simple or strict linearity in the relationship between degrees of statehood and effective rules and public service provision. There exist some variation in the delivery of what we would identify as key rule of law functions – the institutionalized prescription of rules and regulations, as well as ‘law enforcement’ and dispute-resolution services – under conditions of dysfunctional statehood.<sup>46</sup>

The conceptual space created by the decoupling of statehood from governance brings us to a third main insight. It allows us to contemplate the rule of law in a new light, as a good whose functional characteristics may exist, in whole or in part, within spheres of authority that lack consolidated statehood, but possess functionally equivalent alternative modes of rule-making and rule-enforcement. Viewed through this lens, we can approach the rule of law not as a set of State-bound institutional features, but as an amalgam of standards that constrain violence, limit the exercise of power and facilitate the provision of rule-enforcement and dispute-resolution services, regardless of the source, nature or form of authority concerned.

We can consider the features and limitations of such alternative governance–rule of law configurations via two lenses, first by thinking about the rule of law as a set of standards, rather than institutional features, and second by considering private ordering in non-state modes of governance. A third lens through which the scope and character of law and order service provision can be approached is offered by Benedetta Berti in Chapter 5.<sup>47</sup>

### 2.3.1 From Institutional Features to Standards

The longevity and intimacy of the State–rule of law link has meant that, for many decades, the definition of the rule of law itself has largely been articulated in terms of legal institutions and practices bound with the modern Western state. Often a checklist of these is presented as adding up to the rule of law. Dicey’s enormously influential tripartite definition of the term is a strik-

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<sup>45</sup> Ken Menkhaus, ‘State Failure, State-Building, and Prospects for a “Functional Failed State” in Somalia’ (2014) 656(1) *The Annals of the American Academy for Political and Social Science* 154.

<sup>46</sup> Benedetta Berti and Lopez Gutierrez, ‘Rebel-to-Political and Back? Hamas as a Security Provider in Gaza between Rebellion, Politics and Governance’ (2016) 23(5) *Democratization* 1059; Benedetta Berti, ‘Violent and Criminal Non-State Actors’ in Risse, Börzel and Draude (n 40); Till Förster and Lucy Koechlin, ‘Traditional Authorities’ in Risse, Börzel and Draude (n 40).

<sup>47</sup> Berti, ‘Rebel Justice?’ (n 4).

ing case in point. The rule of law, *à la* Dicey is: (1) '[t]he absolute supremacy and or predominance of *regular law* as supposed to the influence of arbitrary power'; (2) 'equality before the law, or the equal subjection of all classes *to the ordinary law of the land administered by the ordinary courts*'; and (3) '*the law of the constitution* [is] the consequence of the rights of individuals, as defined and enforced by the *courts*'.<sup>48</sup>

This 'anatomical approach' to the rule of law,<sup>49</sup> which equates the concept with a set of institutions, procedures and outputs directly tied to modern Western statehood, remains prevalent, not least because it facilitates standardized measurement of State 'compliance' with institutional metrics dictated by powerful international actors. For example, the 2011 Venice Commission report prescribes 'a checklist to evaluate the state of the rule of law in single states', which covers 46 different indicators (articulated as questions) grouped under six dimensions. As an illustration, the extent to which one of these dimensions – 'Legality' – is judged to be present or absent is determined based on questions such as: 'Is there a written Constitution?'; 'Is legislation adopted without delay when required by the Constitution?'; 'Is effective judicial review of the conformity of the acts and decisions of the executive branch of government with the law available?'; and 'Are general and abstract rules included in an Act of Parliament or a regulation based on that Act, save for limited exceptions provided for in the Constitution?'.<sup>50</sup> A similar orientation – focusing on the makeup and function of constitutional, judicial and law enforcement institutions – is to be found in, among others, the rule of law dimension of the WGI or the UN Rule of Law Indicators project.

The anatomical approach has come under growing and varied criticism. Over the past two decades in particular, scholars have attacked it for its perceived neoliberal ideological bias,<sup>51</sup> over-emphasis on State law and institutions as opposed to legal empowerment of the poor,<sup>52</sup> and failure to appreciate the social and cultural embeddedness of law in local ecologies, especially

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<sup>48</sup> Albert V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (first published 1885, 9th edn, Macmillan 1939) 202-3 (emphasis added).

<sup>49</sup> Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (Hart Publishing 2008) 46.

<sup>50</sup> CoE Venice Commission, 'Rule of Law Checklist' (18 March 2016) CDL-AD(2016)007 11-12.

<sup>51</sup> Jeremy Waldron, 'One Law for All? The Logic of Cultural Accommodation' (2002) 59(3) *Washington and Lee Law Review* 3.

<sup>52</sup> Stephen Golub, 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative' (2003) Carnegie Endowment Working Papers No. 41 <https://carnegieendowment.org/files/wp41.pdf>; Stephen Golub, 'The Commission on the Legal Empowerment of the Poor' (2009) 1(1) *Hague Journal on the Rule of Law* 101.



where traditional, community-based and informal justice systems are prevalent.<sup>53</sup> What unites these disparate critiques of the ‘rule of law orthodoxy’<sup>54</sup> is deep frustration with the rather disappointing results produced by decades of rule of law promotion efforts in developing countries<sup>55</sup> and the belief that this failure can be blamed, at least in part, on the exclusive focus on State law and legal institutions as a means of improving rule of law conditions in deeply dysfunctional States.

The proposed shift in approach from institutional features to standards involves two valid claims. The first, aptly noted by Franz von Benda-Beckmann and fellow authors is that: ‘[I]f like governance, the concept of law is not by definition exclusively connected to the state, but allows for a plurality of co-existing legal orders, generated and used by different sets of actors, with different sources of legitimacy’.<sup>56</sup> The veracity of this claim can be readily observed in the various forms of legal pluralism that exist where tribal, religious or other traditional authorities regulate land-rights, family matters and other dispute resolution functions in areas of limited statehood. As Till Förster and Lucy Koechlin document, in many countries of Eastern, North and Southern Africa tribal authorities are either accorded recognized autonomy or made part and parcel of provincial justice administrations.<sup>57</sup> In Kenya, for example, tribal leaders are appointed and salaried civil servants, under a formalized system where traditional justice administration exists side-by-side with civil justice institutions. A different variation of legal pluralism can be observed in Tanzania and Malawi, where communal, tribal land rights co-exist alongside modern, individual property rights.

The second valid claim pertaining to the need to approach the rule of law from the perspective of standards, rather than institutional features, is more principle-driven and generalizable. It is elegantly captured by Gianluigi Palombella’s observation that, in its spirit: ‘the rule of law asks for some

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<sup>53</sup> Brian Z Tamanaha, ‘The Rule of Law and Legal Pluralism in Development’ (2011) 3(1) *Hague Journal on the Rule of Law* 1; Tanja Chopra and Deborah Isser, ‘Access to Justice and Legal Pluralism in Fragile States: The Case of Women’s Rights’ (2012) 4(2) *Hague Journal on the Rule of Law* 337–358; Förster and Koechlin (n 46).

<sup>54</sup> Golub, ‘Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative’ (n 52); Magen, ‘The Rule of Law and Its Promotion Abroad’ (n 2).

<sup>55</sup> Carothers (n 2); Golub, ‘The Commission on the Legal Empowerment of the Poor’ (n 52); Magen, ‘The Rule of Law and Its Promotion Abroad’ (n 2); Tamanaha, ‘The Rule of Law and Legal Pluralism in Development’ (n 53).

<sup>56</sup> Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Julia Eckert, ‘Rule of Law and Laws Ruling: Law and Governance Between Past and Future’ in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Julia Eckert (eds), *Rules of Law and Laws of Ruling – On the Governance of Law* (Routledge 2016) 4.

<sup>57</sup> Förster and Koechlin (n 46) 239.

law to face, limit, or even counterbalance power, regardless of its forms, structures, and those who wield it'.<sup>58</sup> According to this view, any exercise of power, whether defined as public or private, cannot be permitted to be cruel, capricious or arbitrary. This claim has much to recommend it from a normative standpoint, as an ideal about the tolerable exercise of power. Yet it leaves open the practical question of who, in the absence of a capable rule of law State, will reliably and consistently stem power's inclination towards misuse and abuse? Can we, in other words, find evidence for non-state governance constellations where 'some law', to use Palombella's phrase, manages to reliably provide adequate protections against cruelty and arbitrariness? The following two sections examine contexts of legal, political and sociological practice that shed some light on this fundamental question.

### 2.3.2 Private Ordering in Non-State Modes of Governance

Building on Elinor Ostrom's Nobel Prize winning work on the management of common environmental resources,<sup>59</sup> over the past three decades several leading legal scholars have explored the conditions under which groups are capable of establishing and maintaining rule-based governance arrangements without top-down, state-led regulation. Referred to variously as 'private ordering' or 'reputation-based enforcement',<sup>60</sup> these studies focus on the functional terms under which non-state regulatory ecologies emerge in defined communities, and the mechanisms by which their rules are generated, monitored and, most crucially, enforced. The leading examples in this context are Robert Ellickson's study of communal conflict resolution among ranchers and farmers in Shasta County, California,<sup>61</sup> and Lisa Bernstein, Amitai Aviram and Barak Richman's separate studies of informal arrangements among Jewish diamond traders.<sup>62</sup> These case studies generate several useful insights on the

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<sup>58</sup> Palombella (n 37) 445.

<sup>59</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990); Elinor Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20(4) *Global Environmental Change* 550.

<sup>60</sup> Barack D Richman, 'Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering' (2004) 104(8) *Columbia Law Review* 2328.

<sup>61</sup> Robert C Ellickson, 'Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County' (1986) 38(3) *Stanford Law Review* 623; Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press 1994).

<sup>62</sup> Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21(1) *Journal of Legal Studies* 115; Amitai Aviram, 'The Paradox of Spontaneous Formation of Private Legal Systems' (2003) John M Olin Program in Law and Economics Working Paper No. 192 <https://>

mechanisms of private ordering, also on the likely limits of rule-making and enforcement outside the shadow of the state.

One thread running through Olstrom, Ellickson and Richman's findings pertains to the importance of the flow of reliable information through the relevant community. The dissemination of accurate and timely information about individual or family reputations – a function in which gossip plays a significant role – must be guaranteed for reasonably effective detection of cheating and communal sanctioning to occur. In small groups – such as the Shasta Country circle of neighbour ranchers and farmers – this can take place informally. In larger, or more geographically diffuse groups, some degree of institutionalization appears to be necessary. Thus, as Richman documents, most of the global trade in diamonds among Orthodox Jewish traders, is overseen by the New York Diamond Dealers Club, which provides, among others, a sophisticated reputation-management service for individual dealers. Credible rule-based dealing here is facilitated by a system of references of reliability and intra-communal shaming for transgressors. A similar system for rapid exchange of information and reputation-management is found at the Memphis Cotton Exchange.<sup>63</sup>

A second functional condition for private ordering, which can already be gleaned from the above examples, is the centrality of social bonds within the applicable community where rules are generated, monitored and enforced. If one feature of the modern State is the replacement of kin-based, tribal or religious group affinities with impersonal institutions, private ordering can be understood as a side-step or return to reliance upon pre-modern mechanisms of social policing. Such reliance works not only where information about reputation is reliable, but where individuals, families, guilds and other tight-knit groups prize their reputation highly. In the absence of tight communal or religious bonds, governance by reputation falters.<sup>64</sup>

A third feature of private ordering relates to the question of size and scalability. Certainly, one can conceive of sizeable virtual communities where certain private ordering – such as the regulation of online sale in goods and services – would function well under conditions of highly transparent reputation man-

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chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1552&context=law\_and\_economics; Barack D Richman, 'How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York' (2006) 31(2) *Law and Society Inquiry* 383.

<sup>63</sup> Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions' (2001) 99(7) *Michigan Law Review* 1724.

<sup>64</sup> Richman, 'Firms, Courts, and Reputation Mechanisms' (n 60); Richman, 'How Community Institutions Create Economic Advantage' (n 62).

agement and effective financial sanctioning. However, such online schemes are ultimately guaranteed by state regulations. Moreover, the establishment and long-term maintenance of genuinely private orders appears to take place in tight-knit, homogenous groups composed of members who care deeply about their intra-community reputation.<sup>65</sup> Those tend to be micro societies with relatively few members. The Diamond Dealers Club, for example, has fewer than 2000 members today, having gradually grown from a mere 53 members in 1931.

Finally here, the establishment and maintenance of private regulatory systems depends on the ability of such ordering to take place without being undermined or destroyed by external interference. Ostrom already identified what she called ‘autonomy’<sup>66</sup> and ‘polycentric governance’<sup>67</sup> – essentially, peaceful relations with other tiers of rule-making authority – as conditions for the viability of non-hierarchical management of water-resources and other commons. As Aviram observes, private rule-making does not arise spontaneously and may be destroyed unless the system is able to delineate its boundaries and guard itself against external intervention.<sup>68</sup> Because private orders rely so heavily on social cohesion and reputational bonds, the system is likely to fall apart where individuals expect it to be overridden by external interference.

This last factor is of special relevance to the rule of law as it pertains to the critical twin issues of predictability and stability of rules. Even very thin and formalistic conceptions of the rule of law insist that it must ensure a regulatory environment that is sufficiently stable and predictable for people to be able to reasonably plan their actions.<sup>69</sup> A private ordering system that cannot guarantee its own autonomy – in that its decisions can be readily interfered with or overridden by external forces outside its control – struggles to fulfil these basic features of the rule of law.

## 2.4 CONCLUDING REMARKS

The idea and ideal of the rule of law has been intimately and dynamically intertwined with modern statehood for nearly four centuries. That intertwining has proven to be not only longstanding, but also varied and surprisingly pervasive. In our key political and constitutional preoccupations, modern statehood and the rule of law have tended to go hand in hand, and to have done

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<sup>65</sup> Aviram (n 62); Richman, ‘Firms, Courts, and Reputation Mechanisms’ (n 60); Richman, ‘How Community Institutions Create Economic Advantage’ (n 62).

<sup>66</sup> Ostrom, *Governing the Commons* (n 59).

<sup>67</sup> Ostrom, ‘Polycentric Systems’ (n 59).

<sup>68</sup> Aviram (n 62).

<sup>69</sup> Magen, ‘The Rule of Law and Its Promotion Abroad’ (n 2) 59.

so quite exclusively, denying use of the concept of the rule of law to non-state socio-political formations at either the sub- or international levels. Empirically too, as we have seen, a strong correlation appears to prevail between statehood and rule of law measures. As State fragility increases, rule of law indicators decline, whereas stronger State capacity is matched by improvements in rule of law indicators.

Conceptual decoupling of statehood from governance provides a valuable conceptual space to explore the rule of law within governance configurations not inherently dependent on modern consolidated statehood. Recognizing that, in the twenty-first century, traditional modes of political and legal steering by nation-States and international institutions are increasingly inadequate for capturing the realities of governance – as well as for the effective management of global challenges – leading scholars of contemporary politics have, over the past several years, carved out novel ideational space that offers the possibility of exploring ‘non-Weberian’ political formations characterized by dispersion of authority, fragmented, hybrid and overlapping governance networks, where both State and non-State actors are involved, and where governance can occur with or without government. This has allowed us to take seriously the possibility that the provision of binding rules and regulations, rule enforcement and dispute-resolution services do not necessarily have to depend strictly upon the existence of functioning State institutions.

The new conceptual space created by the decoupling of statehood from governance does permit us to contemplate the rule of law in a new light, as a good whose functional characteristics may exist, in whole or in part, within spheres of authority that lack consolidated statehood, but possess functionally equivalent alternative modes of rule-making and rule-enforcement. Viewed through this lens, we can approach the rule of law not as a set of State-bound or State-guaranteed institutional features *per se*, but as an amalgam of standards that constrain violence, limit the exercise of arbitrary power, and facilitate the provision of rule-enforcement and dispute-resolution services, regardless of the source, nature or form of authority concerned. With this standards-based notion in mind we can, in other words, begin to enlarge the realm of the rule of the law in line with the ambition articulated in 2011 by the Venice Commission, namely that the rule of law applies ‘to activities of private actors whose power to infringe individual rights has a weight comparable to state power’.<sup>70</sup>

That having been recognized, the corpus of evidence gathered so far on private-ordering and non-state justice institutions – not least in the chapters contained in this volume – give us substantial reason for pause when it

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<sup>70</sup> Venice Commission, ‘Report on the Rule of Law’ (n 38) 66.

comes to the actual achievement of rule of reasonable law conditions in such 'non-Weberian' settings. Specifically, advocates of a full-throated embracing of the possibility of rule of law conditions prevailing in areas of severely limited statehood, must contend not only with an empirical reality in which such areas tend to attract violent non-state actors, but also with three structural challenges making it difficult for non-state governance configuration to attain the kind of rule of law standards we have come to expect from the moderately functional modern-State.

First is an epistemological challenge, where private ordering appears to be highly dependent upon the dissemination of accurate and timely information about individual, family or clan reputations as a means of guaranteeing reasonably effective detection of cheating and allowing communal sanctioning to occur. In small groups this can take place informally, whereas as the group becomes larger or more geographically diffuse, the challenge of reputation-based information and enforcement becomes much more difficult to overcome. Second, the issue of scalability already alluded to poses an enormous challenge to non-State governance configurations. Indeed, one central feature of the modern State is the replacement of kin-based, tribal or religious group affinities with impersonal institutions, whereas private ordering can be understood as a side-step or return to reliance upon pre-modern mechanisms of social policing. Such reliance can only work effectively over time in contexts where information about reputation is not only reliable, but where individuals, families, guilds, and other tight-knit groups also prize their reputation highly. In the absence of tight communal or religious bonds governance by reputation is likely to falter, making scalability of private-ordering arrangements practically limited.

Lastly, there is the crucial issue of the ability of the applicable justice system to ensure its long-term autonomy and inviolability. Norms of non-intervention and non-aggression provide a modicum of guaranteed autonomy to states, but not to non-state actors. The establishment and maintenance of private regulatory systems depends on the ability of such ordering to take place without being undermined or destroyed by external interference. In the absence of stable, peaceful relations with other tiers of rule-making authority the viability of non-hierarchical rule-making and enforcement mechanisms is unlikely to last, and the system is likely to fall apart where individuals expect it to be overridden by external interference. This last limitation is of special relevance to the rule of law since it pertains to the critical twin issues of predictability and stability of rules.