

THE RELATIONSHIP BETWEEN  
LEGAL PLURALISM AND THE RULE OF LAW  
IN SOUTH AFRICA  
AND TIMOR-LESTE

LAURA GRENFELL

A thesis submitted for the degree of Doctor of Philosophy

at The Australian National University

March 2009

## **Declaration**

I hereby declare that this thesis is exclusively the result of my own work.

Laura Grenfell

## Acknowledgments

First I would like to thank my supervisor, Professor Hilary Charlesworth, for her unwavering encouragement and generous guidance. I would also like to thank the two other members of my supervisory panel, Anthony Regan of the State, Society and Governance in Melanesia Programme and Professor Kim Rubenstein at the College of Law for their assistance.

At the Australian National University I also would like to thank for their camaraderie all the members of the Regulatory Institutions Network – in particular, for their invaluable discussions, insights and proofing-reading assistance, Professor John Braithwaite, Dr Jeremy Farrall, Dr Susan Harris Rimmer, Adérito Soares, Bu Wilson and visitor Professor Antony Anghie.

I would like to thank all my colleagues at the Law School at the University of Adelaide, including the library staff, for enabling and encouraging me to pursue this research.

In South Africa I would like to thank: Professors Christina Murray and Tom Bennett for hosting me at the University of Cape Town and for sharing their insights into African customary law, legal pluralism and constitutional law, and; Rashida Manjoo for her comments on Chapters 4 and 5.

I am also grateful to those NGOs and UN staff in Timor-Leste which have given me their valuable time, to all contributors to the East Timor Studies Association and to all participants at the Australian National University's (now) annual East Timor Week.

Finally, for their moral support, I would like to thank my friends and family, in particular Ian Grenfell and Brendan Grigg.

## ABSTRACT

The re/establishment of the 'rule of law' in transitional countries has become a mantra of the international community. At its core, the rule of law assumes that the state enjoys a monopoly of law. This thesis argues that the promotion of the rule of law in transitional countries gives insufficient attention to whether a strong level of legal pluralism exists, in that forms of non-state law, such as customary law, operate in parallel with state law and are preferred by a large proportion of the population. A strong level of legal pluralism is the norm in many regions of the world, particularly in Africa, Asia and the Pacific, where between 80 to 90 per cent of disputes are taken to non-state legal mechanisms for resolution.

This study examines two transitional countries, South Africa and Timor-Leste, which are attempting to re/establish the rule of law and where legal pluralism is strong. Both countries have adopted new constitutions after periods of conflict, occupation and apartheid. In these two constitutional frameworks, the rule of law has been inscribed as a central value with little consideration of the presence of legal pluralism. The case studies provide a useful contrast in that South Africa has a relatively robust economy and legal institutions, and has been attempting to address directly the relationship between legal pluralism and the rule of law. In contrast, Timor-Leste has a weak economy, few functioning legal institutions and its Constitution does not directly address the question of legal pluralism.

This thesis analyses the relationship between the rule of law and legal pluralism in these countries through two lines of inquiry: 1) by examining how these two concepts were negotiated in the process of drafting a new constitution, and; 2) by exploring the practical implications of these particular constitutional arrangements.

In regard to the first line of inquiry, this study shows that the rule of law is often entrenched into constitutions so as to assist the state in asserting its external, international legitimacy and its place among sovereign nations. In contrast, legal pluralism relates to the state's *internal* legitimacy and how the state's leaders understand this legitimacy.

In regard to the second line of inquiry, this study argues that the result of the relationship between the rule of law and a strong level of legal pluralism in the two countries is that both the rule of law and legal pluralism are balanced and compromised according to pragmatic dictates at various levels. In South Africa, state institutions are actively insulating the world of customary law from the rule of law, drawing the line only at the constitutional guarantee of equality. In Timor-Leste there is very little rule of state law because the weakness in the state's legal institutions and the confusion regarding the applicable law is leading the population to rely heavily on non-state mechanisms to resolve disputes. Thus efforts to promote the rule of law in Timor-Leste that focus solely on state institutions are currently relevant to the lives of only a minority of the population.

This thesis argues that the rule-of-law enterprise needs rethinking so as to make it more germane and useful in the context of post-conflict states where legal pluralism is strong. It concludes by setting out five elements drawn from the case studies that can guide this rethinking exercise.

## TABLE OF CONTENTS

Chapter 1. Introduction .....	1
Chapter 2. Limitations and Trade-Offs in the Globalised Relationship between the Rule of Law and Legal Pluralism .....	9
1. Introduction .....	9
2. Colonialism and the Rise of International Law.....	10
3. Law and Development during the Cold War Era.....	13
4. Law and Development in the Post-Cold War Era.....	20
4.1 Profit: The Free Market and Development .....	21
4.2 Principles: Human Rights and Democracy .....	28
5. Transitional Justice.....	31
6. The United Nations .....	38
6.1 UN Peace Operations and Transitional Justice .....	40
6.2 UN Member States.....	45
6.3 Structural Aspects of the UN and the World Bank.....	47
7. Conclusion.....	49
Chapter 3. The Intersection of “Fact” and “Myth”: The Conceptual Relationship between Legal Pluralism and the Rule of Law.....	51
1. Introduction .....	51
2. Legal Pluralism .....	51
2.1 State Law Pluralism and Deep Legal Pluralism.....	54
2.2 The Benefits and Limitations of Legal Pluralism .....	56
3. The Rule of Law.....	59
3.1 Legal Predictability and Certainty .....	61
3.2 Government Bound by Law .....	67
3.3 Equality .....	70
4. Points of Intersection and Contact .....	73
5. Conclusion.....	81
Chapter 4. “One Law for One Nation”: The Rule of Law and Legal Pluralism in South Africa’s Constitutional Dispensation .....	82
1. Introduction .....	82
2. Context .....	83
3. The Rule of Law.....	91
3.1 The Interim Constitution and Section 1(c) of the Final Constitution .....	92
3.2 The Rule of Law during Apartheid .....	95
3.3 The Vague Role of the Rule of Law in South Africa’s Final Constitution.....	98
4. Legal Pluralism .....	104
4.1 The Initial Negotiations and the Interim Constitution .....	105
4.2 The Final Constitution .....	109

4.3 Pragmatism.....	113
5. Conclusion.....	119
 Chapter 5. Legal Pluralism, the Rule of Law and “the Most Vulnerable Groups” in South African Society.....	120
1. Introduction.....	120
2. The Rule of Law, Legal Pluralism and Access to Justice.....	121
3. The Rule of Law and Customary Courts.....	125
3.1 Supervision, Appeals and Compliance of Customary Courts.....	127
3.2 The Independence and Impartiality of Customary Courts and the Principle of Separation of Powers.....	130
3.3 Unequal Justice and Forum Shopping .....	137
4. The Rule of Law and Customary Law .....	140
4.1 “True Legal Pluralism” and the Rule of Law.....	141
4.2 Competing Versions of Customary Law.....	143
4.3 <i>Bhe, Shilubana</i> and State Recognition of Customary Law .....	147
4.4 <i>Bhe</i> , Customary Law and “the Most Vulnerable Sections of Society” .....	153
5. Conclusion.....	160
 Chapter 6. The Sources and Legitimacy of Law in Timor-Leste.....	162
1. Introduction.....	162
2. Local Customary Law and its Sources of Legitimacy .....	163
3. The Portuguese State and the Indonesian State.....	166
4. The UNTAET Administration .....	169
4.1 The Rule of Law and the <i>Alves Case</i> .....	171
4.2 UNTAET and Local Customary Law .....	172
4.3 UNTAET and International Law .....	176
4.4 UNTAET’s Legacy .....	179
5. The ‘Mother Law’ and its Sources of Legitimacy .....	181
5.1 International Norms and Local Norms.....	183
5.2 Political Dynamics of the Resistance and the Diaspora.....	186
5.3 Tension between Local Norms and Constitutional Human Rights.....	188
5.4 Questioned Legitimacy .....	191
6. Conclusion.....	195
 Chapter 7. Timor’s “Transition to an International Standard of Law”: The Rule of Law and Local Customary Law in Post-Independence Timor-Leste .....	197
1. Introduction.....	197
2. Timor-Leste’s Rule-of-Law Institutions .....	199
2.1 The Courts and the Provedor.....	200
2.2 The 2006 Crisis .....	203

2.3 The Reinado Affair and Various Approaches to the Rule of Law .....	206
3. Legal Uncertainty and Confusion regarding the Applicable State Law .....	212
3.1 Indonesian or Portuguese Law .....	213
3.2 International Law .....	215
3.3 Local Customary Law .....	219
4. Initiatives Linking Customary Law with State Law .....	225
4.1 Mediation Initiatives: Land Law Disputes and General Civil Cases .....	225
4.2 The CAVR .....	230
5. The International Community, Legal Pluralism and the Rule of Law .....	235
6. Conclusion.....	239
 Chapter 8. Conclusion.....	 240
 Bibliography.....	 253