

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

Chapter 1. Introduction

While it was at the end of the nineteenth century that English scholar AV Dicey proposed his definition of the rule of law,¹ the modern concept of the rule of law only came into fashion in the late twentieth century. Dicey's definition has had much influence on the concept even into the twenty-first century despite the criticism that it is little more than a description of English constitutional law as it was at the time.² Dicey was adamant that the rule of law could not be found in the French legal system and, in his haste to demonstrate this, mis-described some core aspects of the French system.³ Thus, from its beginnings, an edge of Anglo parochialism has marked thinking on the rule of law. Despite this parochialism, the rule of law has enjoyed a meteoric rise in the last decade of the twentieth century and the first decade of the twenty-first; in this period it developed into one of the key concepts promoted by global institutions such as the United Nations and the World Bank and by development agencies in the West. Although there is recognition that the rule of law is vague and elastic as a concept, it is nevertheless advocated by the international community as a universal good because it conveys a host of principles such as constitutionalism that are considered to have been instrumental in strengthening the developed world and its state institutions.

The rule of law has, in particular, become a mantra used by the international community to address the myriad problems facing countries that are labelled 'post-conflict' and 'transitional', terms that will be used interchangeably in this thesis.⁴ Those states in which the rule of law is dominant, mostly Western states, are at the forefront of arguing that the rule of law must be established in post-conflict and transitional states. They cast the absence of the rule of law as the source of a host of ills, including political and social

¹ Albert Venn Dicey, *An Introduction to The Study of The Law of the Constitution* (1885). See Chapter 3 below at n 77 for a brief discussion of Dicey's definition.

² Judith N Shklar, "Political Theory and the Rule of Law" in Allan Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (1987) 1, 5-6.

³ William Robson, *Justice and Administrative Law* (2nd ed 1947) 345. Robson also criticised Dicey for misinterpreting the English legal system: 343. See also, William Ivor Jennings, *The Law and the Constitution* (5th ed, 1959) 54-60.

⁴ In this context 'transitional' refers to countries undergoing a transition to democracy, liberalisation and the rule of law from a period when these ideals were absent or seriously undermined. See Part 5 of Chapter 2.

instability and international human rights violations, and pour large amounts of funding into aid programmes purporting to assist such states build the rule of law.

The modern concept of the rule of law is based on two assumptions: first, the existence of a modern state and, second, that within this modern state paradigm the state is sufficiently strong and organised to enjoy a monopoly of law. In this sense the rule of law is shorthand for the rule of state law; it does not refer to a situation where there is more than one system of law operating and where state law must compete with other forms of law. In regard to these two assumptions, it is safe to assume in the twenty-first century that every geographical region of the world is covered by a modern state in that there are few, if any, people who are not nominally subject to some form of state. However, it is another thing to assume that the prevalence of the modern state paradigm means that every state is successfully able to assert its law over other forms of law that have either preceded the modern state or that, for cultural or religious reasons, enjoy greater observance than state law. In these situations of competing non-state law, it is difficult to discern the rule of state law. This is the case in many post-conflict and transitional countries where the rule of state law is emergent and frail.

The promotion of the rule of state law by the international community overlooks the fact that in most states there are multiple structures of law and power that operate in parallel with the state. These parallel structures operate to a small degree in many Western states such as Australia where a large number of Aboriginal people continue to observe a system of elders and social norms regardless of whether they live in urban or regional areas.⁵ In transitional and post-conflict states where, for various reasons, the state is weak and has limited reach, these parallel power structures are more marked; the mere existence and operation of non-state law can pose a challenge to the state and its institutions, particularly when the latter are still in embryonic form. Both these cases are examples of 'legal pluralism', with a number of legal systems operating in the same geographical space.

Legal pluralism is a description that, unlike the rule of law, is rarely promoted as an ideal. In the law and development literature of the 1950s and 1960s, the concept was marginalised

⁵ Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (2008) 153-158.

partly because many scholars projected that, in the modern state paradigm, forms of non-state law, such as customary law, would wither and die.⁶ Similarly, early literature in the field of ‘transitional justice’, sometimes labelled ‘post-conflict justice’, paid scant attention to the existence of non-state forms of law. Scholars in this field have generally neglected legal pluralism and overlooked the need to study the process by which international and state norms are translated into, and reconciled with, norms at the local level.⁷ Early transitional justice scholars failed to notice the fact that non-state law is often the type of law with which people are likely to have first and frequent contact, particularly in regions where the modern state paradigm struggles to take hold. For example, according to Abdullahi Ahmed An-Na’im, customary law is the most important source of law for the majority of Africans.⁸ While there is consensus among legal anthropologists that customary law may not function in post-colonial states in the same way as it did before colonisation, it cannot be said that it has disappeared.⁹ Indeed, in many parts of Africa, customary law is arguably enjoying a resurgence.¹⁰ In 2002 Rama Mani observed that there has been inadequate consideration of customary law in the context of rule-of-law reform.¹¹

Overall, development agencies estimate that in many developing countries, particularly in Africa, the state legal system resolves only 20 per cent of disputes.¹² In one post-conflict state, Afghanistan, the government acknowledges that the official court system is able to

⁶ Köنز, Peider, “Legal Development in Developing Countries” (1969) 63 *Proceedings of the American Society of International Law* 91, 96.

⁷ Ruti Teitel, *Transitional Justice* (2000).

⁸ This statement is based on a survey of fifteen African countries undertaken in 1997: Abdullahi Ahmed An-Na’im, “Protecting Human Rights in Plural Legal Systems of Africa: A Comparative Overview” in An-Na’im (ed), *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa* (1999) 39, 47.

⁹ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996); Martin Chanock, “The Law Market: The Legal Encounter in British East and Central Africa” in W J Mommsen and J A De Moor (eds), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* (1992) 279.

¹⁰ Barbara Oomen’s observation that there has been a revival in traditional leadership in Africa points to the possibility that customary law is experiencing a resurgence: Barbara Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) 27. For greater explanation, see Chapter 5 below.

¹¹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002) 80.

¹² UK Department for International Development, *Safety, Security and Accessible Justice: Putting Policy into Practice* (July 2002) 58; Laure-Hélène Piron, “Time to Learn, Time to Act in Africa” in Thomas Carothers (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 275, 291.

resolve only approximately ten per cent of cases.¹³ This means that in these regions as much as 90 per cent of disputes are resolved either through customary law and other forms of non-state law or are left unresolved.¹⁴ These figures show that legal pluralism is a factor that should not continue to be ignored by those actors involved in promoting the rule of law. The sheer scale of legal pluralism in parts of Asia and Africa indicates that it is necessary to consider how it interrelates with efforts to establish the rule of law in these regions.

This thesis examines the relationship between the rule of law and legal pluralism. It argues that it is important to study this relationship because serious implications flow from the interface between the two concepts that should be considered by leaders and policymakers who are promoting the rule of law through national initiatives and international programmes in transitional countries. It is argued that policies and programmes that aim to advance the rule of law without any, or with insufficient, consideration of legal pluralism can have a limited impact in the short term, particularly where large parts of the population have little contact with the state and its institutions. In the context of strong legal pluralism, rule-of-law rhetoric raises expectations to levels that cannot be met because of the weakness of state law and state institutions. Thus the rule-of-law enterprise may need to be rethought so as to remain useful and relevant.

This thesis situates itself at the cross roads of various fields of literature: post-conflict and transitional justice, law and development, peace-building, human rights law, comparative constitutional law and legal anthropology. It does not seek to contribute to all of these fields but to draw on them to gain a fuller understanding of the relationship between the rule of law and legal pluralism.

In this thesis I focus on two countries, South Africa and Timor-Leste, known prior to its independence in May 2002 as East Timor. Both states have inscribed the rule of law as a

¹³ Government of the Islamic Republic of Afghanistan (Ministry of Justice), *Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan* (2005) 12.

¹⁴ The calculation of these percentages by development agencies and the Afghan state assumes that if state institutions were stronger they may be able to resolve a greater percentage of cases. Marc Galanter contests this idea in regard to Western states such as the US: "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 *Journal of Legal Pluralism* 1.

guiding constitutional value for their transitions. Critically, legal pluralism has a strong presence in both countries: large parts of the population of South Africa and Timor-Leste either reject state law or find it inaccessible and rely instead on non-state law that operates in parallel to state law. This non-state law takes many forms and derives from many sources; in this thesis I examine only those forms that are variously described as ‘traditional’, ‘customary’, ‘indigenous’, ‘living’ or ‘local’ law. These terms are at times used interchangeably; whether one term is more apt than another in any particular example is not the focus of my thesis.

South Africa and Timor-Leste are sometimes linked because they are post-colonial states that are undergoing dramatic transitions in the course of which they have experimented with similar transitional justice mechanisms, such as truth commissions, and have drafted new constitutions. In both states it is possible to argue that the rule of law was lacking prior to their transitions. For example, South Africa’s Truth and Reconciliation Commission found that the rule of law was absent in the apartheid state, from 1948 to 1994, and that one of the reasons for the longevity of the apartheid regime was the ruling National Party’s superficial adherence to ‘rule by law’, a debased version of the rule of law.¹⁵ Similarly, Indonesia’s occupation of East Timor from 1975 to 1999 was the subject of widespread international criticism focusing partly on the regime’s lack of respect for the rule of law, in the sense that there were no means of checking the abuse of state power.¹⁶ Thus, in their current transitions, both countries are attempting to establish a new legal order by drafting constitutions and entrenching the rule of law as a guiding norm.

These two countries provide an interesting contrast in that they are very different in terms of population, economy, state legal culture and infrastructure. South Africa has a population of about 50 million people, eleven official languages, and it describes itself as a ‘rainbow nation’ because of its many ethnicities. It is not a typical transitional country because, in contrast to most of its African neighbours, it has a relatively robust economy

¹⁵ *Final Report of the South African Truth and Reconciliation Commission* (1998), Vol 4, Ch 4, [18, 32].

¹⁶ International Commission of Jurists and the Netherlands Institute of Human Rights, *Indonesia and the Rule of Law: Twenty Years of ‘New Order’ Government* (1987) 61ff; International Commission of Jurists, *Ruler’s Law: Mission to Indonesia* (1999) 42-50; Amnesty International, *East Timor: Justice Past, Present and Future* (2001) 13.

and long-established state institutions, most of which have continued to play a role in the post-apartheid era.¹⁷ Timor-Leste has a population of just one million people, with over seventeen languages spoken across the country's thirteen districts. As one of the poorest countries in Asia with nascent and fragile state institutions, it sits at the opposite end of the spectrum of transitional countries to South Africa.¹⁸

In their other key differences, South Africa and Timor-Leste offer useful case studies in examining the relationship between the rule of law and legal pluralism. For example, South Africa had very little outside assistance in executing the stages of its post-apartheid transformation while Timor-Leste's transition to independence was largely ushered in under United Nations (UN) administration. Critically, South Africa's Constitution recognises legal pluralism and its state institutions are active in protecting aspects of customary law while the Constitution of Timor-Leste sidesteps the issue of legal pluralism and Timorese institutions have resorted to taking an *ad hoc* approach to dealing with non-state forms of law. These geographical and institutional differences between South Africa and Timor-Leste provide a window into the different dynamics produced by the relationship between the rule of law and legal pluralism in transitional and post-conflict countries.

The structure of the thesis is as follows.

Chapters Two and Three introduce the concepts of the rule of law and legal pluralism. Chapter Two traces how the two concepts have been understood in key historical periods that have shaped the post-Cold War era and contemporary international law. It focuses particularly on discourses that have dominated international institutions such as the UN and the World Bank in the 1990s. In this, it looks at how and why these institutions are promoting the rule of law while legal pluralism has been largely sidelined. It examines what interests are served by the promotion of the rule of law and questions the role played by the rule of law in the lives of the poor and vulnerable sections of society.

¹⁷ For a recent survey of South Africa's economy, see Organisation of Economic Cooperation and Development, *Economic Assessment of South Africa 2008* (15 July 2008).

¹⁸ Timor-Leste is the lowest ranked Asian country in the UNDP Human Development Index 2007/2008.

Chapter Three examines the relationship between the two concepts in order to gain a deeper understanding of their points of intersection. It sets out the main tenets of each concept and maps how they come into contact in transitional and post-conflict states. It argues that in this context aspects that make the two concepts appear otherwise incompatible are transformed.

The concrete dynamics of the relationship between the rule of law and legal pluralism are explored in the two case studies presented in Chapters Four to Seven. Chapters Four and Five examine the relationship and its implications in South Africa while Chapters Six and Seven analyse this relationship in relation to Timor-Leste. These case studies follow two lines of inquiry: first, how the two concepts were negotiated in the periods leading up to, and during, the constitution-drafting process, and; second, the practical implications of these constitutional arrangements.

Chapter Four examines South Africa's constitutional negotiations in the 1990s. It argues that South Africa inscribed the rule of law into its Constitution partly out of a desire to establish the legitimacy of the post-apartheid legal order within the international community. At the same time, it shows that the constitutional entrenchment of legal pluralism resulted from an attempt to secure internal legitimacy for the new legal order by negotiating with traditional leaders. The practical implications of these constitutional arrangements in South Africa are analysed in Chapter Five. This chapter looks at whether these arrangements that guarantee the continuing operation of customary courts are producing a patchwork rule of law. It argues that South Africa's legal institutions are actively compromising the rule of law in order to protect legal pluralism and to insulate customary law from Western values.

Chapter Six shows that in Timor-Leste the process of drafting the country's first ever constitution was influenced by the presence of the UN administration and stymied by the dominance of one political party that was uninterested in conducting proper consultations with the population. Drawing largely on lusophone constitutions as well as the *Universal Declaration of Human Rights*, the Constitution is replete with international norms and largely devoid of non-state based local norms. The Constitution does not recognise local

customary law as a source of law despite the widespread evidence that for the population this form of law is generally its first option in resolving most disputes.

Chapter Seven shows the disconnection between the state and the populace when the modern state paradigm ignores the relationship between legal pluralism and the rule of law. The chapter sketches the uncertainty and confusion in regard to Timor's applicable state law and it scrutinises the various initiatives that seek to give state law greater resonance with the population by linking it to customary legal mechanisms and norms. In the name of strengthening the modern state paradigm and human rights in Timor, the international community has recently joined local organisations in calling for the government to address the position of customary law. The chapter observes that if and when Timor-Leste heeds these calls to recognise customary law, it needs to be aware of the inevitable compromises that will transform the rule of law and customary law. This case study on Timor-Leste looks to South Africa's experience as an example of the challenges that can arise when the relationship between the rule of law and legal pluralism is addressed within the official state sphere. However, it is conceded that the resonance of South Africa's experience for Timor-Leste may in some respects be limited because of the fact that South Africa has relatively strong state institutions and a healthy economy.

This thesis does not aim to undermine programmes that seek to establish the rule of law or to assert that they represent the wrong path for transitional and post conflict states; such an argument would require the support of significant empirical work. Rather, it aims to make an original contribution to the field of rule-of-law reform by questioning why legal pluralism has received inadequate consideration in this field and investigating the relationship between legal pluralism and the rule of law. Through studies of South Africa and Timor-Leste this thesis argues that those actors involved in the promotion of the rule of law need to give close consideration to the dynamics of legal pluralism. Only when there is some understanding of the challenge of establishing the rule of law in a state where legal pluralism is strong can the rule-of-law enterprise be properly reconsidered and tailored to meet the exigencies of this context. This thesis concludes by setting out five elements drawn from the case studies which are critical to making the rule of law more relevant and useful in this context.

Chapter 2. Limitations and Trade-Offs in the Globalised Relationship between the Rule of Law and Legal Pluralism

1. Introduction

The relationship between the rule of law and legal pluralism has varied in marked ways through the major global historical shifts in modern times: the rise of the modern Westphalian state, colonialism and dispossession, decolonisation and development, the Cold War and post-Cold War transformations. In all these shifts the rule of law has, from one angle, endured as a beacon, variously symbolising civilisation, development, capitalism and Western democracy. At the same time, legal pluralism has presented a challenge to those institutions that promote a rule-of-law orthodoxy because its existence contests the idea that the state has a monopoly over law. At the ground level, legal pluralism has throughout these shifts played an important role in enabling access to justice.

The post-conflict context, where a state is undergoing a transition from conflict, illuminates the intimate and fraught nature of the relationship between the rule of law and legal pluralism. The dynamic of this relationship can be traced to the legacy of the above-mentioned historical shifts: most transitional, post-conflict states are in the process of decolonisation as well as post-Cold War transformation and, almost without exception, they need economic development to lift their populations out of poverty. Indeed, colonialism, underdevelopment and Cold War machinations have been major contributors to the causes of conflict and they have made transitional states vulnerable to a host of global pressures. In this post-conflict equation, the rule of law is perceived as an important norm; for example, the UN invokes it as something of a panacea for post-conflict states. In contrast, legal pluralism is characterised in ambivalent terms by those states and international organisations that enjoy global hegemony. This perception of legal pluralism is now shifting, as the past decade has shown that the concept is becoming more relevant to the work of the UN and international financial institutions (IFIs), as well as other key players, in the context of developing and post-conflict countries. This chapter aims to chart the evolving relationship between the rule of law and legal pluralism in order to understand the dynamics between the two concepts on the world stage.

In five parts this chapter outlines the relationship between the rule of law and legal pluralism in the international arena. It begins by briefly excavating, in Part 2, the historical relationship between the rule of law and legal pluralism during colonialism. In this period, legal pluralism was manipulated for the colonial purposes of maintaining law and order while the concept of the rule of law was subsumed within the omnipotent concept of ‘civilisation’. Part 3 traces how, during the period of decolonisation and the Cold War, the work of Max Weber transformed the colonial dichotomy between civilised modern systems and traditional systems into a theory of modernisation upon which the law and development movement (LADM) based its initial forays into law reform. Parts 4, 5 and 6 all relate to the post-Cold War era but each part focuses on separate, if interconnected, fields. Part 4 examines the two latest phases of the law and development movement. It sets out the basic tenets of the rule-of-law orthodoxy promoted by IFIs such as the World Bank and argues that the most recent phase of the LADM in the past decade has witnessed an increased interest in legal pluralism. The lens is narrowed in Part 5 which analyses the shifting understanding of the rule of law in the field of transitional justice and the field’s new and pragmatic interest in legal pluralism. It posits that the confluence of this pragmatism and shifting understanding has resulted in a concept of ‘sustainable justice’. Part 6 analyses how the rule of law and legal pluralism figure in the approach of the UN to the problems facing post-conflict states. It suggests that while the UN’s approach to legal pluralism has shown little nuance, there are indications that this may be changing as the UN responds to new challenges raised by Timor-Leste’s attempt to enhance its legal framework.

Overall, this chapter argues that the rule of law is the dominant paradigm for state governance in the international arena and that for certain sections of society this dominance has resulted in limitations and trade offs in accessing justice. However, the dynamics of the relationship between the rule of law and legal pluralism are in constant change as more attention is being given to the existence of legal pluralism in post-conflict states such as Timor-Leste and South Africa.

2. Colonialism and the Rise of International Law

While the rule of law did not overtly figure as part of the colonial project in the nineteenth century, legal pluralism played a major role, particularly in British colonies such as South

Africa.¹ For example, in British Africa, legal pluralism was manifested in the form of official parallel legal systems of African customary law and imported law.² Chanock observes: “The claim to have brought a civilizing law and order has been an important part of the justification of colonialism”.³ The imported ‘civilising law’ constituted one part of the dual mandate, which comprised civilisation and commerce. Customary law was subjected to the test of Western civilised values through repugnancy clauses, worded variously in British colonies as imposing limits based on “natural justice”, “good conscience”, or “civilisation”.⁴ Thus, while the British colonial policy of legal pluralism formally allowed parts of customary law to continue, customary law was always subservient to imported law and both its substance and procedure could be declared repugnant to those vague Western moral standards supposedly representing civilisation.⁵ Furthermore, in some British colonies, customary law was subjected to codification so as to mould customary law into a Western conception of rule-centred law.⁶

In this context, law was used to secure state goals and exercise state power but there were few mechanisms by which citizens could use law in defence of their rights.⁷ Below the

¹ Gardiol J van Niekerk, “Legal Pluralism” in JC Bekker, Christa Rautenbach and NMI Goolam (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) Ch 1; Tom W Bennett, *Customary Law in South Africa* (2004) 34-41; HR Hahlo and Ellison Kahn, *The Union of South Africa: The Development of its Law and Constitution* (1960) 319-334.

² For a broad analysis of legal pluralism as a colonial project, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002).

³ Martin Chanock, “The Law Market: The Legal Encounter in British East and Central Africa” in W J Mommsen and J A De Moor (eds), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th Century Africa and Asia* (1992) 279, 280.

⁴ M B Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975) 130. In French colonies, customary law could not be applied if it were repugnant to “public order and morality”; and similarly in Portuguese colonies in Africa custom was applied to indigenous people so long as it was not “contrary to public order, that is, the principles of humanity, the fundamental principles of morality or to free exercise of sovereignty”. See respectively, Thierry Verhelst, *Safeguarding African Customary Law: Judicial and Legislative Processes for Its Adaptation and Integration* Occasional Paper, No 7 (1968) iii-iv, see <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1008&context=international/asc> at 23 October 2008; Adriano Moreira, “Portuguese Territories in Africa: Customary Law in the Portuguese Overseas” in *The Future of Customary Law in Africa* (1956) 229, 229-230. See also, William B Harvey, *Introduction to the Legal System in East Africa* (1975) 522-524.

⁵ Note that some contemporary African scholars discuss the repugnancy clause as an example of the rule of law: Ada O Okoye, “The Rule of Law and Sociopolitical Dynamics in Africa” in Paul Tiyambe Zeleza and Philip J McConnaughay (eds), *Human Rights, the Rule of Law, and Development in Africa* (2004) 71, 76. This is possibly because the concept of ‘natural justice’ purports to be universal.

⁶ See, eg, the *Natal Code, Law 19 of 1891*.

⁷ Above n 3, 304.

highest courts, the administration of justice in British Africa required no separation of powers between the executive and the judiciary.⁸ In sum, Chanock writes, the colonial period can be characterised as “bureaucratisation without the rule of law”.⁹ Rule *by* law is more apt a description than rule of law, as law provided few means to limit the abuse of state power.

While the rule of law was not a concept much deployed in the colonial era, the concept of civilisation marked legal thought and language at the height of colonialism in the nineteenth century. As a concept, civilisation was used particularly by positivists as a means of distinguishing between European and non-European states, especially in regard to law and sovereignty.¹⁰ The argument was that only unique and civilised institutions created law, and for a state to be a member of international society and to enjoy and assert sovereignty, it was necessary that it possess such institutions.¹¹ The positivist strategy was to declare that there was no law in certain non-European regions in the sense of law which flowed from sovereign command in written form. Indeed, even today, customary law is still characterised by some as not being law because it does not have the same qualities as ‘modern law’.¹² John Austin, a legal philosopher at the forefront of nineteenth century positivism, argued that customary law was not a proper source of law and described it as “merely a rule of positive morality”.¹³ Indirectly this gave legitimacy to the colonial project, justifying European assertions of sovereignty over the ‘uncivilised’ non-European world. Through positivism, law came to be conceived as deriving its authority from the state.

The positivist emphasis on law as that flowing from sovereign command posed a conundrum for the proponents of international law in this era: it had to be defended from

⁸ H F Morris and James S Read, *Indirect Rule and the Search for Justice: Essays in East African Legal History* (1972) 295ff.

⁹ Above n 3, 305.

¹⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) Ch 2. See also, Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001) Ch 2.

¹¹ Anghie, *ibid* 56.

¹² See Explanation of Australia’s vote against the UN General Assembly adoption of the *UN Declaration on the Rights on Indigenous Peoples* by the Hon. Robert Hill Ambassador and Permanent Representative of Australia to the United Nations, 13 September 2007, discussed below, n 169.

¹³ John Austin, *The Province of Jurisprudence Determined* (1954) 31.

arguments that it was not law at all because it flowed from custom between states. Thus, much effort was put into refashioning international law as a doctrinal project that embodied the laws of civilised society and civilised states. As Martti Koskenniemi argues, international law arose in the late nineteenth century “to map the breakdown of the traditional world ... into Sovereign states”.¹⁴ In other words, its mission was to cement a connection between civilisation and a particular political form, Western statehood, sometimes referred to as the Westphalian state.

In the twenty-first century, the language of civilised states continues to be used in international law and diplomacy. For example, Article 38(1) of the *Statute of the International Court of Justice* provides that the International Court of Justice can be guided by general principles of law that are recognised by ‘civilised nations’. In 1991 Nelson Mandela described apartheid as “the antithesis of civilised values” and observed that international human rights standards “provided the legal and moral inspiration for the [anti-apartheid] struggle”.¹⁵ The same language also figures in the sphere of diplomacy. For example, in 2003 the Dutch Foreign Minister stated: “If a civilised society wants to remain civilised, it has no alternative but to try and uphold the rule of law and other general human rights principles.”¹⁶ Thus we see the link between the nineteenth-century concept of civilisation with the concept of the rule of law, which came to the fore in the twentieth century. Both concepts attempt to invoke something that transcends all culture; they are projected as representing (legal) rationality, the sovereign Westphalian state, and the antithesis of the ‘positive morality’ of custom.

3. Law and Development during Decolonisation and the Cold War Era

The Cold War era has had a significant impact on the twenty-first century. After World War II, the relationship between the rule of law and legal pluralism was placed under new pressure by the waves of political, economic, social and cultural change produced by

¹⁴ Martti Koskenniemi, “The Fate of Public International Law: Between Technique and Politics” (2007) 70 *Modern Law Review* 1, 24.

¹⁵ Quoted in Heinz Klug, “Hybrid(ity) Rules: Creating Local Law in a Globalized World” in Yves Dezalay and Bryant G Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (2002) 276, 297-298.

¹⁶ Minister of Foreign Affairs of the Kingdom of the Netherlands, “Human Rights and Terrorism” (Speech delivered at the Seminar on Human Rights and Terrorism, The Hague, 18 September 2003) at < <http://www.nhc.nl/speechminister.pdf> > 21 October 2008.

decolonisation, development and the Cold War. The Cold War gave birth to a rhetoric from the West that centred largely on the rule of law. The process of decolonisation highlighted the challenge of legal pluralism but the movements for modernisation and development attempted to negate legal pluralism by pushing for uniform and predictable laws. This section traces the dynamics of these factors in this period, which stretches from 1945 until the fall of the Berlin Wall in 1989.

During the early days of the Cold War, United States' elites and policy makers identified the rule of law as a feature that distinguished the capitalist West from the Communist states. In this framework the rule of law was portrayed by the US administration as securing the legal structures and institutions that protected individual rights and freedoms from state intervention. In its Cold War campaign the United States linked the rule of law to democracy and attempted to export its legal institutions to the developing world, particularly in Latin America, under the rubric of the rule of law. Members of the legal profession often carried out the export of the rule of law with missionary zeal. Take for example the speech of Ross Malone, a President of the American Bar Association, delivered in the late 1950s:

The rule of law is a concept which has existed since Moses received the Ten Commandments upon Mount Sinai. It has survived autocracy, anarchy, tyranny and demagoguery and has come to its highest state of development in the democracy of the twentieth century. And what is the role of lawyers in the Rule of Law? Lawyers are the handmaidens of justice ... the technicians of democracy.¹⁷

Lawyers were at the forefront of this mission as attempts were made to reform legal education and the legal profession in Latin America as well as Asia and Africa.¹⁸ These

¹⁷ Ross L Malone, "The American Lawyer's Role in Promoting the Rule of Law" (1959-1960) 43 *Marquette Law Review* 3, 4.

¹⁸ James A Gardner, *Legal Imperialism and Foreign Aid in Latin America* (1980) 6-8. An example of such legal reform work in Africa is in the following: Judicial Advisers' Conference, Makerere College, Kampala, Uganda 1953, *Native Courts and Native Customary Law in Africa* (1960) (originally published as a special supplement to the *Journal of African Administration* October 1953).

lawyers hoped that legal reforms would filter down to create a cultural shift towards a respect for state institutions and state law.

The rule of law was criticised by the Communist East as buttressing capitalism and serving class exploitation by the property-owning bourgeoisie.¹⁹ The response of the West was that the Communist bloc took an instrumentalist approach to law whereby the law was employed as an instrument of the state and, in particular, the ruling party. However, the US rhetoric of the rule of law did not account for the complexity of American legal thought at the time, which, since the 1930s, was in the thrall of legal realism and a form of instrumentalism. American legal realism was a response to legal formalism in that it emphasised the gap between ‘law on the books’ and ‘law in action’ and it introduced sociological elements focussing on the process of law. Legal realism tended to shift the focus from legal rules to legal process. According to James Gardner, this legal realism bred a “rule-sceptical approach”, where scepticism was shown toward formal rules of law. Law was portrayed as “an instrument for achieving policy and social engineering ends” and hence, in his view, it was unsurprising when dictators in Latin America used the law in a pragmatic and instrumental fashion to serve their own ends.²⁰ In Gardner’s opinion, this “rule-sceptical approach” undermined the entire US mission of exporting the rule of law and other legal institutions to Latin America.

While the focus of the United States’ rule of law efforts lay primarily in Latin America, other Western States, such as Britain, took the lead in Africa to assist decolonising states to establish the rule of law in the Westphalian state. In Africa, however, the urgent question was the role of law and moreover, the question of *which law?* Legal pluralism was at the forefront of this question as leaders of newly independent countries negotiated a panoply of challenges: the need for legitimate authority, the call for modernisation and development, the desire for centralised power, and the gap between ‘law on the books’ and ‘law in action’. The two sides of the Cold War vied with each other to influence this time of

¹⁹ Martin Krygier, “Marxism and the Rule of Law: Reflections After the Collapse of Communism” (1990) 15 *Law and Social Inquiry* 633-663.

²⁰ Gardner, above n 18, 15.

transition in Africa and legal practitioners were the vanguard of the cultural aspects of this war.²¹

Under the rubric of the ‘law and development movement’ (LADM), a group of mostly Western scholars attempted to respond to, and theorise, the challenges faced by the decolonising and developing world. Members of the movement received substantial financial support from the Ford Foundation and the US Agency for International Development (USAID) for projects that aimed to assist Third World countries to establish legal institutions considered essential to developing a modern nation.²² In its crudest form, this assistance meant exporting US statutes to replace colonial or indigenous law, all in the name of development.

The LADM was influenced by the cross-disciplinary work of Max Weber on legitimate authority and the development of markets.²³ Weber identified three types of legitimate authority: (1) legal authority; (2) traditional authority, and; (3) charismatic authority. He characterised the first type as “rational” because it is based on an impersonal order of formal legality where there is a consistent system of abstract, precise and universal rules and the possibility of appeal. Administrative decisions and rules are formulated in writing: this means that bureaucracy plays a “crucial role ... Indeed, without it capitalistic production could not continue.”²⁴ The second type, traditional authority, is based on

²¹ The politicisation of the rule of law can be seen in the conference reports and declarations of the International Commission of Jurists (ICJ). During the early years of the Cold War, the ICJ wanted to promote the rule of law at the international level by establishing a universal formulation of the concept. For this purpose, from 1955-1965 the ICJ held conferences in every region of the world. To a very formal, sparse and Western formulation of the rule of law in the *Act of Athens* (1955), the *Declaration of Delhi* (1959) added the need to “advance the civil and political rights of the individual ... [and] establish social, economic, educational and cultural conditions”. In 1961 the *Law of Lagos* added that: “all Governments should adhere to the principle of democratic representation in their Legislatures”. The development of the ICJ’s formulations shows the dynamics of global and regional politics. See, eg, ICJ, *African Conference on the Rule of Law, A Report on the Proceedings of the Conference* (1961).

²² See John Henry Merryman, “Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement” (1977) 25 *American Journal of Comparative Law* 457, 457-459.

²³ Max Weber, *The Theory of Social and Economic Organization* (A R Henderson & T Parsons trans, 1947 ed). See David Trubek, “Toward a Theory of Law: An Essay on the Study of Law and Development” (1972) 82 *Yale Law Journal* 1; David Trubek, “Max Weber on Law and the Rise of Capitalism” [1972] *Wisconsin Law Review* 720; Marc Galanter, “The Modernization of Law” in Myron Weiner (ed), *Modernization: The Dynamics of Growth* (1967) Ch 11.

²⁴ Weber, *ibid* 338.

personal loyalty. While it is hinged on precedent (ie tradition), it lacks formal principles and it privileges “principles of substantive ethical common sense”.²⁵ Overall, Weber characterised this type of authority as non-rational, arbitrary, nepotistic, particularistic and prone to corruption. Moreover, he argued that it obstructs the “development of markets ... and capitalism”.²⁶ The third type, charismatic authority, is revolutionary in nature and lacks even the minimal predictability offered by traditional authority. This authority relies neither on formal principles, such as a constitution or statutes, nor on a traditional position derived by ancestry. Weber writes: “[f]rom the point of view of rational economic activity, charisma is a typical anti-economic force”.²⁷

The first type of authority in Weber’s work, “legal authority”, can be identified as the rule of law. For Weber, ‘legal authority’ plays a crucial role in economic growth and political development. This is because procedurally the system is highly predictable and substantively it allows freedom of contract. The other two types of authority, which figured among the rank of African leaders in the 1960s, are portrayed as obstructive to the goal of development. Traditional and charismatic authority impliedly cause and reflect underdevelopment. Whereas the US Cold War rhetoric on the rule of law may have smacked of propaganda to scholars, Weber’s work provided an apparently objective sociological and economic foundation on which to support the project of promoting the rule of law and, in particular, the modernisation of legal systems. Thus the LADM broadly advocated the modernisation of law and impliedly encouraged and relied on the centralisation of state power in the developing world, otherwise known as the Westphalian state.²⁸ The transplantation of legal institutions from the Western world was believed to hasten the process of development in the developing world.²⁹

²⁵ Ibid 342.

²⁶ Ibid 354.

²⁷ Ibid 362.

²⁸ This faith in the state and rule of law was brought together with legal realism’s aggressive approach of social engineering and was dubbed “liberal legalism”: David M Trubek, “Law and Development” in Neil J Smelser and Paul B Baltes (eds), *2001 International Encyclopedia of the Social and Behavioural Sciences* (2001) 8443.

²⁹ A direct response to modernisation theory was dependency theory, which was sceptical regarding the potency of law reform and emphasised the complexity of relationships between developing and developed countries on an economic, social and political level: see Kevin E Davis and Michael J Trebilcock, “Legal Reforms and Development” (2001) 22 *Third World Quarterly* 21-36.

The LADM's promotion of the rule of law in the developing world usually came at the expense of legal pluralism, in particular, local, traditional and indigenous legal systems, which faced erosion and abolition by the state. This is because uniform laws are generally unable to accommodate a diversity of local norms and local forms of accountability. To some scholars, the demise of indigenous legal systems was inevitable and no great loss.³⁰ In the late 1960s, only a few LADM scholars, such as Marc Galanter, were ambivalent about the notion that moving towards modern legal systems was "necessarily a good thing per se".³¹ Galanter noted that the process would not enrich indigenous law as "modern law includes techniques for eroding away and suppressing local law by official law ... [i]t tolerates no rivals".³² He believed that the problem with modernising the law was that it could make law unresponsive to the concerns and interests of diverse groups at the local level. At the same time, however, Galanter articulated a belief, that can be read between the lines of Weber's work, that the modernisation process was an 'irreversible' tide that would sweep societies world-wide.³³ Mohan Gopalan Gopal observes that the assumptions about the evolutionary processes of development of legal systems inherent in Weber's work "reinforced the erosion of traditional legal systems" and significantly contributed to "the crisis of law in developing countries as countries and societies were induced to move from traditional to rational legal systems".³⁴

In Africa the process of modernising the law had begun under colonial rule but this intensified in the 1950s with the project of restating customary laws, spearheaded by the London University's School of Oriental and African Studies. Decolonisation and the pressures for development gave urgency to the question of how newly independent African governments could re-organise their legal systems in order to modernise and to shake off the discriminatory laws imposed by colonial regimes. During British colonial rule, for example, legal pluralism had been used to impose different laws through a system of

³⁰ Peider K n z, "Legal Development in Developing Countries" (1969) 63 *Proceedings of the American Society of International Law* 91, 96.

³¹ Galanter, above n 23, 164.

³² Ibid 163-164.

³³ Ibid 163.

³⁴ Mohan Gopalan Gopal, "Law and Development: Toward a Pluralist Vision" (1996) 90 *American Society of International Law Proceedings* 231, 236. Gopal argues that for law and development to move forward, it needs a new vision that is essentially pluralistic and "resists a universalist analytical framework": 237.

parallel laws that applied on the basis of race and ethnicity. By the mid 1950s there was some consensus among former British African colonies that both common law and customary law should continue but it was debated whether they should be integrated into a single system so as to apply to all equally.³⁵ Given the rupture of colonialism, it was asserted by some that customary law could not be seen as a simple continuation of pre-colonial law but was in fact a debased version.³⁶ An argument made in favour of integration was that the development of ‘native law’ could be guided in the direction of English law.³⁷ Many of the other arguments made for integration related to the rule of law: the need for consistency and legal certainty, the right of appeal, and a separation of powers. Legal pluralism in Africa posed a raft of technical quandaries as well as the danger of encouraging tribalism, which ran counter to the interests of the nation-state. Thus the response to legal pluralism in post-independence Africa veered towards attempting to subordinate indigenous law and abolish legal pluralism in the name of the rule of law. Indeed, Manfred Hinz observes the historical continuity in this Western attitude to legal pluralism when he comments on the “generations of missionaries, anthropologists and lawyers, whose first interest was to force African customary law into the Procrustean bed of either the bible, civilisation or a western paradigm of Rule of Law”.³⁸

In the mid 1970s the LADM lost steam: financial support for the US legal assistance programmes waned after David Trubek and Marc Galanter published a strong critique of the LADM, arguing that it had failed to assist developing countries. They attributed this failure partly to the fact that LADM programmes and literature had stressed the centrality of the state and placed the state as “the primary agent of social control and change”.³⁹ In particular, the movement had paid insufficient attention to legal pluralism: “[the LADM] showed little interest in nonstate forms of legal or other social ordering; indeed, one detects

³⁵ *Native Courts and Native Customary Law in Africa: Judicial Advisers’ Conference 1953*; see above n 18. Note that there were many degrees of integration: see Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) Ch 4.

³⁶ See Mamdani, *ibid* 128. See also, Chanock, above n 3.

³⁷ See, eg, Mamdani, *ibid* 118; Chanock, above n 3; Francis G Snyder, “Colonialism and Legal Form: The Creation of ‘Customary Law’ in Senegal” (1981) 19 *Journal of Legal Pluralism* 49.

³⁸ Manfred Hinz quoted in Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd ed, 2006) 391.

³⁹ David M Trubek and Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” [1974] *Wisconsin Law Review* 1062, 1079.

a subtle bias against informal legal systems and customary law”.⁴⁰ Trubek and Galanter argued that liberal legalism’s model of law was ethnocentric in that it overlooked the fact that in the developing world the grip of local law is far stronger than the law of the state.⁴¹ It appears from this that the demise of the LADM can be traced partly to its failure to examine or understand the dynamics of the relationship between legal pluralism and the rule of law in the developing world. However, coming little more than a decade after the beginning of LADM, this critique was arguably hasty and it shows that at that time Trubek and Galanter may have had a limited understanding of the *long-term* nature of the project of building the rule of law.

The demise of the modernisation paradigm led to a renewed interest in legal pluralism in the late 1970s and 1980s, and, in particular, legal anthropologists championed ‘deep legal pluralism’, the situation where the state does not recognise customary law.⁴² According to Brian Tamanaha, the attitude among many scholars of this period was the mantra of ‘folk law good’ and ‘state law bad’.⁴³ However, throughout this period legal pluralism remained located on the sidelines of mainstream legal thought.

Parallel to this in the 1970s and 1980s was the rise in popularity of alternative dispute resolution (ADR) in the US, which was part of a larger movement interested in the reform of national legal systems in order to enhance access to justice for the poor and vulnerable sections of society. Access to justice was usually equated with access to courts; ADR showed that formal courts were not always necessary for the resolution of disputes. In some developing and post-conflict states, convergence presumably took place between traditional dispute resolution and ADR.

4. Law and Development in the Post-Cold War Era

The end of the Cold War in 1989 heralded a host of transitions and a revived interest in the rule of law as a tool of development. In this era the main focus was the transition of former Communist states to democracy and the free market. The rule of law was portrayed as

⁴⁰ Ibid.

⁴¹ Ibid 1080.

⁴² For an elaboration of what is meant by the term ‘deep legal pluralism’, see Chapter 3.

⁴³ Brian Tamanaha, “The Lessons of Law-and-Development Studies” (1995) 89 *American Journal of International Law* 470, 481.

capable of facilitating these two types of transition; it was “advanced in the name of both principles and profits”.⁴⁴ Trubek has dubbed the 1990s as “the R[ule]O[f]L[aw] era”, a time when the rule of law “really became big business”.⁴⁵ In this period the World Bank reportedly supported 330 rule-of-law projects⁴⁶ at a cost, according to Trubek, of about three billion US dollars.⁴⁷ Thus from the early 1990s when South Africa’s transition began, to the early 2000s, when East Timor’s transition began, the rule of law lay at the centre of promoting democracy and the free market. During this fervour, legal pluralism still figured as a marginal consideration, as the following sections show.

4.1 Profit: The Free Market and Development

While IFIs such as the World Bank were uninterested in the work of the LADM in the 1960s, they became some of the main drivers of the movement’s new manifestation. This interest in the rule of law comes from the twin beliefs that the rule of law has a “universal quality” that makes it stand apart “as a nonideological, even technical, solution”⁴⁸ and that the free market needs modern state legal institutions in order to encourage investment and economic development. The World Bank was influenced by the “New Institutional Economics” of economists such as Douglass North, which focuses on legal institutions that are conducive to economic growth.⁴⁹ Drawing on this economic analysis, the World Bank supported programmes designed to boost and reform formal systems of contract law and private property, regimes for bankruptcy, capital investment and taxation, as well as functioning criminal justice systems to ensure law and order and to attract foreign investment. Thus the law promoted by this neo-liberal understanding of the rule of law is chiefly private law, which is depicted as neutral and devoid of any distributional effect.

⁴⁴ Thomas Carothers, “The Rule of Law Revival” (1998) 77 *Foreign Affairs* 95, 95.

⁴⁵ David Trubek, “The Rule of Law in Development Assistance” in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 74, 81-82.

⁴⁶ The World Bank, Legal Vice Presidency, *Legal and Judicial Reform Observations, Experiences and Approach of the Legal Vice Presidency* (2002) 14.

⁴⁷ Trubek above n 45, 74.

⁴⁸ Carothers, above n 44, 99.

⁴⁹ Douglass C North, *Institutions, Institutional Change and Economic Performance* (1990). Note that from around 1997, IFIs and the development community generally began to use the term ‘good governance’ to refer to a number of aspirations for the functioning of governing including transparency, accountability, participation and the rule of law.

This private law is also represented as universally applicable and hence IFIs have pushed for the harmonisation of national laws based on international ‘best practice’.⁵⁰

Essential to this formalist conception of the rule of law is an independent judiciary capable of protecting property and enforcing contracts.⁵¹ Legal predictability and enforceability are foremost so as to create a stable legal environment for the free market.⁵² The World Bank’s formulation of the rule of law is state centric in nature and top-down. While constitutions are depicted as drivers of development, non-state actors such as civil society organisations are only considered relevant to the development agenda in relation to their potential impact on state institutions, such as the judicial system.⁵³

Legal pluralism figures on the margins of this neo-liberal framework. Most frequently, international development bodies have neglected customary legal systems. While the World Bank has been active in promoting the reform of legal systems since 1990, it has not dealt explicitly with the dynamics of customary law even in countries where such law is predominant. Leila Chirayath et al observe:

Of the 78 assessments of legal and justice systems undertaken by the [World] Bank since 1994, many mention the prevalence of traditional justice in the countries looked at, but *none* explore the systems in detail or examine links between local level systems and state regimes.⁵⁴

Following a Weberian logic, IFIs and other global aid bodies have often considered customary legal systems in negative terms, as inefficient, ‘backward’ and lacking in rationality and legal authority. Customary legal systems are portrayed as overly complex, inaccessible to foreigners, discriminatory towards women and outsiders, and as hindering the project of ‘greater integration into the world economy’. In this regard, Thomas

⁵⁰ Katharina Pistor, “The Standardisation of Law and its Effect on Developing Economies” (2002) 50 *American Journal of Comparative Law* 97.

⁵¹ Ibrahim Shihata, *The World Bank in a Changing World: Selected Essays*, compiled and edited by Franziska Tschofen (1991) 84-90, 225-230. The World Bank, above n 46, 5.

⁵² The World Bank, above n 46, 19.

⁵³ *Ibid* 39.

⁵⁴ Leila Chirayath, Caroline Sage and Michael Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (July 2005) (Report prepared as a background paper for the *World Development Report 2006: Equity and Development*) 3 (emphasis original).

Carothers argues that rule-of-law aid providers are responsible for a form of Western imperialism. He asserts:

They do not have much interest in non-Western forms of law, in traditional systems of justice, or, in the case of some American rule-of-law experts, even in civil law. ... Aid providers know what endpoint they would like to help countries achieve – the Western-style, rule-oriented systems they know from their own countries.⁵⁵

The turn of the twenty-first century shows a shift in this approach. The failure of neo-liberal policies to deliver promised growth has led to what David Kennedy has labelled “chastened neoliberalism”.⁵⁶ This is illustrated by the inclusion in the World Bank’s programmes of measures to limit market excess, incorporate social aspects such as social, economic and cultural rights, and to provide direct relief to the poor.⁵⁷ The concept of the rule of law remains central to this new approach despite the fact that some leading scholars question the causal link between the rule of law and development, citing the cases of China and Japan.⁵⁸ However, the World Bank’s understanding of the concept appears to have changed from one of formalism towards a more substantive understanding.⁵⁹ This shift is seen in the following World Bank statement:

⁵⁵ Thomas Carothers, “The Problem of Knowledge” in Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 15, 19, 21.

⁵⁶ David Kennedy, “The ‘Rule of Law,’ Political Choices, and Development Common Sense” in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 95, 150.

⁵⁷ David Trubek and Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Approach” in Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 1, 8. This change has been heralded by the World Bank’s Comprehensive Development Framework which was initiated by James Wolfensohn, *A Proposal for a Comprehensive Development Framework* (May 1999).

⁵⁸ Carothers, above n 55, Ch 2; Frank Upham, “Mythmaking in the Rule-of-Law Orthodoxy” in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006), 75. See also Kevin E Davis, “What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?” (2004-2005) 26 *Michigan Journal of International Law* 141. See generally, David Kennedy, “Laws and Developments” in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the Twenty-First Century – Essays in Honour of Peter Slinn* (2003) 17.

⁵⁹ Santos describes the World Bank’s formulation of the rule of law as currently something of a “hodge-podge” because some parts of the Bank are continuing to espouse formalist understandings of the rule of law while other parts are using more substantive approaches to the rule of law based on the work of Amartya Sen. Santos points out that the World Bank is not a monolithic institution and

It is asserted that *formalist* rule of law, which stresses institutionalised legal mechanisms and absolute autonomy from politics, is a necessity for economic development. But attempts to transplant *formalist* rule of law to developing and/or democratising countries could actually be counterproductive for economic, institutional, and political development, especially when *informal mechanisms* would be more effective and efficient.⁶⁰

This statement indicates the World Bank's new interest in the role of informal norms and mechanisms in improving economic efficiency and growth.

There are signs that the World Bank recognises that in some contexts it may be beneficial for informal norms and mechanisms to supplement, and sometimes supplant, formal law.⁶¹ For example, the World Bank's 2003 land review report showed that the Bank was questioning the previous economic orthodoxy that the recognition of customary land rights constrained economic development and that individualisation and privatisation were essential to encourage development.⁶² The report acknowledged that in certain circumstances the security of customary tenure was more effective and less expensive than that provided by state institutions. It observed that only two to ten per cent of the total land area in Africa is covered by 'modern' forms of land tenure which means that more than 90 per cent of land in Africa is regulated outside state legal systems.⁶³ The report states: "the failure to formally recognise customary and other traditional institutions has effectively excluded the majority of land and the population using it from the rule of law, with

hence it is difficult to pin down one single approach. Alvaro Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" in David Trubek and Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 253.

⁶⁰ World Bank, Legal Institutions of a Global Economy Homepage cited in David Trubek, above n 45, 91 (emphases added).

⁶¹ Kerry Rittich, "The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social" (2004-2005) 26 *Michigan Journal of International Law* 199-243.

⁶² World Bank, *Land Policies for Growth and Poverty Reduction*, World Bank Policy Research Report (2003).

⁶³ World Bank, *ibid* xxiii, 62. This dichotomy between modern and traditional is used in the previous report of the World Bank on this subject, entitled *Land Reform: Sector Policy Paper* (1975) 5.

potentially far-reaching implications for governance”.⁶⁴ This comment then endorses a policy in Africa of ‘state law pluralism’, where the state recognises customary land tenure, on the grounds of promoting the rule of law.⁶⁵

A shift towards legal pluralism can also be seen among some leading aid agencies.⁶⁶ For example, since 2000 the policy of the United Kingdom Department for International Development (DFID) appears to be taking the fact of legal pluralism seriously and moving away from a purely state-centric approach to development. DFID has been developing “safety, security and access to justice” (SSAJ) programmes in Africa that focus on how poor people experience insecurity and injustice⁶⁷ and recognise the importance of customary legal systems and other non-state legal systems in providing justice to the poor. For DFID, improving access to justice requires a focus on both state and non-state legal systems and ensuring that they work justly and equitably.⁶⁸ South Africa is the subject of one of the SSAJ programmes and there is some indication that the SSAJ policy is partly

⁶⁴ Ibid 62. World Bank, *Land Reform: Sector Policy Paper* (1975) focussed almost exclusively on formal title. It briefly discusses the “communal system” in terms that imply that customary tenure has a finite life: 19.

⁶⁵ However, the report points out while state recognition in relation to customary tenure has been introduced in many parts of Africa, such recognition “without actual institutions for enforcement” can lead to insecurity and conflict: 65. This problem is discussed in Chapter 7 in relation to Timor-Leste.

⁶⁶ Apart from the UK’s Department for International Development, Germany’s Gesellschaft für Technische Zusammenarbeit (GTZ) appears to be taking a similar approach. The shift from 2000 onwards may have been spurred by the strategies suggested by the International Council on Human Rights Policy in 2000 which included ensuring access to justice and institutions of redress, recognising indigenous systems and empowering women and minorities: *Local Perspectives: Foreign Aid to the Justice Sector* (2000) 57-66.

⁶⁷ UK DFID, *Justice and Poverty Reduction*, DFID Issues Paper (December 2000); UK DFID, *Safety, Security and Accessible Justice: Putting Policy into Practice* (July 2002); UK DFID, *Non-State Justice and Security Systems*, Briefing, (May 2004). For an overview of the operation of such programmes in Africa, see Laure-Hélène Piron, “Time to Learn, Time to Act in Africa” in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) Ch 11.

⁶⁸ UK DFID 2000, *ibid* [22]. See also Stephen Golub, “A House Without a Foundation” in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006), 105 where he argues that in DFID’s SSAJ programmes informal systems “remain programmatic stepchildren to the judiciary and other official institutions”: 119; Stephen Golub, “The Rule of Law and the UN Peacebuilding Commission: A Social Development Approach” (2007) 20 *Cambridge Review of International Affairs* 47. Another expert has commented that there is “little evidence of its [SSAJ’s] operationalisation” in Africa: Celestine Nyamu-Musembi, “Ruling out Gender-Equality? The Post-Cold War Rule of Law Agenda in Sub-Saharan Africa” (2006) 27 *Third World Quarterly* 1193, 1199.

influenced by South Africa's approach to legal pluralism.⁶⁹ The concept of the rule of law is relatively tangential to the programme; overall, DFID appears to be more restrained in its promotion of the rule of law than the World Bank and the USAID.⁷⁰

Since at least 1998, USAID has shown an interest in understanding the relationship between the rule of law and ADR, which includes traditional dispute resolution involving customary law.⁷¹ In its guide for practitioners of ADR, USAID acknowledges that ADR can increase access to justice for women and other socially disadvantaged groups and can support rule-of-law objectives. However, it broadly comments: "ADR programs are instruments for the application of equity, rather than the rule of law."⁷² The guide represents ADR as potentially unpredictable in contrast to the rule of law, which is portrayed as stable and more capable of redressing power imbalances between parties.⁷³

An evaluation of the work of the Danish International Development Assistance (Danida) in developing countries concluded that its support for the formal legal system through the promotion of the rule of law has "important limitations and trade-offs" given that the majority of the population is unable to access the formal legal system.⁷⁴ In the short term the neglect of informal legal systems means that access to justice for the majority is not being addressed.⁷⁵ In other words, the evaluation implied that Danida is giving excessive attention to state-centric strategies associated with the rule of law in countries where legal pluralism is strong and statehood is nascent and fragile.

In 2002 the Legal Vice-Presidency of the World Bank proposed that one of the four conditions for the rule of law is that "justice is accessible to all" and asserted that it

⁶⁹ One of the authors of the SSAJ Policy document, Wilfred Scharf, was at the time South Africa's leading expert on non-state justice.

⁷⁰ See USAID, *At Freedom's Frontiers: A Democracy and Governance Strategic Framework* (2005); USAID and US Department of State, *Strategic Plan: Fiscal Years 2007-2012 – Transformational Diplomacy* (2007).

⁷¹ The relationship is discussed in USAID, *Alternative Dispute Resolution: Practitioners' Guide* (March 1998). Since this 1998 report, USAID has commissioned a number of reports on the relationship between the rule of law and ADR in developing and transitional countries.

⁷² Ibid 3.

⁷³ The Guide advises practitioners not to rush into ADR programmes without considering the need to "creat[e] a more even balance of power among potential users": ibid 3.

⁷⁴ Danish Ministry for Foreign Affairs and Danida, *Evaluation: Danish Support to Promotion of Human Rights and Democratisation, Volume 2: Justice, Constitution and Legislation* (2000) vi.

⁷⁵ Golub, "A House", above n 68.

promoted ADR and customary forums.⁷⁶ Since 2002 the World Bank has adopted a differentiated strategy for “fragile states” which includes post-conflict countries with weak or dysfunctional institutions such as Timor-Leste. This strategy continues to promote the rule of law despite reports that rule-of-law assistance programmes have had limited impact on the ultimate social goals associated with the rule of law in post-conflict states.⁷⁷ A paper written for the World Bank on this problem recommends that the World Bank adopt new strategies to take advantage of the informal structures that exist in countries such as Timor-Leste, where it can take close to 20 years to establish formal institutions.⁷⁸ These suggestions appear to have some support with other arms of the Bank: six months before this paper was published, the World Bank issued a report on Timor-Leste which noted the limited access to the formal justice system and recommended to the government of Timor-Leste that it establish a legal framework for linking customary practice to the formal justice system.⁷⁹

At least on paper, development agencies and IFIs are beginning to pay more attention to the fact of legal pluralism; no longer is legal pluralism being rejected as impeding economic growth and development. However, on the whole, legal pluralism remains peripheral to the field of law and development. The concept of the rule of law continues to be a powerful rhetoric that lends credibility to IFIs in their promotion of particular economic policies and programmes of institutional development in developing and fragile states.⁸⁰ This close relationship between IFIs and the concept of the rule of law has resulted in a top-down and state-centric approach to development that neglects the legal mechanisms relied on by those at the ground level.

⁷⁶ The World Bank, above n 46, 1-2, 6. In 2002 the World Bank began its “Justice for the Poor” (J4P) programme in Indonesia, followed by programmes in Cambodia, Sierra Leone, Kenya, Rwanda and in mid 2008 in Vanuatu and Timor-Leste. The J4P programme is based on the link between development, accessible legal institutions and the need to understand complex local legal systems. In Timor-Leste the programme focuses on two areas: unresolved land claims involving the state and state officials, and service delivery at the local level.

⁷⁷ Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt*, World Bank Social Development Papers, Paper No 37, (October 2006).

⁷⁸ Ibid 17-18.

⁷⁹ World Bank, *Strengthening the Institutions of Governance in Timor-Leste* (April 2006) [60].

⁸⁰ Santos, above n 59, 255.

4.2 Principles: Human Rights and Democracy

The rule of law is also believed to be a precondition to establishing principles such as human rights and democracy.⁸¹ In this context the rule of law is understood in abstract and universalising terms as requiring the observance of democratic and international human rights standards. It is seen as part of a global approach to social justice driven mainly by the human rights movement.

To crystallise this, the human rights movement has pushed an agenda of constitutionalism across the world in the belief that a legal framework of constitutional guarantees of judicial review, judicial independence and separation of powers will aid the protection of international human rights standards and the rule of law.⁸² In a sense, this is a natural meeting point as constitutionalism, the rule of law and international human rights law are all focussed on the state as their principal subject. While the three concepts allow space to criticise the state, they rely upon the state for their fulfilment and thus reinforce the power of the state and promote it as the centre of “emancipatory promise”.⁸³ However, they differ in that international human rights law overtly promotes universal norms.

At the international level, human rights law and legal pluralism are incompatible because the element of universalism in the former leaves little space for diversity and local norms. In this sense international human rights law has a veneer of imperialism, arguably shared by the rule of law,⁸⁴ as it pushes a particular set of norms as ‘universal values’. According to Kennedy, these norms are projected as civilised, rational and modern norms in contrast to any other ‘particular’ and backward norms. He argues:

The human rights movement contributes to the framing of political choices in the third world as oppositions between ‘local/traditional’ and ‘international/modern’ forms of government and modes of life. This effect

⁸¹ For an insightful analysis of the relationship between the rule of law and human rights, see Balakrishnan Rajagopal, “Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination” (2007-2008) 49 *William and Mary Law Review* 1347, 1359-1362.

⁸² Louis Henkin, “A New Birth of Constitutionalism” (1992) 14 *Cardozo Law Review* 533, 547.

⁸³ On human rights law, see David Kennedy, “The International Human Rights Movement: Part of the Problem?” (2002) 15 *Harvard Human Rights Law Journal* 101, 113.

⁸⁴ See Rosa Ehrenreich Brooks, “The New Imperialism: Violence, Norms and the Rule of Law” (2003) 101 *Michigan Law Review* 2275.

is strengthened by the presentation of human rights as belonging to the modern world, but coming from some place outside of political choice, from the universal, the rational, the civilised.⁸⁵

This positioning of human rights means that it is understood as a rational mode in opposition to the sphere of the traditional and customary. Sally Engle Merry states that “[I]ike colonialism, human rights discourse contains implicit assumptions about the nature of civilized and backward societies often glossed over as modern and traditional”.⁸⁶ In contrast, legal pluralism contains no such assumptions because it is devoid of any substantive criteria or standards. This means it gives equal weight to every set of norms, including local norms and those norms lacking legal rationality, without making any claims of transcendence or universality for any set of norms.

The tension between legal pluralism and human rights is particularly apparent in the sphere of women’s human rights where some state actors seek to explain their non-compliance with human rights treaties by citing the prevalence of local customs or traditions whose power exceeds that of the state.⁸⁷ The response of many actors in the human rights movement has tended to brand customs and traditions as negative and harmful and to conflate them with culture in the developing world.⁸⁸ This often leads to calls for the wholesale abolition of traditions and customs.⁸⁹ A more nuanced approach is shown by the work of Celestine Nyamu-Musembi whose work on customary law in Africa highlights that customs and traditions provide positive openings and opportunities for gender equality as well as barriers.⁹⁰ She encourages scholars and human rights activists to study legal pluralism as a means to identifying the positive aspects of custom and tradition for women.

⁸⁵ Kennedy, above n 83, 116.

⁸⁶ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006) 226.

⁸⁷ Ibid Ch 4.

⁸⁸ This is observed by Merry, *ibid* 12-13.

⁸⁹ Merry gives the example of the UN Committee on the Elimination of Discrimination Against Women recommending the complete abolition of the practice of *bulubulu* in Fiji even though in some contexts it may be useful: *ibid*, Ch 4. The South African Rural Women’s Movement and South African National Civics Organisation (SANCO) both oppose engagement with local law.

⁹⁰ Celestine Nyamu, “How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries” (2000) 41 *Harvard International Law Journal* 381. See also Nyamu-Musembi, ‘Are Local Norms and Practices Fences or Pathways? The

The need to understand legal pluralism has been automatic for many human rights activists working at the local level. In Timor-Leste, for instance, some local activists and women's groups have been involved in attempting to modify local customary law in line with international human rights standards by organising local education campaigns in villages on issues such as rape and domestic violence.⁹¹ For example, some groups advocate for compensation paid in relation to domestic violence and rape to be paid directly to the victim rather than to the victim's family as custom dictates.⁹² These actions make clear that formal Western-style law is not regarded as a panacea; instead a modified form of customary law is considered an ongoing and viable means of community dispute resolution. These groups recognise that ignoring customary law is not a practical option in a post-conflict state where the state legal system is struggling to operate even in the capital. To ignore customary law may deny the possibility of enhanced access to justice for the poor and most marginal.

Little has been directly written on the relationship between legal pluralism and democracy despite the fact that many states embrace forms of both concepts.⁹³ In contrast, much has been written on the relationship between the rule of law and democracy,⁹⁴ with most commentators asserting a causal link between the two. For example, Hans Corell, the former Legal Counsel of the UN, asserts with little deliberation that democracy is a

Example of Women's Property Rights', in Abdullahi Ahmed An-Na'im (ed), *Cultural Transformation and Human Rights in Africa* (2002) 126.

⁹¹ See Tanja Hohe and Rod Nixon, *Reconciling Justice: 'Traditional' Law and State Justice in East Timor (Final Report)* (2003) (Report for the United States Institute of Peace) 61 describing the work of Centro Feto (Centre for Women).

⁹² Ibid.

⁹³ A burgeoning literature is appearing on constitutional pluralism. See, eg, James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995); Neil Walker, "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 317; Gavin W Anderson, *Constitutional Rights After Globalization* (2005). One scholar, Paul Berman, argues that various forms of compromise between the two concepts exist in a number of national and supranational systems where different communities live under one system, whether federal or otherwise. For example, in Europe, the European Court of Human Rights uses the doctrine of the 'margin of appreciation' so that national communities can follow their own democratic laws where there is no consensus at the supranational level while the European Union uses the principle of subsidiarity, which gives national legislatures some leeway in which to manoeuvre: Paul Schiff Berman, "Global Legal Pluralism" (2007) 80 *Southern California Law Review* 1155.

⁹⁴ See, eg, Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy" (2001) 74 *Southern California Law Review* 1307; Carothers, above n 44, 96-97.

“requirement for the rule of law”.⁹⁵ In contrast, Carothers, the director of the Democracy and Rule-of-Law Project at the Carnegie Endowment, questions the direct causal connection between the rule of law and democracy and describes it as opaque.⁹⁶ In his view, “[d]emocracy often, in fact usually, co-exists with substantial shortcomings in the rule of law”.⁹⁷

The connection between democracy and the rule of law appears to be largely aspirational and political. For example, the Final Report of the South African Truth and Reconciliation Commission claims that democracy is encompassed within the concept of the rule of law. The Report states: “As argued so impressively by Dicey more than a century ago, parliamentary sovereignty and the rule of law work hand in hand and are premised on a political system that is fundamentally representative of all the people subject to that Parliament”.⁹⁸ Given that England did not have universal suffrage at the time Dicey propounded his theory of the rule of law, this interpretation is a little stretched. The motivation for this claim is clear, however, given that the apartheid government asserted its adherence to the rule of law in the absence of universal suffrage.

In sum, in the last two phases of the LADM, the rule of law has been strenuously promoted in the name of both principle and profit while IFIs are gradually recognising that legal pluralism is not necessarily an obstacle to development but may be a link to certain sections of society.

5. Transitional Justice

In the field of transitional justice, the rule of law is once again at the forefront due to the heavy influence of the human rights movement. Legal pluralism hovers mostly on the field’s margins but experiences in Rwanda and Timor-Leste have highlighted its role in assisting to achieve some measure of accountability and redress for victims in post-conflict states.

⁹⁵ Hans Corell, “A Challenge to the United Nations and the World: Developing the Rule of Law” (2004) 18 *Temple International and Comparative Law Journal* 391, 393.

⁹⁶ Carothers, above n 55, 15.

⁹⁷ *Ibid* 18.

⁹⁸ (1998) Vol 4, Ch 4, [41].

Transitional justice began life as a study of justice mechanisms used by countries in transition from conflict and authoritarianism to democracy and ‘liberalisation’.⁹⁹ Transitional justice mechanisms are temporary processes that aim to give a once-off injection of principles and capacity to a state legal system so as to kick-start the establishment of the rule of law in a post-conflict environment. These mechanisms, which include criminal trials, truth commissions, lustration processes, reparations, conditional amnesty and constitution-making, are mostly backward looking and short term in nature¹⁰⁰ and understand ‘justice’ in terms of accountability for past human rights abuses. While the human rights movement has been particularly vocal in calling for criminal prosecutions as providing the path to accountability for human rights abuses, it has been fairly critical of truth commissions, a mechanism used across the world and most prominently by South Africa in the 1990s as a means to skirt expensive and lengthy prosecutions.

At the national level, transitional justice mechanisms were embraced particularly in the first waves of transition, such as those in Eastern Europe and Southern Africa, where there was some semblance of key state institutions still in existence, such as judicial systems, which were capable of activating transitional justice mechanisms.¹⁰¹ However, in some later transitions from conflict, such as Rwanda and Timor-Leste, the solutions were less clear-cut because there was little state infrastructure and capacity remaining.

According to Ruti Teitel, early transitional justice literature was marked by aspirations toward idealised conceptions of justice and the rule of law and the belief that transitional justice mechanisms would help transform countries into democratic states that observe international human rights standards.¹⁰² However, today the main concern of transitional justice is the project of “nation-building”,¹⁰³ which has shifted transitional justice to a more sustainable, partial conception of justice and a thin and compromised conception of the rule

⁹⁹ See, eg, Neil Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes – Country Studies* (1995).

¹⁰⁰ Constitution-making is clearly the exception here although the International Criminal Court is also exceptional in that it is a permanent institution.

¹⁰¹ Ellen Lutz, “Transitional Justice: Lessons Learned and the Road Ahead” in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (2007) 326.

¹⁰² Ruti Teitel, “Transitional Justice Genealogy” (2003) 16 *Harvard Human Rights Journal* 69.

¹⁰³ *Ibid* 89.

of law. This shift is presumably partly the result of the nation-building exercises not only in Timor-Leste but also in Iraq and Afghanistan. There is tension in transitional justice's desire to balance the universalising drive of human rights discourse with the localising drive of nation-building projects. Ultimately both of these concerns leave little room for the consideration of non-state norms. At its core, the field of transitional justice is focussed on the state:¹⁰⁴ it strives to understand how the state can be strengthened on a liberal and democratic basis¹⁰⁵ and how prosecutions can shore up the state's stability and legitimacy. Access to justice for ordinary people and the rights of victims have been an afterthought in transitional justice literature.¹⁰⁶

Much like the rule-of-law promotion field, transitional justice has overlooked or attempted to ignore legal pluralism: it rarely examines non-state legal norms operating at the local level, even in situations where local legal systems are predominant. For example, in her much lauded book, *Transitional Justice*, Teitel discusses the concept of constitutionalism in the transitional context by drawing on various cases studies, including from her native South America, such as Colombia.¹⁰⁷ However, Teitel does not examine how constitutions are made meaningful at the local level, that is, how they engage with, and translate into, local norms. Her work on constitutional norms presupposes that they automatically have some meaning in transitional countries and assumes the existence of state power, even when looking at the constitutions of countries such as Columbia where the state is very weak and limited, geographically and normatively. This oversight is representative of much of the early transitional justice literature in that it fails to investigate the operation of norms at the local level and their engagement with national and international norms.

¹⁰⁴ Kieran McEvoy argues that the “state centric and ‘top-down’” nature of transitional justice can be traced to the fact that it is over dominated by legalism: McEvoy, “Letting Go of Legalism: Developing a ‘Thicker’ Version of Transitional Justice” in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (2008) 15, 16, 25.

¹⁰⁵ Constitution-making is a good example of the field's emphasis on state power because the process of constitution-making aims to institutionalise the supremacy of state power, as well as its delimitation, often at the expense of local power.

¹⁰⁶ See Lorna McGregor commenting on “first wave transitional justice models”: “International Law as a ‘Tiered Process’: Transitional Justice at the Local, National and International Level” in Kieran McEvoy and McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (2008) 47, 56.

¹⁰⁷ Ruti Teitel, *Transitional Justice* (2000) Ch 6.

One transitional justice mechanism that has drawn considerable global attention is South Africa's Truth and Reconciliation Commission, which was aimed at achieving reconciliation at the local level, based on the African norm of "ubuntu".¹⁰⁸ The Commission neither claimed any role in reinforcing the rule of law in South Africa nor did it directly incorporate any aspects of customary law into its procedures. However, its counterpart in Timor-Leste, the Commission for Reception, Truth and Reconciliation (known by the Portuguese acronym, CAVR), incorporated aspects of customary law into its reconciliation programme and subsequently it claimed that its programme "reinforced" the rule of law.¹⁰⁹ The CAVR was initiated by the recognition that the state's nascent court system would not be able to address the minor crimes that took place during the Indonesian occupation and withdrawal, as the hybrid court established by the UN was designed to hear only serious crimes.¹¹⁰ To date, this transitional justice mechanism, the CAVR, is Timor-Leste's first and only formal experiment with legal pluralism.

The turning point for transitional justice in its understanding of legal pluralism is Rwanda's decision to establish *gacaca* courts to hear cases against the approximately 100,000 prisoners who, more than five years after the 1994 genocide, were still languishing in prisons without trial. The Rwandan government estimated that it could take two centuries for the UN international tribunal and the national courts to hear all the cases.¹¹¹ Thus, desiring full accountability, the government created another level of special courts, this time at the local level, claiming to draw on aspects of traditional dispute resolution indigenous to Rwandan society, that were used in pre-colonial days to resolve family and neighbourhood disputes. Known as *gacaca* (literally "small grass") courts these new state courts represent a compromise between the local indigenous system and Western legal

¹⁰⁸ *Ubuntu* is a Zulu word sometimes translated as humaneness and human dignity. It implies unity and interconnectedness. See, eg, Rosalind English, "Ubuntu: The Quest for An Indigenous Jurisprudence" (1996) 12 *South African Journal on Human Rights* 641.

¹⁰⁹ *Chega!*, Report of the Commission for Reception, Truth and Reconciliation, Part 9, [164]. For an elaboration on this claim and on the work of the CAVR, see Part 4.2 of Chapter 7.

¹¹⁰ This court, the Special Panel for Serious Crimes, was hybrid only in that it was an arm of the Dili District Court and local and foreign judges constituted the bench. The law applied by the SPSC was not a mixture of international law and customary law.

¹¹¹ The Government of Rwanda, *Genocide and Justice* see <<http://www.gov.rw/government/genocide.html>> at 11 August 2008.

standards and practices.¹¹² An aspect of the former is the popular participation and adjudication by respected community elders while an aspect of the latter is the fact that the state was involved in organising the election of the *gacaca* judges and in this process, encouraged the selection of women.¹¹³ The state-run *gacaca* courts have been heralded as “an impressive innovation in the area of transitional justice”¹¹⁴ possibly because of their grass-roots nature as well as the fact that they form the lowest level of the pyramid of multilayered-transitional justice mechanisms operating simultaneously in Rwanda. However, these courts produced a storm of debate as to whether, as a transitional justice mechanism, the *gacaca* system serves the rule of law.¹¹⁵

In 2002, Amnesty International expressed concern that the rule of law would not prevail in Rwanda if the *gacaca* system did not strictly adhere to international human rights standards, in particular guarantees of due process articulated in Article 14 of the *International Covenant on Civil and Political Rights*.¹¹⁶ It argued that the *gacaca* system fails to guarantee impartiality, equality of arms between the parties to the proceedings, full appeal rights and judicial competency. It read Article 14 as guaranteeing “the right to equal

¹¹² Timothy Longman, “Justice at the Grassroots? Gacaca Trials in Rwanda” in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2007) 206, 210. See also Jacques Fierens, “Gacaca Courts: Between Fantasy and Reality” (2005) 3 *Journal of International Criminal Justice* 896, 912-913. Fierens argues that the process “endeavours to legitimise a hereto unheard-of attempt at people’s justice”. He points out that the hybridisation of the process mutes its traditional aspects and therefore there is little that could be traditional about the process.

¹¹³ Longman, above n 112, 206, 211. Furthermore, the state formally organises these courts and sets out a code of court rules.

¹¹⁴ Catherine Honeyman et al, *Gacaca Jurisdictions: Transitional Justice in Rwanda – Observations from June 10-August 8, 2002* 6 at <http://www.convenor.com/madison/PDF_Gacaca_Report.pdf> at 24 April 2008. Matteo Tondini argues that traditional justice institutions have been “successfully employed” in Rwanda: “From Neocolonialism to a ‘Light-Footprint Approach’: Restoring Justice Systems” (2008) 15 *International Peacekeeping* 237, 241.

¹¹⁵ Amnesty International, *Rwanda: The Troubled Course of Justice*, (26 April 2000); Amnesty International, “Rwanda: Gacaca – Gambling with Justice” (Press Release, 19 June 2002); Amnesty International, *Rwanda: Gacaca: A Question of Justice* (December 2002); Human Rights Watch, “Elections May Speed Genocide Trials” (Press Release, 2001).

¹¹⁶ *Rwanda - Gacaca: A Question of Justice* (2002) 5. Note that as of November 2007, Amnesty International was still expressing concerns about the *gacaca* process and encouraging states to use universal jurisdiction to prosecute perpetrators of the Rwandan massacre: see Amnesty International, *Rwanda: Suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice* (2 November 2007). The *gacaca* courts were wound up at the end of 2007. For a similar and more detailed argument, see Gerald Gahima, “Alternatives to Prosecution: The Case of Rwanda” in Edel Hughes, William Schabas and Ramesh Thakur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (2007) Ch 10.

access to court”,¹¹⁷ by which it understood a Western-style court. Rwanda’s Supreme Court responded by stating that the authors of the Amnesty International report were ignorant of the traditional system of *gacaca*, “which is normal since it is different from the systems they are used to”.¹¹⁸ The Court argued that this transitional justice mechanism places respect for human value and dignity as the forefront rather than blindly following international texts.¹¹⁹ The intention of the *gacaca* system was to reconcile people and rehabilitate Rwandan society, and, given the massive scale of the violence and the limited resources of Rwanda, the system was an appropriate means to achieving full accountability.¹²⁰ At its heart, Rwanda’s decision to establish the *gacaca* system was motivated by a concern that victims receive some form of redress and that all prisoners have ‘access to justice’ within a reasonable time period; unlike Amnesty International, Rwanda did not understand ‘access to justice’ narrowly to mean ‘access to Western-style courts’. For many international NGOs such as Amnesty International, the problem was the failure of *gacaca* courts to conform to dominant understandings of the rule of law.¹²¹

This dialogue between one of the leading human rights NGOs and one of the poorest post-conflict states in the world brings to the fore the tension in transitional justice in relation to the rule of law and legal pluralism in the form of customary law. On the one hand, the use of these hybrid local courts represents an affirmation of local norms of dispute resolution; it also assists Rwanda in building a legal culture and encouraging large-scale participation in a state institution, both important aspects of the rule of law. On the other hand, the *gacaca* system potentially violates international legal standards, which, at a more abstract level, are considered closely connected to dominant understandings of the rule of law. In its response, the Rwandan Supreme Court did not deny the importance of these international legal standards; instead it argued that these international standards needed to be translated

¹¹⁷ Amnesty International, *Rwanda: Gacaca: A Question of Justice* (2002), 31.

¹¹⁸ Republique Du Rwanda, Cour Supreme, *Mise au Point au Sujet du Rapport et Differentes Correspondences d’Amnesty International* (2003) see <<http://www.inkiko-gacaca.gov.rw/pdf/repamnisty.pdf>> 2.

¹¹⁹ Ibid 2.

¹²⁰ Ibid 6. See also Bert Ingelaere, “The Gacaca Courts in Rwanda” in Luc Huyse and Mark Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* 24 (Report of the Institute for Democracy and Electoral Assistance) (2008).

¹²¹ Mark Drumbl, “Law and Atrocity: Settling Accounts in Rwanda” (2005) 31 *Ohio Northern University Law Review* 41, 57-58.

and adapted to the situation on the ground. No doubt the Court saw the international human rights movement as using the rule of law as a stick to enforce the values of ‘civilising nations’.¹²²

On the whole, the field of transitional justice is shifting towards greater acceptance of the Rwandan ‘innovation’.¹²³ Despite the concerns of some human rights groups, legal pluralism is playing an increasingly larger role in transitional justice mechanisms. For example, in Northern Uganda, the promotion of traditional justice has become the “current vogue” as an alternative to the International Criminal Court.¹²⁴ This shift can be attributed to a greater focus on nation-building as well as on local norms and participation, and community-based justice mechanisms. It is also partly a result of studies conducted in the post-conflict states of Rwanda and Bosnia-Herzegovina which have found that the international *ad hoc* courts set up for these two states by the international community have had limited impact on, and legitimacy with local populations.¹²⁵

After two decades, transitional justice literature largely fashions itself as a reflection on the ‘lessons learned’. However, this teleological understanding of the field was disturbed by the manifest failure of the US to learn many of these lessons and to put them to practice in its occupation of Iraq.¹²⁶ According to one commentator, a critical mistake made by the US

¹²² Bell and O’Rourke describe this as “a sinister side to transitional justice as liberalising justice”: Christine Bell and Catherine O’Rourke, “Does Feminism Need a Theory of Transitional Justice? An Introductory Essay” (2007) 1 *The International Journal of Transitional Justice* 23, 38.

¹²³ The UNHCHR has described the *gacaca* court systems as a “hopeful model”: UNHCHR, *Rule of Law Tools for Post-Conflict States: Mapping the Justice Sector* (2006) 15.

¹²⁴ Tim Allen, “Ritual (Ab)Use? Problems with Traditional Justice in Northern Uganda” in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) 47. For the comments made in 2005 by the Chief Prosecutor of the International Criminal Court on the role of traditional justice in relation to the ICC, see “Statements by ICC Chief prosecutor and the Visiting Delegation of Acholi Leaders from Northern Uganda”, ICC-OTP 2005.042-EN, The Hague: ICC, 18 March 2005 <<http://www.icc-cpi.int/press/pressreleases/96.html>> at 15 October 2008. See also IDEA, above n 120.

¹²⁵ See Timothy Longman, Phuong Pham and Harvey M Weinstein, “Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda” in Harvey Weinstein and Eric Stover (eds), *My Neighbor, My Enemy: Justice and Social Reconstruction in Rwanda and the Former Yugoslavia* (2004) 206, 213-215; Laurel Fletcher and Harvey M Weinstein, *Justice, Accountability and Social Reconstruction: An Interview of Bosnian Judges and Prosecutors* (2000) http://www.law.berkeley.edu/clinics/ihr/c/pdf/JUDICIAL_REPORT_ENGLISH.pdf at 11 August 2008.

¹²⁶ Eric Stover, Hanny Megally and Hania Mufti, “Bremer’s ‘Gordian Knot’: Transitional Justice and the US Occupation of Iraq” (2005) 27 *Human Rights Quarterly* 830. Even legally trained

has been to ignore local interests in Iraq,¹²⁷ which has affected the legitimacy of the occupation. Since the invasion of Iraq, state-building literature generally emphasises that more attention has to be paid to local politics and social needs, to the grass roots level, otherwise the introduction of new laws will have no connection to the people. For example, Stromseth, Wippman and Brooks exhort military interveners such as the US and the UN to design rule-of-law programmes that “build on pre-existing informal dispute resolution mechanisms”.¹²⁸ They reason that: “rule of law efforts should not ignore the role of traditional and informal dispute settlement mechanisms, because these may command substantial loyalty and may offer useful models for more formal institutions.”¹²⁹ It is now widely recognised, at least by transitional justice literature, that the top-down imposition of the rule of law is unlikely to generate a culture of the rule of law.¹³⁰

Transitional justice has developed into a field that is more pragmatic, contextualised and nuanced than the universalised and abstract discourse of international human rights law. The shift in the conceptualisation of the rule of law has mirrored this development. More than anything, this divergence from international human rights law is driven by necessity in the post-conflict state; in the cases of Timor-Leste and Rwanda, necessity led the state to harness legal pluralism in the form of customary law in order to achieve accountability and redress for the victims. In moving towards pragmatism, transitional justice has lost some of the law and development movement’s idealism regarding law’s power to transform society. A group of leading transitional justice scholars observe: “The question of law’s capacity to deliver (or hinder) meaningful change in transitional societies is an open one”.¹³¹

6. The United Nations

The UN’s embrace of the rule of law is relatively recent. The year 2004 represents a turning point in the UN’s promotion of the rule of law, for after this date the UN’s approach

professionals have experienced difficulty in understanding the processes of these international mechanisms.

¹²⁷ Ellen Lutz, “Transitional Justice: Lessons Learned and the Road Ahead” in Roht-Arriaza and Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* above n 112, 333.

¹²⁸ Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights: Building the Rule of Law after Military Interventions* (2006) 315.

¹²⁹ Ibid 336.

¹³⁰ David Chandler, *Empire in Denial: The Politics of State-Building* (2006) 166ff.

¹³¹ Christine Bell, Colm Campbell and Fionnuala Ni Aolain, “Foreword - Transitional Justice: (Re)conceptualising the Field” (2007) 3/2 *International Journal of Law in Context* 81, 83.

to the concept of the rule of law shifted from one of caution to open and frequent invocation of the concept as something of a cure-all, particularly for post-conflict states. In UN reports, the rule of law has been paired not only with human rights and international justice but also with democracy, investment, development and poverty alleviation.¹³² However, the UN rarely invokes the concept of legal pluralism. It is fair to say that it has a limited understanding of legal pluralism in the form of local customary law. This is confirmed by a 2003 review of four UN peace operations conducted by King’s College London, which observes the UN’s “consistent lack of acknowledgment of the role of traditional justice systems”.¹³³ That an understanding of traditional justice is developing at all can perhaps be traced to its near-decade-long presence and experience in Timor-Leste.

At the 2005 World Summit, the UN General Assembly adopted a resolution recognising “the need for universal adherence to and implementation of the rule of law”.¹³⁴ The resolution states that the rule of law is “essential” for a host of universal goods, including “sustained economic growth, sustainable development, and the eradication of poverty and hunger”.¹³⁵ In 2006 the UN Secretary-General stated that the rule of law was central to the work of the UN.¹³⁶ And yet the *Charter of the United Nations* does not make any reference to the concept¹³⁷ and it is mentioned only somewhat obliquely in the preamble of the *Universal Declaration on Human Rights* when it states that: “human rights should be

¹³² The UN Development Programme (UNDP), in conjunction with the Commission on Legal Empowerment of the Poor, claims that there is a direct connection between poverty and the absence of protections provided by the rule of law: Commission on Legal Empowerment of the Poor and UNDP, *Making the Law Work for Everyone: Volume 1, Report of the Commission on Legal Empowerment of the Poor* (2008) 2. The Report claims “most studies find that the rule of law makes a significant contribution to growth and poverty reduction” (19) but the Report does not specify which studies this claim is based on. For discussion of a similar claim by UNDP in Timor-Leste, see Chapter 7 at n 173.

¹³³ King’s College London, *A Review of Peace Operations – A Case for Change* (2003), Overall Introduction, 34.

¹³⁴ *2005 World Summit Outcome*, GA Res 60/1, [134], UN Doc A/RES/60/1. See also *The Rule of Law at the National and International Levels*, GA Res 61/39 (18 December 2006) and, GA Res 62/70 (8 January 2008). Both resolutions add that the rule of law is essential to “the protection of all human rights and fundamental freedoms” and request that the UN Secretary General streamline and strengthen the UN’s rule of law activities.

¹³⁵ *2005 World Summit Outcome*, GA Res 60/1, [11], UN Doc A/RES/60/1.

¹³⁶ *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law, Report of the UN Secretary General*, 1, UN Doc A/61/636-S/2006/980 (14 December 2006). See also [24] of the UN Millennium Declaration passed by the UN General Assembly which states “We will spare no effort to promote democracy and strengthen the rule of law”: UN Doc A/RES/55/2 (18 September 2000).

¹³⁷ However, note that references to the peaceful resolution of disputes in conformity with international law are made in the preamble as well as paragraphs 1 and 3 of Article 1.

protected by the rule of law”. Since the signing of the *UN Charter* in June 1945, the concept of the rule of law has come a long way. However, its progress was stalled for almost 45 years,¹³⁸ as the concept was a political football, manipulated by both sides of the Cold War. In the new millennium the UN’s embrace of the concept has been intense; it is promoting the rule of law as a “universal value”¹³⁹ despite acknowledging that the role of the rule of law in peacekeeping has not yet received universal recognition.¹⁴⁰ While the UN is pushing the rule of law to the forefront of the interconnected fields of peacekeeping and transitional justice, it has shown some ambivalence in contrast towards engaging with the dynamics of legal pluralism in these two fields. This section considers official UN views on the relationship between the rule of law and legal pluralism in relation to: (i) UN peace operations and its strategy for transitional justice; (ii) the policies of UN member states, and; (iii) structural aspects of the UN.

6.1 UN Peace Operations and Transitional Justice

The need to strengthen rule-of-law institutions and respect for human rights in the post-conflict environment is recommended as a goal for UN peace operations by the 2000 *Report of the Panel on UN Peace Operations* (the Brahimi Report) which reflects on the decade of UN peace-building and peace-keeping since the end of the Cold War.¹⁴¹ This report also considers the role of legal pluralism in UN peace operations. Written ten months after the UN began its administration of East Timor in October 1999, the Brahimi Report addresses the novel challenges presented in attempting to set and enforce the law in Kosovo and East Timor. One major obstacle in establishing some semblance of the rule of law was the choice of applicable law. The difficulties in achieving consensus and clarity on the local legal code, and the differences in “language, culture, custom and experience”, led the Panel to recommend the development of an interim criminal code based on international

¹³⁸ According to Farrall, only one UN Security Council Resolution referred to the rule of law between 1945 and 1989: Jeremy Farrall, *United Nations Sanctions and The Rule of Law* (2008) 465-467.

¹³⁹ *In Larger Freedom: Towards Development, Security and Human Rights For All, Report of the Secretary General*, [128], UN Doc A/59/2005.

¹⁴⁰ See *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law, Report of the UN Secretary General*, [7], UN Doc A/61/636-S/2006/980, (14 December 2006).

¹⁴¹ *Report of the Panel on United Nations Peace Operations*, [47b], UN Doc A/55/305-S/2000/809 (21 August 2000). From 1989 to 1999 the UN deployed 14 major peace operations.

standards for use by UN operations.¹⁴² To bolster its case for a uniform code, which could include regional adaptations, the Panel cited the problem of a mission’s justice team having to learn the law and procedures of the particular country.¹⁴³ This attitude towards local law can be characterised as dismissive, but it is not apparent in the 2006 Primer put out by the UN Department of Peacekeeping Operations (UNDPKO).¹⁴⁴ The Primer directs that upon arrival a justice team must quickly move to identify, collect and organise the applicable local law and then map and assess the judicial and legal system. It goes further and includes in these steps the mapping of non-judicial dispute resolution and the assessment of informal structures that impact on the operation of the legal system.¹⁴⁵ These documents show that in the past decade the UN has made an important pragmatic shift not only towards respecting local law in post-conflict states but also towards awareness of the dynamics of legal pluralism.

Since the end of the Cold War, few mandates of the UN’s peace operations have addressed transitional justice and rule-of-law activities.¹⁴⁶ According to the 2004 UN Report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, this is a problem because, in the UN’s diagnosis, most post-conflict societies suffer a “rule of law

¹⁴² Ibid [80, 83]. See Vivienne O’Connor and Colette Rausch, *Model Codes for Post-Conflict Criminal Justice Volume I: Model Criminal Code* (2008). On whether such a model legal code would have resolved the problems faced by the UN in East Timor, see Erica Harper, *(Re)Constructing a Legal System in East Timor: Challenges to Introducing International Legal Norms and Principles into Post-Conflict States Under UN Administration* (D Phil Thesis, the University of Melbourne, 2007).

¹⁴³ Ibid [80].

¹⁴⁴ United Nations Department of Peacekeeping Operations, *United Nations Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (December 2006).

¹⁴⁵ Ibid 19-20. In terms of strengthening the national legal framework, it states that there must be “appropriate balance between international expertise and local legal traditions, values and culture, and the participation of the community”: 29. This is more clearly spelt out by the UN Secretary General who identifies “customary, traditional and community-based justice and dispute resolution mechanisms” as additional priority areas for UN activities that focus on the rule of law in the context of long-term development: *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law*, Report of the UN Secretary General, [42] UN Doc A/61/636-S/2006/980, (14 December 2006). See also [15] and [17].

¹⁴⁶ *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, [11], UN Doc S/2004/616 (23 August 2004). This is despite the fact that the UN has been the instigator of many transitional justice mechanisms. For an overview of the role of the rule of law in UN peace operations, see Agnès Hurwitz, “Civil War and the Rule of Law: Towards Security, Development and Human Rights” in Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law: Security, Development, Human Rights* (2008) Ch 1.

vacuum”.¹⁴⁷ The Report further finds that where the international community is providing rule-of-law assistance, it is not always appropriate to the country context because of the tendency to impose foreign models without sufficient assessment and consultation with local stakeholders.¹⁴⁸ While the Report argues that “sustainable justice” requires respect and support for local ownership and leadership as well as a local constituency,¹⁴⁹ there is no recognition in the Report that the concept of the rule of law may itself be a foreign model where it has little extant local tradition in the post-conflict state.

The 2004 Report usefully offers a definition of the concept so as to enable a “common language” in the United Nations. It states that the concept is:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁵⁰

The extensive number of principles that the concept of the rule of law subsumes according to this definition explains why the UN is pushing this concept to the forefront. The rule of law appears to be useful shorthand for a panoply of values deriving mainly from Western liberal traditions. It includes values such as “separation of powers” and “legal certainty” that may not be given equal weight in non-liberal traditions, such as customary traditions in South Africa, where norms regarding substantive justice in the context of the group as a whole outweigh legal certainty.¹⁵¹ Critically, the UN definition also includes international human rights norms: these norms are central to the UN’s understanding of the rule of

¹⁴⁷ Ibid 1 and [27].

¹⁴⁸ Ibid [15].

¹⁴⁹ Ibid [17].

¹⁵⁰ Ibid [6].

¹⁵¹ See Chapter 5.

law¹⁵² even though this is not always apparent in the field. Thus, the rule of *law* refers *not* to any law enacted by a state but state law that is consistent with these standards. This definition is controversial, but arguably the Report only offers this definition for the purposes of the work of the UN as an organisation and does not purport to impose this definition on all its member states.¹⁵³ Nevertheless, the omnibus nature of this definition makes it more of an ideal and aspiration to strive towards, for few states in the world, if any, could be said to realise all these listed principles.

The 2004 Report gives legal pluralism limited recognition in relation to transitional justice. It states that “justice” includes traditional dispute resolution *mechanisms*¹⁵⁴ and attention must be given to informal processes and non-official institutions.¹⁵⁵ Notably it does not extend this to non-state *law*.¹⁵⁶ The Report qualifies that this recognition of non-state processes is subject to international standards. It states:

due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition.¹⁵⁷

The Report acknowledges that where such traditions “are ignored or overridden, the result can be the exclusion of large sectors of society from *accessible justice*”.¹⁵⁸ Here the Report links legal pluralism to accessible justice, but it is noteworthy that even though the Report

¹⁵² At above n 146 at [10] the report identifies the normative foundation for the UN’s advancement of the rule of law as the four pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law and international refugee law.

¹⁵³ Note that in debates in the Sixth Committee that took place on 25 October 2007 Singapore pointed out that there was no universally agreed definition of the rule of law: UN Doc GA/L/3326 (2007). Its own definition does not appear to include international human rights norms and standards. This position might be representative of an Asian view, as few Asian states have ratified the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁵⁴ Above n 146 [8].

¹⁵⁵ Ibid [35].

¹⁵⁶ The report expresses concern that “if there are no modern laws to be applied”, various rule of law actors such as the police may not be effective: *ibid* [30]. This suggests the UN has an ambivalent attitude to ‘traditional’ law and its role in peace-building.

¹⁵⁷ Above n 146 [36] (emphasis added).

¹⁵⁸ *Ibid* [36].

asserts that UN programmes “must support access to justice”,¹⁵⁹ accessible justice is not included in the UN’s lengthy definition of the rule of law quoted above. As the case studies in Chapters 4-7 illustrate, there is tension between the rule of law and accessible justice in both South Africa and Timor-Leste where the majority of the populations have serious difficulties in accessing the state legal system.

A similar approach is taken by the Office of the UN High Commissioner for Human Rights (UNHCHR). Its 2006 guide for UN field missions and transitional administrations emphasises that, despite the “great legitimacy” enjoyed by customary law, field officers should not blindly endorse it.¹⁶⁰ Entitled *Rule of Law Tools for Post-Conflict States*, the guide advises that field officers can assist national reformers by setting out which elements are consistent with international human rights norms and which elements present problems. However, it acknowledges that this task “can be a delicate undertaking with varying degrees of risk”.¹⁶¹ Consistent with other UN documents, the guide’s advice distinguishes the substantive aspects of customary law from the procedural by recommending the use of the “local traditional justice mechanism or mediation model”.¹⁶² From this we can conclude that the UN does not consider the procedural aspects of customary law and traditional justice to be inconsistent with the concept of the rule of law. The substance of such law is framed as potentially incompatible with international human rights law and, by implication, with the rule of law.

The shift in UN policy towards the rule of law and its ambivalence regarding legal pluralism can be seen in its approach to the administration of Timor-Leste. The rule of law is noticeably absent from the initial UN Security Council mandate for the transitional administration of East Timor in 1999. Only since 2003 has the rule of law been mentioned in regard the mandate of UN Missions in Timor-Leste.¹⁶³ The UN responded to the 2006 ‘crisis’ in Timor-Leste by appointing a Deputy Special Representative to focus on ‘Security

¹⁵⁹ Ibid. See UNDP, *Access to Justice – Practice Note* (2004); UNDP, *Programming for Justice: Justice For All: A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (2005).

¹⁶⁰ UNHCHR, *Rule of Law Tools for Post-Conflict States: Mapping the Justice Sector* (2006) 14.

¹⁶¹ Ibid.

¹⁶² Ibid 15.

¹⁶³ SC Res 1473 (2003), [1(iii)], UN Doc S/RES/1473 (4 April 2003). See also SC Res 1599 (2005), [3], UN Doc S/RES/1599 (28 April 2005).

Sector Support and the Rule of Law'.¹⁶⁴ In regard to legal pluralism, it appears that at the beginning of the UN's administration of East Timor the UN had little awareness of the local population's extensive reliance on customary law. However, since 1999 the UN has shown constant concern about the population's limited access to state justice. In January 2008, the Secretary-General's Report on the UN Integrated Mission in Timor-Leste (UNMIT) once again emphasised "the need for increased access to justice".¹⁶⁵ However, the Report revealed that Timor-Leste's Ministry of Justice had requested UNMIT assistance in drafting a legal framework to formalise traditional justice mechanisms.¹⁶⁶ This followed recommendations made by the World Bank, as well as UNMIT's Human Rights and Transitional Justice Section, to formally incorporate aspects of traditional justice, specifically traditional "mechanisms", so that they operate in a more transparent and human rights-abiding way.¹⁶⁷ Chapter 7 discusses the implications of any such possible assistance the UN may offer to Timor-Leste in this regard. By reflecting on the challenges faced by South Africa in balancing the rule of law and strong legal pluralism, set out in Chapter 5, Chapter 7 conjectures that the UN's involvement with this issue could lead it towards a more nuanced and sustainable approach to justice and an understanding of the rule of law that takes greater account of legal pluralism.

6.2 UN Member States

The UN is careful not to have a general position on legal pluralism. This is partly because the legitimacy of customary law is still contested among some member states. The fault lines regarding customary law became apparent in 2007 during debates in the General Assembly on the adoption of the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP).¹⁶⁸ Four Western states, Australia, the United States, Canada and New Zealand, were alone in voting against the adoption of UNDRIP, partly in the belief that this non-

¹⁶⁴ This position lapsed after 18 months. On the 2006 crisis in Timor-Leste, see Part 2.2 of Chapter 7.

¹⁶⁵ *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 August 2007 to 7 January 2008)*, [24], UN Doc S/2008/26 (17 January 2008).

¹⁶⁶ *Ibid* [36].

¹⁶⁷ Recommendation made by UNMIT's Human Rights and Transitional Justice Section, *Report on Human Rights Developments in Timor-Leste, August 2006- August 2007* (2007) 29.

¹⁶⁸ The Declaration (UN Doc A/RES/61/295 (2 October 2007)) was approved on 13 September 2007 by 143 member states, with 11 abstentions, 4 votes against and 34 absences. Similar concerns are set out in *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), entered into force 5 September 1991, 72 *ILO Official Bulletin* 59, Art 8 and 9.

binding instrument introduced a form of legal pluralism via Article 34. This article provides that indigenous peoples have the “right to promote, develop and maintain their ... juridical systems or customs, in accordance with international human rights standards”. The concern was that this recognition of customary law “placed Indigenous customary law in a superior position to national law” and hence customary law could potentially override national law.¹⁶⁹ Given the fact that the Declaration is non-binding and any recognition of customary law is subject to international human rights law, this concern was misplaced. Despite this, the concern indicates a high level of anxiety and aversion to legal pluralism on the part of some leading Western states with sizeable indigenous populations.

During the debates on UNDRIP, Australia asserted: “Customary law is not ‘law’ in the sense that modern democracies use the term; it is based on culture and tradition.”¹⁷⁰ This projection of ‘modern’ law being acultural and ahistorical coincides with the UN’s conception of the rule of law as a universal value that transcends culture and tradition. The UN is careful not to endorse customary law as law *per se*. There are some hurdles to the UN shifting its current approach to legal pluralism: first, the UN considers itself at the forefront of advancing international law which means that at the international level it is already involved in promoting a particular form of legal pluralism (the convergence of international and national law) and a further layer of legal pluralism would distract from this programme. Second, an invocation of a third level of law would be structurally inconsistent with the principle of state sovereignty, the basis of the UN system. Thus the UN is unlikely to go any further in its advocacy of the local as it is already walking a tight rope between legal pluralism and state centralism. Overall, given that the UN system is based on nation-states, it is surprising that the UN pays any attention to legal pluralism at the national level. In the post-conflict context, this attention can be put down to the UN’s concern that the Westphalian model of the state is failing in some regions such as Africa, Asia and the Pacific where non-state custom and tradition still command more reliance than centralised administration.

¹⁶⁹ Explanation of Australia’s vote against the UN GA adoption of the *UN Declaration on the Rights on Indigenous Peoples* by the Hon. Robert Hill Ambassador and Permanent Representative of Australia to the United Nations, 13 September 2007 <<http://www.australiaun.org/unny/GA%5f070913.html>> at 15 October 2008.

¹⁷⁰ Ibid.

6.3 Structural Aspects of the UN and the World Bank

The UN system has not been set up as a model for the rule of law in the domestic setting. For example, the system does not oblige all states to accept the compulsory jurisdiction of the International Court of Justice or the International Criminal Court. Compliance with international law cannot be easily enforced. The system embodies few checks and balances¹⁷¹ and the *Charter of the United Nations*, construed by some as the UN's Constitution, says little explicitly about the need for the activities of its principal organs to be consistent with international human rights standards. Indeed, there is uncertainty as to whether the UN, as an international organisation, is subject to the core UN human rights treaties, which technically can only bind nation-states.¹⁷² It is against this background that we must consider the UN's efforts to promote the rule of law in the conduct of its peace-keeping operations, and in particular its attempts at transitional administration as is illustrated in the case of Timor-Leste in Chapter 6.

Similarly, IFIs do not provide a strong model for the rule of law. As Antony Anghie points out, the World Bank lacks a process of independent judicial review of executive actions.¹⁷³ He asserts that these institutions are not only “fundamentally undemocratic” but they “appear not to be subject to any external scrutiny as to their adherence to the rule of law”.¹⁷⁴

The weak rule-of-law model provided by the World Bank and UN has not dampened their efforts to promote the rule of law in post-conflict states such as Timor-Leste. As Roland

¹⁷¹ See Simon Chesterman, “An International Rule of Law?” (2008) 56 *American Journal of Comparative Law* 331, 351-354; Rajagopal, above n 81, 1373-1374. For discussion of the lack of transparency and formal review in regards to individuals listed for UN targeted sanctions, see Simon Chesterman, “The Spy Who Came in From the Cold War: Intelligence and International Law” (2006) 27 *Michigan Journal of International Law* 1071, 1109-1120.

¹⁷² Annemarie Devereux, “Searching for Clarity: A Case Study of UNTAET's Application of International Human Rights Norms” in Nigel D White and Dirk Klaasen (eds), *The United Nations, Human Rights and Post-Conflict Situations* (2005) 293, 298; Nigel D White, “Towards a Strategy for Human Rights Protection in Post-Conflict Situations” in White and Klaasen (eds), *The United Nations, Human Rights and Post-Conflict Situations* (2005) Ch 19. According to Devereux's analysis, there is no firm legal basis upon which to argue that the UN is bound to act in accordance with international human rights law: 298-299.

¹⁷³ Antony Anghie, “Time Present and Time Past: Globalisation, International Financial Institutions, and the Third World” (1999-2000) 32 *New York University Journal of International Law and Politics* 243, 263-272.

¹⁷⁴ *Ibid* 270, 271.

Paris observes, peacebuilders such as the UN have been actively involved in the transmission of standards to the periphery.¹⁷⁵ These include the liberal norms of international human rights law. The transmission of these liberal norms need not involve their imposition by an external actor such as the UN or the IFIs. In Chapters 4 and 5 we see that these norms were embraced by South Africa without any obvious external imposition. In Chapter 6 we see that Timor-Leste also voluntarily embraced these norms in its Constitution, which was drafted with little overt UN influence. While these standards are defined as acceptable behaviour by ‘the centre’, the UN, they are not necessarily upheld by it. Arguably the contemporary promotion of the rule of law by bodies such as the UN may be viewed as a modern rendering of the *mission civilisatrice*, in that it demonstrates that there is still a belief that a state with functioning rule-of-law institutions is superior to all others.

Finally, we need to consider why, since the end of the Cold War, international organisations such as the UN and the World Bank promote a rule-of-law orthodoxy directed towards working with state institutions¹⁷⁶ and prefer the rule of law to other concepts such as ‘legal empowerment’ and ‘access to justice’.¹⁷⁷ This choice to promote the rule of law is surprising given three factors: firstly, the LADM’s poor track record of establishing the rule of law in various regions prior to the 1990s; secondly, the scant empirical evidence that the concept operates to protect the most vulnerable members of society; and thirdly, the fact that rule of *customary* law is prevalent in many developing and post-conflict countries in Africa and the Asia-Pacific region.¹⁷⁸ The answer lies partly in the structural biases of the UN and IFIs. For the UN it seems that the top-down nature of the rule of law, its focus on the state institutional level rather than the grass roots level, is well suited to an organisation that is a creature of treaty and is based on state membership. Indeed, it is precisely its top-down nature that makes the rule of law the preferred concept for the UN. For IFIs such as the World Bank it is simply easier to organise loan schemes targeting state institutions rather than the grass-roots level. The emphasis on the rule of

¹⁷⁵ Roland Paris, “International Peacebuilding and the ‘Mission Civilisatrice’” (2002) 28 *Review of International Studies* 637, 638.

¹⁷⁶ Stephen Golub, “A House” above n 68, 131.

¹⁷⁷ This question is posed by Golub in regards to the UN: Golub, “The Rule of Law”, above n 68.

¹⁷⁸ See statistics cited in Chapter 1 at n 12 and n 13.

law and good governance means that IFI loans can be aimed at inducing state institutions to act in a way that is conducive to the dual mandate of democracy and the market.

7. Conclusion

Since the end of the Cold War, there have been a number of shifts in the understanding of the rule of law and legal pluralism. First, in this period, the rule of law has become the dominant paradigm: international organisations have transformed the rule of law into a development objective and an end in itself.¹⁷⁹ The rule of law has become a norm in the global arena. This is despite the widespread recognition that the rule of law has played a marginal and ambiguous role in relation to the lives of the poor and vulnerable sections of society. It is broadly acknowledged that the rule of law's focus on strengthening institutions of the Westphalian state has served the interests of capitalism and the state-based system. In the past decade, however, there have been signs that this approach may be changing, as there is increased attention on access to justice. Second, customary law is no longer considered anachronistic, backward and uncivilised. Legal pluralism is becoming the subject of a more nuanced understanding among international institutions. The limitations and trade offs of a rule-of-law approach are increasingly apparent. NGOs, aid agencies and international organisations are slowly beginning to engage with this non-state sphere as they recognise the role of legal pluralism in the lives of the poor and vulnerable, particularly in regard to access to justice.

The impact of this global relationship between the rule of law and legal pluralism on post-conflict states can be seen in their willingness to sign up to the rule of law. This is the case even where other concepts may be more useful to such states given their particular circumstances. This willingness relates not only to the dominance of the rule of law as a norm in the global arena but also to its elastic nature, which is examined in the next chapter. However, while post-conflict states embrace the rule of law on the international stage, their internal negotiation of the concept alongside legal pluralism is much more complex. Before exploring these internal negotiations taking place in South Africa and

¹⁷⁹ Kennedy, above n 56, 157; *In Larger Freedom: Towards Development, Security and Human Rights For All: Report of the Secretary General* states: "The protection and promotion of the universal values of the rule of law... are ends in themselves." [128], UN Doc A/59/2005 (21 March 2005).

Timor-Leste, the next chapter takes us to a deeper exploration of the conceptual relationship between the rule of law and legal pluralism in order to understand their limits and points of intersection.

Chapter 3. The Intersection of “Fact” and “Myth”: The Conceptual Relationship between Legal Pluralism and the Rule of Law

1. Introduction

In Chapter Two I traced the global and historical dimensions of the relationship between the rule of law and legal pluralism and showed how the former has become the dominant paradigm in the global arena. The latter, legal pluralism, is a fact that is given insufficient consideration in rule-of-law programmes. In this chapter I examine the deeper conceptual dynamics in the relationship between the two concepts. On this relationship, one leading legal scholar has asserted that while legal pluralism is a “fact”, the rule of law, as a form of legal centralism, is a “myth”.¹ The chapter begins by setting out some of the main tenets of each concept and how they have been theorised: Part Two scrutinises how the ‘fact’ of legal pluralism has been used as a programme; Part Three considers the so-called ‘myth’ of the rule of law. Part Four broadly examines how the two concepts intersect and come into contact in post-conflict and transitional states. The chapter argues that, while in the context of the Western state the two concepts may often appear incompatible, in the context of the particular dynamics of post-conflict and transitional states with strong legal pluralism, the relationship between the two concepts is often transformed.

2. Legal Pluralism

Legal pluralism is both a fact and a programme. In these forms it has been largely marginalised in global debates on justice. William Twining speculates that the reason for this is the domination of Western legal theory by:

conceptions of law that tend to be monist (one internally coherent legal system), statist (the state has a monopoly of law within its own territory), and positivist (what is not created or recognised as law by the state is not law).²

This statement highlights the tension in the relationship between the rule of law and legal pluralism. As a programme, legal pluralism is the assertion that the state does not have a

¹ John Griffiths, “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism* 1, 38.

² William Twining, *Globalisation and Legal Theory* (2000) 232.

monopoly over law. It recognises the fact of legal pluralism, that there are plural sources of law, and it gives these sources equal status. The idea that there are plural sources of law in society challenges the central assumptions made by liberal adherents of the rule of law. Advocates of the rule of law assume that there is a single, coherent body of norms that derive from one clear source, the state. Rule-of-law approaches identify law solely with the state; they are mostly blind to non-state law. This assumption is called state centralism or state-centrism.

As both a fact and a programme, legal pluralism offers a broader understanding of the law, one that is not limited to state coercive power in the public sphere. Legal pluralism opens law to the understanding of other forms of power, such as regulatory power, and how law cuts across both public and private spheres.³ It embraces civil society as a source of law and regulation and in this it turns its lens equally on the private sphere as on the public sphere. In this sense it incorporates a ‘bottom-up’ approach. At a general level, legal pluralism understands all laws as equal; unlike state centralism it does not presuppose one law to be superior to another. There is no particular formula for the relationship between these different spheres of law that constitute legal pluralism: they can exist in a symbiotic or complementary relationship or they can be antagonistic and hegemonial in nature.⁴

In Africa and the Asia-Pacific region, the question of legal pluralism arises constantly. For example, in Timor-Leste, apart from customary laws in each district and the national legislation passed by the government of Timor-Leste, the individual must also contend with the ambiguity surrounding the applicability of the laws of Portugal, its former coloniser, Indonesia, its former occupier, the Regulations issued by the UN, its former administrator, and international laws incorporated through constitutional provisions. In South Africa the matter becomes more complex as the individual must navigate an even greater plurality of laws: Roman-Dutch common law, apartheid laws, post-apartheid laws, religious laws of

³ Margaret Davies, “The Ethos of Pluralism” (2005) 27 *Sydney Law Review* 87, 103.

⁴ Upendra Baxi, “Discipline, Repression and Legal Pluralism” in Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (1986) 52.

Islam, Judaism and Hinduism, international law, “people’s law” and customary law, both official and “living” versions.⁵

The above form of inquiry into legal pluralism in former colonial societies is that of “classic legal pluralism”⁶ which has been the mainstay of legal anthropologists and legal sociologists since the early twentieth century. Its focus on former colonies has meant that legal pluralism became characterised as something particular only to such states. This particularism has allowed legal pluralism to be easily sidelined by mainstream legal theorists.

Since the 1970s, however, the lens of legal pluralism has been turned back onto the West: ‘new legal pluralism’ asserts the plurality of laws in *all* societies, regardless of whether they were colonised. It finds plural normative orders in all modern societies but it focuses particularly on modern Western societies.⁷ New legal pluralism emphasises the universality of legal pluralism: for example, John Griffiths argues that legal pluralism is a “universal feature of social organisation”.⁸ Sally Engle Merry observes that there is “general agreement that pluralism does not describe a type of society but is a condition found to a greater or lesser extent in most societies”.⁹ This has led Griffiths to make the above-quoted claim that: “Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion.”¹⁰

⁵ For an overview, see Gardiol J van Niekerk, “Legal Pluralism” in JC Bekker, Christa Rautenbach and NMI Goolam (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) Ch 1.

⁶ This term as well as “new legal pluralism” is used by Sally Engle Merry, “Legal Pluralism” (1988) 22 *Law and Society Review* 869, 872.

⁷ New legal pluralism rejects the narrow preoccupation of classic legal pluralism with state-recognised law. Legal plurality is seen broadly, as operating in institutions such as universities, trade unions, companies and factories where the dominance of the state legal system is less apparent.

⁸ Griffiths, above n 1. Merry is more guarded in asserting that: “virtually every society is legally plural”: Sally Engle Merry, “Legal Pluralism” (1988) 22 *Law and Society Review* 869, 871.

⁹ Merry, *ibid* 879. Unlike deep legal pluralism, which can be described as an incontrovertible “fact”, state law pluralism is a choice made by states to engage formally with other forms of law. States can, of course, choose to attempt to abolish other forms of law but this inevitably relegates that form of law to the sphere of deep legal pluralism, as states rarely have the power to control other forms of law to the point of total abolition. However, groups can also make a conscious choice as to whether to use state law or to use an alternative form of law. Hence, like state law pluralism, deep legal pluralism is more than a fact; it is also a matter of ideology but it is not a fixed ideology.

¹⁰ Griffiths, above n 8, 4.

2.1 State Law Pluralism and Deep Legal Pluralism

Legal pluralism has two forms: (1) *state law pluralism* is where the state has incorporated parts of non-state law, such as customary law, into its legal hierarchy. This can happen through the annexation of non-state courts or through the codification or restatement of indigenous law such as native title law in Australia; (2) *deep legal pluralism* is where there is no hierarchy of legal systems – state law and non-state law exist without any formal relationship. Like many Western states, Australia also has deep legal pluralism because many indigenous groups have continued to observe their own laws, which, with few exceptions such as native title, are not recognised or regulated by the state.¹¹

The balance between these forms of legal pluralism is not static in any particular region. According to Lauren Benton, deep legal pluralism was dominant in the West from the fourteenth century until the late eighteenth century, at the time when Portugal was colonising parts of Asia and the Dutch were colonising the Southern tip of Africa.¹² Early modern Europe enjoyed deep legal pluralism, as secular law and canon law both operated outside a single hierarchy, often alongside a form of Germanic customary law that influenced many parts of Europe.¹³ By the mid-nineteenth century, state law pluralism became the dominant policy in European states as well as their colonies in Asia and Africa.¹⁴ This change was possibly related to the rise of legal positivism and the notion of the Westphalian state in Europe. Benton argues that this historical shift shows that state law pluralism is not timeless but “historically recent and contingent”.¹⁵ In other words, legal pluralism has not always been ignored or marginalised in the West.

The 1970s shift away from studying state law pluralism is illustrated by the work of Griffiths who argues that in order to escape from state centrism, legal pluralism should be discussed outside a hierarchical framework of law.¹⁶ For Griffiths, one of the problems

¹¹ Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Law Reform Commission of Western Australia, *Aboriginal Customary Laws – Final Report: The Interaction of WA Law with Aboriginal Law and Culture* (2006).

¹² Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002) 5.

¹³ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 23-25.

¹⁴ Benton, above n 12, 6.

¹⁵ *Ibid* 30.

¹⁶ In other words, Griffiths views state law pluralism as consistent with the ideology of state centrism because it uses a hierarchical approach and hence he dismisses it as a false form of legal pluralism.

with state law pluralism is the tendency of many of its adherents to assume that it is a means to the harmonisation and unification of two or more legal systems. In this framework, legal pluralism is not seen as an end in itself. The framework shows a teleological and linear view of law and transition that can be seen in Weber’s work. The assumption here is that legal pluralism is not a durable solution: it is considered a temporary, stop-gap solution until traditional communities have ‘integrated’ with the modern, Western-influenced legal system in the name of ‘development’. This approach was taken by a number of newly independent countries in Africa and the Asia-Pacific region in the second half of the twentieth century. Efforts were made not only to unify different courts systems and the various local forms of customary law into one law but some countries, such as Ghana and Senegal, went so far as to try to integrate customary law with modern colonial law, thus attempting to do away with legal pluralism entirely.¹⁷

Some post-colonial countries, such as Mozambique and Ethiopia, did not integrate customary law but endeavoured to abolish it. According to Gordon Woodman, state law pluralism is to be preferred over abolition because it is not possible for a state to abolish customary law entirely. He disputes Griffith’s rejection of state law pluralism as irrelevant to the study of legal pluralism.¹⁸ Woodman believes that Griffiths has assumed that state law is a coherent body of norms and that when non-state law is incorporated into state law it becomes part of a totality, a unified structure of norms, practices and institutions.¹⁹ This account of state law fails to recognise its inconsistencies and inner plurality. In other words, legal pluralism exists both outside and *inside* the state legal system.²⁰ When customary law is incorporated into state law, through the unification of court systems, communities may remain the source of the law and hence there are multiple sources of validity, some of which are independent of the state. The transfer of the application and

Thus, true legal pluralism is an attribute of a social field rather than of a legal system: Griffiths, above n 8, 8, 38.

¹⁷ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 129.

¹⁸ Gordon R Woodman, “Legal Pluralism and the Search for Justice” (1996) 40/2 *Journal of African Law* 152. His approach is less abstract in that he considers legal pluralism from the perspective of the subject: from this standpoint he argues that, “in the search for justice”, state law pluralism is preferable to deep legal pluralism because it creates greater certainty for the subject.

¹⁹ Ibid 158.

²⁰ Above n 3.

enforcement of customary law to state institutions does not mean that coherence and consistency is automatically produced within state law. Indeed, state law becomes a more highly contested terrain. This contestation can be seen in South Africa’s post-apartheid negotiation of state law pluralism, set out in Chapter 5. It is partly the contested nature of state law pluralism that leads Woodman to plead that it not be ignored by the field of legal pluralism.

2.2 The Benefits and Limitations of Legal Pluralism

Legal pluralism can be used in many ways: while some governments and groups have attempted to use legal pluralism as a programme by which to achieve equality, others have used it for the purposes of domination and subordination. This explains why legal pluralism is at times romanticised by scholars such as Griffiths, and sometimes deplored.

Legal pluralism is often understood as a means of increasing access to justice in developing countries and transitional states. Where access to the state justice system is limited, legal pluralism is beneficial in enabling other paths to accessing justice. In this regard legal pluralism assists in the critical job of maintaining law and order because the state is often incapable of providing these basic services. By allowing people to use law that is embedded in local values, as opposed to potentially alien national values, legal pluralism can facilitate a sense of community, cultural accommodation, and equality. Indirectly, this can be a step towards justice for minorities, and reconciliation between various groups. For example, the recognition of customary law by the 1996 South African Constitution symbolises the equal status of the African groups that observe such law.²¹ However, where the state is hostile to the law of such groups, deep legal pluralism can be an avenue of resistance to oppressive state law. This was the case in apartheid South Africa where ‘people’s courts’ developed a form of non-state law that was observed in urban areas, particularly in the 1980s, as a reaction to the lack of legitimacy of the apartheid legal order.²²

²¹ See section 211(3).

²² People’s courts began appearing in black townships in 1960s and 1970s and they were particularly prevalent in the last decade of apartheid as a form of resistance to the apartheid legal system. In 1985 police reports estimated there were 400 people’s courts in operation. Association with mob

At a more abstract level, legal pluralism ensures interaction between the law and the social context and hence it is a ‘bottom up’ approach to law. Legal anthropologists such as Sally Falk Moore remind us that spheres of law, such as state law, do not operate in an autonomous or isolated fashion. They can never be abstracted from the social context or from other spheres of law, whether they are local or international, because to do so is to miss half the picture. Moore calls these legal fields and orders “semi-autonomous social fields” because they are porous and fluid. She observes that innovative legislation and other attempts to direct change, such as those of the Law and Development Movement and the World Bank, often fail to meet their intended purposes, or they produce unplanned consequences because social arrangements with binding obligations may already exist in the same field, and these arrangements may be stronger than the new legislation.²³ She concludes that: “Law and the social context in which it operates must be inspected together.”²⁴

On the other hand, legal pluralism as a programme has been criticised as being “quite reactionary”.²⁵ One leading social theorist, Boaventura de Sousa Santos, asserts: “there is nothing inherently good, progressive or emancipatory about legal pluralism”.²⁶ Legal pluralism has been used for the domination, control and subordination of various groups. The apartheid era in South Africa illustrates the “pathological”²⁷ side of legal pluralism as it was used not only for the purposes of law and order but also to segregate and subordinate Africans on tribal and racial grounds through the court system.²⁸ As a programme, legal

violence tainted some of these courts when leadership fell to unsupervised youths. See below, Chapter 5.

²³ Sally Falk Moore, *Law as Process: An Anthropological Approach* (1978) 58.

²⁴ Ibid 55. Moore’s work argues that legal analysis has been too legocentric in nature. In this she follows a long line of thinkers such as Friedrich Carl von Savigny, Henry Maine, Eugen Ehrlich and Bronislaw Malinowski who emphasise the cultural and social nature of law. Moore’s approach has proved to be useful particularly for the study of women’s engagement with the law in Africa: see Agnete Bentzon et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women’s Law* (1998) 46.

²⁵ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2nd ed, 2002) 89.

²⁶ Ibid. Santos prefers to speak of a plurality of legal orders.

²⁷ Martin Chanock, “The South African Native Administration Act of 1927: Reflections on a Pathological Case of Legal Pluralism” in Oliver Mendelsohn and Upendra Baxi (eds), *The Rights of Subordinated Peoples* (1994) 295.

²⁸ The “separate but equal doctrine” first propounded in the United States was refashioned for the South African context in order to prop up minority white rule until the end of the Cold War. Legal pluralism allowed the apartheid regime to argue that indigenous and coloured Africans should be

pluralism can also be used to condone and encourage different standards of justice. At independence, most former colonies in Africa and the Asia-Pacific region chose not to preserve legal pluralism because they wanted equal justice for all.²⁹ Today the problem of different standards of justice being applied on the basis of urban-rural and class divides is particularly fraught in developing countries such as India³⁰ and transitional countries such as South Africa. While forum shopping can assist the vulnerable sections of society in enjoying a choice between forums, more generally it advantages the wealthy and politically savvy, who have both the knowledge and resources to take advantage of the situation.

Apart from problems relating to equality, legal pluralism is the subject of other criticisms. Deep legal pluralism can subject individuals to conflicting duties, place defendants in danger of double jeopardy and generally increase unpredictability in the law. At an abstract level, deep legal pluralism makes it difficult to distinguish law from culture³¹ and therefore it challenges the coherence of the law. Tamanaha’s practical suggestion here is that law should be understood as “whatever people identify and treat through their social practices

subjected to different laws and separate courts on tribal and racial lines. Thus courts such as the Commissioners Courts and the Divorce courts were set up solely for indigenous and coloured people. Their association with Chiefs Courts allowed apartheid governments to argue that they were accommodating cultural differences. Thus, the state embraced legal pluralism through the recognition of fragments of customary law only to the extent that it served the interests of the apartheid regime. In 1951, for example, the nascent apartheid government passed the *Bantu Authorities Act*, which transformed the existing tribal structures so as to include new local authorities who were responsible for the peaceful and orderly administration of their jurisdiction. The new scheme allowed the government to appoint rulers regardless of traditional legitimacy so long as they acquiesced with government directives. This process of grafting elements of state control onto indigenous structures and laws was just one of the many steps which took place in the transformation of customary law from its pre-colonial form.

²⁹ In 1945 in newly independent Indonesia, for example, the government chose to discard local law because there was a belief that having two legal systems bred inequality, discrimination and confusion as different laws were for different people. Previously in colonial Dutch Indonesia, European law governed the legal rights of Europeans, Chinese and Arabs and others classified as ‘foreign orientals’ while locals were subject to local laws. However, a local who commenced a legal action in one region would be judged differently from a local in another region because of the variance in local laws. The new national government sought to impose uniformity on the laws.

³⁰ Marc Galanter and Jayanth K Krishnan, “Debased Informalism: *Lok Adalats* and Legal Rights in Modern India” in Erik G Jensen and Thomas C Heller (eds) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003) 109; Sarah Leah Whitson, “Neither Fish, nor Flesh, Nor Good Red Herring. *Lok Adalats*: An Experiment in Informal Dispute Resolution in India” (1992) 15 *Hastings International and Comparative Law Review* 391.

³¹ For example, two proponents of legal pluralism, Malinowski and Ehrlich, respectively assert that all binding obligations should be considered law and that: “the law is an ordering”: Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926) 14; Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (1975) 24. This was a response to ethnocentric claims that identified law with civilisation and asserted that ‘primitive’ societies did not have law.

as ‘law’”.³² On a more abstract plane, legal pluralism as a programme can be criticised for strengthening relativism, in that it is not possible to judge particular practices,³³ and for demoting the superior position of international law, because legal pluralism holds all spheres of law to be of equal status.

The main problem with legal pluralism is that as a programme it fails to say anything about justice: it does not set out a path by which it is best for plural systems of law to interact in order to best achieve justice. Many theorists suggest that the core study of legal pluralism is to examine the *interactions* between legal systems but they do not prescribe any particular strategy by which this interaction could most benefit the most vulnerable.³⁴ In this sense it is no more than a description of a fact. Overall, legal pluralism says little about the nature of justice except that it flows from multiple sources. It provides no criteria by which to assess which source of law provides justice to the most vulnerable sections of society. As a programme, legal pluralism provides guidance neither in relation to procedural justice nor substantive justice. As Koskenniemi observes, apart from highlighting diversity and freedom, legal pluralism “cannot sustain a project of law in its own right”.³⁵

3. The Rule of Law

In contrast, the concept of the rule of law is often spoken of in the same breath as justice, as a necessary condition for justice and sometimes it is even substituted for justice. EP Thompson famously praised the rule of law as “an unqualified human good”, despite recognising the fact that laws themselves can often be unjust.³⁶ On the other hand, Joseph Raz has advised that we should be “wary of disqualifying the legal pursuit of major social

³² Brian Tamanaha, *A General Jurisprudence of Law and Society* (2001) 193-194.

³³ But see Philip Selznick who argues that a pluralist would admit that there are objective moral principles but each practice must be scrutinised and assessed in light of the particular circumstances: Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (1992) 115.

³⁴ See, eg, Masaji Chiba, “Introduction” in Chiba (ed), *Asian Indigenous Law in Interaction with Received Law* (1986); Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (1995).

³⁵ Martti Koskenniemi, “The Fate of Public International Law: Between Technique and Politics” (2007) 70 *Modern Law Review* 1, 24.

³⁶ Edward Palmer Thompson, *Whigs and Hunters: The Origins of the Black Act* (1977) 266.

goals in the name of the rule of law”.³⁷ Far from being characterised as a ‘fact’, the rule of law has been called “the white myth of transition” because it is an aspiration of states undergoing transition during the post-Cold War era.³⁸

While in Germany the comparable notion to the rule of law is *rechtsstaat* or ‘constitutional state’ and in the United States it is ‘due process of law’, all these notions can be characterised alongside the rule of law as state-centric: at their heart they make the assumption that the state has a monopoly on law. Rarely do the many proponents or even critics of the rule of law examine this assumption in much depth. The following exposition of some of the main tenets of the key approaches to the rule of law shows that these approaches take for granted the existence of a strong state in the Westphalian model. I argue that these approaches have given little consideration to the rule of law in the context where legal pluralism is strong.

Krygier describes the rule of law as “an interconnected cluster of values”.³⁹ The two key approaches to this cluster of values are variously explained as thin or thick, formal/procedural or substantive, and rule-book or rights-based. The first approach advocates the following procedural values: (1) legal predictability and certainty; (2) government bound by law; (3), equality before the law and; (4) law and order.⁴⁰ The second of these approaches generally upholds all the same four values as the first but adds substantive values based on human rights or moral dignity. In certain circumstances, this second approach holds that the added fifth, substantive, value can trump those four values more highly cherished by the first approach. As we saw in the previous chapter, all five values are advocated by both the UN and recent World Bank policy, but the mode in which they are promoted is often inconsistent and elastic, depending on the particular arm or agency of these two large international institutions. I now explore the manner in which the

³⁷ Joseph Raz, “The Rule of Law and Its Virtue” in Raz, *The Authority of Law* (1979) 210, 228-229.

³⁸ Ivan Krastev, “Corruption, Anti-Corruption Sentiments, and the Rule of Law” in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (2005) 323.

³⁹ Martin Krygier, “The Rule of Law” in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social and Behavioural Sciences* Vol 20 (2001) 13404.

⁴⁰ These values are identified by Rachel Kleinfeld as the end goals of the rule of law: Rachel Kleinfeld, “Competing Definitions of the Rule of Law” in Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 31.

first three of these values has been theorised in order to underline the degree to which they can be fairly characterised as state-centric and to illustrate how the post-conflict context poses a different set of challenges and dynamics than those generally considered by Western scholars.

3.1 Legal Predictability and Certainty

Like Max Weber, the English philosopher Friedrich Hayek, an influential proponent of a formal approach and a conservative liberal, argues that predictability is the primary value of the rule of law. He asserts that this predictability promotes individual liberty: it enables individual autonomy to flourish in that people are able to plan their affairs. He defines the rule of law thus:

Stripped of all technicalities, this means that *government in all its actions is bound by rules fixed and announced before-hand* – rules which make it possible to foresee with fair certainty *how the authority will use its coercive powers* in given circumstances and to plan one’s individual affairs on the basis of this knowledge.⁴¹

Hayek emphasises that for predictability, “the laws must be general, equal and certain”.⁴² By ‘general’ he means that the laws are not aimed at any individual or action; they are abstract. He argues that “a true law should not name any particulars, ... it should not single out any specific persons or group of persons”.⁴³

Hayek’s understanding of predictable laws clearly assumes that these laws are state laws. While deep legal pluralism would, to Hayek, provide insufficient predictability, state law pluralism would amount to particular laws for particular people and hence offend his understanding of equality.

Joseph Raz agrees with Hayek that one of the important goals of the rule of law is for the law to be predictable. He articulates the underlying doctrine of the rule of law as “the law

⁴¹ Friedrich Hayek, *Road to Serfdom* (1975) 54 (emphases added).

⁴² Friedrich Hayek, *The Political Ideal of the Rule of Law* (1955) 34.

⁴³ Friedrich Hayek, *The Constitution of Liberty* (1960) 153-154.

must be capable of guiding the behaviour of its subjects”.⁴⁴ From this idea he draws the following list of elements of the rule of law: the law must be prospective, open, clear, public, certain and relatively stable. The making of particularised laws should be guided by rules that are open, stable, clear and general. To realise and support these elements, the following mechanisms are necessary: independence of the judiciary, open and fair hearings, accessible courts, a limited form of legislative and administrative review and a limit on police and prosecution discretion.⁴⁵ For law to be predictable, certain and stable, it is important, according to these two leading theorists, that judges adjudicate as closely as possible according to the rules set out publicly and clearly by the legislature, and presumably the constitution. A separation of powers is presupposed by the formal approaches: the judiciary must be separate from legislative and executive interference in order to adjudicate on general laws in a predictable manner. Raz and Hayek agree that judges should not depart from pre-determined rules so as to achieve substantive justice except in exceptional circumstances, if at all. Thus predictability and procedural law are generally more important than any other consideration.

Hayek’s influence on approaches to the rule of law has been felt widely.⁴⁶ For example, courts in some transitional countries have emphasised predictability as the determinative value of the rule of law.⁴⁷ In the 1990s, the World Bank based much of its policy and its programmes on this aspect of Hayek’s work.⁴⁸ Ibrahim Shihata, the World Bank’s General Counsel in the 1990s, wrote that for the rule of law it is necessary to have “a set of rules which are known in advance” as well as “known procedures for amending the rules when

⁴⁴ Raz, above n 37, 214.

⁴⁵ Ibid 214-218.

⁴⁶ Hayek’s belief that predictability is pivotal to the rule of law is shared by many but debate exists as to whether universal, general laws are essential to achieve predictability. Hayek’s view that particularised laws threaten predictability and the rule of law is followed by Australian scholar Suri Ratnapala who reasons that general laws have an advantage over specialised laws because they correlate with greater efficiency of the market: Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2002) 10-11.

⁴⁷ See, eg, *Retroactive Criminal Legislation Case*, Hungarian Constitutional Court, decision 11/1992 (III.10.) AB hat.

⁴⁸ Alvaro Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development” in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development* (2006) 253, 272-273; Rachel Kleinfeld, “Competing Definitions of the Rule of Law” in Carothers (ed), above n 39, 31, 43.

they no longer serve their purpose”.⁴⁹ In the 1990s, the concept of the supremacy of law, in the form of constitutional supremacy, was incorporated into almost every single post-Cold War constitution, including South Africa’s 1996 Constitution and Timor-Leste’s 2002 Constitution.

One of the appeals of this approach to the rule of law is that it appears to be politically neutral and devoid of content, substance or moral criterion, a claim often made for the formal approach to the rule of law. This attracted Shihata, as he believed it was compatible with a variety of different legal systems and traditions,⁵⁰ and hence suitable for World Bank policy. This line continues to be promoted by Randall Peerenboom who argues that this formal approach provides “a bridge across the various fault lines”: it is endorsed across religions, regions, regimes and ideologies.⁵¹ Even though he recognises the liberal roots of the rule of law, Peerenboom concludes that the “thin rule of law is universally ... valued”.⁵² Heralding the universality of the rule of law he asserts that: “[c]ommunitarians and liberals alike can find much to value in rule of law”.⁵³

One of the assumptions made by Peerenboom and Hayek is that legal certainty and predictability, and hence formal legality, are of primary importance to all cultures, more important than substantive justice. However, it appears that this may be a Western assumption: many systems in the world determine law on a case-by-case basis with sensitivity to the particular context of the matter. In other words, they do not hold it necessary to be bound by rules and treat ‘like cases alike’.⁵⁴ This is especially true in non-liberal, communitarian societies where the law is seen as a tool for compromise and reconciliation between the parties who must continue to live side by side. A strictly procedural approach to justice may affront and alienate people who adhere to different notions of justice. The application of predictable and general rules and a process of

⁴⁹ Ibrahim Shihata, “The World Bank and Governance Issues” in Franziska Tschofen and Antonio R Parra (eds), *The World Bank in a Changing World* (1991) 85.

⁵⁰ Alvaro Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development” in Trubek and Santos (eds), above n 48, 270.

⁵¹ Randall Peerenboom, “Human Rights and the Rule of Law: What’s the Relationship?” (2005) 36 *Georgetown Journal of International Law* 809, 824-5.

⁵² *Ibid* 825. Here he makes the exception of the Critical Legal Studies Movement.

⁵³ *Ibid* 824.

⁵⁴ See, eg, Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (November 2000) 36.

adjudication that results in losers and winners may not always accord with the community’s interest, which may focus on reconciliation and communal harmony. Tamanaha observes that rule by rules is culturally particular. He writes:

Contemporary Asian and African societies, in particular, notwithstanding penetration by Western ideas and practices, continue to have significant communitarian cultural strains which may in various ways and in various contexts clash with aspects of formal legality.⁵⁵

An emphasis on formal legality may be at odds with local values and norms.⁵⁶ Japanese scholar Onuma Yasuaki confirms that this is the case in some Asian cultures:

Legalistic behaviour has been, and still is, regarded as indecent, as it destroys the harmonious and mutually respectful relationship among society members. Resorting to legalistic measures is often regarded as signifying a lack of virtues.⁵⁷

Another difficulty with formal legality is that it has limited application to the private sphere and the realm of community activity.⁵⁸ Radhika Coomaraswamy explains that one of the serious limits of the concept of the rule of law is that it provides protection only in the areas in which the state legislates, which means that full protection of the rule of law is only available in the public sphere.⁵⁹ However, a majority of women and other vulnerable groups spend most of their lives in the non-state, private sphere where they face most abuse and violence. This is particularly the case in post-conflict states such as South Africa and Timor-Leste, as shown in Chapters 5 and 7. Thus, at a practical level the rule of law provides limited protection for women and other vulnerable sections of society.

In his later writing, Raz acknowledges the cultural and institutional assumptions that underpin the end goal of predictability, sometimes referred to as ‘formal legality’ or as

⁵⁵ Tamanaha, above n 13, 121.

⁵⁶ Ibid 140.

⁵⁷ Onuma Yasuaki, “In Quest of Intercivilizational Human Rights: ‘Universal’ vs ‘Relative’ Human Rights Viewed from an Asian Perspective” (2000) 1 *Asia-Pacific Journal on Human Rights* 53, 60.

⁵⁸ Tamanaha, above n 13, 140.

⁵⁹ Radhika Coomaraswamy, “Broken Glass: Women, Violence and the Rule of Law” in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (2003) 143.

‘bureaucratic justice’.⁶⁰ Predictability serves a society in the process of rapid change, in terms of geographical and social mobility, and constant workplace and technological transformation. In this society the rule of law “concerns the conduct of bureaucratic institutions in their relations with *isolated* individuals”.⁶¹ Such a society requires bureaucratic institutions that are impersonal and impartial and that have elaborate and well-policed procedures and machinery so that they can function no matter who controls them or uses them. Raz explains that this approach to the rule of law is particularly pertinent to pluralistic societies, which are divided along religious, ethnic, or economic lines, because the impartiality of the bureaucratic institutions and their procedures operate to remedy the lack of common values and practices in that society. In other words, this approach is apt for a modern industrialised society.⁶² In the context of an industrialised and liberal pluralistic society the rule of law can be used as a tool for reaching a level of fairness in state-individual relations.

Raz acknowledges that the formal approach to the rule of law raises serious problems for communitarian societies that are based on communal law. Indeed, he believes these problems “refute any claim that the rule of law is a universal standard of justice”.⁶³ He writes: “The ideal of communal law is a valid ideal for some societies. In those societies the rule of law, far from being a requirement of justice, does more harm than good.”⁶⁴ Hence Raz believes that the rule of law is a valuable concept only for certain types of society. He warns that the concept may be harmful for those types of societies that do not meet the “cultural and institutional presuppositions for the rule of law” on which the concept relies for its success.⁶⁵ David and Brierly agree that the rule of law may cause social damage to non-liberal societies. They write:

⁶⁰ Raz uses the term ‘bureaucratic justice’: Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 355.

⁶¹ Ibid 355, (emphasis added).

⁶² Ibid 355-357. This appears to be a ‘free market’ society of the kind assumed by Hayek. Raz, however, does not use this description.

⁶³ Ibid 356. Martin Krygier agrees, stating that: “a universal, institution-based definition of the rule of law is implausible”. He argues that the “rule of law is a very good thing ... at least in conditions of modernity”: Krygier, “The Rule of Law: An Abuser’s Guide” in András Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (2006) 129, 129.

⁶⁴ Raz, above n 60, 356.

⁶⁵ Ibid 354.

By wishing to install prematurely the rule of law, such as it is understood in the West, we have upset the old order of societies which were not ready to receive western legal ideas. African civilisation was founded on certain values: a sense of community, ... Unconsciously, perhaps, we have thus contributed to the breaking-up of the ties of family and clan, and we have been incapable of replacing them with a sense of solidarity extending to African society as a whole.⁶⁶

The growth of a specially trained legal profession required by the rule of law has a number of drawbacks according to Raz in that justice becomes expensive and legal issues become technical. Raz points out that: “The law becomes financially inaccessible and conceptually remote and alienating. It serves the business community, but is unresponsive and unavailable to serve the people”.⁶⁷ In his view formal legality can create “a gulf between the law and the people”.⁶⁸

Clearly the relevance of predictable laws depends on the nature of the society. Many aspects of South African and East Timorese society are communitarian. While the overall makeup of the two nation-states is pluralistic in terms of ethnicity, many of their communities are close-knit and homogenous groups. People rely on their neighbours for social and economic cooperation and predominantly observe and identify with local laws rather than state laws.

The importance of these distinctions between industrialised and communitarian societies is identified by comparative legal scholar, Ugo Mattei, through his proposed taxonomy of world legal systems into three families based on whether the primary sources of social norms and order are based on law, politics, or philosophical and religious traditions.⁶⁹ The first family is a rule of (professional) law system where state law is promoted as the main mechanism for resolving disputes. The second family Mattei puts forward is intended as a

⁶⁶ Rene David and John E C Brierly, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd ed, 1978) 520.

⁶⁷ Raz, above n 60, 356.

⁶⁸ Ibid 355.

⁶⁹ Ugo Mattei, “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems” (1997) 45 *American Journal of Comparative Law* 5, 17.

description of transitional countries wherein legal institutions are weak and the law is often not perceived as separate from politics.⁷⁰ The third family encompasses legal systems where there is no separation between the individual’s internal dimension and the societal dimension.⁷¹ This covers communitarian societies where traditional law prioritises harmony and the family or kinship group as the main unit, and, importantly, invokes the supernatural rather than the rule of law as a main source of legitimacy. This third family is less legocentric than the first family; it is difficult to characterise it as a law-based order as it does not set out ‘legal’ mechanisms as the only path to resolving disputes.⁷²

As the following chapters reveal, South Africa and Timor-Leste have elements of all three families; they are transitional states with strong systems of customary law and through their constitutions they aspire to the rule of law – in other words, they are mixed systems.⁷³ Mattei’s taxonomy is not presented in an evolutionary strain; unlike many who have used Weber’s work, he does not imply that the legal systems falling into the last two families should be encouraged to move towards the first group or that such a shift is inevitable. His taxonomy connects with the work of legal anthropologists who underline that each family of legal systems has a distinct logic, social structure and form of social control that cannot be easily transplanted from one to the other. For example, to simply insert a formal concept of the rule of law into a kin-oriented society is likely to have little effect unless the nature of that society changes.⁷⁴

3.2 *Government Bound by Law*

Underlying the understanding of the rule of law as ‘government bound by law’ is the belief that the rule of law via the state is better than the rule of man. This was a sentiment

⁷⁰ Ibid 28, 30.

⁷¹ Ibid 36.

⁷² Non-legal mechanisms such as fighting, shaming, the withholding of social contact and the unilateral withdrawal of economic cooperation are common sanctions in traditional law. See Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (1979) 26-27. The non-violent of these mechanisms can be broadly described as restorative justice as opposed to legal justice.

⁷³ Mattei’s theory recognises that all legal systems are mixed, but their family classification depends on which elements are hegemonic in a system. The existence of two legal systems operating in parallel within the one country, a state known as legal pluralism, thus fits within his theory. States where informal, local legal systems are hegemonic fall into the third family: Mattei, above n 69, 21.

⁷⁴ See, eg, Peter Lawrence, “The State versus Stateless Society in Papua and New Guinea” in B J Brown (ed), *Fashion of Law in New Guinea: Being an Account of the Past, Present and Developing Systems of Laws in Papua and New Guinea* (1969) 15-37, 34.

expressed by Aristotle many centuries before the birth of the Westphalian state. Aristotle implied that the problem with the rule of man is that it is unchecked power, which can act on an individual’s desire, passion or anger.⁷⁵ But to prefer the rule of law to the rule of man is not a simple case of the state using the law to conduct its affairs: this constitutes rule *by* law, a very thin conception of the formal approach to the rule of law. The rule *of* law requires the supremacy of law, sometimes also discussed as supremacy of the constitution. This means that no one is above the law and, moreover, the law binds the state.

It is here that we can observe how formal approaches to the rule of law understand the state. For Hayek and Raz (in his early work), the state is the focal point of law and power, but both liberal scholars conceptualise the state in a negative framework. While Hayek believes that the state has crucial functions to perform, he worries that state power can be “coercive” and argues that the rule of law “means that government in all its actions is bound by rules fixed and announced before-hand”.⁷⁶ He reasons that if the state were bound by fixed rules, then a person could plan their affairs in order to avoid this intervention and minimise their fear of the state. In his early work, Raz expresses concern regarding the arbitrary power of the state, its law and its institutions. AV Dicey, another Western scholar, fears the possibility of discretionary power being wielded by the state in the form of retroactive legislation against the defenceless individual.⁷⁷ Fear of the state is a central motif of the formal approach, whether it is fear of state violence, fear of state abuse, or fear of state arbitrariness. In common, these theorists understand the rule of law as a *shield* against state power and the possibility of its abuse. The shield is designed to minimise the citizen’s fear of the state and its power in the public sphere.

⁷⁵ Aristotle, *The Politics* (George A Kennedy trans, 1991 ed) Book III, Ch xvi. But note that in the previous chapter Aristotle states that rule of the best man may be better than the rule of the best laws because in individual cases a man will give sounder counsel than the law. But he adds that rulers cannot do without the general principles enunciated by the law. In *On Rhetoric* Aristotle says that it is best to settle as many matters as possible by general rules set out in advance: 31, Bk 1, Ch ii, 1354a.

⁷⁶ Hayek, above n 41.

⁷⁷ In *An Introduction to The Study of The Law of the Constitution* (first published 1885, 10th ed, 1959) AV Dicey sets out the first of his three principles as “no man is punishable or can lawfully be made to suffer in body or goods excepts for a distinct breach of law established in the ordinary legal manner before the ordinary courts to the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.”: 188.

Hayek, Raz and Dicey understand the rule of law in relation to the potential strength of the state and its institutions. This nexus between the rule of law and the state can be also seen in the ‘thick’ and ‘substantive’ approach to the rule of law, which incorporates a moral criterion through the inclusion of moral dignity and human rights. However, in this framework, state institutions such as the judiciary are considered not only as powerful but also as benevolent. The courts are able to force the state to refrain from acting, so as to protect individual negative rights such as those relating to due process, and to force the state to act, so as to fulfil positive rights. Ronald Dworkin’s work is a good example as it is premised on the idea that judges have both the skills and inclination to use their discretion to interpret the law and its principles in the morally best light.⁷⁸ This assumes that state institutions have power and capacity *and* are considered legitimate and relevant by the general populace.

Most of the promoters of the two key approaches to the rule of law do not consider whether the rule of law is apt for societies where the state is so weak or fragile that the population neither fears it nor relies on it, but instead turns to non-state, and possibly non-legal, mechanisms to resolve disputes. These two approaches do not address the relevance of the rule of law in the context of a society where eighty to ninety per cent of the population prefers to use informal mechanisms.

One point that is widely recognised is that the rule of law is a political ideal that needs political, social and cultural support to have any meaning. Hayek observes:

It will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority.⁷⁹

⁷⁸ Ronald Dworkin, “Political Judges and the Rule of Law” (1978) 64 *Proceedings of the British Academy* 259, 262.

⁷⁹ Hayek, above n 43, 206.

In other words, the rule of law must become part of the culture of a society or community for it to have any meaning. Rosa Ehrenreich Brooks takes this point further by arguing that:

the rule of law is most fundamentally an issue of norm creation. The rule of law is not something that exists ‘beyond culture’ and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is a culture.⁸⁰

However, Brooks makes it clear that for the rule of law to be relevant and effective there must be a broader culture that values *formal* law.⁸¹ As we saw earlier in this chapter, it cannot be assumed that all cultures value formal state law: legal pluralism demonstrates that there can be multiple sources of law valued by society that compete with formal state law. For example, some states such as China have a history of holding formal law in low regard and avoiding its use in favour of informal means of resolving disputes.⁸² While Peerenboom acknowledges this, like Weber he observes it through an evolutionary framework, implying that a shift to formal law is not only desirable and possible but, for states such as China, also inevitable.⁸³

3.3 Equality

Inequality is a prime problem in post-conflict states. Among Western scholars there is much debate as to whether the rule of law requires formal equality or substantive equality.⁸⁴ For example, Hayek is adamant that substantive equality and distributive justice

⁸⁰ Rosa Ehrenreich Brooks, “The New Imperialism: Violence, Norms and the Rule of Law” (2003) 101 *Michigan Law Review* 2275, 2285.

⁸¹ Ibid 2314.

⁸² Randall Peerenboom, “Varieties of Rule of Law: An Introduction and Provisional Conclusion” in Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the United States* (2004) 1, 44-45.

⁸³ Peerenboom points to the shift to highly law-based orders made by Singapore, South Korea and Hong Kong to support his view that such change is possible, inevitable and desirable for other Asian countries: *ibid*.

⁸⁴ For example, many scholars have attempted to decipher whether Dicey intended his formulation of equality to be limited to formal equality: see Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] *Public Law* 467, 470-474; Trevor RS Allan, *Constitutional Justice. A Liberal Theory of the Rule of Law* (2001) 17-21.

are incompatible with the rule of law⁸⁵ and this view strongly influenced the World Bank’s approach to the rule of law in the 1990s. However, there is no set form of equality for the rule of law, which makes the concept of the rule of law attractive to many governments, and empty to critics.

One of the main questions in the post-conflict context is whether equality means ‘equal access to justice’ or ‘equal standards of justice for all’, both of which are aspects of formal equality. As explained above, legal pluralism assists in the former by highlighting a diversity of justice forums while it has no input in regard to the latter except in that it holds each standard as equal. In 2002 the World Bank expressed equality as “every person in society is treated equally under the law” and added the further condition that “justice is accessible to all”.⁸⁶ In contrast, the UN takes a slightly more substantive approach, at least on paper, in that the UNDP’s “access to justice” programme is styled as a “human rights-based approach to access to justice”.⁸⁷ The distinction is the UN’s focus on the standard of justice that is to be equally accessed and applied.

Rachel Kleinfeld comments on the global proliferation of access-to-justice programmes “as a means of helping to create *de facto* equality before the law”.⁸⁸ *De jure* equality in regard to justice simply requires the state to open up courthouses and to pass general legislation that does not distinguish between people. Equality is *de jure*, and not *de facto*, where groups in society, such as women and children, are not able to access the state legal system due to prevailing cultural norms or, for example, because domestic violence legislation is

⁸⁵ Friedrich Hayek, *The Constitution of Liberty* (1960); *Road to Serfdom* (1975) Ch 6.

⁸⁶ The World Bank, Legal Vice Presidency, *Legal and Judicial Reform Observations, Experiences and Approach of the Legal Vice Presidency* (2002) 1.

⁸⁷ See UNDP, *Access to Justice – Practice Note* (2004); UNDP, *Programming for Justice: Justice For All: A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (2005). The latter document defines “access to justice” as “the ability to seek and obtain a remedy through formal and informal institutions of justice, and in conformity with human rights standards”: 5. Note that UNDP does not invoke equality as a basis of its programme but instead it states its mandate “to reduce poverty and strengthen democratic governance”. Some idea of the proportionate support UNDP gives to the formal and informal parts of the justice sector can be gauged from Ewa Wijkowska, *Doing Justice: How Informal Justice Systems Can Contribute* (December 2006) (Report written for UNDP and the Oslo Governance Centre) 11.

⁸⁸ Rachel Kleinfeld, “Competing Definitions of the Rule of Law” in Carothers (ed), above n 40, 31, 39.

not enforced or properly adjudicated by state institutions.⁸⁹ To produce *de facto* equality, access-to-justice programmes need to have a strong understanding of the barriers facing people in accessing justice.

To understand equality in the post-conflict and transitional context it is necessary to consider the role of informal, non-state justice mechanisms such as customary law, otherwise one is looking at only a small part of the overall picture. Since about 2002, both the UN and World Bank have formally acknowledged that such mechanisms have a role in providing access to justice. The pertinent question is how the recognition or non-recognition of such mechanisms affects equality in the post-conflict state. Regardless of state recognition, these mechanisms often constitute the main paths to justice by poor and vulnerable sections of society, such as female victims of domestic violence, who turn to these mechanisms when weak state institutions do not properly enforce state law or when state institutions alienate them. The reluctance of international organisations to embrace and support these non-state justice mechanisms is partly a result of concerns regarding the risk of institutionalising low quality justice for the vulnerable and poor sections of society that access them and hence entrenching two different standards of justice, such as was the case during British colonialism and apartheid. For example, local customary systems in Timor-Leste are perceived as discriminatory and biased against women and they are generally run entirely by men.⁹⁰ Furthermore, these systems do not hold it necessary to treat ‘like cases alike’. For these reasons, these systems are unlikely to be embraced as rule-of-law institutions even though they arguably contribute to the rule of law by assisting in the provision of equal access to justice. However, the flipside is that the decision to ignore these systems may have a greater impact on equality in that some eighty per cent of the population is accessing systems to which no international support or attention, in the form of monitoring, is being given. Furthermore, in some post-conflict contexts, this

⁸⁹ Similarly, equality is only *de jure* and not *de facto* where there is inconsistent enforcement, prosecution and adjudication of laws in that the more powerful groups in society are able to evade the law through bribery and corruption or the threat of violence.

⁹⁰ Aisling Swaine, *Traditional Justice and Gender Based Violence* (August 2003) 2-4, 27-33 (Report for the International Rescue Society).

attitude may be discriminatory as it fails to recognise the collective right to normative and institutional autonomy of indigenous peoples.⁹¹

As the question of equality illustrates, the rule of law and legal pluralism intersect particularly in the post-conflict context. This shows that it is useful to examine the particularities of this context. According to Krygier, a mix of the particular and the universal is essential for the rule of law.⁹² However, this dichotomy between the universal and the particular is not always useful. For example, while Hayek puts forward predictability as a universal and Dworkin’s substantive definition proposes human rights, both these ‘universals’ appear to be ‘particulars’, because they are formulated for states with strong state institutions, where formal law matters. The particulars/universals proposed by these leading Western scholars may not be apt for countries in Africa and the Asia-Pacific region where legal pluralism is prevalent and state institutions are frail. The following section considers the question of how we should understand the rule of law in systems where there is strong legal pluralism and customary law is the preferred form of law.

4. Points of Intersection and Contact

Customary law is seldom paired with the rule of law. It is negatively characterised as particular. At the international level, there has been an unspoken assumption that customary law is inimical to the rule of law because many customary norms sit in tension with international norms, in particular human rights principles. There are a number of factors that underpin this assumption about the relationship between customary law and the rule of law. One is that customary law does not emanate from the state but from the people and hence its control does not lie within the state domain. A related second factor is that customary law competes with state law. A third factor is that customary law appears unpredictable to outsiders because it is generally not written. A fourth factor is that customary law is generally not uniform across the state: for example, in Timor-Leste, it is

⁹¹ See *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), entered into force 5 September 1991, 72 *ILO Official Bulletin* 59, Arts 8 and 9; *UN Declaration on the Rights of Indigenous Peoples*, Art 34, UN Doc A/Res/61/295 (2007); Ewa Wijkowska, above n 87, 13.

⁹² Krygier, above n 63, 146.

localised to the extent that it is difficult for legal anthropologists to discern many commonalities across the array of its local legal systems.⁹³ A fifth factor is that customary law generally has few mechanisms of scrutiny because it is designed to guide small and generally insular communities as to appropriate behaviour. A final factor is that customary legal norms are at times inconsistent with ‘universal’ international human rights norms and this mainly affects the most vulnerable and women.⁹⁴

One exception to this trend in thinking about customary law is Mark Plunkett who argues that customary law systems can be “micro ROL [rule of law] systems”.⁹⁵ He reasons that people living according to customary law “follow a sophisticated ROL system derived from ancient legal systems that regulate the distribution of all resources – material, human, and spiritual”.⁹⁶ To make this argument, Plunkett uses a very broad definition of the rule of law: “where both the ruler and the ruled respect the legal rules that govern the relationships”.⁹⁷ This definition appears to stretch even to “ROL systems offered by warlords”.⁹⁸ Plunkett posits that in the process of building the rule of law, these micro ROL systems are as important as the institutional model for the rule of law put forward by Hayek, and thus they need to be harmonised in the post-conflict context.⁹⁹ He is effectively arguing that all informal legal systems *per se* can be considered to be rule-of-law systems and that there is a need in the post-conflict context to reconcile this paradigm of customary law with the state legal system. However, Plunkett’s definition of the rule of law fails to include mechanisms to ensure that the ruler respects the same legal rules as the ruled (ie government bound by law) and hence the definition appears to impose few criteria on what constitutes a rule-of-law system.

⁹³ David Mearns, *Looking Both Ways: Models for Justice in East Timor* (2002) (Report prepared for Australian Legal Resources International) 31; Tanja Hohe and Rod Nixon, *Reconciling Justice: ‘Traditional’ Law and State Justice in East Timor (Final Report)* (2003) (Report for the United States Institute of Peace) 13.

⁹⁴ See, eg, Amnesty International, *East Timor* (2001) 40ff.

⁹⁵ Mark Plunkett, “Re-establishing the Rule of Law” in Gerd Junne and Willemijn Verkoren (eds), *Post Conflict Development: Meeting New Challenges* (2005) 78.

⁹⁶ *Ibid* 79.

⁹⁷ *Ibid* 76.

⁹⁸ *Ibid* 80.

⁹⁹ *Ibid* 78-9.

A more sustained illustration of the intersection between the rule of law and legal pluralism can be seen in a definition of the rule of law proposed for Afghanistan, a post-conflict state where 80 per cent of cases are settled through traditional justice bodies while the state legal system deals only with 20 per cent, at most, of all disputes.¹⁰⁰ The definition put forward by the *Afghanistan Human Development Report 2007*¹⁰¹ (“the Afghan report”) classifies customary law systems and other non-state justice institutions as rule-of-law systems. It states:

the rule of law refers to **all** those state and *non-state* institutions that promote justice and human development through the application of public rules that are deemed fair, applied independently, enforced equally, and consistent with human rights principles.¹⁰²

The four main dimensions of this definition (independence of rule of law institutions, public and fair laws, equal enforcement, and consistency with human rights principles) have been impliedly identified as ‘universals’ by the authors of the Afghan report. The four dimensions can be recognised as similar to those values conventionally proposed by Western scholars and international institutions even though predictability and government bound by law are notably absent. However, this definition is distinguished by the fact that it includes “non-state institutions” as “rule of law institutions” where they observe the four listed dimensions.

The Afghan report’s proposed definition of “rule of law institutions” embraces legal pluralism in the form of three major legal traditions: Western positive law, Islamic Sharia

¹⁰⁰ See Afghanistan Human Development Report 2007, *Bridging Modernity and Tradition: Rule of Law and the Search for Modernity* (2007) (“The Afghan Report”). These statistics come from annual surveys conducted by the Asia Foundation (see, eg, *Afghanistan in 2006: A Survey of the Afghan People* (2006) 59) and a survey conducted by the Afghan Ministry for Justice entitled *Justice for All – A Comprehensive Needs Analysis: Challenges and the Way Forward for the Justice Sector in Afghanistan* (2005).

¹⁰¹ Human Development Reports are commissioned by the United Nations Development Programme. They are independently written and researched. The concept of human development is influenced by Amartya Sen’s concept of human development being measurable by ‘capabilities’. The ‘capabilities’ approach takes into account an individual’s social context in relation to their ability *to do or to be* and it aims to get people above a threshold level of each capability. In this framework, law must enhance people’s capabilities to enjoy rights and entitlements. See generally, Amartya Sen, *Development as Freedom* (1999); *Inequality Re-examined* (1992).

¹⁰² The Afghan Report, above n 100, 43, (emphasis in bold original, emphasis in italics added).

law and customary law. According to its authors, during consultations, people described the rule of law negatively but emphasised the importance of customary law and traditional institutions of dispute settlement for the rule of law.¹⁰³ Indeed, one senior judge pointed out that these institutions were able to enforce their decisions more effectively than state courts, and, unlike the courts, they could achieve reconciliation between parties through using various forms of alternative dispute resolution.¹⁰⁴ Overall, these traditional institutions are perceived as more effective, less corrupt and more legitimate than state institutions despite the fact that *jirgas* and *shuras* do not conform to international human rights standards either in their composition or in some of their norms.¹⁰⁵ In Afghanistan, legal pluralism is clearly a dominant paradigm. Alongside the rule of law, legal pluralism is put forward by the Afghan report as a means to ‘human development’.

For many Western scholars and practitioners, this proposed definition of the rule of law is controversial because the rule-of-law orthodoxy promoted by the UN and IFIs is geared towards working with state institutions.¹⁰⁶ Conventionally, ‘rule-of-law institutions’ are understood as the familiar triad of state courts, police and prisons and not *non*-state institutions. Consideration of non-state institutions is often limited in post-conflict literature to the work of non-governmental organisations (NGOs) in civil society¹⁰⁷ and only recently has this been extended to traditional justice mechanisms.

¹⁰³ Ibid 42-3.

¹⁰⁴ Ibid 43.

¹⁰⁵ Women are generally excluded from participation in *jirgas* and *shuras* and have difficulty in accessing them without the assistance of a male relative. The practice that is of most concern to international development agencies and human rights advocates is that of *bad*, where a dispute is settled by the offer of a woman for marriage from the offender’s family to the victim’s family without the consent of the woman. This practice is part of *Pashtunwali*, principles that apply specifically to Pashtuns who comprise approximately 40 per cent of the population. It is prohibited by both state positive law and *sharia*. While the Afghan Report arguably downplays this practice as more an exception than a norm (above n 100, 126), the USAID report highlights the practice as prevalent in rural and remote communities: USAID, *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Court and Informal Bodies* (2005) 10, 49.

¹⁰⁶ Stephen Golub, “A House Without a Foundation” in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 105, 131. See Chapter 2.

¹⁰⁷ See, eg, David Tolbert and Andrew Solomon, “United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies” (2006) 19 *Harvard Human Rights Journal* 29, 54-56. It should be noted, however, that while the reference to “non-state institutions” in the Afghan Report covers dispute resolution forums, it excludes non-state prisons and non-state police: The Afghan Report, above n 100, 97.

For the Afghan community, the most controversial aspect of the proposed definition appears to be the inclusion of human rights: the Afghans consulted for the Afghan report stated that the fairness of the law could only be judged in relation to Islamic principles.¹⁰⁸ Few considered human rights as an important dimension of the rule of law.¹⁰⁹ This is consistent with an earlier study that concluded that fairness in Afghanistan is measured according to local norms.¹¹⁰ The Afghan report acknowledges that the inclusion of human rights as a dimension of the definition is imposed: it “largely represents the demands of the international community and donor countries”.¹¹¹

The proposed definition of the rule of law is pragmatic in that it recognises that the Afghan state does not have a monopoly of law, and that the reach and legitimacy of the state legal system is unlikely to improve dramatically for a number of decades. Thus the Afghan report recommends a hybrid system with horizontal forms of accountability whereby the Afghan Independent Human Rights Commission is given the responsibility for monitoring and supervising these traditional institutions in each district in order to ensure that human rights standards are upheld.¹¹²

In this picture, tension is palpable between access to justice, enabled by legal pluralism, and the rule of law, which here includes human rights. The Afghan report sets out “access to justice and the rule of law” as separate concepts and separate paths to human

¹⁰⁸ Ibid 44.

¹⁰⁹ Ibid 46.

¹¹⁰ USAID, *Afghanistan Rule of Law Project*, above n 105, 9.

¹¹¹ The Afghan Report, above n 100, 46. The report notes that while the Afghan Constitution and new and amended legislation is generally consistent with human rights principles, there remains tension between national legislation and these principles: 46-47.

¹¹² The Afghan Report asserts that existing vertical accountability mechanisms in Afghanistan, such as the judicial system’s internal appeals process, are “outdated and generally unused”: *ibid* 100. The report does not make clear how officers of the Afghan Independent Human Rights Commission would be able to enforce respect for human rights norms among non-state justice institutions. Matteo Tondini points out that the UN Development Programme is currently engaging tribal justice in Afghanistan. He is critical of the rule-of-law orthodoxy which focuses primarily on state courts and he argues that a “more balanced approach” that is based on legal empowerment would lead to “a more realistic establishment of the rule of law”: “From Neocolonialism to a ‘Light-Footprint Approach’: Restoring Justice Systems” (2008) 15 *International Peacekeeping* 237, 241. See also, Amy Senior, “Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law” (2006) *Al Nakhlah* 4 at http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf at 16 October 2008.

development.¹¹³ In relation to the unequal treatment of women by non-state institutions, the two concepts appear to collide. Most reports on Afghanistan’s legal system¹¹⁴ express grave concerns regarding the violation of women’s human rights at the hands of non-state justice mechanisms in relation to practices such as *bad*.¹¹⁵ However, what is striking is that these concerns appear to be overridden by the recent consensus among many international organisations that non-state law must be recognised and engaged with in Afghanistan at a formal level so as to ensure greater access to justice for the population.¹¹⁶ Recent reports consistently prioritise access to justice over the rule of law in that they agree that state law pluralism is the only viable path for justice in Afghanistan, at least in the short term.¹¹⁷ In other words, in a context where conflict and violence have been the norm for decades, access to justice and non-violent means of dispute resolution are understood as a necessity while the rule of law is cast as a longer-term aspiration.

The rule of law is a concept that government heads across the globe have endorsed and none have defiantly rejected,¹¹⁸ even when the concept holds little currency at the local level. As the dominant paradigm in the global arena, the international norm provides a badge of legitimacy for governments at the international level. Regardless of the fact that the rule of law is an aspiration that may be unrealisable in Afghanistan’s short-term future, the Afghan state is keen to invoke the concept and institute it as a central pillar and goal of its *Afghanistan National Development Strategy* (ANDS), a document which sets out for the international community the Afghan state’s development agenda.¹¹⁹ The legitimacy

¹¹³ The Afghan Report, *ibid*, 6, 34, 58. This compartmentalisation is also apparent in UNDP, *Programming for Justice: Justice For All: A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (2005) 84.

¹¹⁴ The Afghan Report, *ibid*; Thomas Barfield, Neamat Nojumi and J Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* (2006) (Report for the United States Institute of Peace); USAID, *Afghanistan Rule of Law Project*, above n 105.

¹¹⁵ See above n 105.

¹¹⁶ Above n 114. This is not the case with the report of the International Commission of Jurists authored by Dr Martin Lau, *Afghanistan’s Legal System and its Compatibility with International Human Rights Standards, Final Report* (2003). The title of this report indicates its orthodox approach to the rule of law.

¹¹⁷ The Afghan Report undergirds its position of prioritising legal pluralism by pointing out that certain features of *jirgas* and *shuras* are “consistent with values and principles of the restorative justice paradigm that is now increasingly prominent internationally”: above n 100, 94. The authors appear to use this ‘international prominence’ as a hook to international legitimacy.

¹¹⁸ Tamanaha, above n 13, 2.

¹¹⁹ The rule of law forms part of Pillar 2 of the *Afghanistan National Development Strategy 2008-2013 (ANDS). A Strategy for Security, Governance, Economic Growth and Poverty Reduction*, Prepared

conferred by the concept is recognised by ANDS, which states: “The rule of law is the foundation of legitimate government”.¹²⁰ Thus, the “myth” of the rule of law is a flag that countries fly to signal their legitimacy and sovereignty to the international community.

For post-conflict states where former resistance leaders are now heading governments, such as South Africa and Timor-Leste, the rule of law carries additional value as it provides a point of distinction from the past regime, in respect of which it can be claimed that the rule of law was absent, and places the present governments in a morally superior position. Thus there is acute pressure on governments of post-conflict states to assert this legitimacy through invoking the rule of law before the international community. This generally involves the rule of law being proclaimed in the state’s constitution, often in the constitutional preamble, as is the case with Afghanistan’s Constitution, or in the ‘state’s objectives’ and ‘founding values’, as seen in the constitutions of Timor-Leste and South Africa.¹²¹ The preamble of Afghanistan’s Constitution speaks of “regaining Afghanistan’s deserving place in the international community”, and similarly the South African constitutional preamble talks of South Africa “tak[ing] its rightful place as a sovereign state in the family of nations”.¹²²

Internally, however, the concept of the rule of law must be balanced and reconciled with dominant paradigms operating within the territory of the state and thus the concept becomes more muted at this level. The characterisation of traditional dispute resolution forums as possible “rule of law institutions” in Afghanistan is an example of this attempt at balancing because it aims to realign those aspects of these forums which would, at least in the eyes of Western scholars, disqualify such a characterisation. The following chapters argue that at the internal level the practical outcome of this attempt at balancing is

by the Presidential Oversight Committee (of the Islamic Republic of Afghanistan) for the ANDS (2008) <http://www.ands.gov.af/ands/ands_docs/index.asp> at 26 September 2008.

¹²⁰ *Afghan National Development Strategy (ANDS). An Interim Strategy for Security, Governance, Economic Growth and Poverty Reduction*, Ch 7.3, Prepared by the Presidential Oversight Committee (of the Islamic Republic of Afghanistan) for the ANDS, SY 4 Dalwa 1384 (2006) <[Http://www.ands.gov.af/ands/I-ANDS/volume-one.asp](http://www.ands.gov.af/ands/I-ANDS/volume-one.asp)> at 25 April 2008.

¹²¹ See section 1 of South Africa’s 1996 Constitution; sections 1(1) and 6(b) of Timor-Leste’s 2002 Constitution as well as its preamble which states: “Fully conscious of the need to build a democratic and institutional culture proper of a State based on the rule of law where respect for the Constitution, for the laws and for democratically elected institutions constitute its unquestionable foundation”.

¹²² The Constitution of Timor-Leste devotes a whole section, section 8, to aspirational statements about “international relations”.

inevitably one of a ‘rule-of-law patchwork’ in that the rule of law is visible only in various patches of the state’s operation. However, the degree to which the concept of the rule of law is visible in this patchwork differs according to the particular context of the post-conflict state.

The case studies on South Africa and Timor-Leste illustrate how the rule of law and legal pluralism are negotiated and in some cases balanced and reconciled in particular post-conflict states. Both states have constitutions that invoke the rule of law and have large sections of the population that use non-state law and non-state institutions as a means of resolving disputes. However, South Africa represents a strong post-conflict state where state institutions continued operating after the end of apartheid while Timor-Leste represents a fragile post-conflict state where state institutions collapsed upon the withdrawal of Indonesian forces.

The case studies focus on two lines of inquiry in relation to the relationship between the rule of law and legal pluralism: first, the manner in which the legitimacy of the state was understood and negotiated during the process of setting up the state’s ground rules through a constitution, and; second, the practical implications of these constitutional arrangements, particularly for the most vulnerable sections in society, including women and children.

The following chapters show that in both states the rule of law is included in constitutional texts largely to legitimate the nascent state at the international level. In contrast, the entrenchment of legal pluralism relates to the varying needs and desires on the part of the state’s new leaders to legitimise the state at the local and internal level. This double act of legitimacy means that when the two concepts are negotiated within the state, the practical outcome is that the rule of law becomes muted. When balanced against internally dominant paradigms such as the rule of *customary* law, the rule of law is compromised.

The scope of my case studies is circumscribed by their focus on state law pluralism, often derogatively referred to as ‘weak legal pluralism’, and associated with legal centralism. All studies that use a state constitution as their central focus necessarily suffer this limitation which sometimes leads legal anthropologists to dismiss such research as pertaining to

‘false’ legal pluralism.¹²³ The case studies risk invoking such labels in that they attempt to map how the new constitutions of South Africa and Timor-Leste are addressing their historical legacies of colonialism, occupation, apartheid and conflict as well as the imposition of international norms and the state-based system on their populations. The studies show that labels such as ‘false’ are analytically unhelpful as descriptors of legal pluralism as blurriness marks the manner in which a large number of people in both South Africa and Timor-Leste experience the interaction between non-state, informal law and the law of the constitutional state.

5. Conclusion

The relationship between the rule of law and legal pluralism is highly dependent on context. On the one hand, Western scholars have purported to formulate abstract and universal formulations of the “myth” of the rule of law while on the other hand, some legal anthropologists have romanticised the “fact” of legal pluralism. Neither formulation of these concepts appears particularly useful or relevant to the post-conflict context where the nature and power of each concept depends on whether the state is attempting to use the concepts to shore up its *external* legitimacy or its *internal* legitimacy. The following case studies show the complex machinations of post-conflict states in endeavouring to perform this double act of legitimacy. Each case study begins with the constitutional moment of recognising legal pluralism and the international norm of the rule of law. The case studies then trace how the two concepts are practically negotiated and transformed at the ground level. They aim to understand the manner in which vulnerable groups in South Africa and Timor-Leste experience legal pluralism and the rule of law and whether “fact” and “myth” are adequate descriptions of this experience.

¹²³ See, eg, Griffiths, above n 1, 1ff; On constitutions and bills of rights as epitomising legal centralism, see Harry W Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (1985) 190.

Chapter 4. “One Law for One Nation”: The Rule of Law and Legal Pluralism in South Africa’s Constitutional Dispensation

1. Introduction

The slogan “One Law for One Nation” became the chorus line for South Africa’s constitutional song, the by-line for newspaper advertisements for the new constitutional dispensation, and it is the banner under which the text of the 1996 Constitution, known as the Final Constitution, sits. For post-colonial states emerging from significant periods of oppression, aspects of which involved the legal regime subjecting people to different legal systems or standards according to their race, ethnicity or citizenship, the concept of one law for all can be a revolutionary and liberating one.

While ‘one law’ accords with the concept of the rule of law and constitutionalism, it sits uncomfortably with the concept of legal pluralism, where two or more legal systems operate. South Africa’s 1996 Constitution was designed to revolutionise its legal system from one based on racial segregation and oppression to a system founded on equality and human dignity. Like most constitutions drafted in the 1990s, it is a cocktail of values drawing heavily from the international order, with some added local, home-grown values.¹ In this respect, the rule of law and legal pluralism, in the form of customary law, can be characterised to represent respectively the global and the local. This chapter examines South Africa’s constitutional dispensation in the 1990s in order to understand the relationship between the rule of law and legal pluralism in this period.

This chapter shows that both the invocation of the rule of law as a constitutional founding value and the constitutional entrenchment of legal pluralism can be traced to a host of pressures applied by external and internal forces. The negotiating parties to the South African constitutional dispensation responded to these pressures believing the two concepts would promote the legitimacy of the state’s new constitutional framework on a number of fronts. Thus, the parties embraced the rule of law and legal pluralism on the assumption that they might assist the post-apartheid state to establish its legitimacy both at the

¹ Heinz Klug, “Participating in the Design: Constitution-making in South Africa” in Penelope Andrews and Stephen Ellmann (eds), *Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Laws* (2001) 152. Klug argues that while many of the principles listed were clearly influenced by international norms, they were nevertheless locally formulated and approved.

international level and the rural, local level. However, before this could happen, the stains of apartheid had to be removed from both concepts so as to transform them.

The chapter begins by setting out the historical context in which the two concepts operated and by exploring the role of constitutions in the post-Cold War era in shoring up international legitimacy. It traces the inclusion of the rule of law as a constitutional founding value and it then examines the internal negotiations that led to the constitutional recognition of legal pluralism. It observes that, in the case of the former, international organisations may have been instrumental in influencing the decision to entrench explicitly the rule of law as a founding value of the Constitution. In terms of the latter, the African National Congress (ANC) allowed traditional leaders to drive the agenda of legal pluralism in the belief that they could provide a much-needed connection to the rural population. Overall, it argues that pragmatism played a large role in South Africa’s constitutional negotiations and hence it is possible that the main actors gave little consideration to the relationship between the rule of law and legal pluralism and its future operation within the constitutional framework.

2. Context

To understand the relationship between the rule of law and legal pluralism in South Africa it is necessary at first to consider aspects of the history of both South Africa’s legal system and the ANC’s relationship with law.

Of apartheid, John Dugard writes: “The apartheid order was a legal order. Most of the injustices perpetrated by successive apartheid governments between 1948 and 1990 were committed in the name of the law.”² During apartheid, the governing National Party used the law and legality as a substitute for legitimacy. Thus, one of the ANC’s main strategies was to undermine the legal system. It rejected the legitimacy of state law as well as state judges, whom it generally saw as conniving with the apartheid regime.³ In the mid-1980s

² John Dugard, “Retrospective Justice: International Law and the South African Model” in A James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (1997) 269, 270.

³ See, eg, ANC, “Mass Action for People’s Power: Statement of the National Executive Committee of the ANC, 8 January 1989”, [February 1989] *Sechaba* 2, 4. In some situations, state law was used as a means of resistance. Abel analyses some of the legal victories against apartheid during the 1980s and concludes that they “strengthened the commitment of the anti-apartheid movement to legality –

the ANC and its allies, such as the United Democratic Front, went so far as to encourage people to take law into their own hands. They aimed to make the country ‘ungovernable’ for the state and promoted the establishment of people’s courts in opposition to the apartheid state’s local councils.⁴ This strategy contributed to a strong level of deep legal pluralism in South Africa, which is still prevalent today.

During the decades of apartheid the ANC looked to international legal standards as a vehicle by which to establish its legitimacy. The ANC recognised international law not just as a tool of justice and political transformation but also as a “passport to international acceptability”.⁵ The apartheid regime, in contrast, saw international law as “an alien and hostile legal order” and “a threat to the state”.⁶ On the whole, South African courts and lawyers largely ignored public international law during apartheid.

The ANC’s concerted efforts to gain support from the international community and influence international law can be seen having effect after 1960, when the UN Security Council passed a resolution condemning the South African Government for the Sharpeville massacre which left 69 black protestors dead.⁷ The UN General Assembly played a significant role in championing the ANC: in 1962 it attempted to impose sanctions on South Africa and in each of the three decades until 1990, it passed resolutions condemning apartheid as an international crime,⁸ culminating in the drafting of the 1973 *UN Convention on the Suppression and Punishment of the Crime of Apartheid*.⁹ In 1974 the President of the General Assembly rejected the credentials of the South African delegation and the state

and also, perhaps that of the post-apartheid polity”: Richard L Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (1995) 549.

⁴ Aran S MacKinnon, *The Making of South Africa: Culture and Politics* (2003) 255ff;

⁵ Heinz Klug, *Constitutional Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000) 48.

⁶ John Dugard, “International Law and the South African Constitution” (1997) 8 *European Journal of International Law* 77, 77; John Dugard, “The South African Judiciary and International Law During the Apartheid Era” (1998) 14 *South African Journal on Human Rights* 110.

⁷ UN SC Res 134 (1 April 1960).

⁸ See 1962 GA Res 1761 (sanctions); 1966 GA Res 2202A (XXI); 1970 GA Res 2627 (XXV); 1984 GA Res 39/72A.

⁹ By the end of apartheid in 1990, the convention had been ratified by 89 states. During this period, apartheid was declared a crime in other international instruments such as the 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, opened for signature on 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970) and the 1977 *First Additional Protocol to the Geneva Conventions* opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

subsequently withdrew from other UN organs and specialised agencies such as the International Labour Organisation (ILO).¹⁰ In 1975 the UN gave observer status to the ANC and in 1976 it invited Oliver Tambo, the President of the ANC, to address the General Assembly. The ANC also formed a close relationship with specialised international agencies: for example, in the 1980s its trade union members received training from the ILO and in 1980 it became a signatory to the *1948 Geneva Conventions* as well as their *First Additional Protocol 1977* which was directed at protection of actors involved in internal conflict, such as the situation in South Africa. In the ANC’s view, apartheid was contrary to the UN Charter and it used international law as far as possible to isolate the apartheid government in the international community. In 1991 ANC leader Nelson Mandela argued:

By characterizing apartheid as a crime, by protecting our combatants, by describing certain aspects of apartheid as genocide, *international rules have validated our struggle*. .. We have been cut off from full membership of the international community through South Africa’s refusal to adhere to the basic international texts governing human rights.¹¹

The ANC also built relations at the regional level, effectively influencing the agenda of the Organisation of African Unity (OAU), now the African Union. In 1989 the ANC was at the forefront of the OAU’s *Harare Declaration*, which set out a list of principles such as democracy and equality and called for an “internationally acceptable solution” so that South Africa could take its “rightful place” in the international community.¹² The Declaration included guidelines for the process of negotiation, which focussed squarely on a new constitution as a means of establishing a new order. The UN General Assembly

¹⁰ Note that despite this, South Africa did retain its membership of the UN so it could assert its status as a sovereign state and prevent a black government in exile from taking its place.

¹¹ Quoted in Heinz Klug, “Hybrid(ity) Rules: Creating Local Law in a Globalized World” in Yves Dezalay and Bryant G Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (2002) 276, 298. As South Africa’s Truth and Reconciliation Commission states, the effect of international law’s designation of apartheid as a crime against humanity was “to render as just the moral, political and legal status of the struggle against apartheid”: *Truth and Reconciliation Commission of South Africa Report*, Vol 6, Section 5, Ch 1, [28-9].

¹² *Declaration of the OAU Ad Hoc Committee on Southern Africa on the Question of South Africa*, Harare, Zimbabwe, 21 August 1989, [17].

subsequently upheld the principles of the *Harare Declaration* but emphasised that a new constitutional order should be based on the *UN Charter* and the *Universal Declaration of Human Rights*.¹³ The ANC understood that, in the struggle for South Africa, it was largely in the international arena that the struggle would be won.¹⁴

Thus, while encouraging people to flout apartheid state law within South Africa, the ANC was also active in participating in, and influencing, circles of international law, and preparing to set up a new legal order at the state level. During the transition, which involved a series of political negotiations between the major players behind closed doors, international law continued to play an important role for the ANC. When negotiations broke down in mid-1992, the ANC successfully appealed to the UN to send a mediation team.¹⁵ The UN Observer Mission in South Africa was active in attempting to prevent the escalation of violence and in monitoring the 1994 elections.¹⁶ International involvement displeased the cabinet of the governing National Party, which was determined to limit international involvement to observation and analysis.¹⁷

Hence there is much complexity in the ANC’s relationship with the law and the concept of the rule of law during apartheid. While the ANC considered the rule of law to exist only at the international level, it was equivocal in relation to the rule of customary law in rural areas and gave it only marginal consideration.¹⁸ Upon the collapse of the apartheid regime at the end of the Cold War, the ANC had to restore the legitimacy of state legal institutions and begin promoting the rule of law in relation to state law. This was a challenge given that it had encouraged the people to subvert the state and had led by example. To transform the legal order and restore the legitimacy of state institutions after apartheid, the ANC used

¹³ *Declaration on Apartheid and its Destructive Consequences in Southern Africa*, UN Doc A/RES/S-16/1 (14 December 1989). South Africa’s Foreign Minister responded by calling the GA’s statement a “flagrant contravention” of the *UN Charter* because of its interference with the state’s internal affairs: William Gutteridge, “South Africa: Apartheid’s Endgame” in William Gutteridge (ed), *South Africa: From Apartheid to National Unity, 1981 to 1994* (1995) 147, 174.

¹⁴ Stephen Ellis and Tsepo Sechaba, *Comrades Against Apartheid: The ANC and the South African Communist Party in Exile* (1992) 203.

¹⁵ See UN Security Council Resolutions 765 (16 July 1992) and 772 (17 August 1992).

¹⁶ On the role of the UN in South Africa, see The United Nations and Boutros Boutros-Ghali, *The United Nations and Apartheid, 1948-1994* (1994) 105-126.

¹⁷ Deryck Schreuder, “The Commonwealth and Peacemaking in South Africa” in Norman Etherington (ed), *Peace, Politics and Violence in the New South Africa* (1992) 73, 95.

¹⁸ Lungisile Ntsebeza, *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2006) 258-266.

the entrenchment of international norms. Thus, international norms came to enjoy an important position in the constitutional dispensation: the Final Constitution embodies a number of mechanisms to ensure that the new legal order evolves in accordance with international law,¹⁹ and great care was taken in the drafting to ensure that the Final Constitution’s extensive bill of rights complies with international human rights standards.²⁰

The legacy of South Africa’s isolation by the international community is illustrated in the eagerness of the post-apartheid state to show the international community its credentials. This can be seen in the 1995 case of *S v Makwanyane*²¹ where the newly established Constitutional Court ignored national sentiment at the time, which favoured the death penalty, in unanimously ruling that the death penalty was not constitutional under the Interim Constitution. The Court was acutely aware that the world’s eyes were upon it as this was its first hearing and its first important case of adjudicating the values of the new legal order. Furthermore, the case was decided at a time when the world was watching the drafting of the Final Constitution. The judges in *Makwanyane* made extensive reference to both international law and comparative law: for example, a third of the main judgment by Chaskalson P was spent exploring cases from UN bodies as well as the decisions of some of the world’s leading courts including those of the US, India and Canada. The judgment of Mokgoro J explained that the “interpretation clause [section 35] prescribes that courts seek guidance in international norms and foreign judicial precedent ... thereby promoting *the ideal and internationally accepted values* in the cultivation of a human rights jurisprudence for South Africa”.²² No member of the Court disputed the role of international and foreign norms in aiding constitutional interpretation. The Court appeared to heed the warning “that the state which disclaims the authority of international law places herself outside the circles of civilized nations”.²³

¹⁹ See ss 39, 231-233 of the Final Constitution. For example, s 233 provides that preference be given to any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

²⁰ Dugard, “International Law”, above n 6, 77, 84.

²¹ 1995 (3) SA 391 (CC).

²² Ibid [304] (emphasis added).

²³ This warning was made by Henry Maine, as quoted by Chief Justice Kotze in *CC Maynard et alii v The Field Cornet of Pretoria* (1894) 1 SAR 214 at 223.

Many members of the Court referred to the concept of ‘civilisation’ as representing a benchmark for the new legal order. The judgment of Kentridge AJ framed the issues in terms of the “evolving standards of civilisation” which he held demonstrated “the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies”.²⁴ He affirmed the view that “the State is (or should be) ‘institutionalised civilisation’” and held that statement to be apt for South Africa’s new constitutional order.²⁵ Similarly, Madala J questioned the existence of the death penalty in a ‘civilised society’.²⁶ Mahomed J referred to the international community as the “civilised community” and called the ethos of the Constitution “universalistic”.²⁷ The inference in these judgments is that for the new legal order to be recognised as ‘civilised’, it needed to take note of the standards observed by the ‘civilised’ international community.²⁸

However, there is some tension in the case in relation to the role of ‘indigenous’ norms in constitutional interpretation. This is made apparent in the judgment of Mokgoro J. While Mokgoro J acknowledged that section 35 requires consideration of international norms, she stated: “However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality.” She urged that the courts “should recognise that indigenous South African values are not always irrelevant nor unrelated” to the task of constitutional interpretation. In common with Langa, Madala, and Mahomed JJ, Mokgoro J singled out the concept of ‘*ubuntu*’, often translated as humaneness or human dignity, which was included in the post-amble to the Interim Constitution.²⁹ The judges held that this African concept was a shared value, running “across cultural lines”, and was one that

²⁴ 1995 (3) SA 391 [199].

²⁵ Ibid.

²⁶ Ibid [239].

²⁷ Ibid [278, 262].

²⁸ Didcott J also uses this terminology when writing of “the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself”: *ibid* [190]. The strategy of measuring the values of South Africa’s new legal order with those of the “civilised world” is also apparent in *S v Williams* 1995 (3) SA 632 (CC) which considers the constitutionality of corporal punishment.

²⁹ The Constitutional Postamble relates to “National Unity and Reconciliation”. There is much literature on *ubuntu*. See, eg, Rosalind English, “*Ubuntu*: The Quest for An Indigenous Jurisprudence” (1996) 12 *South African Journal on Human Rights* 641. See also, Drucilla Cornell and Karin van Marle, “Exploring *Ubuntu*: Tentative Reflections” (2005) 5 *African Human Rights Law Journal* 195.

should be promoted when interpreting the Interim Constitution’s Bill of Rights.³⁰ Sachs J agreed that the consideration of indigenous norms was a necessary aspect of interpreting the provisions of the Interim Constitution’s Bill of Rights. He held:

In my view, s.35 requires this Court not only to have regard to public international law and foreign case law, but also to all the dimensions of the evolution of South African law which may help us in our task of promoting freedom and equality. *This would require reference not only to what in legal discourse is referred to as “our common law”, but also to traditional African jurisprudence.*³¹

Sachs J stated that constitutional interpretation requires the giving of “long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice”.³² He pointed out that legal texts and reports gave little coverage to such law but “[t]hat is no reason for this Court to continue to ignore the legal institutions and values of a very large part of the population”.³³ In this statement he clearly intended to rebuke certain members of the Court for failing to consider such law and to stress that the new legal order needed to engage with “all sections of society”,³⁴ in particular the “very large part of the population”, in order to enjoy legitimacy.

Makwanyane can be read as an early attempt by some members of the Constitutional Court to transform legal pluralism from a tool of state oppression and subordination into a vehicle to promote a renaissance in African identity and legal tradition. Mokgoro J and some of her brother judges attempted to cast the new legal order as one that embraced its “rainbow” legal heritage and gave equal consideration to “the traditions, beliefs and values of all

³⁰ See 1995 (3) SA 391 [307-9]. *Ubuntu* was articulated in the post-amble to the Interim Constitution but not in the Final Constitution. Sachs J limited the scope of traditional African jurisprudence to the practices of various tribes in South Africa. Madala J opened up the scope of African jurisprudence much wider than his fellow judges by stating that there is a “need to bring in the traditional African jurisprudence to these matters, to the extent that such is applicable, and [I] would not confine such research to South Africa only, but to Africa in general”: [258].

³¹ Ibid [373] (emphasis added).

³² Ibid [365].

³³ Ibid [371].

³⁴ Ibid [370]. See also, [361].

sectors of South African society”.³⁵ Using this approach, they tried to strike a balance between establishing legitimacy in the eyes of the majority black population and earning support from the international community. The case also illustrates the strong acceptance of international norms both within the Court and in the text of the Interim Constitution. In 1995 the Court gave significant detailed consideration to international law in its judgments,³⁶ manifesting the willingness of the new legal order to engage with the values of ‘civilised’ community.

Constitutions lie at the national-international interface in that they aim to shore up the state’s internal and external legitimacy. At the international level, a constitution represents a state’s ‘mission statement’ articulating for the international community the state’s guiding values so as to establish its position in the community of civilised states. Indeed, many constitutions appear to have been written with an international audience in mind, composed mainly of IFIs, the UN and states like the US. For example, in the cases of Iraq, Afghanistan, Bosnia and Timor-Leste, Feldman observes the “substantial intervention and pressure imposed from outside to produce constitutional outcomes preferred by international actors, including NATO, the United Nations, and international NGOs, as well as foreign states like the United States and Germany”.³⁷ At the national level, constitutions are aimed at guiding both state institutions and the people. Moreover, they are aimed at achieving internal legitimacy for the new state or government and thus it is essential that they connect with the people. In relation to Iraq, Feldman relates the general consensus among Iraq’s political elites that if the new Iraqi Constitution did not recognise Islam as the official state religion, the new government would have had little chance at all of “achieving the smallest measure of legitimacy”.³⁸

While South Africa’s Constitution was not the product of such ‘imposed constitutionalism’, it nevertheless shows a complex, self-imposed process of negotiation between global norms

³⁵ Ibid [361] per Sachs J.

³⁶ In 1995 the Constitutional Court gave detailed consideration to international law in more than a third of cases dealing with the Bill of Rights. In 2004 the Court gave such consideration in only one in five cases. See George Williams and Devika Hovell, “A Tale of Two Systems: International Law in Constitutional Interpretation in Australia and South Africa” (2005) 29 *Melbourne University Law Review* 95, 116.

³⁷ Noah Feldman, “Imposed Constitutionalism” (2005) 37 *Connecticut Law Review* 857, 858-859.

³⁸ Ibid 877.

such as the rule of law and more local norms such as legal pluralism, in the form of customary law. In the 1990s, the ANC was keen to maintain its relationships within the international community but it was also vulnerable to pressure from international organisations such as the World Bank and IMF to turn to neo-liberal economic policies.³⁹ While the ANC had previously been aligned with the Soviet Union, its manifesto for the 1994 elections integrated elements of neo-liberalism and social democracy. The shift of the ANC Government towards neo-liberalism was illustrated by the introduction in 1996 of a conservative economic policy entitled Growth, Employment and Redistribution (GEAR),⁴⁰ an initiative of the World Bank.⁴¹

The 1990s also saw a general re-emergence of traditional leaders in Sub-Saharan Africa,⁴² which Barbara Oomen sees as governed by two scenarios: the collapse of state institutions in weak states and the desire of relatively strong states to attain extra legitimacy.⁴³ South Africa fits neatly into the second scenario as the ANC wanted to broaden its support base on the home front and promote the legitimacy of the Constitution with rural inhabitants by keeping traditional leaders on side. This meant that local ‘African’ norms and African identity were embraced in constitutional debates and often offset against ‘foreign’ Western values. The following two sections trace these dynamics and examine how the rule of law and legal pluralism were negotiated in South Africa’s constitutional dispensation in the 1990s.

3. The Rule of Law

In state-building and transitional justice literature, the rule of law is understood as pivotal to constitutions and the principle of constitutionalism. For example, Simon Chesterman opines: “the most basic purpose of a constitution [is] to provide for the peaceful exercise of

³⁹ William Mervin Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (2005) 72, 77.

⁴⁰ MacKinnon, above n 4, 284-286.

⁴¹ Patrick Bond, *Against Global Apartheid: South Africa Meets the World Bank, IMF and International Finance* (2nd ed, 2003) 69.

⁴² Barbara Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) 11. See also, Ntsebeza, above n 18, 272.

⁴³ Oomen, *ibid* 11. See also, 104 where Oomen discusses the forced resurgence of traditional leaders in Angola and Zimbabwe.

power in accordance with the rule of law”.⁴⁴ According to Stanley Katz, constitutionalism is a process within society by which the “community commits itself to the rule of law”.⁴⁵ For post-apartheid South Africa, the process of drafting the constitution and the constitutional text itself were both important symbols of the new legal order and its legitimacy. Thus the South African constitutional preamble talks of South Africa “tak[ing] its rightful place as a sovereign state in the family of nations”. In this section I argue that the recognition of the rule of law as a founding principle of South Africa’s supreme law was also designed to establish the state’s place in the international community of ‘civilised nations’.

3.1 The Interim Constitution and Section 1(c) of the Final Constitution

The rule of law did not explicitly figure as an issue during the first rounds of political negotiations, which led to the drafting of the Interim Constitution and the formulation of the 34 Constitutional Principles (“CPs”) that bound the drafters of the 1996 Final Constitution.⁴⁶ Most of the 34 CPs are broadly stated and draw on internationally recognised norms. For example, CP IV provides: “The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.” This principle arguably captures the rule of law, as it is understood by dominant Western approaches. Other principles, such as separation of powers (CP VI) and judicial review (CPVII) also relate to Western approaches to the rule of law but none of the principles make any express reference to the concept.⁴⁷ The absence of an explicit reference to it in the 1993 Interim Constitution⁴⁸ can be explained by the fact that, as a provisional

⁴⁴ Simon Chesterman, “Imposed Constitutions, Imposed Constitutionalism and Ownership” (2005) 37 *Connecticut Law Review* 947, 949.

⁴⁵ Stanley N Katz, *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience* (1994) 14.

⁴⁶ For a history of how the Constitutional Principles were negotiated, see Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa’s Negotiated Settlement* (2000) 77ff. Note that the Constitutional Principles also influenced the drafting of the Interim Constitution.

⁴⁷ The omission of the rule of law is slightly surprising given that many of the transitional constitutions drafted in the 1990s make some express reference to the rule of law. See, eg, Article 1(1) of the 1990 Constitution of Namibia which provides: “The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.”

⁴⁸ Note that the preamble to the Interim Constitution refers to the “constitutional state” which is understood by some commentators as a translation of the German word for *rechtsstaat*: Iain Currie

document, it was more focussed on the mechanics of transforming the social order than on what could be construed as a question of symbolism, language and style.

The 1993 Interim Constitution was a substantive revolution in that it shifted South Africa from a system of parliamentary supremacy to a system of constitutional supremacy. It was the first time a national constitution of South Africa had entrusted courts with the function of reviewing the constitutionality of legislation to ensure compliance with constitutional values and principles. Furthermore, it was the first time that the courts were given the role of protecting human rights through the Constitution. In the new Bill of Rights, found in Chapter Three of the 1993 Interim Constitution, a guarantee of equality rights was placed first in order. By undertaking the process of drafting a constitution, and enshrining values such as equality, the negotiating parties indicated their commitment to the rule of law.

The rule of law was finally introduced explicitly into the constitutional dispensation in the 1996 Final Constitution’s list of “founding values” in section 1, which provides:

The Republic of South Africa is one sovereign democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and *the rule of law*.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. (emphasis added)

In section 1 the rule of law is placed alongside other central values of the new social order such as ‘the achievement of equality’. The rule of law is connected to these other values, but it is particularly tied with ‘supremacy of the constitution’, which is reiterated more

and Johan de Waal, *The Bill of Rights Handbook* (5th ed 2005) 11. See also Loammi C Blau, “The *Rechtsstaat* Idea Compared with the Rule of Law as a Paradigm for Protecting Rights” (1990) 107 *South African Law Journal* 76, 90.

extensively in section 2.⁴⁹ The order of these two provisions is clearly meant to signal that the values set out in section 1 will be enforced according to section 2. Notably, most of the values in section 1 are liberal values; only human dignity could be construed as a value common both to Western liberal value systems and traditional African systems.⁵⁰

It is widely accepted that the main international influences on the drafting of South Africa’s Final Constitution are the Constitutions of Canada, Namibia, Germany and the United States⁵¹ but only the first two of these Constitutions make any express reference to ‘the rule of law’.⁵² Given the agreement that the influence of foreign experts was to be minimised,⁵³ it can be surmised that the reference in section 1 to the rule of law is largely a result of the state’s desire to bolster its legitimacy on the international front. As set out in Chapter Two, by the early 1990s, the concept of the rule of law was fast becoming the dominant global paradigm. For example, in 1989 the World Bank stressed that Africa was suffering a crisis of governance and that development needed the establishment the rule of law.⁵⁴ At the time of the drafting of the Final Constitution, the World Bank had become very influential in South Africa, particularly among the top ranks of the ANC leadership; many ANC officials were sent to Washington DC for a familiarisation course at the World Bank and in 1996 the World Bank was important in steering South Africa towards adopting the

⁴⁹ Section 2 provides: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

⁵⁰ Human dignity is partly captured by the African concept of *ubuntu* which was included in the Postamble to the Interim Constitution: see above n 29.

⁵¹ See DM Davis, “Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience” (2003) 1 *International Journal of Constitutional Law* 181; François Du Bois, “The Influence of Foreign Law in South Africa” (2003) 13 *Transnational Law and Contemporary Problems* 593, 625ff; Jeremy Sarkin, “The Effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions” (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 176.

⁵² See the Preamble to the 1982 Canadian *Charter of Fundamental Rights and Freedoms*. However, in all of these Constitutions, the rule of law is woven into ideas of constitutionalism. Klug asserts that “it is uncontroversial to state that South Africa’s new constitutional order was shaped by and reflects the post-cold war hegemony of an American-style constitutionalism”: Klug, above n 5, 132. Although the ANC initially embraced socialist models, it also had its own rights-based tradition, as demonstrated by its *Freedom Charter* of 1955, and this “facilitated the [ANC’s and South Africa’s] transition towards constitutionalism”: 131.

⁵³ Klug, above n 5, 69.

⁵⁴ The World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth – A Longterm Perspective Study* (1989) 61, 192. Note that this report did not cover either South Africa or Namibia.

conservative economic policy, GEAR.⁵⁵ The World Bank was giving policy advice to the ANC government in a number of areas⁵⁶ and the government was keen to do all it could to attract foreign direct investment.⁵⁷ Given the nexus between investment and the rule of law promoted by the World Bank in the 1990s, it is possible that this could have had an impact on the drafters of South Africa’s Final Constitution and their decision to include the rule of law as a founding value of the new legal order.

3.2 The Rule of Law during Apartheid

It is apparent that South Africans did not rush into embracing the concept of the rule of law as the ‘magic bullet’ to their problems during the constitutional dispensation. Indeed, Yvonne Burns wryly comments: “It is an interesting exercise to consider why the drafters of the Constitution thought fit to include this doctrine in the Constitution, given [the rule of law’s] former rather dismal performance in protecting human rights.”⁵⁸ GE Devenish explains that during apartheid the concept of the rule of law was “savagely mutilated” because it was unable to restrain the power of the legislature which was strengthened by the doctrine of parliamentary sovereignty. She elucidates:

South Africa’s lamentable history in relation to ferocious and draconian security laws was such that the rule of law provided little or no inhibition as far as these were concerned. ... in apartheid South Africa it proved singularly and tragically ineffectual.⁵⁹

⁵⁵ Ian Taylor, *Stuck in Middle GEAR: South Africa’s Post-Apartheid Foreign Relations* (2001) 63-5. There is also some indication of influence by USAID, which asserts that it has “a long tradition of supporting the rule of law in South Africa”: *Independent Evaluation of SDC’s Human Rights and Rule of Law Guidance Documents: Influence, Effectiveness and Relevance within SDC* (March 2004) 113.

⁵⁶ Bond, above n 41, 69.

⁵⁷ See the speech made by Thabo Mbeki in mid 2001 quoted in Bond, *ibid* 127-128.

⁵⁸ Yvonne Burns, *Administrative Law under the 1996 Constitution* (2nd ed, 2003) 70. Interestingly, most South African writers in this area discuss Dicey’s approach to the rule of law as having founded the modern conception of it: Burns, *ibid*; Iain Currie and Johan de Waal, *The New Constitutionalism and Administrative Law Vol 1* (2001); and GE Devenish, *A Commentary on the South African Constitution* (1998).

⁵⁹ Devenish, *ibid* 11.

During apartheid, the concept of the rule of law was not widely embraced because Afrikaaners in the legal profession identified it with foreign English traditions.⁶⁰ Indeed, the courts avoided referring to the concept during this era.⁶¹ Furthermore, the legal profession was dominated at the time by the doctrine of legal positivism as articulated by John Austin.⁶² Through the lens of strict legal positivism, the rule of law was rejected as a legal value or political standard rather than a juridical concept.⁶³ According to this view, the rule of law simply required that laws be properly enacted and enforced. Liberal critics of apartheid, such as Dugard, also rejected the idea of the rule of law as a useful concept because of the vagueness of the concept and the uncertainty as to its content.⁶⁴ This vagueness and uncertainty meant the concept was often equated with its narrowest end goal, the maintenance of law and order, and hence was more rule *by* law than the rule of law. The vagueness associated with the concept also lent it too easily to manipulation, as demonstrated by a booklet published in 1968 by the South African government entitled *South Africa and the Rule of Law*.⁶⁵ The booklet offered its own definition of the rule of law, stating that “it requires that a person on trial be accused in open court; be given an opportunity of denying the charge and of defending himself and that he be given the choice of a counsel”.⁶⁶ The booklet went on to assert that South Africa’s court system fulfilled all these requirements of the rule of law. This very thin and distorted approach to the rule of law fails to mention the function of the rule of law in regard to curtailing arbitrary government action or guaranteeing equality before the law.⁶⁷ But to most South African

⁶⁰ John Dugard, *Human Rights and the South African Legal Order* (1978) 41.

⁶¹ Currie and de Waal, above n 58, 76.

⁶² See Chapter 2 at n 13.

⁶³ Ibid 44-45. See, eg, Francois Venter, “The Withering of the ‘Rule of Law’” (1973) 8 *Speculum Juris* 69. Venter asserts that the rule of law is incompatible with the political philosophy of ‘humanism’ articulated in South Africa’s 1961 Constitution. He further argues that the rule of law is an “ethical doctrine” which cannot properly be called a “juridical concept”. He states: “The conclusion must therefore be that the Rule of Law doctrine *witers* as soon as it is subjected to jurisprudential analysis”: 88 (emphasis original). For a general overview, see Richard L Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994*. (1994) Ch 2.

⁶⁴ Dugard, above n 60, Ch 3.

⁶⁵ See also Oliver Schreiner, *The Contribution of English Law to South Africa; and the Rule of Law in South Africa* (1967); Johannes Henrik Snyman, *South Africa and the Rule of Law: Testimony of a Supreme Court Judge* (1970).

⁶⁶ Department of Foreign Affairs of the Republic of South Africa, *South Africa and the Rule of Law* (1968) 47.

⁶⁷ Dugard, above n 60, 42. To charges of racial discrimination South Africa held up its “separate but equal” policy and the concept of self-determination in the different homelands.

lawyers at the time, the problems of arbitrary and discriminatory legislation were political problems that could not be remedied by the legal concept of the rule of law.⁶⁸

On the international front, reports of the International Commission of Jurists (ICJ) refuted the assertions of the apartheid government, such as those found in the 1968 booklet, arguing that the mere performance of legal formalities did not satisfy the rule of law.⁶⁹ The ICJ’s position was that the rule of law had been eroded in South Africa because the rule of law was not fulfilling its main function of limiting state power.⁷⁰ It argued that in apartheid South Africa, parliamentary supremacy and political interference with the judiciary meant that the courts were unable to fulfil this function of checking the limits of state power.⁷¹ However, the breadth of the ICJ’s definition of the rule of law, encompassing respect for a wide range of human rights, including social and economic rights, meant that even proponents of the rule of law sidelined its work.⁷² Given the perceived weaknesses of the rule of law, critics such as Dugard preferred to advocate for a Bill of Rights rather than the rule of law as a more direct means of addressing the inequalities produced by the apartheid system.

Despite this negative perception of the rule of law among many quarters, the concept was placed alongside equality as a founding value in section one of the Final Constitution, which is super-entrenched.⁷³ Unlike equality, it does not receive any explicit elaboration in the body of the Constitution although it is clearly tied to provisions, such as separation of powers and access to courts, that underlie the rule of law. Given the poor perception of the rule of law during apartheid, it has needed to undergo a significant transformation, from a weak concept denoting vagueness and uncertain content to a strong and credible concept that can stave off future abuses, in order to play the role of a founding value. However, it is

⁶⁸ Ibid 45.

⁶⁹ International Commission of Jurists, *South Africa and the Rule of Law* (1988) 144.

⁷⁰ Ibid.

⁷¹ International Commission of Jurists, *Erosion of the Rule of Law in South Africa* (1968) iv.

⁷² Anthony Mathews, *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* (1978) Ch 3.

⁷³ See section 74 (1) of the Final Constitution which requires that amendments of section 1 be passed by higher majorities than any other constitutional amendment: 75% majority of the National Assembly and two-thirds majority in the National Council of Provinces.

arguable that, at a technical level, the rule of law is also somewhat superfluous in South African constitutional jurisprudence on three grounds elucidated below.

3.3 *The Vague Role of the Rule of Law in South Africa’s Final Constitution*

One reason why explicit constitutional entrenchment of the concept of the rule of law could be considered jurisprudentially superfluous is that the concept and its import were implied in constitutional jurisprudence relating to matters that took place before the enactment of the Final Constitution. This is apparent when looking at cases dealing with the principle of legality, which is understood to be an integral part of the rule of law.⁷⁴ In the 1999 case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*⁷⁵ (“*Fedsure*”) the Constitutional Court looked at the Interim Constitution and held that the principle of legality is a “fundamental” part of the rule of law. Given that the Interim Constitution is devoid of any textual reference to the rule of law, it seems that the principle of legality does not need an express articulation of the “rule of law” for its operation. The Court held that “the principle of legality is implied within the terms of the interim Constitution” and it stated that: “fundamental to the interim Constitution is a principle of legality”.⁷⁶ Unfortunately the Court did not identify which part of the Interim Constitution was relevant in this respect; it stated vaguely that the rule of law was a “fundamental principle of constitutional law” but to support this proposition it was forced to refer to the 1996 Final Constitution as well as the constitutional jurisprudence of Canada and Germany. The Court’s invocation of the principle of legality in *Fedsure* has caused some concern: this is partly because the principle was used (and abused) as a common law constitutional

⁷⁴ Hoexter defines the principle of legality as “a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards”: Cora Hoexter, “The Principle of Legality in South African Administrative Law” (2004) 4 *Macquarie Law Journal* 165, 184.

⁷⁵ 1999 (1) SA 374 (CC). The constitutional principle of legality holds that all legislative and executive organs of state are limited to exercising only those powers conferred on them. In administrative law, the principle as a ground of review is articulated in section 6 of the *Promotion of Administrative Justice Act 3 of 2000*. This Act is connected to s 33 of the Constitution, which requires administrators to act lawfully, reasonably and procedurally fairly and to give reasons in certain circumstances.

⁷⁶ *Ibid* para 58.

principle during the apartheid era and today some critics believe the principle should derive from the text of the post-apartheid constitutions and not from outside the ‘one law’.⁷⁷

Fedsure demonstrates that enshrining the rule of law as a founding principle in section 1(c) of the Final Constitution did not introduce the principle of legality into South African jurisprudence.⁷⁸ However, the explicit articulation of the rule of law meant that the principle of legality, and other principles deriving from the rule of law, became firmly rooted in the Final Constitution and no longer needed to be implied into the Constitution. Constitutional recognition of the rule of law bolstered the concept, its principles, as well as corollary principles such as constitutionalism, which is not explicitly articulated in the Constitution.

A second reason for the possible superfluity of the rule of law is the rule of interpretation that norms of greater specificity should be exhausted before norms of generality and abstraction, such as the rule of law, should be applied. This is apparent in the case of *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa*⁷⁹ where the Constitutional Court articulated a “definitive statement”⁸⁰ on the requirement rising from the rule of law that all law and state conduct must have a rational relation to a legitimate government purpose. Here the Court held:

It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny, the

⁷⁷ See, eg, Frank I Michelman, “The Rule of Law, Legality and the Supremacy of the Constitution” in Stuart Woolman and Theunis Roux (eds), *Constitutional Law of South Africa* (2nd ed, 2005) 11-1.

⁷⁸ Indeed, the principle of legality was part of South Africa’s pre-transitional constitutional law. See Michelman, *ibid*, 11-1.

⁷⁹ 2000 (2) SA 674 (CC).

⁸⁰ Currie and de Waal, above n 48, 12.

exercise of power by the executive and other functionaries, must, at the least, comply with this requirement.⁸¹

Before the Court could consider this requirement, it had to decide whether the relevant conduct was administrative action and subject to some specific rights in the Bill of Rights. Generally, however, any consideration of the constraints placed on public power by the rule of law are preceded by an examination as to whether another form of constraint on public power is operative, which is that arising from the Bill of Rights. This constraint requires that rights are limited only by laws of general application if they satisfy the conditions set out in the Final Constitution’s limitation clause, section 36. Because it is more specific, the limitation clause is perhaps the primary constraint, and it is operative in almost every case because of the extensive nature of the Bill of Rights. This leaves very little scope for the rule of law to operate, possibly explaining why it has been invoked in a noteworthy way in so few cases.

A third reason is that the rule of law underpins doctrines that already appear to be self-standing. For example, the Constitutional Court has found that the concept of the rule of law underpins the doctrine of vagueness, which requires that laws must be written in a clear and accessible manner: there must be reasonable certainty.⁸² In *President of the Republic of South Africa v Hugo*,⁸³ Mokgoro J said:

The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to confirm his or her conduct to the law. Further, laws should apply generally, rather than targeting specific individuals.⁸⁴

⁸¹ 2000 (2) SA 674 (CC) [85]. The Court found that despite the fact that the President had acted in good faith in making the decision to bring certain legislation into force, there was no rational connection, objectively viewed, between this decision and a legitimate government purpose because the schedules relating to the relevant legislation were not yet in operation.

⁸² *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) [108]. See also, *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others In re: Application for Declaratory Relief* 2005 (3) SA 238 (CC) [246].

⁸³ 1997 (4) SA 1 (CC).

⁸⁴ *Ibid* [102].

Here Mokgoro J states one of the key principles of Hayek’s approach to the rule of law, which is that laws should apply generally and never specifically. However, it is unclear from Mokgoro J’s judgment whether the doctrine of vagueness requires the explicit constitutional recognition of the rule of law.

A related example is an aspect of the rule of law that is more relevant to transitional countries where the state legal system is not at full strength. In the case of *Chief Lesapo v North West Agricultural Bank*,⁸⁵ the Constitutional Court held that “self-help”, in the sense of vigilantism and taking the law into one’s own hands, is inimical to a rule-of-law society.⁸⁶ Writing for the Court, Mokgoro J stated:

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. *The right of access to court* is a bulwark against vigilantism ... Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance.⁸⁷

Thus the concept of the rule of law is connected to the right to access to court, set out in section 34 of the Final Constitution, which provides: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another *independent and impartial tribunal or forum*”.⁸⁸ This provision means that, for the state to satisfy the rule of law, it is not necessary that it provide access to a court so long as the alternative is a “tribunal or forum” that is “independent and impartial”. Presumably, however, the principle against self-help is strengthened by the rule of law but not necessarily founded by it, for in *Makwanyane* the

⁸⁵ 2000 (1) SA 409 (CC).

⁸⁶ Ibid [11].

⁸⁷ Ibid [22]; (emphasis added). Here the Court held that “any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land”: [16].

⁸⁸ (Emphasis added).

Constitutional Court located the principle operating in the Interim Constitution, but there the Court traced it to the concept of constitutionalism.⁸⁹

The Constitutional Court also considered the relationship between the rule of law and section 34 in a case dealing with evictions orders granted by a court to a landowner against 40,000 people squatting on his land in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd.*⁹⁰ The Court emphasised the state’s obligation “to provide the necessary mechanisms for citizens to resolve disputes that arise between them”.⁹¹ Specifically, it held that it would be inconsistent with the rule of law if the court orders for eviction were executed because it would “cause unimaginable social chaos and misery”.⁹² On the other hand, the state’s failure to do anything, such as expropriate the property, breached the landowner’s constitutional right to an effective remedy as required by the rule of law and section 34. Here, once again, it appears that section 34, or other provisions in the Bill of Rights,⁹³ would have produced the same result in the absence of section 1(c).

From the above it appears that the rule of law is purely procedural in nature in South African constitutional law, much like the thin approach to the rule of law. For example, the principle of legality existed during apartheid despite the contracted interpretations given by the apartheid regime to its requirements.⁹⁴ However, constitutional scholars maintain that the rule of law in the Final Constitution has a substantive content that “dictates that the government must respect the individual’s basic rights”.⁹⁵ While it is not clear to Iain Currie and Johan de Waal as to what kinds of rights might qualify in this regard, they argue it “seems logical” that “respect for human dignity, equality and freedom” “ought also to be the rights protected by the rule of law” because they are repeatedly emphasised in the Bill

⁸⁹ 1995 (3) SA 391 (CC) [168].

⁹⁰ 2005 (5) SA 3 (CC).

⁹¹ Ibid [39]. The Court stated that these mechanisms were legislative, executive and judicial in nature.

⁹² Ibid [47].

⁹³ Ibid [51]. This case is interesting because the Court preferred to rely on the rule of law and s 34 rather than the parties’ right to private property and to housing. See Hugh Corder, “Judicial Policy in a Transforming Constitution” in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition and Human Rights* (2007) 91, 101.

⁹⁴ Michelman, above n 77, 11-1.

⁹⁵ Currie and de Waal, above n 48, 13.

of Rights.⁹⁶ While this fits in neatly with the thick approach to the rule of law, the problem is that, unlike Dworkin’s scenario where the rule of law helps to fill the gaps in the rule book,⁹⁷ the concept of the rule of law does not fill any gaps: it merely bolsters existing rights in the Bill of Rights. As the Constitutional Court has clarified, the rule of law does not give rise to ‘discrete and enforceable rights’ in itself but it works to ‘inform and give substance’ to the rights provisions in the rule of law.⁹⁸ In this sense the rule of law appears somewhat superfluous to the constitutional jurisprudence of post-apartheid South Africa.⁹⁹

If the constitutional recognition of the concept of the rule of law is superfluous, in the sense that the courts were already happy to imply it in its absence and it fails to go much further than existing constitutional provisions, then the question is why it was included given the concept’s reputation for being weak, vague, manipulable, dismal and “singularly and tragically ineffectual”. Perhaps an answer is that it came as part of the Bill of Rights package. Much of the debate during the apartheid era concerned whether the rule of law could have effect in the absence of a bill of rights, but this debate was swept aside by the entrenchment of an extensive Bill of Rights in the Final Constitution. However, it is not entirely clear why the Bill of Rights, which is so sweeping, should need to be bolstered by the rule of law. It is possible that the drafters of the Final Constitution were influenced by the emerging rhetoric of global institutions and hegemonic states and were keen to shore up the Constitution’s legitimacy on the international front. Regardless, section 1(c) reinforces the checks and balances of power in the Final Constitution and symbolises the new legal order’s commitment to the rule of law. As Cora Hoexter says, it “acts as a kind of safety net” and enables judicial review of all public power.¹⁰⁰

⁹⁶ Ibid 13.

⁹⁷ See Chapter 3.

⁹⁸ *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) [21, 23]. This decision held that all the founding values in section 1 of the Final Constitution had this effect.

⁹⁹ For an analysis of some of the rule of law problems currently facing South Africa, see David Dyzenhaus, “The Past and Future of the Rule of Law in South Africa” (2007) 124 *South African Law Journal* 734.

¹⁰⁰ According to Hoexter, the rule of law fills the gaps in the judicial review of public power because it catches “exercises of public power that do not qualify as administrative action” under section 33 of the Final Constitution, which sets out the rights to administrative justice, and the *Promotion of Administrative Justice Act 3 of 2000*: Cora Hoexter, “The Principle of Legality in South African Administrative Law” (2004) 4 *Macquarie Law Journal* 165, 183.

4. Legal Pluralism

Legal pluralism represents another front for establishing the legitimacy of the Constitution and the new legal order. As a means to fostering a form of internal legitimacy, the need to reinvent and transform legal pluralism was manifest given the history of its exploitation and manipulation by colonial and apartheid governments in South Africa. Since the 1927 *Black Administration Act* legal pluralism had been operating uniformly across South Africa but prior to that it had operated in different provinces at various times. Particularly during apartheid legal pluralism was viewed in negative terms.¹⁰¹ It was used to subject Africans to different laws and pen them into a separate court system with arguably inferior safeguards. While these separate courts could apply customary law, this law was not considered equal to the common law applied by the ordinary courts. The repugnancy clause¹⁰² meant that the common law had always been regarded as the ‘dominant’ system while customary law had been relegated to the position of ‘servient’ law, applying only to ‘blacks’.¹⁰³ Customary law was marginalised and neglected; this was largely as a result of a policy designed to exclude Africans from fully participating in the South African legal system.¹⁰⁴ Legal pluralism is called by some of its detractors in South Africa as ‘legal dualism’ because its state manifestation is founded on racist ideology of segregation. During apartheid, state law pluralism was based on inequality. For the architects of post-apartheid South Africa, the challenge was to develop a form of state law pluralism based on the equality of legal systems.¹⁰⁵

The process by which legal pluralism became recognised in the Final Constitution was complex and contested. However, it is worth exploring in some detail because of the dynamics between legal pluralism and two core constitutional values often associated with the rule of law, equality and democracy. The process shows the compromises that were made to these core values in order to secure the support of traditional leaders and to

¹⁰¹ Anne Griffiths, *In the Shadow of Marriage: Gender and Justice in An African Community* (1997) 28.
¹⁰² Section 1(1) of the *Law of Evidence Amendment Act 45 of 1988* provides: “Any court may take judicial notice ... of indigenous law ... [p]rovided that indigenous law shall not be opposed to the principles of public policy and natural justice”. See also Chapter 2 at n 4.
¹⁰³ Marius Pieterse, “It’s a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism” (2001) 17 *South African Journal on Human Rights* 364, 372.
¹⁰⁴ Tom W Bennett, *A Sourcebook of African Customary Law for Southern Africa* (1991) v.
¹⁰⁵ Gardiol J Van Niekerk, “Succession, Living Indigenous Law and *Ubuntu* in the Constitutional Court” (2005) 26 *Obiter* 474, 486.

promote the legitimacy of the Constitution with the “very large part of the population” referred to by Sachs J in *Makwanyane*.

4.1 The Initial Negotiations and the Interim Constitution

The process began with CP XIII, which represented the negotiated position on customary law and the role of traditional leaders. It states:

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.¹⁰⁶

According to Christina Murray, this principle was intended to remedy the fact that during the apartheid regime the government often replaced unco-operative chiefs “with more compliant people”.¹⁰⁷ Thus, this principle was designed to protect the traditional roles of chiefs and headmen and to transform their future.¹⁰⁸ As is clear, this principle also recognises indigenous law (here used interchangeably with ‘customary law’ by the drafters of both the Interim Constitution and the Final Constitution) and it requires that courts apply such law to the extent that it is consistent with both the Constitution and legislation. Effectively, this principle appears to place customary law on an equal footing with the

¹⁰⁶ Section 2 of Act 3 of 1994 inserted this second part to Principle XIII on 25 April 2004. Note that two days before the first democratic national elections were held in April 1994, an amendment was added to CP XIII via a second sub-principle:

Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

This amendment to the Constitutional Principles recognised the constitutional status of the king of the Zulus at the provincial level. Its aim was to persuade the Inkatha Freedom Party (IFP) to reverse its decision to boycott the national and provincial elections, and in this the amendment was successful. See Lourens Du Plessis and Hugh Corder, *Understanding South Africa's Transitional Bill of Rights* (1994) 11. However, as a whole the amended Principle sits uncomfortably with CP XVII's requirement of democratic representation at all levels. It states: “At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.” This non-derogation proviso is curious and it later led to some contention before the Constitutional Court during the certification hearings. However, these Constitutional Principles illustrate the highly negotiated nature of the constitution-making process.

¹⁰⁷ Christina Murray, “Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court” in Penelope Andrews and Stephen Ellmann (eds), *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Laws* (2001) 103, 105.

¹⁰⁸ Ibid.

common law of South Africa.¹⁰⁹ This was a symbolic and momentous event as it was the first constitutional articulation of legal pluralism. This constitutional recognition of customary law would have most impact on South Africa’s rural population who number approximately 20 million, or 40 per cent of the population. It is this part of the population to which customary law is most likely to apply.

CP XIII was translated into Chapter 11 of the Interim Constitution. Section 181 differed from CP XIII in the fact that it gave recognition to “indigenous law” “subject to regulation by law”, possibly making customary law subject, not only to legislation, but also the common law. Three sections of Chapter 11 also operated to include traditional leaders in all three tiers of government: local; provincial, and; national government.¹¹⁰ At the top two tiers, this inclusion in government was in the form of a body of traditional leaders, which was empowered to advise the elected governments on matters relating to traditional leadership and customary law and to delay relevant legislation for 30 days. At the local level, traditional leaders were guaranteed seats in local government without the need of election. These provisions were a response to the demand for inclusion by traditional leaders; they argued that a majority of South Africans owed them allegiance and that to ignore their role would ensure resistance to a new government.¹¹¹ Although their representativeness as a lobby group had not been proven, the nature of the negotiating process allowed traditional leaders even to lobby for 30 per cent of the seats in the Senate.¹¹² At this point their demands were rebuffed, as it was apparent that this option

¹⁰⁹ The question of whether customary law operates on an equal footing with the common law in South Africa will be addressed in the following chapter.

¹¹⁰ Sections 182-184. The effect of s 184 is similar to that of CP XIII in that it gives recognition to the continuation of traditional authority and its “powers and functions”, as well as giving recognition to “indigenous law”, but only subject to regulation by law.

¹¹¹ Doreen Atkinson, “Principle Born of Pragmatism?: Central Government in the Constitution” in Steven Friedman and Doreen Atkinson (eds), *South African Review 7: The Small Miracle, South Africa’s Negotiated Settlement* (1994) Ch 4, 115-116. According to Atkinson, the ANC, through Cyril Ramaphosa, initially responded to these demands by proposing a “sub-council on local and regional government be responsible for paying traditional leaders”. This did not satisfy the demand of traditional leaders that councils be established at all three levels.

¹¹² Ibid 116. Atkinson notes that the Pan African Congress, a minor party, supported these demands that traditional leaders be given seats in the Senate.

would have had a disproportionate impact on the principle of democracy in shielding traditional leaders from the electoral process.¹¹³

Chapter 11 was a huge success for the negotiators representing traditional leaders, especially given that they were accepted in the negotiating process only late in the piece.¹¹⁴ Up until this point in the negotiations, little consideration had been given to the question of customary law and traditional leadership.¹¹⁵ On the other hand, the initial concern of traditional leaders was to secure a guarantee that their existing salaries, status, and powers would be maintained under the new constitutional order.¹¹⁶ The question of customary law appears to have been a secondary consideration for traditional leaders.

For traditional leaders, it was disappointing that customary law was made subject to the Interim Constitution, its Chapter 3 Bill of Rights, and specifically its guarantees of equality. They demanded that customary law be insulated from the Constitution’s guarantees of equality.¹¹⁷ This was not without constitutional precedent in Africa. To support their case, traditional leaders could draw on the constitutional arrangements found in other jurisdictions in Southern Africa such as Zimbabwe,¹¹⁸ Zambia,¹¹⁹ Swaziland¹²⁰ and

¹¹³ According to Mokgoro, the chosen option also involves potential danger: “[it] could discriminate against similar cultural representative structures and/or spur similar demands from counterparts which, in a society as highly polarised as South Africa, are anything but few.”: Yvonne Mokgoro, “Traditional Authority and Democracy in the Interim South African Constitution” (1996) 3 *Review of Constitutional Studies* 60, 69.

¹¹⁴ Traditional leaders and their representatives were initially excluded from the Convention for a Democratic South Africa (CODESA) established in July 1991, but, some, such as Chief Nonkonyama, attended as part of a homeland delegation. Following CODESA, 4 delegations of traditional leaders (each with 8 members) were invited to participate in the Multi-Party Negotiation Process that began in 1993 and was responsible for drafting the Interim Constitution.

¹¹⁵ Tom W Bennett, *Human Rights and African Customary Law under the South African Constitution* (1995) 21.

¹¹⁶ Iain Currie, “The Future of Customary Law: Lessons from the Lobolo Debate” [1994] *Acta Juridica* 146, 149.

¹¹⁷ Catherine Albertyn, “Women and the Transition to Democracy in South Africa” in Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 39, 57ff; Thandabantu Nhlapo, “Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously” (1994-1995) 9 *Third World Legal Studies* 49, 61.

¹¹⁸ Subsection 23(3)(a) and (b) of the *Zimbabwe Constitution* (Order 1600 of 1979).

¹¹⁹ Section 23 (4)(d) of the *Constitution of Zambia* (Act 1 of 1999).

¹²⁰ Section 15(4)(b) of the *Swaziland Constitution* (1377 of 1968); note that this constitution has been superseded by a 2005 Constitution.

Botswana,¹²¹ as well as many other jurisdictions in Africa and the Asia-Pacific region.¹²² The Constitutions of these countries in Southern Africa and elsewhere include provisions whereby customary law is shielded from the application of norms of equality and/or non-discrimination.¹²³

The relationship between the right to gender equality and the status of customary law became the site of a battle between women and traditional leaders. At the heart of the question lay the legality of the customary system of patrilineal succession,¹²⁴ which traditional leaders felt had to be protected against the gender equality clause.¹²⁵ One delegate, Chief Nonkonyana, objected to the equality provisions in the Bill of Rights, stating that as a traditional leader, he did not support equality for women.¹²⁶ The notion of equality, he asserted, “is foreign to us”: “We are in Africa and we remain in Africa. We are not prepared to sacrifice our Africanism.”¹²⁷ In his view, the Bill of Rights would “inflict irreparable harm on the entrenched cultural values of indigenous people of South Africa”.¹²⁸ In short, he demanded that customary law be excluded from the Bill of Rights.¹²⁹ Various clauses on customary law were drafted for inclusion in Chapter 3 in

¹²¹ See, eg, section 15(4)(d) of the *Botswana Constitution* (Independence Order 1171 of 1966) which provides:

15. Protection from discrimination on the grounds of race, etc.

(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

...

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not...

¹²² Some constitutions which allow customary law to override anti-discrimination provisions in the Pacific region are as follows: the *Constitution of Fiji Islands*, s 38 (8)-(10); *Constitution of Tuvalu* s27(3)(d); and *Constitution of Solomon Islands* s15 (c).

¹²³ Bennett, above n 115, 28.

¹²⁴ Bennett argues that as a result of this particular concern for patrilineal succession, the traditional leaders “almost inadvertently ... emerged as the champions of customary law”: *ibid* 21.

¹²⁵ For a detailed history of the battle between women’s groups and traditional leaders on the question of gender equality in the Interim Constitution, see Spitz and Chaskalson, above n 46, Ch 19.

¹²⁶ Carmel Rickard, “Equality for Women? No Thanks” *Sunday Times* 8 August 1993.

¹²⁷ Quoted in Oomen, above n 42, 48.

¹²⁸ *Ibid* 79.

¹²⁹ Albertyn, above n 117, 57. In response, women’s groups, such as the Women’s National Coalition representing over 90 women’s groups, argued that to shield customary law from the Bill of Rights would be to deny human rights protection to a third of the population, black women. Such a denial

order to reach a compromise with traditional leaders. For example, one compromise, Clause 32, gave people the right to opt in and out of customary law by voluntary association with a community that observed such law or chose its application to their personal relationships. These compromise clauses were removed when the position of the traditional leaders kept shifting and following strong lobbying by women’s groups,¹³⁰ many representing rural women whose lives are most affected by these issues. The concession made to traditional leaders was in the form of Chapter 11, discussed above. Thus, to keep the traditional leaders on side, the two main negotiating parties, the ANC and National Party, had to compromise the principle of democracy but they were successful in protecting the Bill of Rights, specifically the equality guarantees, from any similar compromise.

4.2 The Final Constitution

Elections were held in 1994 for the Constitutional Assembly that was to draft the Final Constitution. The ANC gained a sizeable majority of the seats in the Constitutional Assembly but not the two-thirds required for the adoption of the Final Constitution. The elections meant that the drafting of the Final Constitution was underpinned by democratic legitimacy and there was an emphasis on popular consultation and participation in order to secure greater legitimacy for the final product.¹³¹ This process was responsible for transforming the 34 CPs into enduring constitutional principles.

In May 1995, the Congress of Traditional Leaders of South Africa (CONTRALESA), an organisation with some 2000 members, forwarded a resolution to the Constitutional Assembly putting its case for strengthening the institution of traditional leadership in the Constitution:

would defeat the purpose of the Bill of Rights, which was to provide everyone with equal protection of the law.

¹³⁰ See Spitz and Chaskalson, above n 46, 385-390.

¹³¹ The process undertaken by the Constitutional Assembly comprised two elements: a public participation programme, and a political programme. The public participation programme invited ordinary South Africans to engage with the process by making submissions to the CA, either by writing or via a telephone talk-line. The programme lasted about three and a half months, between 1 January and 17 April 1996. It succeeded in attracting over 2 million submissions, mostly in the form of petitions, and the media provided significant coverage of the process, reportedly reaching about 73% of the adult population. The aim of the public participation programme was to engender local ownership of the Constitution and to ensure that the Constitution reflected local realities: Murray, above n 107, 106.

The constitution ... should be a mirror of the soul of the nation – it must include all aspirations, beliefs and values. The constitution will not be successful if it relies only on foreign concepts and institutions. The institution and role of traditional leaders, which have been in existence as long as – if not longer than – liberal democracy in the West, have to be treated with respect and accordingly be integrated within the structures of national, provincial and local government.¹³²

In this statement, CONTRALESA appears to cast itself as “the soul of the nation”. The statement shows its desire to manipulate the tension between the inclusion of international norms and local norms in the Constitution so as to promote its own interests.

Traditional leaders were concerned about two aspects of the Final Constitution. First, they were upset about the demotion of the constitutional status of the bodies of traditional leaders, provided for in the Interim Constitution, to an enabling clause in Chapter 12 of the Final Constitution which allowed national and provincial legislatures to provide for such bodies.¹³³ While provisions dealing with the constitutional status of traditional leaders were demoted in the Final Constitution, traditional leaders would have noticed that guarantees of equality were promoted and upgraded.¹³⁴ These changes made apparent the position of equality as one of the primary guarantees in the Final Constitution.¹³⁵ Arguably

¹³² Constitutional Assembly, *Traditional Authorities, Block 4* (May 30, 1995), Cape Town, 36.

¹³³ Klug, above n 1, 152. For traditional leaders, this may have felt like a step backwards as previously the Interim Constitution had guaranteed the establishment of these councils whereas under section 212 of the Final Constitution they would need to lobby the government in the future to act. Section 212 provides: “(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council of traditional leaders”.

¹³⁴ For example, the limitation clause of the Final Constitution, section 36, no longer referred specifically to customary law (subsection 33(3) of the Interim Constitution) but was drafted more broadly. Section 36(1) provides: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society *based on human dignity, equality and freedom*, taking into account all relevant factors” (emphasis added). Note that subsection 33(3) of the Interim Constitution became part of the Interpretation clause of the Final Constitution, subsection 39(3). Equality was also incorporated into the interpretation clause of the Final Constitution, section 39 and under section 37 it was listed as a non-derogable right in times of emergency.

¹³⁵ Note that section 9 of the Final Constitution is the Constitution’s main guarantee of equality.

these constitutional guarantees of equality were strengthened in the face of the demands of traditional leaders, thus making the tension between international and local norms apparent. Thus, traditional leaders continued to protest their second concern, that neither customary law nor traditional leadership were shielded from the Final Constitution and legislation.¹³⁶ In regard to customary law, the relevant provision of the Final Constitution was section 211(3) in Chapter 12, which provides: “The courts *must* apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”¹³⁷ Traditional leaders desired the entrenchment of customary law rather than its mere recognition. Thandabantu Nhlapo implies that women’s groups were collectively advocating for a third option, the abolition of customary law, but there is little evidence for this at a broad level.¹³⁸

Traditional leaders had a final opportunity to press their concerns before the Constitutional Court whose role was to certify the Final Constitution as the concluding step in South Africa’s constitutional dispensation.¹³⁹ The main group of “objectors”, which included CONTRALESA,¹⁴⁰ complained to the Court about the “destructive confrontation” between the Bill of Rights and legislation on the one side and indigenous law on the other,¹⁴¹ and asserted that traditional authority is the reality of government for millions of people living

¹³⁶ The relevant provision for traditional leadership was subsection 211(1) which provides: “The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.”

¹³⁷ (Emphasis added). After the enactment of the Interim Constitution, traditional leaders still held hope for a final constitution in which customary law would operate outside of the constitution, despite the fact that CP XIII had been entrenched to the contrary. Furthermore, Nhlapo suggests in his writing at the time that it is possible to read the Constitutional Principles as requiring the entrenchment of customary law in the Constitution, a position which would place customary law beyond the reach of legislation. Nhlapo, above n 117, 52, 61.

¹³⁸ Nhlapo, *ibid* 52 fn 19. In early 1994 the Women’s National Coalition, comprising approximately 90 women’s groups, agreed on a *Women’s Charter* and presented it to the President. The document aimed to influence the drafting of the Final Constitution. The Charter does not call for the abolition of customary law. While Article 9 notes that customary practice often subordinates and excludes women, it merely calls for “Custom, culture and religion ... [to] be subject to the equality clause in the Bill of Rights.” Note, however, that the Rural Women’s Movement did call for the total abolition of customary courts.

¹³⁹ This process provided an opportunity for minority parties and individuals to challenge certain provisions that they had reluctantly agreed to in order to meet the drafting deadline, or, in the case of the Inkatha Freedom Party, to which they had not agreed to at all.

¹⁴⁰ The objectors to Chapter 12 also included the Traditional Authorities Research Group and Professor A J Kerr. It should be noted that various organisations voiced support for Chapter 12: the Legal Resources Centre, the Centre for Applied Legal Studies and the Community Law Centre at the University of the Western Cape.

¹⁴¹ *Certification of the Constitution of the Republic of South Africa (“Certification Case”)* 1996 (4) SA 744 (CC) [202].

in rural South Africa. They complained that sections 211 and 212 of Chapter 12 failed to comply with CP XIII on three main grounds. First, the sections failed to *protect* the “institution, status and role” of traditional leadership; the sections merely *recognised* it but failed to extend to “protect[ion]”.¹⁴² A second ground related to the recognition of traditional courts. Here the objectors argued that the Final Constitution failed to comply with CP XIII because it did not specifically mention these courts. The third related argument was that the horizontal application of the Bill of Rights would effectively undermine traditional leadership and thus nullify the Constitution’s protection of customary law.

The Court dismissed the first argument, holding that Chapter 12 of the Final Constitution did comply with CP XIII(1), in that the “institution, status and role of traditional leadership” were recognised and protected in the Final Constitution. It identified that CP XIII sought to acknowledge the existence of three elements of traditional African society: traditional leadership, customary law and, at the provincial level, traditional monarchy.¹⁴³ Chapter 12 gave an express guarantee of the continued existence of the first two elements. The Court stressed that without this express guarantee being given to customary law, the principle of equality in CP VI would have led to a presumption against legal pluralism in the constitutional framework.¹⁴⁴ Traditional leadership was guaranteed under section 211(2).¹⁴⁵ The Court argued that the fact that the three elements of traditional African

¹⁴² A related argument was that the words “institution”, “status” and, in particular, “role”, envisage a constitutionally entrenched function. The underlying purpose of CP XIII was to guarantee, not simply enable, a role for traditional forms of government in the constitutional structure: *Certification Case* fn 14[0].

¹⁴³ *Certification Case* [195].

¹⁴⁴ *Ibid* [195].

¹⁴⁵ The Court held that section 212(1) should be read as complementing section 211 rather than diminishing it. On the drafting of section 212 the Court opined: “The CA cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislation deliberation and judicial interpretation.”: [197]. The Court implied that it was not necessary to read section 211(2) in light of section 212(1) in that the reference to “applicable legislation” in section 211(2) did not necessarily relate to section 212: [192]. In response to an argument that a reduction of powers was made in relation to customary law, the Court noted that whereas the power to establish a provincial House of Traditional Leaders had previously been an exclusive provincial power, section 212(2) transformed this into a concurrent power. However, this was a case of a small reduction in provincial power rather than a case of non-compliance with CP XIII(1): [409]. Another argument related to the ability of the national government to set the salaries of traditional leaders at the provincial level. The impact of these two

society are declared to be subject to the Final Constitution highlights the point “that in a constitutional state, no-one exercises power or authority outside of the constitution”.¹⁴⁶ In effect the Court was articulating the concept of constitutionalism, whereby the constitution aims to provide a check on all forms of power. Hence the “one law” referred to in the constitutional slogan is the law of the Constitution.

The Court also dismissed the second argument, pointing out that traditional courts, which numbered about 1500 at the time, were recognised in section 166 of the Final Constitution, subsection (e) of which refers to “any other court established or recognised by an Act of Parliament”.¹⁴⁷ Its response to the third argument, relating to the horizontal application of the Bill of Rights and its effect on customary law, was that the objection concerned not the Final Constitution but the Constitutional Principles, upon which it could not comment.¹⁴⁸ With this, the Court closed down all attempts to alter the position of legal pluralism and customary law in the Final Constitution.

4.3 Pragmatism

The approach to legal pluralism by the drafters of the Interim Constitution appears to have been largely pragmatic. During its struggle against apartheid, the ANC’s policies on traditional leadership were vague and ambivalent.¹⁴⁹ For example, in 1988, the ANC had stated its position on traditional leadership in its Constitutional Guidelines: “The institution of hereditary rules and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution”.¹⁵⁰ These guidelines make it clear that the ANC preferred democracy to traditionalism. However, during the negotiations in 1992-1993, this principle was tested as the ANC back-flipped in order to embrace traditional leaders. Spitz and Chaskalson argue that “[t]his was one area where the ANC and the NP/government were particularly alive to electoral

matters was raised in the Second Certification Case: see *Certification of the Amended Text of the Constitution of The Republic Of South Africa* (“*Certification Case 2*”) 1997 (2) SA 97 [176-8].

¹⁴⁶ Ibid [194].

¹⁴⁷ Ibid [199]. The Court also points to Schedule 6, section 161 which provides: “Every Court, including courts of traditional leaders ... continues to function.”

¹⁴⁸ CP XIII (quoted in full above in the text) set out that customary law would be “subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith”.

¹⁴⁹ Ntsebeza, above n 18, 258.

¹⁵⁰ Principle (c) of the *Constitutional Guidelines for a Democratic South Africa* (1989) 5 *South African Journal on Human Rights* 129, 130.

considerations.”¹⁵¹ Once it became plain to the two parties that traditional leaders might still possess the power to sway a large part of the population, the parties began to include them in negotiations in order to broaden their support base. In particular, in 1992 the ANC was intent on preventing the leader of the Inkatha Freedom Party, Chief Buthelezi, from manipulating traditional leaders so as to stall or undermine the negotiations. Hence, from mid 1992, it campaigned for the inclusion of traditional leaders in all levels of government.¹⁵² However, many members of the ANC only really envisaged traditional leaders as performing ceremonial and advisory roles. This is shown in the policy guidelines formulated by the ANC in 1992:

The institution of chieftainship has played an important role in the history of our country and chiefs will continue to *play an important role in unifying our people and performing ceremonial and other functions* allocated to them by law. The powers of chiefs shall always be exercised subject to the provisions of the constitution and other laws. Provision will be made for an appropriate structure consisting of traditional leaders to be created by law, *in order to advise parliament* – on matters relevant to customary law and other matters relating to the powers and functions of chiefs.¹⁵³

In terms of rural governance members of the ANC believed that traditional leaders would play a subordinate role to that of elected representatives and would not have the power to control the allocation of land in rural areas as they did in the days of apartheid.¹⁵⁴ Both the ANC and National Party wanted to make a deal with the traditional leaders but there were deep divisions within each party as to the acceptable cost of such a deal.¹⁵⁵ Traditional leaders rejected the ANC’s view that their functions would be limited to ceremonial and advisory roles. For the ANC, the cost flowing from the negotiations of the 1993 Interim Constitution was the compromise to the principle of democracy at the local level as

¹⁵¹ Spitz and Chaskalson, above n 46, 380.

¹⁵² Tshidiso Maloka and David Gordon, “Chieftainship, Civil Society, and the Political Transition in South Africa” (1996) 22 *Critical Sociology* 37, 45.

¹⁵³ Quoted in Ntsebeza, above n 18, 266 (emphasis added).

¹⁵⁴ Ntsebeza, above n 18, 267.

¹⁵⁵ Spitz and Chaskalson, above n 46, 381.

traditional leaders were effectively guaranteed *ex officio* membership of local government. Meanwhile, the principle of gender equality was left intact as a result of lobbying by women’s groups, particularly within the ANC.

As the ANC consolidated its domination of the sphere of parliamentary politics, it was concerned to prevent power bases outside this sphere from developing and flourishing.¹⁵⁶ Given that the ANC had used legal pluralism in the past in order to encourage resistance to the state and its legal system, it presumably understood the potential of deep legal pluralism to divide and fragment the state and make it ungovernable if legal pluralism went unchecked and unsupervised by the state. Thus it was considered safer to bring traditional leaders within the constitutional framework, under state control, than to have them outside fomenting resistance to state power, even at the cost of compromising democracy.¹⁵⁷

Despite this, the drafters of the Final Constitution recognised traditional leadership as a non-democratic institution. An effort was therefore made to wind back and limit the scope of these powers by using vague and discretionary language in Chapter 12 so as to lessen the damage wrought by the Interim Constitution in compromising democracy. Traditional leaders used all means to block these limits by lobbying the Constitutional Assembly, boycotting local government elections, protesting on the streets¹⁵⁸ and submitting objections to the Constitutional Court. However, in the end, traditional leaders managed to retain much of their power. First, they succeeded in winning a role at the local level,¹⁵⁹

¹⁵⁶ MacKinnon, above n 40, 282.

¹⁵⁷ In addition, the ANC no doubt realised the potential of traditional leaders to be key players in addressing law enforcement problems in rural areas. Crime reached a peak during the drafting of the Interim Constitution and crime rates continued to soar after the 1994 election: Ted Leggett, “Just Another Miracle: A Decade of Crime and Justice in Democratic South Africa” (2005) 74/3 *Social Research* 581, 583.

¹⁵⁸ In late 1995, some traditional leaders from both the ANC and the Inkatha Freedom Party protested in Pretoria on the grounds that they were not adequately represented despite the broad public participation programme: Klug, above n 1, 151. In 1995, traditional leaders threatened to boycott the local government elections.

¹⁵⁹ Tom Bennett and Christina Murray point out that section 212(2) refers to “local level” rather than the “local sphere of government” or “local government”, which technically means that traditional leaders do not have a constitutionally guaranteed role in local government. They argue that the position of Chapter 12, separated from other chapters dealing with the main institutions of government, implies that the role of traditional leadership may not be governmental. Despite this, a framework of national and provincial laws is setting up traditional leaders as organs of state with governmental responsibilities: “Traditional Leaders” in Stuart Woolman and Theunis Roux (eds), *Constitutional Law of South Africa* (2005) 26-20, 26-25.

despite the fact that they are unelected and hence unaccountable. Second, they retained their role in presiding over customary law courts, subject to the Constitution’s rights protections, without people being given the choice of accessing the court system of their preference by opting in or out of customary law in communities where traditional leaders still function. While this thesis focuses on customary law and not on local government, scholars of traditional leadership have argued that traditional leaders derive most of their authority from their position at the local level of government and specifically, their control of the land allocation process.¹⁶⁰ This not only puts traditional leaders into conflict with elected councillors at the local level but it also places pressure on people in rural areas to obey the decisions of traditional leaders relating to customary law. Moreover, the dual function of traditional leaders raises separation of powers issues, which are examined in the following chapter.

Overall, debate on the constitutional role of customary law and legal pluralism in South Africa was largely sidelined in both the negotiations and constitution-drafting process because attention was focused on the future role of traditional leaders. The ANC gave customary law little consideration and, in this respect, traditional leaders were mainly interested in the issue of the principle of male primogeniture, which later became a constitutional issue, as explained in the following chapter. Tom Bennett argues that the ANC had no intention of suppressing customary law,¹⁶¹ but it is noteworthy that the ANC did not mention the role of customary law in any of its bills of rights preceding the

¹⁶⁰ Ntsebeza, above n 18, 22. The system of communal land tenure in rural areas is currently being reformed. See the *Traditional Leadership and Governance Framework Act 41 of 2003* (TLGFA) and the *Communal Land Rights Act 11 of 2004* (CLRA), which is currently under constitutional review. The TLGFA deems existing traditional authorities to be traditional councils, subject to composition requirements, while the CLRA recognises traditional councils as land administration committees with the power to represent a community owning communal land. Only 40 per cent of the membership of these councils are elected while 30 per cent of the membership is reserved for women. For a critical analysis of the impact of these land reforms on power and gender relations, see Anninka Claasens and Sizani Ngubane “Women, Land and Power: The Impact of the Communal Land Rights Act” in Anninka Claasens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (2008) 154. See also section 10(2)(i) of the Traditional Courts Bill 2008 which effectively enables a customary court to deprive a person of their land rights.

¹⁶¹ Bennett, above n 115, 21.

constitution, such as the 1955 *Freedom Charter*, and did not initially include it as a point of discussion during the negotiations.¹⁶²

Penelope Andrews suggests a number of reasons as to why the ANC may have initially overlooked the issue of customary law. First, she asserts that the ANC was mainly dominated by urban elites who often neglected the concerns of rural communities.¹⁶³ Its ally, the United Democratic Front, was urban-oriented and poorly organised in rural areas.¹⁶⁴ Second, traditional leaders were often seen as “puppets of the apartheid government” because of the way in which they had been manipulated to serve the apartheid administration.¹⁶⁵ Third, much of the solidarity among black South Africans had been undermined by apartheid policies of separate development, which tended to exaggerate cultural and ethnic differences.¹⁶⁶ To these three reasons, two factors can be added. The first is that the ANC desired to bring unity to a nation of highly diverse ethnicities, dubbed a “rainbow nation”, and may have believed that customary law would bring division between various ethnic groups and cultures. For example, the Inkatha Freedom Party was endeavouring to divide the nation by playing on the link between custom and ethnicity; the ANC countered this by attempting to redefine custom and traditional leadership through emphasising their African and nationalist character.¹⁶⁷ The second additional factor is the fact that the recognition of customary law may be seen as the continuation of apartheid, as well as the segregationist politics and racism that underpinned the preservation of customary law in that system. As explored in the following chapter, the critical question here is, what law was it that the drafters were intending to recognise as customary law – was it the apartheid and colonial version of customary law or the law being practised by communities?

¹⁶² As above. See, eg, Constitutional Committee of the ANC, *A Bill of Rights for a Democratic South Africa: Working Draft for Consultation* (reprinted) [1990] *Monitor* 64.

¹⁶³ Penelope Andrews, “The Stepchild of National Liberation: Women and Rights in the New South Africa” in Penelope Andrews and Stephen Ellmann (eds), *Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Laws* (2001) 333.

¹⁶⁴ Ntsebeza, above n 18, 260. Ntsebeza describes the UDF as “largely regarded as an internal above ground wing of the then banned ANC”: *ibid.*

¹⁶⁵ Penelope Andrews, “Women’s Rights and Traditional Law: A Conflict” (1994-1995) 9 *Third World Studies* viii, xi.

¹⁶⁶ Andrews, above n 163, 333.

¹⁶⁷ Oomen, above n 42, 92-93.

It is doubtful that the ANC promoted the constitutional entrenchment of customary law solely as a means of affirming the legitimacy of customary law. It appears to have been a vehicle to establish the legitimacy of the ANC, the Constitution and state governance among rural inhabitants. The ANC assumed traditional leaders enjoyed high popular legitimacy in rural areas despite the fact that there was ongoing conflict in many areas between traditional leaders and grass roots organisations.¹⁶⁸ On the related topic of community justice, a 1995 memorandum to the Constitutional Assembly illustrates the logic being used by some of the Assembly’s advisors. It points out that “recognition [of community justice mechanisms] will provide the state with a certain amount of legitimacy, which is needed in this crucial period of transformation if the rule of law is to prevail.”¹⁶⁹ This memorandum shows that at least some advisors understood the critical nexus between legal pluralism and the rule of law, in that law operating outside the state has the potential to undermine the state and its attempt to centralise power. However, on the whole, the drafters of the Final Constitution gave little consideration to the relationship between the rule of law and legal pluralism. In particular, there is no evidence that they understood the challenge of fitting customary courts within a constitutional rule-of-law framework which emphasises equal justice, separation of powers and “independent and impartial” forums.

The end result of South Africa’s constitutional negotiations was that constitutional recognition was given to legal pluralism: section 211(3) of the Final Constitution gives equal status to customary law and the common law by stating that the courts “must” apply customary law where it is applicable. Officially, neither system is inferior or superior: in line with the rule of law, both are equally subject to the ‘one law’, the Constitution and its Bill of Rights. The constitutional dispensation transformed legal pluralism by elevating customary law and by requiring that it conform to the Bill of Rights. It did not fully

¹⁶⁸ Ntsebeza, above n 18, 274. Ntsebeza argues that traditional leaders “were unpopular and/or feared” in many areas and that the ANC failed to understand the realities on the ground: 294-295. See also, Oomen, above n 42, 60, 98, 44. Oomen points out that in 1994 the South African National Civics Organisation had the constituency and political clout to compete with CONTRALESA but it lost traction because CONTRALESA was more adept and experienced in participating in official politics and international NGOs were keen to support traditional leadership: 99.

¹⁶⁹ The memo continues: “The question of state recognition at this stage means the possibility of gaining legitimacy at the bottom of the social structure. But fundamentally, this process will facilitate the consolidation of the rule of law.” Memorandum addressed to “Members of the Theme Committee #5 of the Constitutional Assembly” from Fikile Kobese, Martin Monyela and Daniel Nina, Re Community Courts, 9 February 1995, 2 (on file with author).

transform the position of traditional leaders, as they resisted attempts to curtail the powers they enjoyed under apartheid. However, when presiding in customary courts, traditional leaders are constitutionally bound to promote the “spirit, purport and objects of the Bill of Rights”.¹⁷⁰ The following chapter examines the extent to which this can be observed.

5. Conclusion

The main players in South Africa’s constitutional negotiations gave little consideration to the practical relationship between the rule of law and legal pluralism within the new constitutional framework. They looked to both the international level and the local level in order to shore up the legitimacy of the state and its new legal order. The rule of law provided a signal to the international community while the negotiation of legal pluralism appeased traditional leaders, at least in the short term, and attempted to forge a connection between the Constitution and the very large part of the population that apparently lives under customary law. However, the rule of law is a concept with a close association with common law principles in South Africa’s legal system while legal pluralism remains tied to the political pressures exerted by traditional leaders in the post-conflict context. The following chapter explores the complexity of the practical relationship between the rule of law and legal pluralism. Its window into this relationship is provided by the approaches taken by the courts, the Law Commission as well as the Traditional Courts Bill 2008.

¹⁷⁰ See section 39 of the Final Constitution as well as the horizontality clause, section 8(2), which applies to traditional leaders as “organs of state”.

Chapter 5. Legal Pluralism, the Rule of Law and “the Most Vulnerable Groups” in South African Society

1. Introduction

According to some commentators, South Africa’s constitutional dispensation has led to a “patchwork democracy” because the dynamics of legal pluralism have allowed democracy to be compromised at the local level.¹ This chapter examines whether the dispensation has also produced a ‘patchwork rule of law’ in South Africa. It explores how institutions in South Africa’s new legal order understand the relationship between the rule of law and legal pluralism.

This chapter begins by considering the nexus between the rule of law and legal pluralism in relation to deep legal pluralism, where non-state justice operates without any legal authorization from, or recognition by, state justice. It highlights the readiness of state courts to explicitly invoke the rule of law as a dominant norm in this context. In Sections Three and Four the focus is turned to the dynamics of state law pluralism and the new order’s attempt to give equal status to customary law and common law within the constitutional framework. It analyses four cases emanating from different levels of the court system that illuminate the nature of the relationship between the rule of law and legal pluralism in South Africa’s new legal order. At first sight it appears that the rule of law is not registering on the radar of these courts but a closer look reveals that the concept is forced to play a muted role in relation to state law pluralism because of its close association with common law principles and its Western roots.² This approach has been affirmed by the Traditional Courts Bill 2008. The practical effect of this approach on women and children, described by the Constitutional Court as the state’s most vulnerable groups,³ is outlined and the chapter concludes by comparing the protection afforded to these groups by the rule of law and legal pluralism.

¹ See, eg, Barbara Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005); Lungisile Ntsebeza, *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2006).

² This close association with common law principles and the Western roots of the rule of law are shown in the previous chapters.

³ *Bhe and Others v The Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) [32].

Overall, this chapter argues that South Africa’s top legal institutions are insulating legal pluralism from various constitutional principles relating to the rule of law as a means of elevating and showing respect to the concept of legal pluralism. To a certain extent, this mirrors and furthers the attempts made by traditional leaders during the constitutional negotiations to have customary law insulated from the Bill of Rights. Thus the rule of law is being compromised in order to uphold and protect legal pluralism, to provide greater access to justice, and to appease traditional leaders and their support base.

2. The Rule of Law, Legal Pluralism and Access to Justice

Access to government services and all parts of government including justice is a strong theme of the Final Constitution.⁴ As Chapter 4 noted, the Constitutional Court has interpreted section 34 and the rule of law as guaranteeing “the right of access to court” and as requiring the state to provide mechanisms for dispute resolution including a legislative framework, mechanisms and institutions such as courts, and infrastructure to facilitate the execution of court orders.⁵ This section briefly examines the background to section 34 in order to sketch the relationship between the rule of law and the two main forms of legal pluralism, deep legal pluralism and state law pluralism. It then outlines the approach proposed by the South African Law Reform Commission (“Law Commission”) to address the dynamics of these two forms of legal pluralism.

Section 34 provides: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. Apart from creating a right to access to a court or another tribunal or forum, section 34 requires tribunals and forums other than courts to be “independent and impartial” when they resolve civil disputes and it guarantees due process in that disputes must be resolved by fair and public hearings.⁶ The provision effectively directs all disputes to be resolved by the state, indicating the state’s ambition to

⁴ Fifteen provisions in the Final Constitution guarantee access to government services, national resources and to the arms of government. Six of these provisions are found in Chapter 2, the Bill of Rights.

⁵ See *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) [41]; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), discussed in Chapter 4 at n 85ff.

⁶ ‘Due process’ is the term used in Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (5th ed, 2005) 704.

monopolise dispute resolution, and to counter the phenomenon of ‘self-help’, which was fostered by resistance forces during apartheid. In the following paragraph from *S v Makwayane*⁷ the Constitutional Court commented on ‘self-help’ as a problem in relation to the ‘constitutional state’, a German notion of an aspect of the rule of law, mentioned in the preamble to the Interim Constitution:

[I]n a constitutional State individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the State, in the constitutional State compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. This is not a fanciful possibility in South Africa.⁸

One of the most serious problems facing South Africa in its endeavour to become a ‘constitutional state’ is that it does not have a monopoly over dispute resolution and presently does not have the capacity to establish such a monopoly. Inadequate access to state justice means that individuals and communities have not ‘abandoned their right to self help’; the problem is most acute in rural areas without traditional leaders⁹ and urban communities such as black townships and informal settlements.

The Law Commission has described the wide range of non-state justice forums operating in South Africa as “diverse, fragmentary and tentative”.¹⁰ These include customary courts other than those recognised by the state, urban forums in townships and informal settlements, and religious courts. In the sphere of customary law, ward heads generally run non-state recognised courts in rural areas; in 2006 there were approximately 12 000 such

⁷ 1995 (3) SA 391 (CC).

⁸ Ibid [168].

⁹ Three of the nine provinces do not have traditional leaders, namely the Western Cape, Gauteng and the Northern Cape.

¹⁰ South African Law Commission [hereafter SALC], *Community Dispute Resolution Structures*, Discussion Paper No 87 Project 94 (1999) [3.3.4.5]. Note that in 2002 the SALC’s name changed to the South African Law Reform Commission but to avoid confusion I will refer to it throughout as the SALC.

courts in South Africa¹¹ operating as courts of first instance before the dispute is referred to the state-recognised courts of traditional leaders, known as customary courts.¹² In urban areas, in townships and informal settlements where there are few traditional leaders, community dispute resolution forums operate in the form of street committees, yard, block or area committees.¹³

These dispute resolution mechanisms employ non-state law, often referred to as ‘people’s law’,¹⁴ and are examples of self-help, which the Constitutional Court has held to contravene the rule of law and section 34 of the Final Constitution.¹⁵ Currently all these non-state justice structures operate beyond the reaches of state control in the form of deep legal pluralism. As mentioned in Chapter 3, the prevalence of deep legal pluralism, sometimes in the form of ‘mob justice’, can be partly explained by the resistance strategy of undermining the apartheid state and its legal apparatus. The problem with deep legal pluralism is that there are no state controls on the quality of the justice meted out and no mechanisms to ensure conformity to constitutional guarantees. Hence, in the context of the prohibition of self-help and the right of access to state courts, the courts are willing to embrace the rule of law as a dominant and determinative norm.

The Law Commission has suggested that there is another, deeper reason for the prevalence of deep legal pluralism in South Africa. In 1997, the year that the Final Constitution came

¹¹ DS Koyana et al, “Traditional Authority Courts” in J C Bekker, Christa Rautenbach and N M I Goolam (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) 131, 137. Customary courts are estimated to number around 1500: see Chapter 4 at n 147.

¹² The term ‘customary court’ will be used in this thesis to refer to state courts presided over by traditional leaders.

¹³ See Wilfried Scharf and Daniel Nina (eds), *The Other Law: Non-State Ordering in South Africa* (2001). During apartheid, these forums were mostly used as a stop-gap to the problem of crime while some were used as a form of resistance to the state. Quality was not always assured: in the mid 1980s, ‘kangaroo-type courts’ (sometimes known as “people’s courts”) emerged, involving reports of mob justice and brutal punishments. These courts brought discredit to unofficial community justice structures generally. While non-state urban courts are not customary courts, they are informed partly by African customary law and sometimes use aspects of customary law such as shaming and community censure.

¹⁴ On people’s courts, see Sandra Burman and Wilfried Scharf, “Creating People’s Justice: Street Committees and People’s Courts in a South African City” (1990) *Law and Society Review* 693; Jeremy Seekings, “Social Ordering and Control in the African Townships of South Africa: An Historical Overview of Extra-State Initiatives from the 1940s to the 1990s” in Wilfried Scharf and Daniel Nina (eds), *The Other Law: Non-State Ordering in South Africa* (2001) Ch 4.

¹⁵ See *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC): see discussion in Chapter 4 at n 85ff.

into force, it diagnosed South Africa’s legal system as suffering from a “legitimacy crisis” and stated: “The essence of the legitimacy crisis lies in the historical superimposition of a foreign legal system with its concomitant Western jural postulates upon those of Africa.”¹⁶ The Law Commission believed that black South Africans perceive the formal legal system as illegitimate, repressive and prohibitively expensive.¹⁷ It explained:

For many, a foreign, dominant Western legal system, is seen to be superimposed on an intuitive, indigenous legal system. It is seen as alien, inaccessible and inappropriate for dealing with conflict which most South Africans experience in their daily lives. This invariably prevents meaningful access to court ... Many Black communities have actively rejected this system which has been seen as intricately linked in their oppression.¹⁸

According to the Law Commission, the problem is that the formal legal system was created to suit the needs of only one part of the population, the white minority. The Law Commission observed that Western dispute settlement procedures based on “retributive justice” are regarded as “not suited to solve legal problems as well as problems of social adjustment encountered by urban blacks”.¹⁹ In contrast, informal law is related to “restorative justice” as it attempts to promote reconciliation between parties and promote community values.²⁰ Thus, using the retributive/restorative justice dichotomy, the Law Commission reasoned that many South Africans have preferred the path of ‘self-help’ to formal state justice because the former is better adjusted to their needs than the latter.

As a state institution, the Law Commission has predictably proposed state law pluralism as a solution to the problem of ‘self-help’. In a series of discussion papers and reports, the Law Commission has recommended means by which state law pluralism can be

¹⁶ SALC, *Simplification of Criminal Procedure (Access to the Criminal Justice System)* Issue Paper 6 Project 73 (1997) [2.3-2.4] (emphasis added).

¹⁷ SALC, *Community Dispute Resolution Structures* Discussion Paper No 87 Project 94 (1999) [1.2.1].

¹⁸ Ibid.

¹⁹ SALC, *Simplification of Criminal Procedure (Access to the Criminal Justice System)*, Issue Paper 6 Project 73 (1997) 6.

²⁰ SALC, *Community Dispute Resolution Structures*, Discussion Paper No 87 Project 94 (1999) [1.2.5]. Note that CONTRALESA submitted to the Law Commission that customary courts apply a form of restorative justice: [3.3.1.11].

transformed from a colonial²¹ and apartheid concept based on racialised inequality into one that promotes equality and serves the interests and needs of the majority of the population in accessing state justice.

The Law Commission has made proposals on two sets of projects on legal pluralism. One set is focussed on dispute resolution mechanisms and their procedures: (1) the establishment and recognition of community courts by the state so as to “meet the needs” of urban communities that suffer minimal access to state justice,²² and; (2) the transformation of customary courts so as to meet the needs of rural communities. The former are beyond the scope of this thesis. In regard to the latter, part of the customary courts project has been to propose changes to their current operation so that they conform to the constitutional framework. A second set of projects is focussed on the substance of customary law and on ‘harmonising’ customary law with the common law so that there is little substantial divergence resulting in the application of either system. The harmonisation project does not aim to unify the common law and customary law into a single system applicable to all, as this might take place at the expense of customary law. Instead, it is based on the continuing operation of customary courts.

In these two Law Commission projects to transform legal pluralism, the rule of law has received little consideration, perhaps because the concept is seen as a common law principle and to represent the dominant Western legal system.²³ As we see in the following sections, all of South Africa’s leading legal institutions, the National Parliament as well as state courts and the Law Commission, are reluctant to invoke the rule of law as a yardstick for aspects of state law pluralism.

3. The Rule of Law and Customary Courts

The post-apartheid state inherited a complex structure of courts and legislation. More than a decade after the end of apartheid, customary courts continued to derive their power from

²¹ According to van Niekerk, state law pluralism dates back to 1806 during the second British occupation of the Cape. In 1927, the *Black Administration Act* consolidated the diverse colonial legislation on customary law and entrenched state law pluralism for the country as a whole: Gardiol J van Niekerk, “Legal Pluralism” in J C Bekker, Christa Rautenbach and N M I Goolam (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) 3, 7.

²² See, eg, SALC, *Community Dispute Resolution Structures* Discussion Paper 87 Project 94 (1999).

²³ See Part 3.3 of Chapter 4 regarding the perception of the rule of law as a common law principle.

the *Black Administration Act 38 of 1927*. Under the *Act* the Minister had the power to authorise a traditional leader to hear civil claims between ‘Blacks’ and to try more minor criminal matters where the accused is ‘Black’.²⁴ The relevant provisions of the *Black Administration Act* are soon to be repealed²⁵ and customary courts are to be regulated by the Traditional Courts Bill 2008, once enacted,²⁶ which makes no mention of race as a basis of the jurisdiction of customary courts.

In the new legal order, customary courts occupy an awkward position. On the one hand the rule of law means that all courts need to fit within the state’s court hierarchy so that they are aligned with constitutional values and can be properly supervised. On the other hand, respect for legal pluralism means that the state must take care to respect the dignity of customary courts and not subject customary courts to common law principles, as this would undermine the equal status that both forms of law enjoy under the Final Constitution. In order to illuminate the balancing of the relationship between the rule of law and legal pluralism, the following section examines the operation of customary courts in relation to three areas: their position within the state court hierarchy and their general compliance with the constitutional order; their level of independence and separation of powers, and; their role in delivering ‘equal justice’.

²⁴ Sections 12(1) and 20 of the *Black Administration Act 38 of 1927*. Section 35 defined “Black” to “include any person who is a member of any aboriginal race or tribe of Africa”. Schedule 3 to the *Black Administration Act* limited the criminal jurisdiction of customary courts to minor matters. According to Oomen, there is no such thing as a typical customary court in South Africa: Oomen, above n 1, 202.

²⁵ The *Black Administration Act* has been deemed to be unconstitutional and hence is to be repealed in stages by the *Repeal of the Black Administration Act and Amendment of Certain Laws Act No 28 of 2005*.

²⁶ The Traditional Courts Bill 2008 is intended to regulate the continued functioning of customary courts upon the repeal of the *Black Administration Act*. It was drafted mainly in consultation with traditional leaders. In mid 2008 the Portfolio Committee on Justice and Constitutional Development postponed the adoption of the Bill after public hearings in May 2008 led to calls for further consultation. Concerns about the Bill have been expressed on a number of grounds including gender equality. According to the *Memorandum on the Objects of the Traditional Courts Bill*, the South African Human Rights Commission and the Commission on Gender Equality do not support the policy thrust of the Bill (see [3.2]-[3.3]). The legislation may need to be passed by the National Council of Provinces (NCOP), as customary law is a matter of concurrent national and provincial legislative competence under section 76 of the Constitution and Schedule 4. This process involving NCOP is generally a lengthy one and hence the repeal of the *Black Administration Act* has been delayed.

3.1 Supervision, Appeals and Compliance of Customary Courts

Appeals from customary courts are heard by Magistrates’ Courts, although such appeals appear to be very infrequent.²⁷ Given that customary courts are not courts of record,²⁸ these appeals are generally heard *de novo*.²⁹ For the Law Commission, the problem lies in the fact that magistrates generally have little training in customary law and thus they “are likely to reinterpret customary law in a way that undermines the whole system of customary justice”.³⁰ To remedy this, the Law Commission proposed the establishment of a ‘Customary Court of Appeal’ to hear all appeals³¹ but this has not been included in the Traditional Courts Bill 2008, which shows that the government does not share the Law Commission’s concerns in this regard.

Customary courts currently operate without any supervision.³² The Law Commission recommended that the position of a Registrar or a Commissioner be established to supervise customary courts so that supervision comes from within the realm of customary law and customary courts be shielded from the common law world of Magistrates’ Courts.³³ It stated that the aim of the appointment of a Registrar or Commissioner would be to:

²⁷ No statistics are available but Oomen relates that between 1994-1999, the Sekhukhune Magistrates’ Court registered only six appeals from customary courts. Furthermore, when some matters are taken directly to this court, the magistrate frequently sends them to be dealt with at first by the customary court despite the fact that plaintiffs have a choice of court: Oomen, above n 1, 205.

²⁸ The Law Commission has expressed the general view that “customary courts are not equipped and are not likely to be equipped, both in material and human resources terms” to be courts of records: SALC, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90 (2003) [4.5]. Instead it has recommended that customary courts make more detailed records of hearings: Recommendation 7, xiii.

²⁹ Note that parties are not permitted to change their cause of action: Tom W Bennett, *Customary Law in South Africa* (2004) 148. See also, Koyana, above n 11, 139-140.

³⁰ SALC, *Report on Traditional Courts and the Judicial Function of Traditional Leaders* Project 90 (2003) 33.

³¹ Alternatively the SALC proposed that this new court would hear only civil appeals, with the next tier being the High Court, or, for criminal matters, the Magistrates’ Courts: *Report on Traditional Courts and the Judicial Function of Traditional Leaders* Project 90 (2003) 33.

³² Under the *Black Administration Act* Magistrates Courts do not appear to have the power of supervising ‘customary courts’. They are unable to guide or monitor them without the commencement of an appeal by a party: Bennett, above n 29, 147.

³³ SALC, *Report on Traditional Courts and the Judicial Function of Traditional Leaders* Project 90 (2003) 32.

insulate customary law and its adjudicatory procedures from encroachment by the common law through too much association with magistrates’ courts. The commission would *preserve a strictly customary universe*, sufficient unto itself until human rights and constitutional considerations compelled referring out of a matter to the general law system.³⁴

Here we see the Law Commission attempting to protect legal pluralism while simultaneously suggesting the introduction of greater uniformity in the manner in which customary courts are regulated on a national level, a concern of the rule of law.³⁵ Once again it appears that this proposal has not been accepted by the government, which has instead given Magistrates’ Courts the power of procedural review.³⁶

The failure of customary courts to comply with state regulations has also been of some concern to the state’s legal institutions. For example, in 1999, the Law Commission noted that any attempt to change the powers of these courts and to circumscribe their criminal jurisdiction “is unlikely to meet with compliance”.³⁷ One reason for this non-compliance lies in the fact that customary law, by its nature, does not distinguish precisely between civil and criminal matters,³⁸ and to require precise compliance in this regard would be to force customary law into the prism of the common law, which makes this distinction. Under the Traditional Courts Bill 2008 non-compliance is a concern because the draft legislation sharply limits the criminal jurisdiction of customary courts.³⁹

³⁴ Ibid 30 (emphasis added).

³⁵ The Report quoted with approval the view of R B Mqoke who suggests in regards to this last aspect that: “Such an office would also strive for *uniformity* on such crucial issues as jurisdiction, the imposition of appropriate sentence... .” This emphasis on uniformity indicates that the Law Commission has some desire to balance rule of law concerns with the preservation and maintenance of legal pluralism: *ibid* 9 (emphasis added).

³⁶ Section 14 of the Traditional Courts Bill 2008.

³⁷ SALC, *Report on Conflicts of Law* Project 90 (1999) [3.17].

³⁸ *Ibid*. See also, Koyana, above n 11, 137, 144.

³⁹ Schedule 1 of the Act limits the jurisdiction to theft, malicious injury to property, *crimen injuria* and assault excluding grievous bodily harm. This list excludes domestic violence. Anecdotally, some scholars observe that in some remote regions, customary courts have been hearing all criminal matters including rape and attempted murder.

Non-compliance stems from some practical realities. For example, most traditional leaders have no training in the implications of the Constitution,⁴⁰ thus, in the day-to-day operation of customary courts, compliance with constitutional principles, if any, is presumably sketchy. The Traditional Courts Bill 2008 requires all traditional leaders who preside over customary courts to attend training but it does not specify the nature of this training.⁴¹ However, attempts by Parliament to structure and regulate customary courts are, according to Bekker, “paper law. It is really much ado about nothing.”⁴² His point is that despite the fact that there are state regulations⁴³ governing the structure, jurisdiction and general operation of these courts, “[f]ew chiefs know about these rules,”⁴⁴ and if they do, they do not work by them.⁴⁵ For example, the requirement of a written record of the case⁴⁶ to be prepared and sent to the local magistrate has in practice been almost meaningless, as it was not clear whether the Magistrates’ Court had review jurisdiction⁴⁷ and there was no supervision as to whether all cases were recorded. Moreover, the records that are made are reportedly “barely intelligible” and rarely filed.⁴⁸

In some instances there may be cultural reasons for non-compliance, in that traditional leaders find it difficult to comply with state law where the norms of their communities greatly diverge from state norms. For example, under Schedule 3 to the *Black Administration Act*, customary courts are prohibited from hearing cases of “pretended witchcraft”.⁴⁹ The *Witchcraft Suppression Act 3 of 1957* makes it a criminal offence for a

⁴⁰ Traditional authorities come under provincial administration which, according to Bekker, has neither the means nor the will to provide such training: J C Bekker, “Administration of Justice by Traditional Leaders in Post-Apartheid South Africa” (2002) 16 *Speculum Juris* 240, 241. Under the Traditional Courts Bill 2008, this training will be the responsibility of the National administration.

⁴¹ Section 4 of the Traditional Leaders Bill 2008 requires all traditional leaders who have been designated as presiding officers of customary courts to attend training programmes. Failure to attend within a certain time period can lead to suspension or revocation of their designation.

⁴² Bekker, above n 40, 243.

⁴³ See Chiefs’ and Headmen’s Civil Courts: Rules R2082 of 1967. For a useful compendium of rules relating to customary courts, see Francois De Villiers, *Selected South African Legislation on Customary Law and Traditional Authorities* (1998).

⁴⁴ Bekker, above n 40, 242.

⁴⁵ Ibid 241.

⁴⁶ Rule 6 of the Chiefs’ and Headmen’s Civil Courts: Rules R2082 of 1967.

⁴⁷ There is some uncertainty as to whether Magistrates’ Courts have review jurisdiction: Bennett, above n 29, 147.

⁴⁸ C R M Dlamini, *The Role of Chiefs in the Administration of Justice in Kwazulu* (D Phil Thesis, University of Pretoria 1983); Oomen, above n 1, 206.

⁴⁹ See the Third Schedule to the *Black Administration Act*.

person to impute witchcraft to another; these, and similar, offences can be heard only by Magistrates’ Courts and other formal courts. However, given the strong level of belief in witchcraft prevailing in many rural communities in South Africa, in practice customary courts often resolve disputes relating to witchcraft so as to keep the peace.⁵⁰ It is in relation to witchcraft that we see a clash between the Western legal paradigm, which is based on a liberal rational discourse, and the customary law paradigm, which accommodates belief in the supernatural and the power of ancestors.

In regard to compliance with state law, then, the rule of state law is largely absent in the sphere of customary courts. Customary courts operate at the interface between state law pluralism and deep legal pluralism and the new attempt to regulate customary courts through the Traditional Courts Bill 2008 may end up as nothing more than “paper law”.

The following subsections seek to outline some reasons why, and instances when, the courts, the Law Commission and even Parliament are prepared to compromise the rule of law so as to accommodate legal pluralism.

3.2 The Independence and Impartiality of Customary Courts and the Principle of Separation of Powers

It has generally been held that customary courts enjoy constitutional recognition because they qualify as a court under section 166(e) of the Final Constitution.⁵¹ Inclusion in this list means that they must conform to strict standards of independence and impartiality

⁵⁰ This state of affairs is confirmed in the 1996 *Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province*. Where local disputes remain unmediated, they can escalate into killings; indeed witchcraft killings in rural areas where police presence is thin account for a significant number of murders ever year. The Report illuminates a schism between traditional courts and other state courts in that: “[t]raditional courts agree that witches exist, whilst the formal courts say witches do not exist”: 51. The Report states that traditional courts regard the *Witchcraft Suppression Act 3 of 1957* “as a very unjust piece of legislation, because its aim is not to punish witches but those individuals who name others as witches”: 52. This refers to the fact that the Act does not provide a basis upon which witches can be prosecuted but it stipulates the prosecution of those who impute witchcraft on another. Some scholars share this criticism. Hund, for example, argues that: “By criminalizing these traditional remedies on the ground that they were contrary to the British rule of law, ... the seeds of lawlessness were sown.”: John Hund, “African Witchcraft and Western Law – Psychological and Cultural Issues” in Hund (ed), *Witchcraft Violence and the Law in South Africa* (2003) 1, 9.

⁵¹ See Constitutional Court, *Certification of the Constitution of the Republic of South Africa* (“*Certification case*”) 1996 (4) SA 744 (CC) [199] discussed in Chapter 4 at n 139ff; Bennett, above n 29, 127, fn 221.

pursuant to section 165(2).⁵² Customary courts have struggled to establish the standard of independence and impartiality required by section 165(2).

A corollary is that customary courts appear to breach the principle of separation of powers that is impliedly entrenched in the 1996 Final Constitution, much in the same way as the Australian Constitution.⁵³ The principle of separation of powers was explained by the Constitutional Court in the case of *South African Association of Personal Injury Lawyers v Heath*⁵⁴ (“*Heath*”) where the Court held that there “can be no doubt that our Constitution provides for such a separation [of powers], and that laws inconsistent with what the Constitution requires in that regard, are invalid”.⁵⁵ The Constitutional Court made it clear that the Constitution requires a separation between the courts and the two other branches of government. Chaskalson CJ stated that this separation:

must be upheld, otherwise the role of the courts as an independent arbiter of issues ... will be undermined. The Constitution recognises this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of State or other person may interfere with the functioning of the courts and all organs of State, through legislative and other measures, must assist and protect the courts *to ensure their independence, impartiality, dignity, accessibility and effectiveness*.⁵⁶

The concluding clause of this statement places independence and impartiality alongside values that are connected to legal pluralism, namely accessibility and effectiveness. Dignity can arguably relate to courts that are respected either as impartial and independent

⁵² In contrast, if they were recognised as tribunals, they would only need to conform to the requirements of section 34. This section is subject to the limitations clause in the Bill of Rights which allows “significant deviations” from the standards imposed by section 165(2): Currie and de Waal, above n 6, 731.

⁵³ Both constitutional texts are structured so as to provide separate chapters for the three arms of government. See *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) [19] (“*Heath*”). See also, Currie and de Waal, *The New Constitutional and Administrative Law* Vol 1 (2001) 96.

⁵⁴ *Heath*, *ibid*.

⁵⁵ *Ibid* [22].

⁵⁶ *Ibid* [26] (emphasis added).

or as administering customary law and upholding legal pluralism. It indicates that the Constitutional Court believes that these values should be balanced against each other and hence the principle of separation of powers should not be interpreted too rigidly.

The position of customary courts is illustrated by two cases from the Transkei Division Court, *Bangindawo v Head of Nyanda Regional Authority*⁵⁷ (“*Bangindawo*”) and *Mhlekwana and Feni v Head of the Western Tembuland Regional Authority & Anor*⁵⁸ (“*Mhlekwana*”), which were decided before the *Heath case*. They provide a valuable insight into the balancing of legal pluralism and the rule of law in the lower courts. Neither of these cases dealt directly with an appeal from a customary court. In both cases the courts were asked to deal with the constitutional validity of the legislation regulating the Regional Authority Courts (RACs), which are hybrid courts in that they derive some of their simplified procedural aspects from customary courts and some of their other more technical procedural aspects from ‘Western’ courts. In a sense, the RACs are a legislative attempt to assimilate the procedure of customary courts with that observed by Western type courts.⁵⁹ These two judgments make *obiter dicta* on the constitutionality of customary courts and the position of traditional leaders as presiding officers.

In the first case, *Bangindawo*, Madlanga J heard a challenge to the constitutionality of two criminal convictions that had been made pursuant to the *Regional Authorities Courts Act 13 of 1982* (“*RAC Act*”). The applicants argued that provisions of the *RAC Act* violated the constitutional requirement that the judiciary be independent and impartial.⁶⁰ In considering this question, Madlanga J looked at the case of *R v Valente*⁶¹ in the Canadian Supreme Court, and held that, while the case’s test assisted in determining the appropriate standards for courts traditionally of a *Western* origin, common law courts, the same could not be said for other courts such as the RACs which used procedures of customary courts. He asserted:

⁵⁷ 1998 (3) SA 262 (Tk).

⁵⁸ 2001 (1) SA 574 (Tk).

⁵⁹ *Mhlekwana*, *ibid* [629D].

⁶⁰ See section 96(2) of the Interim Constitution.

⁶¹ [1985] 2 SCR 673.

[T]he position is different when it comes to the African customary law setting. There is a danger in a wholesale transplant of a concept suited to one legal system onto another legal system.⁶²

Madlanga J distinguished these other courts on the basis that “African customary law knows of no distinction between the executive, the judicial and the legislative arms of government.”⁶³ Therefore, he found:

no reason whatsoever for the *imposition of the Western conception* of the notions of judicial impartiality and independence in the African customary setting. Any such imposition is very much akin to the subjection of matters African to ‘public policy’.⁶⁴

This last reference to ‘public policy’ is to the repugnancy clause and hence the reference brings in overtones of the colonial project of subordinating African customary law to Western common law. Madlanga J proceeded to hold that the impartiality of presiding officers is satisfied in the RACs, and in customary courts,⁶⁵ because the adherents of African customary law believe in the impartiality of their traditional leaders when they exercise their traditional authority.⁶⁶ He stated: “The imposition of anything contrary to this outlook *would strike at the very heart of the African customary legal system*, especially the judicial facet thereof.”⁶⁷ Madlanga J based this reasoning on two provisions of the Interim Constitution, section 31 which guaranteed the right to culture⁶⁸ and section 181(1) that gave constitutional recognition to legal pluralism.

The reasoning in Madlanga J’s judgment is guided by legal pluralism. For example, his interpretation of what standard is required by the Constitution in relation to judicial impartiality and independence is coloured by legal pluralism and the need to elevate African customary law to a status equal to the common law. In the Appeal Court decision

⁶² 1998 (3) SA 262 (Tk) [272B].

⁶³ Ibid [272B].

⁶⁴ Ibid [273B-C] (emphasis added).

⁶⁵ Ibid [274] Madlanga J asserts that his comments relate more to the courts of chiefs and kings than to the RACs.

⁶⁶ Ibid [273B].

⁶⁷ Ibid [273D].

⁶⁸ Section 31 of the Interim Constitution.

of *Mhlekw*, which followed *Bangindawo*, the Court opined that because Madlanga J accepted that RACs do not have the independence required by the Interim Constitution, he must not have considered the level of independence required by the Constitution.⁶⁹ However, this reading seems to overlook the fact that Madlanga J did look at the Interim Constitution’s requirements but was guided on this point by sections 31 and 181.

In *Mhlekw* the Appeal Court considered the same legislation and many of the same questions but here it was determining a civil case in light of the Final Constitution and it was bound by the Constitutional Court’s decision in *De Lange v Smuts NO and Others* (“*De Lange*”).⁷⁰ *De Lange* approved of the Canadian Supreme Court’s test in *R v Valente* and did not limit the application of this test to only courts of ‘Western origin’. Thus the Court in *Mhlekw* examined whether the appointment of presiding officers to the RACs complied with the “traditional constitutional value of judicial independence”.⁷¹ The Court considered the fact that the traditional leaders presiding in RACs were performing administrative functions, exercising powers similar to the police (such as the powers of arrest, search and seizure) and reporting to, and advising, government on various matters.⁷² It concluded that there were insufficient measures to guarantee judicial independence of presiding officers in the RACs because there were no measures to prevent such officers from performing non-judicial duties that might result in findings that may be the subject of public controversy.⁷³

However, the Court in *Mhlekw* observed in *obiter dicta* that its decision did not necessarily affect the position of chiefs in customary courts, thus indicating that it is not clear cut in either direction. It held:

Section 165(2) of the Constitution does not, in my view, constitute a prohibition against the appointment of chiefs or the head of a traditional authority as a judicial officer simply by reason of the fact that they also perform other functions. ... The Constitution does not prohibit traditional

⁶⁹ 2001 (1) SA 574 (Tk) [612].

⁷⁰ 1998 (3) SA 785 (CC).

⁷¹ 2001 (1) SA 574 (Tk) [613]

⁷² Ibid [610-3].

⁷³ Ibid [616].

leaders or laymen from being appointed presiding officers in courts of law.⁷⁴

The relevant issues here are the lack of separation of powers in the customary law arena and the fact that traditional leaders do not necessarily have any training in the common law. The Court did not identify either issue as fatal for the appointment of traditional leaders. However, the decision was made before the *Heath case* and thus the reasoning in *Mhlekw*, that “there is no general or entrenched separation of powers in the Constitution”⁷⁵ and therefore no necessary problem of a lack of independence and impartiality in the courts of traditional leaders, cannot stand. Overall, the courts in *Bangindawo* and *Mhlekw* were attempting to insulate customary courts from the “imposition” of certain constitutional principles because some principles, like the rule of law, have a close connection with common law principles such as the principle of legality.

In 1998 the Law Commission declared:

If courts and Parliament are sincere in their respect for African cultural traditions, they must construe application of the bill of rights in such a way that the common law does not become a dominant regime.⁷⁶

In 1999 it conceded that there is a lack of a separation of powers in the institution of customary courts because traditional leaders have no security of tenure, and in some cases they act as both prosecutor and judge.⁷⁷ However, the Law Commission concluded that while a formal separation of powers is desirable, it is neither “crucial” nor “practical at this juncture”.⁷⁸ The Law Commission has made no further comment on the matter, except in a puzzling footnote where it observed: “The principle of separation of powers does not appear to apply to traditional leaders and their councillors.”⁷⁹ The Law Commission has

⁷⁴ Ibid [616], citing *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC), and [617].

⁷⁵ Ibid [616D].

⁷⁶ SALC, *Harmonisation – Conflicts of Law*, Discussion Paper 76, Project 90 (1998) [1.7.8].

⁷⁷ Ibid [4.2].

⁷⁸ Ibid [4.2].

⁷⁹ SALC, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90 (2003) fn 76 31. Its approach is similar in relation to the question of community courts. In discussing community courts, the Law Commission only gives a token nod to the Constitution and

not canvassed the various rule-of-law problems facing customary courts.⁸⁰ Its silence on the rule of law appears to endorse the view of Madlanga J in *Bangindawo* that Western norms are not relevant to the sphere of African customary law. At a broad level it appears to be attempting to shield and insulate the procedural sphere of customary law from various constitutional principles, including those relating to the rule of law, in a bid to protect the ‘dignity’ of customary courts and respect legal pluralism, in particular the status of African customary law. This parallels the attempt by traditional leaders during the drafting of the Interim Constitution to seek permanent insulation for customary law from the Bill of Rights.

The Law Commission’s reasoning also appears to be driven by pragmatism. In 1999 it candidly acknowledged that the state cannot afford to abolish customary courts. It asserted that Magistrates’ Courts “would probably grind to a halt” if they had to hear all the disputes presently resolved by the courts of traditional leaders.⁸¹ The Law Commission noted that traditional leaders had responded to debate on the option of abolishing customary courts by threatening to cause disruption and to withhold cooperation with the state.⁸² Thus, in this context, the Law Commission gave the practicalities of “dignity, accessibility and effectiveness” much weight in balancing them against the constitutional principles of judicial “independence and impartiality”.

In the Traditional Courts Bill 2008 the National Parliament has finally attempted to clear up some of the confusion as to the applicability of the principles of separation of powers to

does not discuss any principles: see SALC, *Community Dispute Resolution Structures*, Discussion Paper No 87 Project 94, (1999) [4.7].

⁸⁰ In its 2003 *Report on Traditional Courts and the Judicial Function of Traditional Leaders* the Law Commission considered whether customary courts should continue to be recognised as ‘courts’ or as ‘tribunals’. However, while the Law Commission explored the problems of enforcement and dignity, the Report did not discuss the constitutional requirement in section 165(2) that all ‘courts’ be independent and impartial. The failure to discuss this constitutional issue implies that either that the issue was not presented or that the Law Commission did not consider it a problem and subscribed to Madlanga J’s view in *Bangindawo*. Note that the Report makes no mention of this case or of *Mhleleka*. However, in 1999, the Law Commission quotes some of the above passages cited from *Bangindawo* with approval: SALC, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, Discussion Paper 82 Project 90 (1999) [4.2].

⁸¹ SALC, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, Discussion Paper 82 Project 90 (1999) [3.2.2].

⁸² *Ibid* [3.2], which details the submissions of CONTRALESA and NADETRAC (National Development and Restoration of Traditional Customs Forum).

customary courts. Section 7 of the Bill provides that customary courts “are distinct from courts referred to in section 166 of the Constitution”, meaning that the principle of separation of powers does not apply, but the provision does not spell out the precise constitutional position of these courts.⁸³ Section 7 further states that these courts seek to resolve disputes “in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution”. The following section observes that only some constitutional norms and standards seem to be given weight in relation to legal pluralism.

3.3 Unequal Justice and Forum Shopping

The cases of *Bangindawo* and *Mhleleka* also highlighted the fact that some courts enjoy concurrent jurisdiction in South Africa. This opens up the possibility of forum-shopping and unequal justice, aspects of legal pluralism that are considered antithetical to the rule of law.

In *Bangindawo*, the applicants challenged the jurisdiction of the RAC, which enjoyed concurrent jurisdiction with the Magistrates’ Courts. They pointed out that in appeals the respondent has the prerogative of choice and this prerogative, they argued, is arbitrary and without rational basis and hence violated the equal protection and non-discrimination clause, section 8, of the Interim Constitution. In dismissing the submission, Madlanga J observed that this situation “occurs daily in our legal system”.⁸⁴ On the submission that the RACs’ truncated procedures entailed a lower standard of justice, he stated:

It amounts to no more than comparing apples and potatoes. The elaborate procedure the applicants emphasise can be criticised for providing fertile ground for the raising of technical points which are not infrequently upheld by the courts. On the other hand the less elaborate procedure of the regional authority courts has the advantage of leaving less room for such

⁸³ This is curious given that the Constitutional Court held in 1996 that section 166 “does indeed provide for ... [the] recognition of customary courts: *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) [199].

⁸⁴ 1998 (3) SA 262 (Tk) [278G].

technicalities and of having the real substance of disputes dealt with and laid to rest. ... ‘judging one court by the other is senseless’.⁸⁵

Madlanga J implied that the procedures applied by courts of ‘Western origin’ are overly technical to the point of failing to reach the real substance of disputes. Thus he refused the imposition of various concerns of the rule of law as unnecessary and potentially harmful.

The Court in *Mhlekw* examined these questions in more detail. Here the issue was articulated as one of different procedures in the two concurrent courts with one court (in this case, the RAC) providing fewer procedural rights for a fair trial guaranteed by section 35(3) of the Final Constitution, than the other. In circumstances where there are concurrent courts and no relevant rule, the accused person is not given a choice of forum as this prerogative is left to the complainant. Thus, two persons charged with the same offence could be treated quite differently, contrary to section 9(1) of the Final Constitution, which guarantees equality before the law. The Court examined whether the denial of rights by the RAC could be justified: was there a rational relationship in the differentiation between persons falling within the same category and a governmental purpose?

The respondents suggested that the purpose was evident in the intention of the *RAC Act*, which was to provide for a “culturally defined legal regime” and restore some of the powers that traditional leaders had lost via legislation.⁸⁶ They submitted that the aim of the *RAC Act* was to allow litigants to enjoy a style of justice with which they were familiar, and quoted the second reading speech made in Parliament concerning the Bill for the *RAC Act*, that: “In a country where a large section of the population lives according to customary law, it would seem appropriate that certain courts are set aside for this use.”⁸⁷ Therefore, the RACs’ procedures were kept simple so that they could be easily followed, low in cost, expedient and broadly in line with the procedures followed by customary courts. However, the respondents were unable to link these purposes relating to legal pluralism to the differential treatment suffered by the applicants who were afforded fewer procedural rights in the RACs than they would in the Magistrates’ Court. The respondents were unable to

⁸⁵ Ibid [279-280], quoting JC Bekker at the end of the quotation.

⁸⁶ 2001 (1) SA 574 (Tk) [621C].

⁸⁷ Ibid [623G].

establish that the applicants were believers in, and adherents of, customary law or that the issues raised required adjudication in accordance with customary law.⁸⁸ The Court found that the manner in which the legislation allowed different standards to operate was arbitrary and had no rational relationship with a governmental purpose.⁸⁹ Regarding the constitutional right to culture, the Court held it was a matter of choice and freedom and it could not be used to impose a culture and its practices on a person.⁹⁰ Furthermore, reconciliation, the purported objective of customary courts, cannot be forced onto an unwilling participant.⁹¹

On this point of unequal justice, legal pluralism failed in *Mhlekwana* as a justification for the denial of rights and thus the Court held the RACs to be unconstitutional.⁹² Pitted against legal pluralism were rule-of-law concerns regarding arbitrariness and unequal treatment but, once again, the Court chose not to invoke the rule of law and turned to tests flowing from the Bill of Rights, specifically, the constitutional guarantee of equality. Unlike the rule of law, the norm of equality is considered a relevant norm in the sphere of customary courts. Given South Africa’s apartheid history, it is likely that only the invocation of equality can outweigh legal pluralism.

The “guiding values” in section 3 of the Traditional Courts Bill 2008 make it clear that equality is a determinative norm in the sphere of customary courts.⁹³ In contrast, section 3(2)(d) directs that the rule of law is to be muted in the context of customary courts, by providing: “the principles underlying the traditional justice system are not, in all respects, the same as in the context of *due process*, as applied or understood in the retributive justice

⁸⁸ Ibid [621D].

⁸⁹ Ibid [621E]. See also, [623B]. The Law Commission’s response was to recommend that defendants in criminal matters be given the right to opt out of the jurisdiction of a customary court in favour of any other court: SALC, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90 (2003) Recommendation 12, xiv.

⁹⁰ 2001 (1) SA 574 (Tk) [629-630].

⁹¹ Ibid [630A]. Overall the Court disagreed with Madlanga J in *Bangindawo* that the RACs were similar to customary courts on the ground that the RACs enjoy a wider jurisdiction to try serious offences and have the power to impose imprisonment as a penalty: [628].

⁹² Since the decision, the Minister of Justice has called for the RACs to cease operation.

⁹³ Note, however, that the Traditional Courts Bill 2008 does not allow people to ‘opt out’ of customary courts, contrary to the decision in *Mhlekwana*. Under section 20(c) it is an offence for a person not to appear before the court when summoned by the presiding officer even when that person does not reside in the court’s jurisdiction but is merely passing through.

system”.⁹⁴ Presumably “due process” here means a fair and public hearing, as it has no specific constitutional meaning. The Traditional Courts Bill 2008 subtly compromises the rule of law despite the fact that, unlike the approach of the Law Commission, it purports to make the Constitution and its norms central to the post-apartheid transformation of customary courts. Thus, the end result is a patchwork rule of law, in that, at the lowest rung of the state court system, the rule of law appears to be compromised, but this time, in the name of promoting ‘restorative justice’. The strategy of invoking restorative justice in this context reveals an assumption on the part of South Africa’s legislators that there is growing acceptance in the international arena that restorative justice mechanisms do not apply the same standard of the rule of law as retributive justice mechanisms *and* that they should not be forced to fit the same mould. Perhaps this strategy should be read as an attempt by South Africa’s legislators to redefine the rule of law in relation to legal pluralism and hence transform it.

4. The Rule of Law and Customary Law

As the previous section illustrated, South Africa’s legal institutions are committed to ensuring that customary law enjoys equal status with common law, even at the expense of compromising the rule of law. These institutions have been involved in a project to ‘harmonise’ and ‘integrate’ the substance of customary law and common law, particularly in relation to marriage and succession, so that the application of either system does not produce substantially different results. However, this process of harmonisation is subject to the constitutional norm of equality and thus legislation and rules that are discriminatory are unlikely to survive constitutional review.

This section begins by showing that these developments are adding fuel to the belief of some scholars that the constitutional dispensation is leading to the demise of legal pluralism. These scholars continue to maintain that the substance of customary law must be completely insulated from the Constitution in order to give it equal status to common law. The proposal to insulate customary law then raises the question of which version of

⁹⁴ (Emphasis added). Note that the Bill avoids the customary/common law dualism by using the terminology of ‘restorative justice’ and ‘retributive justice’, which is commonly employed in the field of post-conflict justice.

customary law, official or living, is recognised by the Constitution. The Constitutional Court addressed this conundrum in *Bhe and Others v The Magistrate, Khayelitsha and Others* (“*Bhe*”)⁹⁵ and *Shilubana and Ors v Mwamitwa* (“*Shilubana*”)⁹⁶ when it examined the impact of customary law and state law in the sphere of succession on “the most vulnerable groups” in society. The section concludes by exploring the manner in which the rule of law and legal pluralism serve the needs of these “vulnerable groups”.

4.1 “True Legal Pluralism” and the Rule of Law

The question of whether the two legal systems enjoy equality has produced much debate, particularly in relation to the application of the Bill of Rights to the two systems. In 1997, shortly after the Final Constitution came into force, AJ Kerr predicted that the application of the Bill of Rights to customary law would mean that “the whole of the present customary law of intestate succession” would be inconsistent with the Constitution, as would be much of customary marriage law and property law.⁹⁷ He argued that the result could be a vacuum in customary law of “considerable proportions”⁹⁸ and calculated that 85 per cent of customary law could be invalidated through inconsistency with the Bill of Rights.⁹⁹ Other scholars share this view of the potential destructive impact of the Constitution on customary law. For example, Gardiol van Niekerk commented:

it may be argued that the Constitution is a typical western instrument which entrenches mainly western values and that by advancing the Constitution as the meta standard, indigenous law will disappear.¹⁰⁰

In light of this potential impact, Kerr reasoned that the Constitutional Court should view customary law as “exempt” from the Bill of Rights.¹⁰¹ Presumably Kerr envisaged some

⁹⁵ 2005 (1) SA 580 (CC).

⁹⁶ Case CCT 03/07 [2008] ZACC 9 (4 June 2008); 2008 (9) BCLR 914 (CC).

⁹⁷ A J Kerr, “The Bill of Rights in the New Constitution and Customary Law” (1997) 114 *South African Law Journal* 346, 352.

⁹⁸ *Ibid* 355.

⁹⁹ A J Kerr, “Inheritance in Customary Law under the Interim Constitution and under the Present Constitution” (1998) 115 *South African Law Journal* 262, 268.

¹⁰⁰ Gardiol J Van Niekerk, “Succession, Living Indigenous Law and *Ubuntu* in the Constitutional Court” (2005) 26 *Obiter* 474, 487.

¹⁰¹ Kerr, above n 97, 355. Kerr argued that there is scope for this under section 8(2) of the Constitution, which provides that the Bill of Rights “binds a natural or a juristic person *if, and to the extent that, it*

temporary form of exemption or insulation for the substance of customary law from the Bill of Rights, which would allow it to be developed to a position of equal strength with the common law. However, this reasoning is curious given that section 8(1) of the Final Constitution provides that the Bill of Rights applies to “all law” and, in effect, such insulation would place customary law outside the Constitution and produce a situation of deep legal pluralism.

Thomas and Tladi present a similar argument by arguing that section 211(2) of the Final Constitution (which recognises the judicial powers of traditional leaders), “excludes the supremacy of the constitution over customary laws applied by tribal authorities”.¹⁰² In other words, the authors argue that customary courts should be exempt from all the provisions of the Constitution while at the same time enjoying constitutional recognition. In their view, this path would allow the Constitution to create “true legal pluralism”.¹⁰³ The dire alternatives to this interpretation of section 211(2) are for the Bill of Rights to operate either like a repugnancy clause, with the power to “annihilate” customary law, or for it become mere “paper law”, because in practice it would apply only to a small part of South Africa where Western law is respected and enforced.¹⁰⁴ To Thomas and Tladi, these alternatives do not entail “true legal pluralism”, a form of legal pluralism on which they place much value. Overall, the Constitution is painted as inimical to “true legal pluralism”.

The above two approaches to the interpretation of the Constitution’s recognition of legal pluralism are effectively arguing for the substance of customary law to be on an equal footing with the common law while, at the same time, being insulated from interference by the courts. Underlying these approaches appears to be the view that customary law deserves to be shielded and bestowed special treatment given the decades of its neglect and subordination during colonial and apartheid governments. Chuma Himonga and Rashida

is applicable, taking into account the nature of the right and of any duty imposed by the right” (emphases added). Alternatively, the Constitutional Court could suspend a declaration of invalidity under section 172 (1)(a) of the Constitution to allow either the national or provincial legislatures (who enjoy concurrent competence in this area) to legislate. Kerr reasoned that the Constitutional Court would not have certified the Constitution if it understood the Bill of Rights as being able to invalidate large sections of customary law.

¹⁰² Ph J Thomas and D D Tladi, “Legal Pluralism or a New Repugnancy Clause” (1999) XXXII *Comparative and International Law Journal of Southern Africa* 354, 363.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

Manjoo appear to take this ‘insulation’ approach further, by arguing that intervention with customary law by the democratically elected legislature ought to be restricted. They warn that “an unrestricted use of legislation will in no time unnecessarily ossify and distort customary law, and even bring it to its demise”.¹⁰⁵ Thus it appears that some scholars believe that legal pluralism would be best protected by divorcing it from key aspects of South Africa’s new legal order: the widely heralded Final Constitution, the Constitutional Court, and the democratically elected legislature. In effect, they appear to be arguing for the removal of ‘rule-of-law’ checks on the substance of customary law.

4.2 Competing Versions of Customary Law

What constitutes ‘customary law’ is also highly contested. Anthony Costa encapsulates a widely held view: “[C]ustomary law as it stands is corrupted, inauthentic and lacking authority. It is a foreign imposition, a stranger in Africa.”¹⁰⁶ Given that traditional leaders fought so hard for the constitutional recognition of customary law, it is necessary to examine what is meant by the term ‘customary law’. Was constitutional recognition given to the law that was officially recognised by the apartheid state or to the law that communities are living and practising?

A dichotomy is commonly drawn between official customary law and living customary law, two versions of customary law. Broadly speaking, official customary law assumes that customary law can be understood as a code of rules. This assumption regarding custom has produced much debate among legal anthropologists. On the one hand, Isaac Schapera and Adam Kuper assert that rules determine behaviour and outcomes and can be distinguished from social rules.¹⁰⁷ On the other hand, Simon Roberts and John Comaroff challenge this approach by stressing the *process* of dispute resolution and the shifting power relations

¹⁰⁵ Chuma Himonga and R Manjoo, “What’s in a Name?: The Identity and Reform of Customary Law in South Africa’s Constitutional Dispensation” in Manfred O Hinz (ed), *The Shade of New Leaves: Governance in Traditional Authority, A Southern African Perspective* (2006) 329, 341. Himonga and Manjoo imply that it is preferable for the development of customary law be the domain of the courts rather than the legislature because this allows the development to take place on a case-by-case basis.

¹⁰⁶ Anthony Costa, “The Myth of Customary Law” (1998) *South African Journal on Human Rights* 525, 534.

¹⁰⁷ See, eg, Isaac Schapera, *A Handbook of Tswana Law and Custom* (2nd ed, 1955); Adam Kuper, “The Kgalagari and the Jural Consequences of Marriage” (1970) *5 Man (New Series)* 466-482.

between the negotiating parties in this process.¹⁰⁸ The latter approach has been highly influential among legal anthropologists in the last few decades,¹⁰⁹ and thus customary law has come to be understood as “processual”, “relational” and “negotiated” rather than rule-based.¹¹⁰

‘Living customary law’ is the term used to describe the law that is lived and practised by people on a daily basis. However, some scholars, such as Oomen and Himonga, prefer the term ‘living law’ because such law is negotiated using a variety of sources that would be considered both customary and *non*-customary.¹¹¹ Oomen observes that these sources range from custom to constitutional law to developmental values, thus showing that state law, the Constitution, often forms one element of this law but it does not necessarily determine the outcome. She explains:

The local system of dispute resolution is about mixing and matching rules that refer to culture, common sense, state regulations, the Constitution, precedent and a variety of other resources hardly considered contradictory.¹¹²

Oomen stresses that the ‘rules’ are not determinative as the varied sources can be mixed and matched in multiple ways depending on the power relations between the two parties. Presumably, for this law to operate in a harmonious fashion in South Africa, *ubuntu*, the African concept of humanness and human dignity, needs to be a controlling value in this process of mixing and matching.

Official customary law includes all customary law incorporated into legislation¹¹³ or articulated in judicial decisions, as well as all customary law that “can be ascertained

¹⁰⁸ John Comaroff and Simon Roberts, *Rules and Process* (1981).

¹⁰⁹ Anne Griffiths, *In the Shadow of Marriage: Gender and Justice in An African Community* (1997) 16-17.

¹¹⁰ Oomen, above n 1, 233.

¹¹¹ See Himonga and Manjoo, above n 105; Oomen, above n 1, Chapter 6.

¹¹² Oomen, above n 1, 210.

¹¹³ In parts of South Africa, codes were drafted and enacted from the 1880s onwards: Bennett, above n 29, 46.

readily and with sufficient certainty,”¹¹⁴ as long as such law is not in conflict with the Constitution or repugnant to natural justice and public policy.¹¹⁵ Under section 211(3) of the Final Constitution, customary law is exempt from legislative amendment unless Parliament does so explicitly. All courts in South Africa can apply customary law.¹¹⁶ For example, a person who lives by customary law can theoretically ask a Magistrates’ Court to hear their civil dispute arising out of customary law.¹¹⁷ However, studies show that higher courts tend to apply official customary law while lower courts are more likely to apply living customary law, because they generally live closer to the communities they serve.¹¹⁸ In this sense, lower courts are at the interface of state law pluralism and deep legal pluralism.

Proponents of living customary law argue that the constitutional right to culture¹¹⁹ entails “the right of the people to have the courts apply the law practised by them”.¹²⁰ Himonga and Craig Bosch argue, for example, that the Constitution recognises “the law generated by the cultural communities” and they therefore reason that if the courts ignore living customary law when they are applying or developing customary law, they will be depriving individuals and communities of their rights.¹²¹ In the same vein, living customary law is sometimes portrayed as a democratic form of law in that the people themselves shape it.¹²² In contrast, the development of official customary law was neglected by legal institutions

¹¹⁴ *The Law of Evidence Amendment Act 45 of 1988*, section 1(1). Note that there is no single, uniform system of customary law in South Africa: Tom W Bennett, “The Conflict of Laws” in JC Bekker, JMT Labuschagne and LP Vorster (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) 15, 25.

¹¹⁵ *The Law of Evidence Amendment Act 45 of 1988*, section 1(1). Although the repugnancy clause has been rarely invoked, the Law Commission has recommended its repeal: SALC, *Harmonisation – Conflicts of Law*, Discussion Paper 76, Project 90 (1998). The clause is criticised as a means of imposing Western values onto customary law. See, eg, Gardiol J van Niekerk, “Indigenous Law, Public Policy and Narrative in the Courts” (2000) *Tydsknf vir Hedendaagse Romeins – Hollandse Reg* 403.

¹¹⁶ Bennett argues that it is not clear whether the application of customary law by the courts is mandatory or permissive: Bennett, above n 114, 17.

¹¹⁷ It is theoretical because there is evidence that in some areas, magistrates automatically direct matters to be heard at first by a customary court: Barbara Oomen, above n 1, 205.

¹¹⁸ SALC, *Customary Law: Succession*, Discussion Paper 93, Project 90 (2000) [4.2.4].

¹¹⁹ Sections 30-31 of the Final Constitution.

¹²⁰ Chuma Himonga and Craig Bosch, “The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?” (2000) 117 *South African Law Journal* 306, 331.

¹²¹ *Ibid.*

¹²² Ian Hamnett, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (1975) 10.

during the apartheid era and hence it became stagnant and out of touch with community practices.¹²³ This is particularly apparent in relation to the position suffered by women in official customary law: generally official customary law is seen as discriminatory towards women and as institutionalising gender inequality. This perception relates to the fact that until 1998 under official customary law married women were considered legal minors and could not own or inherit any property or make contractual relations.¹²⁴ Thus, scholars such as Himonga argue that it is living customary law rather than official customary law that should receive constitutional recognition alongside the common law. To bolster their argument regarding living customary law, scholars point to the words of the Constitutional Court in the *Certification of the Constitution of the Republic of South Africa* to the effect that the Constitution guarantees “the survival of an evolving customary law”.¹²⁵ In all, this is an endeavour to reinvent legal pluralism as a positive force: to transform customary law from a source of law historically oppressive to black people, particularly black women, to a source of law that is not only receptive of community mores but also driven by these evolving values. At a more abstract level, it is an attempt to draw deep legal pluralism (living customary law) and state law pluralism (state law) closer together.

In 2003, the Constitutional Court indicated the likely constitutional recognition of living customary law as customary law. In *obiter dicta* it described customary law as follows:

It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. ... In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms.¹²⁶

¹²³ Tom W Bennett, *A Sourcebook of African Customary Law for Southern Africa* (1991) v; SALC, *Customary Law: Succession*, Discussion Paper 93 Project 90 (2000) [3.1.2].

¹²⁴ This inequity was remedied by the *Recognition of Customary Marriages Act 120 of 1998*.
¹²⁵ 1996 (4) SA 744 (CC) [197].

¹²⁶ *Alexkor Ltd and Anor v Richtersveld Community and Others* 2004 (5) SA 460 (CC) [52-3].

From this description it is clear that legal certainty, an aspect of the rule of law extolled by Hayek and Raz, is not a value prioritised by customary law. Instead, the value of flexibility is central to customary law. In the 2004 decision of *Bhe* and the 2008 decision of *Shilubana* the Constitutional Court directly considered the question of whether the Final Constitution recognises official customary law or living customary law and how such customary law can be balanced with the value of legal certainty.

4.3 *Bhe, Shilubana and State Recognition of Customary Law*

The cases of *Bhe* and *Shilubana* are useful in giving us an insight into the relationship between the rule of law and legal pluralism in South Africa’s constitutional framework. In *Bhe*, the Constitutional Court was asked to examine section 23 of the *Black Administration Act*, which provided a scheme for black Africans whose kin died intestate. The Act runs parallel to the *Intestate Succession Act 81 of 1987* and it enables customary law to regulate matters of succession amongst Africans. The case rolled together a trilogy of cases concerning the rights of daughters and sisters to succeed a deceased male person. Parliament had attempted to deal with this question back in 1998 but the proposed Bill¹²⁷ met a hostile reaction from traditional leaders who declared that they were “fundamentally opposed to the Eurocentric approach which is prevalent in [our] country” and expressed concern that common law principles were replacing customary law.¹²⁸ In an attempt to avoid the repetition of such confrontation, in 2004 the Court invited traditional leaders sitting in the National House of Traditional Leaders to make a submission in regard to the issues raised by *Bhe* but this offer was declined.

In 2008 the Court again invited the National House of Traditional Leaders to make a submission in regard to the issues raised by *Shilubana*. The case involved a decision by a traditional community in the province of Limpopo to promote gender equality in the succession of traditional leadership through the appointment of a woman to a chieftainship position, for which she was previously disqualified on account of her gender. Once again the National House of Traditional Leaders declined to make a submission but the invitation

¹²⁷ *Customary Law of Succession Amendment Bill 1998*.

¹²⁸ The submission of the National House of Traditional Leaders is quoted in SALC, *Customary Law: Succession*, Discussion Paper 93, Project 90 (2000) [1.2.2].

was accepted by three other public organisations: the Commission for Gender Equality, the Congress of Traditional Leaders of South Africa (CONTRALESAs) and the National Movement for Rural Women.

4.3.1 Bhe

Specifically, the case of *Bhe* challenged the constitutionality of section 23 of the *Black Administration Act* when read together with the relevant regulations, and the constitutionality of the customary law principle of male primogeniture. The Constitutional Court was unanimous in finding that the *Black Administration Act* and the customary rule of male primogeniture were unconstitutional in that they violated the constitutional rights to equality and human dignity¹²⁹ of women and children, described by the court as “the most vulnerable groups in our society”.¹³⁰ This was on the basis that, in relation to the *Intestate Succession Act*, the *Black Administration Act* and the rule resulted in substantially different outcomes depending on which system of law was applied.

The Court was, however, not unanimous as to the remedy. The remedy posed a problem because in striking down the impugned provisions of the Act, a gap would result which would mean uncertainty for black Africans attempting to deal with intestate estates. The Court had three options: (1) to suspend its declaration of invalidity for a specified period and hence allow the impugned provisions of the Act to apply until the Parliament passed legislation; (2) to develop customary law rules of succession on a case-by-case basis in line with the “spirit, purport and objects of the Bill of Rights”, as set out in section 39(2) of the Final Constitution, or; (3) to substitute the invalid provisions with a modified version of the *Intestate Succession Act*, legislation which applies to all non-black South Africans. The majority chose the last remedy and ordered that the *Intestate Succession Act* apply to most African families until the Parliament passes legislation on the matter. In contrast, the minority chose the second option. It is at this point of divergence that the tension between the rule of law and legal pluralism is most acute.

¹²⁹ Sections 9 and 10 respectively.

¹³⁰ 2005 (1) SA 580 (CC) [32] per Langa DCJ in the majority. See also [115, 118, 187, 236] of Ngcobo J in the minority.

On the place of customary law in South Africa’s legal system, the majority made it clear that the Constitution required that customary law not merely be tolerated but also accommodated. Citing the constitutional right to culture, as well as section 211 (2) and section 39 of the Final Constitution, the majority held that: “It [customary law] is protected by and subject to the Constitution in its own right.”¹³¹ It emphasised that customary law should no longer be seen as subordinate to the common law, as it was in the past when customary law was seen through the lens of the common law.¹³²

The majority judgment, authored by Langa DCJ, extolled the positive aspects of customary law, emphasising consensus, dispute resolution and prevention, communitarian values such as *ubuntu* and family unity.¹³³ It also acknowledged the negative aspects of customary law. For example, Langa DCJ stated: “Customary law has, in my view, been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones.”¹³⁴ The majority judgment attributed such negative aspects to official customary law, which it noted was “no longer universally observed”.¹³⁵ The majority stated: “official customary law as it exists in the text books and in the Act is generally a poor reflection, if not distortion, of true customary law”.¹³⁶ Thus the majority judgment set up a dichotomy between official customary law and living customary law, describing the latter as “an acknowledgment of the rules that are adapted to fit in with changed circumstances”.¹³⁷ In describing living customary law as “true customary law”¹³⁸ we see an implicit acceptance of living customary law¹³⁹ but the judgment added: “The problem with the adaptations is that they are *ad hoc* and not uniform.”¹⁴⁰ Thus, while the majority appears to have made the momentous acceptance of living customary law, it simultaneously rejected it on grounds that resemble rule-of-law concerns.

¹³¹ Ibid [41].

¹³² Ibid [43].

¹³³ Ibid [45].

¹³⁴ Ibid [89].

¹³⁵ Ibid [84].

¹³⁶ Ibid [86].

¹³⁷ Ibid [87].

¹³⁸ Ibid [86].

¹³⁹ Ibid [109] the majority held: “The difficulty lies not so much with in the acceptance of the notion of ‘living’ customary law, as distinct from official customary law, but in determining its content ...”.

¹⁴⁰ Ibid [87].

These rule-of-law concerns also drive the majority’s choice of remedy. This choice of remedy, whereby the common law temporarily replaces customary law, has led to fears that legal pluralism is not being upheld and respected, contrary to the Constitution. The majority rejected the proposed remedy of the case-by-case approach of developing customary law on the ground of its slowness and, moreover, it rejected “[t]he lack of uniformity and the uncertainties it causes”.¹⁴¹ The uncertainty the court referred to is two-fold. First, there is the court’s own lack of certainty in developing customary law: the difficulty of determining the content of living customary law when there is “insufficient evidence and material” to make such a determination.¹⁴² Secondly, the majority appeared to be concerned that a case-by-case approach would cause greater uncertainty and confusion in the lower courts than already exists; it observed that some lower courts have been incorrectly applying the common law system to African intestate estates while others have been adhering to the official rules of customary law.¹⁴³ This “piecemeal”¹⁴⁴ development of customary law was not considered sufficient to guarantee the constitutional protection of the rights of women and children in such circumstances. In the majority’s view, only legislation can provide the necessary certainty and uniformity necessary to guarantee these rights.

In this judgment, it is apparent that rule-of-law concerns are given greater weight than the survival of customary law and the concept of legal pluralism. The majority refused to develop customary law according to the “spirit, purport and objects of the Bill of Rights”.¹⁴⁵ In its view, the fate of customary law hangs with the democratically elected legislature. However, according to the majority’s own judgment, the rules of succession in customary law have not been able to keep pace with changing social conditions and values for the reason “that they were captured in legislation”.¹⁴⁶ Thus the majority judgment left the future of customary law uncertain, as it appeared such law would be left to stagnate

¹⁴¹ Ibid [112]

¹⁴² Ibid [109]. Chuma Himonga challenges this: Himonga, “African Customary Law in South Africa – Many Faces of *Bhe v Magistrate Khayelitsha*” [2005] *Recht in Afrika* 163, 177.

¹⁴³ Ibid [112]. Here the Court cites *Makholiso and Others v Makholiso and Others* 1997 (4) SA 509 (Tk) as an example of the former, and *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) as an example of the latter.

¹⁴⁴ Ibid [113].

¹⁴⁵ Section 39(2) of the Final Constitution.

¹⁴⁶ 2005 (1) SA 580 (CC) [82].

once again unless the courts recognised living customary law or Parliament legislated to the effect that the courts themselves must develop customary law on a case-by-case basis.

The minority judgment held that the Court has an obligation to develop customary law in the same way it has an obligation to develop the common law, on a case-by-case basis.¹⁴⁷ This obligation to develop customary law is triggered in two instances: first, where it is necessary to adapt customary law to changed circumstances, and second, when customary law must be brought into line with the Bill of Rights.¹⁴⁸ The first instance relates to living customary law and the changing needs of the community. In the minority, Ngcobo J held that only the second instance matched the facts of *Bhe* as the issue was whether customary law complied with the Bill of Rights.

Legal pluralism drives the remedy offered by Ngcobo J’s minority judgment. While the judgment noted that the *Intestate Succession Act* will bring about uniformity in succession for all races, it argued that differences in family structures among the races renders this uniform application “inadequate”.¹⁴⁹ It speculated that the majority’s solution “may well lead to the obliteration of indigenous [customary] law” and it pointed out that the Constitution guarantees the “survival of an evolving customary law”¹⁵⁰ and the right of those people who wish to live by their law. In Ngcobo J’s view, South Africa is just one of many countries that have “a pluralist legal system in the sense of common, statutory and indigenous law” and he pointed out that other such African countries have not felt compelled to replace customary law with common law or statutory laws.¹⁵¹ Ngcobo J stated his belief that:

the answer lies ... in flexibility and willingness to examine the applicability of indigenous [customary] law in the concrete setting of

¹⁴⁷ Ibid [212-223] per Ngcobo J who cites *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) as authority.

¹⁴⁸ Ibid [216-8].

¹⁴⁹ Ibid [229]. One example offered is that of polygamous marriages, however, note that the majority order that the *Intestate Succession Act* be modified for such marriages. While the majority held that all estates (except those in the process of being wound up under customary law) are subject to the *Intestate Succession Act*, these estates are administered by the *Administration of Estates Act 66 of 1965*.

¹⁵⁰ Ibid [230]. The judgment cites the *Certification case*, above n 51 [197].

¹⁵¹ Ibid [235].

social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. ... Indigenous [customary] law is part of our law. It must therefore be respected and accorded a place in our legal system. It must not be allowed to stagnate as in the past or disappear.¹⁵²

Ngcobo J recommended that the “overriding consideration must be to do that which is fair, just and equitable”.¹⁵³ In the absence of an agreement in the deceased’s family, the magistracy should decide the dispute as to the choice of law according to what is fair, just and equitable in the circumstances. Unlike the majority, Ngcobo J appeared to place much trust in the skills of the lower courts and their ability to deal with the wide discretion that the choice of law rules and the values of fairness, justice and equity confer. He deemed this judicial discretion to be more useful in this context than the principles of certainty and uniformity.

In *Bhe*, we see that in balancing the rule of law and legal pluralism, the majority of South Africa’s highest court gave greater weight to the concerns of the rule of law. However, as the lower court in *Mhlekwana* shows, these rule-of-law concerns are only able to outweigh the interests of legal pluralism when combined with the constitutional right to equality. In contrast, the minority judgment of Ngcobo J was prepared to forgo certainty in order to achieve equity in each case. The rule of law is not explicitly referred to in either of the judgments but, as I argue further shortly, it looms just beneath the surface as an ‘imposed’ Western norm that is no longer in fashion when dealing with customary law in the new legal order.

4.3.2 Shilubana

In *Shilubana* the Constitutional Court reiterated the need to balance legal certainty and the need to protect rights with the importance of respecting legal pluralism.¹⁵⁴ However, it illuminated a path by which the Constitution and the courts could recognise living customary law while retaining legal certainty. Specifically, in this case the Court was

¹⁵² Ibid [236] (emphasis added).

¹⁵³ Ibid [238].

¹⁵⁴ Case CCT 03/07 [2008] ZACC 9, (4 June 2008) [76].

asked to determine whether a traditional community could change its norms and customs so that they were in line with the Constitution and the Bill of Rights. The lower courts in this case had decided that traditional leaders have only narrow discretion to develop customary law. The Constitutional Court disagreed on the basis that this would mean that no body or person could exercise the power to make constitutionally-driven changes in traditional leadership. The Court unanimously held that section 211(2) of the Constitution gives traditional communities the power to act so as to develop their customary law incrementally and bring it in line with the Constitution.¹⁵⁵ On the question as to the procedure that should be used to change customary law, the Court reasoned that the right to amend and repeal customary law under section 211(2) included the right to decide how to do so. The Court stated: “[C]ustomary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts.”¹⁵⁶ In this statement the Court clarified that section 211(2), alongside section 39(2), empowers the Court to recognise living customary law. However, the Court appears to limit this recognition to the sphere of succession and traditional leadership by distinguishing *Bhe* on a number of grounds: first, that *Shilubana* raises concerns relating to a single traditional community and hence does not affect legal certainty in other communities; second, the Court’s decision does not violate vested rights, and; third, the Court’s decision does not deny vulnerable persons the protection of the law.¹⁵⁷ Thus, in this case we see the Court’s growing confidence and willingness to engage with the interface between deep legal pluralism and state law pluralism inhabited by living customary law.

4.4 *Bhe*, Customary Law and “the Most Vulnerable Sections of Society”

While the case of *Bhe* has attracted both critics and admirers, it is too early to gauge the response to *Shilubana*. One of Himonga’s concerns regarding the *Bhe* case pinpoints a key problem with the majority’s reasoning, which is its failure to clarify the source of the values of legal certainty and uniformity in the Final Constitution, a criticism equally applicable to

¹⁵⁵ Ibid [73]. It stated: “Any other result would be contrary to section 211(2) and would be disrespectful of the close bonds between a customary community, its leaders and its laws.”

¹⁵⁶ Ibid [81].

¹⁵⁷ Ibid [77].

Shilubana. The confusion caused by the Constitutional Court’s failure to refer to the rule of law is apparent in the following criticism from Himonga:

It may be argued that certainty and uniformity may be admirable features of the common law, but they are not necessarily more desirable than the living customary law feature of flexibility. Neither can they be wholly justified in a constitutionally self-acclaimed multicultural and democratic society.¹⁵⁸

In her view, these values of certainty and uniformity are important to the common law (in which she includes statutory law) but the courts should not assume that they are shared by all legal systems in South Africa. Himonga implies that this assumption is inappropriate in “a society that has a constitutionally entrenched legal pluralism”.¹⁵⁹

Himonga argues that customary law is by “its very nature flexible, which predisposes it to uncertainty”¹⁶⁰ and she contrasts it with the certainty and uniformity of the common law. Given the Constitution’s recognition of customary law, it is not apparent to her why one value is more desirable than the other. In Himonga’s view, the common law values of certainty and uniformity are being used to hinder and frustrate the development of living customary law, and hence it is essential that they should be subjected to constitutional scrutiny.¹⁶¹ The Court’s failure to articulate in a transparent fashion that these values derive from one of the Constitution’s founding values, the rule of law, rather than mere common law values, has clearly led to some confusion and misunderstanding.¹⁶²

As a supporter of legal pluralism, Himonga is also critical of *Bhe* because she believes it indicates a move towards the replacement of customary law by the common law or the abolition of customary law,¹⁶³ thus seriously undermining legal pluralism in South Africa.

¹⁵⁸ Himonga and Manjoo, “What’s in a Name?”, above n 105, 342.

¹⁵⁹ Himonga, “African Customary Law”, above n 142, 177-8.

¹⁶⁰ Himonga, *ibid* 178.

¹⁶¹ Chuma Himonga, “The Advancement of African Women’s Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession” [2005] *Acta Juridica* 82, 105.

¹⁶² Note that in *Shilubana* the Court refers obliquely to the rule of law at [68].

¹⁶³ Chuma Himonga, “Taking Stock of Changes to Customary Law in a New South Africa” in Graham Glover (ed), *Essays in Honour of AJ Kerr* (2006) 215, 222-3.

Van Niekerk is also critical in this respect and believes that the majority decision in *Bhe* fails to “bear out a commitment to honour the status of indigenous law as entrenched in the Constitution”.¹⁶⁴ This is because the Court eliminated the rule of male primogeniture, which she believes is “fundamental” to customary law,¹⁶⁵ rather than adapting and modifying it in such a way that would harmonise the two legal systems and ensure their equal status. In van Niekerk’s view, customary law is “yet to be accorded equal status” because “Western law is still regarded as the dominant system and legal development is largely directed by Western values”.¹⁶⁶

The view of van Niekerk is that customary law and common law are being forced to converge “within a framework of Western values”,¹⁶⁷ by which she presumably means the common law and the Constitution. The law of succession is a good example of this forced convergence. The official customary law of succession conflates succession to status and inheritance of property,¹⁶⁸ presumably to fit within the common law mould. In contrast, living customary law involves the distribution of property to individuals but these rights over property are not absolute and are subject to the decision-making process of a family council. In this framework, a customary estate has a duty to provide for all members of the family, particularly the ‘most vulnerable’. The assignment of absolute property rights and the equal division of an intestate estate among the deceased’s children (where there is no surviving spouse) according to common law principles can jeopardise the equilibrium reached by the arrangements made under living customary law.¹⁶⁹

As an advocate of women’s rights and customary law, Himonga is equivocal about *Bhe*. On the one hand it is a victory for women in that the official customary law recognises women’s constitutional right to succeed a deceased, while on the other hand she is

¹⁶⁴ Gardiol J Van Niekerk, “Succession, Living Indigenous Law and *Ubuntu* in the Constitutional Court” (2005) 26 *Obiter* 474, 487.

¹⁶⁵ *Ibid* 486.

¹⁶⁶ Van Niekerk, above n 21, 6.

¹⁶⁷ *Ibid* 11.

¹⁶⁸ Christa Rautenbach, “Law of Succession and Inheritance” in J C Bekker, J M T Labuschagne and L P Vorster (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) 97, 107.

¹⁶⁹ *Ibid*. See also, Alice Armstrong, “Rethinking Women’s Law in Southern Africa” in Welshman Ncube and Julie Stewart (eds), *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa* (1995) 116, 124-125; Beatrice Donzwa et al, “Which Law? What Law? Playing with the Rules” in Ncube & Stewart (eds), *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa* (1995) 73, 73-74.

dismissive of the decision and labels it “tragic” because it has little impact on women who live under and practise living customary law.¹⁷⁰ Her point is that many black women have minimal contact with official customary law and other state law because they live in townships, informal settlements and rural communities where the state exerts negligible influence largely due to its lack of capacity. In these areas, there is little implementation or enforcement of state law, either in the form of common law or official customary law. In contrast, living customary law plays a significant role in women’s lives as it sets social norms that are used to resolve disputes within and between families, covering matters that the common law rarely ventures to regulate.¹⁷¹ In this context, legal pluralism is simply a fact in the lives of the “most vulnerable groups” in South African society. However, it is important to recognise that in this equation state law is secondary. As Galanter writes in relation to modern society more generally, “the national (public, official) legal system is often the secondary rather than a primary locus of regulation”.¹⁷²

Himonga observes that the lives of the majority of black women in South Africa straddle both the state sphere and the non-state sphere and hence she suggests that women can often improve their lives by negotiating and manipulating both living law and state law to their advantage. She relates that in some instances women have been able to “secure resources outside of the ‘real rights culture of the general law’ paradigm by negotiating their spaces within customary law frameworks”.¹⁷³ She gives little detail as to how this negotiation can take place if women hold little power and status within their community. Various studies show that women’s power to negotiate in this informal sphere depends on their shifting status in the social order of kinship networks, which relates to factors such as wealth, age, marriage, procreation and education.¹⁷⁴ Thus, unlike their white counterparts, black women do not experience the theoretical separation of the law from society; in accessing

¹⁷⁰ Chuma Himonga, “African Customary Law” above n 142, 171.

¹⁷¹ One example is the promotion of compulsory virginity testing by customary courts: Open Society Foundation for South Africa, *South Africa: Justice Sector and the Rule of Law* (2005) 121; but see the Northern Province, *Circumcision Act*.

¹⁷² Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” (1981) 19 *Journal of Legal Pluralism* 1, 20.

¹⁷³ Chuma Himonga and Rashida Manjoo, “What’s in a Name?”, above n 105, 339.

¹⁷⁴ See, eg, Anne Griffiths, *In the Shadow of Marriage: Gender and Justice in An African Community* (1997) Ch 4; Oomen, above n 1, 214-6.

law they must negotiate a more complicated range of social factors which obscure the supposedly autonomous and central role of the law as promised by the rule of law model.

Himonga argues that the “dynamism of the living law is a potential force for the improvement of women”.¹⁷⁵ Overall, she implies that living customary law serves “the most vulnerable groups in society” better than either official customary law or the common law because it is the law that is most accessible and thus most easy to negotiate. Oomen addresses this same question when she examines how different versions of customary law advantage different groups within a community. On the one hand, Oomen is critical of official customary law and those magistrates, anthropologists and state officials who are reluctant to accept the changeable nature of custom. In her view, this approach hinders the coexistence of customary law and human rights¹⁷⁶ and suppresses the process of democratisation.¹⁷⁷ On the other hand, she acknowledges that “the relatively powerless benefit from codification”¹⁷⁸ because when rules are set down and treated as determinative rather than open to negotiation, the outcome depends less on the status of the person in the community. She argues that uncertainty benefits those in power¹⁷⁹ and explains:

The unclarity of norms is beneficial to those in power, who can draw from a whole pool of vague rules, notions, ideas, and state, biblical and other sources to support their position. To those who rule, there is a logic to the disorder.¹⁸⁰

That customary law is vulnerable to abuse and manipulation is confirmed by other studies.¹⁸¹ This analysis juxtaposes legal flexibility and legal certainty and arguably aligns them with legal pluralism and the rule of law. In this equation it appears that the rule of law benefits the most vulnerable groups in society because it is based on the value of legal

¹⁷⁵ Chuma Himonga et al, “Uncovering Reality: Excavating Women’s Rights in African Family Law” (1993) 7 *International Journal of Law and the Family* 314, 363.

¹⁷⁶ Oomen, above n 1, 250.

¹⁷⁷ Ibid 234,

¹⁷⁸ Ibid 204.

¹⁷⁹ Ibid 204.

¹⁸⁰ Ibid 233.

¹⁸¹ See, eg, the studies undertaken by the Women and Law in Southern Africa project: Unity Dow and Puseletso Kidd, *Women, Marriage and Inheritance* (1994) Ch 7; Beatrice Donwa et al, above n 169, 96-97. The latter study argues that instances of abuse are rare while the former argues that customary law is highly open to manipulation by parties.

certainty achieved through rules and minimal discretion of the decision maker. Through fixing rules and procedures, the rule of law aims to eliminate the relational and negotiated aspects of law because it attempts to set down the ground rules for societies where *ubuntu* cannot be assumed to be operating. Theoretically, the horizontality rule entrenched in the Final Constitution’s Bill of Rights means that constitutional protections extend to regulate the interactions between private citizens and thus protect vulnerable groups in everyday dealings.

However, as Coomaraswamy has noted,¹⁸² the reality is that at a practical level the rule of *state* law protects vulnerable groups only in their interaction with the state. Its protection is very limited because the low capacity of the state means that women and children rarely interact with the state. The rule of law guarantees certainty in a formal sphere that most women are unable to access largely due to their lack of resources and their status. Thus, Himonga may be correct in arguing that, for many women, they are better off seeking to influence the development of living customary law than relying on the rule of law, which for them is practically no more than a myth. However, the problem with this path is that women often experience bias and discrimination in participating in customary courts,¹⁸³ although this reputation for bias and discrimination is equally shared by state courts due to the legacy of apartheid.

In the customary law arena the invocation of relevant state law, such as equality guarantees, does not automatically empower a party negotiating the resolution of a dispute.¹⁸⁴ The usefulness of state law depends on the status of the person invoking it and whether they can rally sufficient support for their position.¹⁸⁵ In other words, the dynamics operating at the

¹⁸² See Chapter 3 at n 59.

¹⁸³ According to research conducted by Oomen in the region of Sekhukhune, 42 per cent of women surveyed believed that they had suffered discrimination and bias at the hands of customary courts: Oomen, above n 1, 188. Note that section 9(2)(a) of the Traditional Courts Bill 2008 stipulates that women be afforded “full and equal participation” in the proceedings of customary courts and special consideration be given to “vulnerable persons”.

¹⁸⁴ Ann Stewart, “Juridifying Gender Justice: From Global Rights to Local Justice” in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century* (2003) 36, 48. Stewart elsewhere notes that when women in Africa resort to state law they are often perceived as “anti-African, [and] as imperialists”: Stewart, “Should Women Give Up on the State? – The African Experience” in Shirin M Rai and Geraldine Lievesley (eds), *Women and the State: International Perspectives* (1996) 23, 38.

¹⁸⁵ Griffiths, above n 173; Oomen, above n 1, 214.

local and community level determine the extent to which state law can be empowering.¹⁸⁶ While dispute resolution in the customary law arena emphasises harmony, Oomen argues that it is deeply embedded in unequal power relations: “Behind harmonious decisions there often lurches, explicitly or implicitly, the threat of force ... bewitchment, expulsion from the community [and] the wrath of the ancestors”.¹⁸⁷ Nevertheless, she puts forward access to information about the common law system as a form of empowerment,¹⁸⁸ so that legal pluralism provides a real choice of systems and the protections offered by the rule of law are an option.

The problem is that traditional leaders are often the first and only contact that people have with the law. Many traditional leaders are hampering their community’s access to information about forms of state law, apart from customary law, in order to retain their domain of power.¹⁸⁹ Magistrates are also to blame: where a party attempts to avoid a traditional leader by taking their matter straight to the Magistrates’ Court, they are frequently redirected back to the customary court.¹⁹⁰ In this way, both forms of judicial officers who preside over the state’s lowest courts, are effectively obstructing legal pluralism and the path it potentially offers towards the empowerment of vulnerable groups in society.

The rule of law is limited in its ability to provide protection to approximately 20 million South Africans and to improve their access to justice. For these South Africans, the rule of state law is largely a myth because the state struggles to make contact with their lives. While legal pluralism offers some choice of law, it fails to guarantee quality of justice. In its current form, legal pluralism allows customary courts to continue to mix and match norms so as to benefit mostly the powerful groups in society. Only occasionally do women and other vulnerable groups manage to use legal pluralism to their advantage because they experience the choice of law offered by legal pluralism differently and in a more limited fashion. For these groups, a first step is to ensure that they can experience legal pluralism

¹⁸⁶ Stewart (2003), above n 183, 50.

¹⁸⁷ Oomen, *ibid* 210.

¹⁸⁸ *Ibid* 252.

¹⁸⁹ *Ibid* 234.

¹⁹⁰ *Ibid* 205.

as a “fact” so that they are able to exercise a real choice between legal systems. The Traditional Courts Bill 2008, once enacted, is unlikely to be able to facilitate this shift.

5. Conclusion

While the rule of law is a dominant norm in the international arena, it has come to play an ambivalent role in South Africa’s legal transformation. On the one hand it performs its function of assisting the new order to achieve international legitimacy: in the eyes of the international community, South Africa is a transitional country with strong state institutions that continue to uphold the Constitution. On the other hand, we have seen that the rule of law is a norm that sits awkwardly in the context of the new order’s attempt to respect its constitutional commitment to legal pluralism. With the strong support of the state’s main legal institutions, South Africa’s Parliament is actively insulating the world of customary law and customary courts from the rule of law, a founding value of the Constitution. In some respects, these double standards operate on a socio-economic fault line in that the protections provided by the rule of law are not applicable to those South Africans living in poor rural and urban communities. The phrase “One Law for One Nation” is currently proving to be an empty and unfilled slogan.

It is uncontroversial to conclude that, as a result of its approach to legal pluralism, South Africa has a patchwork rule of law. However, this chapter has also sought to show that the rule of law is by no means a ‘cure all’ for vulnerable groups in South African society because the state makes minimal contact with their lives and lacks capacity to extend its reach. At the same time, legal pluralism is also no panacea as it fails to guarantee any quality of justice that meets the needs of vulnerable groups. This case study shows that as post-apartheid South Africa undergoes a transition to a new legal order based on equality and human dignity, the relationship between the rule of law and legal pluralism transforms the former and pares it back to one of its core goals identified in Chapter 3, equality. Unlike with other rule-of-law principles, state institutions are vigilant in upholding the principle of equality as they work to improve access to justice for women and other vulnerable groups. The challenge lies in guaranteeing that equality is firmly rooted in South Africa’s plural legal systems.

The next chapters present a case study on Timor Leste, which contrasts strongly with that on South Africa because state law pluralism plays no role in Timor-Leste and Timorese legal institutions are very weak. The following case study sets out the dynamics of the relationship between the rule of law and legal pluralism in this context.

Chapter 6. The Sources and Legitimacy of Law in Timor-Leste

1. Introduction

Like South Africa, East Timor has been subjected to waves of imposed foreign legal systems, starting with the Portuguese in the sixteenth century, the Indonesians in 1975 and the United Nations in 1999 following the UN ballot for independence. On 20 May 2002 Timor-Leste became an independent state with a Constitution that declares it to be “a democratic, sovereign, independent and unitary State based on the rule of law”. International norms abound in Timor-Leste’s Constitution while local norms are scarce.

This chapter charts the impact of international influences on Timor-Leste’s negotiation of the rule of law and legal pluralism in its Constitution. It begins by sketching the extent of deep legal pluralism in Timor-Leste and the broader differences between state law and local customary law. It then traces, in Parts 3 and 4, the relationship between the rule of law and legal pluralism during three formative periods of Timor’s history, Portuguese colonisation, Indonesian occupation and UN administration, in order to show the tenacity of local customary law and legal pluralism throughout these periods of international intervention and the limited adherence to the rule of law prior to independence. In particular, in Part 4 it focuses on the UN administration and argues that it provided a poor model of the rule of law for Timor’s independence leaders. Part 5 examines Timor-Leste’s ‘mother law’, its Constitution, and analyses the factors that led to both the invocation of the rule of law and the sidestepping of local customary law.

Overall, this chapter argues that establishing the rule of law in Timor-Leste presents many challenges because state law has historically been weak and shown little respect for the rule of law, while local customary law has continued through the centuries and periods of conflict to provide communities with mechanisms to resolve disputes. In the period leading up to independence, Timor Leste’s leaders entrenched a number of norms from the international sphere, including the rule of law, into the Constitution in order to secure the new state’s international legitimacy. However, this focus on the international sphere has come at the expense of attaining local legitimacy for the state, its institutions and its Constitution. The result is a strong schism between international and local norms. Given

the strength of legal pluralism, it is likely that the international norms invoked in Timor's Constitution will become empty unless they are connected in some form to local norms.

2. Local Customary Law and its Sources of Legitimacy

When the UN arrived in 1999, there were few anthropological or sociological studies on Timor-Leste because of the territory's isolation during Portuguese colonisation and Indonesian occupation.¹ Since 1999, mainly Western anthropologists and NGOs have attempted to fill this gap. Using these studies, this section briefly explains some of the main norms of local customary law in order to show that these norms derive from a separate paradigm, and draw on a different source of legitimacy, to those of state and international law.

To refer to local customary law, the Indonesian word *adat* and the Tetun word *lisan* are often used.² Anthropologists emphasise that these terms refer to more than a system of legal principles governing crime, property, land and marriage in that they relate to a whole system of social relationships.³ On a broad level, law is considered part of a larger socio-cosmic order in which there is a flow of goods and persons and in this scheme there is little conceptual separation of individuals from this larger order and flow of values.⁴ This means that crimes are committed not just against a particular individual and their community but also against one's own ancestors.⁵ Hence, it is considered essential that harmony also be reached with the world of the ancestors, as it is the ancestors who legitimate, and set the

¹ See, eg, F A E Van Wouden, *Types of Social Structure in Eastern Indonesia* (Rodney Needham trans, 1968 ed); James J Fox (ed), *The Flow of Life: Essays on Eastern Indonesia* (1980); Elizabeth Traube, *Cosmology and Social Life* (1986); Gerzon Therik, *Wehali: The Four Corners Land: The Cosmology and Traditions of A Timorese Ritual Centre* (D Phil Thesis, the Australian National University, 1995). Earlier studies, including lusophone studies, are discussed in Rod Nixon, *Integrating Indigenous Approaches into a 'New Subsistence State': The Case of Justice and Conflict Resolution in East Timor* (D Phil Thesis, Charles Darwin University 2008) Ch 7.

² *Adat* is the Indonesian word for the sacred laws or beliefs systems on which local law is based. In Tetun the word is *lisan*.

³ See Tanja Hohe and Rod Nixon, *Reconciling Justice: 'Traditional' Law and State Justice in East Timor (Final Report)* (2003) (Report for the United States Institute of Peace); Tanja Hohe, "Justice Without Judiciary in East Timor" (2003) 3/3 *Conflict, Security and Development* 335.

⁴ Hohe and Nixon, *ibid* 63.

⁵ *Ibid* 23.

principles of, the entire local customary order.⁶ However, the central position of the ancestors in this order means that local leadership is based on descent and hierarchy. Ospina and Hohe explain: “These traditional political concepts form a system in which traditional society can work without a proper state body.”⁷

There are numerous local systems of law across all regions of Timor-Leste but some underlying norms are shared. The main example is the process, sometimes described as arbitration or mediation, used by local legal systems to deal with disputes, where leaders such as a local spiritual leader (*lia nain*) or village chief (*chefe*) listens to the parties before informing them of the required means of compensation. In 2002 anthropologist David Mearns explained the central role of compensation in Timorese systems of law thus:

[J]ustice is never simply a matter of punishment but rather of compensation for the victim and the victim’s family whose honour had been damaged by the crime or offence. Moreover, the acts of individuals as perpetrators have consequences not just for them alone, but also for their families whose shame and dishonour result from any member’s crime or misbehaviour.⁸

From this observation it is apparent that justice and punishment are understood in a collective sense. The debt payment owed by the perpetrator for a crime committed is made in the name of the family as a whole and can be paid by the perpetrator’s family. For example, the crime of arson may involve reimbursing the victim’s family to the extent that the victim’s family is offered the perpetrator’s family belongings.⁹ Similarly, sexual assault may be resolved through compensation paid by the perpetrator to the victim’s

⁶ Ibid 17; Dionisio da C Babo-Soares, “A Brief Overview of the Role of Customary Law in East Timor”, (paper presented at a symposium on East Timor, Indonesia and the Region organised by the Universidade Nova de Lisboa, July 1999) 3 (on file with author).

⁷ Sofi Ospina and Tanja Hohe, *Traditional Power Structures and Local Governance in East Timor: A Case Study of the Community Empowerment Project* (2002) 66.

⁸ David Mearns, *Looking Both Ways: Models for Justice in East Timor* (2002) 43 (Report prepared for Australian Legal Resources International).

⁹ Aisling Swaine, *Traditional Justice and Gender Based Violence* (August 2003) 21 (Report for the International Rescue Society).

family.¹⁰ In this framework, individual rights, such as that of rape victims, are not given priority. Committing a crime is seen as more than an individual act of transgression: it is seen as a community problem.¹¹ The debt created by the act must be settled before social relations can return to normal.¹² In small and remote communities where the state has little reach, this process of discussion, agreement and compensation is an important aspect of justice and social harmony. Taking a matter to the state legal system may risk jeopardising eventual harmony between the parties because formal court settlements generally fail to arrange compensation.¹³ This can lead to the instigation of new crimes as the parties settle the matter in their own way and, in the worst-case scenario, it can spiral into generations of conflict, known as the “‘blood-feud’ phenomenon”.¹⁴

Anthropologists have pointed out that some of the distinctions employed by the state legal system are considered alien to local systems of law in Timor-Leste. One example is the distinction in the state legal system between civil and criminal law. Hohe and Nixon explain that in local legal systems non-violent crimes such as theft may be considered to be more serious than violent crimes while matters such as adultery and divorce are also considered to be very serious because they affect the social fabric.¹⁵ At the same time, the Western legal system does not understand some of the basic tenets of local systems of law. One example is the belief in witchcraft in many districts in Timor-Leste which is contrary to streams of liberal rationalism found in the Western legal system.¹⁶

Thus, while state law and customary law are often in contact with each other, they operate in distant paradigms. On the one hand, state law promotes legal mechanisms as the main means of resolving disputes, while, on the other hand, local customary law prioritises harmony and the kinship group and invokes the supernatural rather than the rule of law as

¹⁰ The crime of rape is conceptualised differently: there is little distinction between rape and adultery. Local legal systems often require the perpetrator to marry the victim or to pay compensation. The case of a man reneging on his promise to marry a woman after consensual sexual intercourse is considered by local authorities to be more serious than that of a violent rape. See Hohe and Nixon, above n 3, 60. See also Swaine, *ibid* 47.

¹¹ See Hohe and Nixon, above n 3, 22.

¹² See Mearns, above n 8, 43.

¹³ Hohe and Nixon, above n 3, 59.

¹⁴ Babo-Soares, above n 6, 11-12.

¹⁵ Hohe and Nixon, above n 3, 19, 63.

¹⁶ Mearns, above n 8, 45. See “‘Witches’ Murdered in E Timor”, Australian Broadcasting Corporation News, 9 January 2008.

its main source of legitimacy. According to Ugo Mattei's taxonomy of world legal systems, set out in Chapter 3, the two systems in Timor-Leste fall into different legal families. Like 'living law' in South Africa, local customary law in Timor-Leste is less legocentric than state law in its approach to resolving disputes. The next section considers the evolution of the formal legal system in Timor-Leste and the tenacity of local customary law in the lives of the local population. It also traces the limited adherence to the concept of the rule of law in the state legal systems that operated prior to independence in 2002.

3. The Portuguese State and the Indonesian State

According to historians and anthropologists, formal legal systems never held great sway in Timor-Leste. The state legal system was weak during the periods of both Portuguese colonisation and Indonesian occupation, which has meant that local customary law has continued in operation until today.¹⁷

During their four centuries of colonial rule beginning in 1556¹⁸ the Portuguese were more interested in tax collection and trade¹⁹ than developing broader state administration and hence colonial rule did not have a significant impact on local power structures and systems of law.²⁰ The Portuguese ruled through a system that bestowed military power onto local chiefs who were expected to provide strong loyalty to Portugal and maintain law and order, a form of indirect rule.²¹ This was often accomplished through using the local custom of entering into blood oaths (*juramentu*) in order to make political connections and achieve peace. The use and manipulation of such local customs gave Portuguese rule a sense of local legitimacy.²²

¹⁷ See Hohe and Nixon, above n 3, 27; Jean A Berlie, "A Concise Legal History of East Timor" (2000) 3 *Studies in Languages and Cultures of East Timor* 138.

¹⁸ This is the date of the first Portuguese settlement at Lifau (in the present day Oecusse). It was not until the beginning of the eighteenth century that a Portuguese Governor was appointed in East Timor. For a history of East Timor, see John G Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (1991); James Dunn, *Timor: A People Betrayed* (1996), Ch 2.

¹⁹ See Hohe and Nixon, above n 3, 27.

²⁰ Ibid 27. More generally, Taylor states "the salient features of East Timorese society remained in the mid twentieth century much as they had been at the time of the Portuguese arrival": above n 18, 15.

²¹ See Berlie, above n 17, 145.

²² Ospina and Hohe, above n 7, 46; Josh Trindade, "Reconciling the Conflicting Paradigms: An East Timorese Vision of the Ideal State" in David Mearns (ed), *Democratic Governance in Timor-Leste: Reconciling the Local and the National* (2008) 160, 165.

Jean Berlie states that until the twentieth century “the local native authorities had considerable judicial power” but it is not apparent that a separate system of native courts was recognised by Portugal.²³ In 1910 the Republic of Portugal was founded and Portuguese rule became more direct.²⁴ During Portuguese colonial rule, Timor-Leste was divided into nine administrative districts²⁵ and it is reported that four courts of justice existed in Dili, Bacau, Suai and Oecusse, presumably to hear serious crimes committed by locals and to resolve disputes relating to non-locals.²⁶ Contrary to Governor Da Silva’s advice in 1897 that Portugal promulgate special laws for Timor-Leste that reflected the territory’s social conditions and customs,²⁷ few such laws were made over the centuries.²⁸ However, this minimal outside interference allowed local legal systems to continue operating.²⁹ It would be difficult to argue that there was any semblance of the rule of law at work in colonial East Timor. There is no evidence of either due process being observed in the justice meted out under state law to locals and non-locals or of any avenues to check and restrain the abuse of state power by state officials.

A greater impact was felt by the imposition of the Indonesian legal system during the occupation (1976-1999). East Timor was annexed as the 27th province of Indonesia in 1976. As a province, it became subject to laws adopted by Indonesia’s national legislative council and only civil matters were left to the local level to deal with.³⁰ According to one report, during the occupation, Indonesia passed a law that “permitted no local traditional

²³ Berlie, above n 17, 147.

²⁴ After World War Two, Portugal recognised East Timor as one of its ‘overseas provinces’, rather than a colony. See Berlie, *ibid* 148, who says that a “politico-administrative statute for Timor was published in the Organic Law of the Portuguese Overseas (no 2066)” in June 1953. This was during the dictatorship of António de Oliveira Salazar (1932-1968). It is possible that this issue was formalised earlier by the Portuguese Constitution in 1951. However, see James Dunn, *East Timor: Rough Passage to Independence* (2003) 32, who says that this status was declared in 1963.

²⁵ The nine districts were Dili, Lautem, Viqueque, Bacau, Manatuto, Suro, Ermera, Bobonaro, and Oecusse.

²⁶ See Berlie, above n 17, 150.

²⁷ Governor Jose Celestino da Silva (1897) *Relatorio das Operações de Guerra no Districto Autónomo de Timor no Anno de 1896, Enviado ao Ministro e Secretario D’Estado dos Negocios da Marinha e Ultramar pelo Governador do Mesmo Districto* 42-3 translated by Laura Meitzner Yoder in Yoder, *Custom, Codification, Collaboration: Integrating the Legacies of land and Forest Authorities in Oecusse Enclave, East Timor* (D Phil Thesis, Yale University, 2005) 291-292.

²⁸ Berlie, above n 17, 149.

²⁹ Hohe and Nixon, above n 3, 27.

³⁰ See Hohe and Nixon, above n 3, 27.

institution to exist apart from those adopted by the national legislative body”.³¹ Due to widespread perceptions of its corruption, the local population viewed the Indonesian legal system with deep distrust.³² People saw state law as the tool of the oppressor or as “simply irrelevant”³³ and considered state courts to be partial and political, condoning impunity for perpetrators of serious crimes against the local population.³⁴ Amnesty International asserted in 2001:

Under Indonesia the judiciary was independent in law, but in practice the courts were an arm of government used to detain and imprison political opponents - especially supporters of political independence. The Indonesian judiciary was, and still is, widely recognised as suffering from deeply rooted corruption.³⁵

There was no separation of powers as the Indonesian executive controlled the actions of the judiciary.³⁶ It is fair to say that during this time there may have been rule *by* law but not rule *of* law in the sense that there were no effective mechanisms for constraining and disciplining the abuses of public power. Sarah Pritchard states:

under Portuguese colonial administration and repressive Indonesian occupation, there was little opportunity for the East Timorese people to develop an understanding of and commitment to concepts such as the rule of law and the independence of the judiciary.³⁷

³¹ Shelley R Quast, *Report on East Timor* (March 2002) 22 (Report for the International Legal Assistance Consortium). Babo-Soares explains that this law (UU No 5 Tahun 1974 tentang Pokok Pemerintahan di Daerah), adopted in 1974, “permits no local traditional institution to exist apart from those adopted by the national legislative body”: above n 6, 10.

³² See Hohe and Nixon above n 3, 7; see also 26-7. Babo Soares writes that “the degradation of public credibility on the judicial system” during the period “prompted people to rely on traditional ways of solving disputes rather than on state courts”: above n 6, 12.

³³ See *Chega!*, *Report of the Commission for Reception, Truth and Reconciliation*, Part 9, [143].

³⁴ Amnesty International, *East Timor: Justice Past, Present and Future* (2001) 13.

³⁵ *Ibid.*

³⁶ International Commission of Jurists and the Netherlands Institute of Human Rights, *Indonesia and the Rule of Law: Twenty Years of ‘New Order’ Government* (1987) 61ff; International Commission of Jurists, *Ruler’s Law: Mission to Indonesia* (1999) 42-50.

³⁷ Sarah Pritchard, “United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor” (2001) 24 *University of New South Wales Law Journal* 183, 190.

Given these circumstances, there was minimal public confidence in state law: local people preferred to use the path of customary law wherever possible in order to avoid contact with the state.³⁸ Locals would rarely access the formal legal system, except when it came to report serious cases such as murder.³⁹ The formal legal system was seen as a last resort. In short, the rule of law was absent and the distrust of the state legal system meant deep legal pluralism flourished, with local customary law operating alongside state law.⁴⁰

4. The UNTAET Administration

It is uncontroversial that the concept of the rule of law was not respected by the Indonesian state in East Timor during colonisation and occupation. The first concerted effort to establish the rule of law took place during the UN administration from the arrival of the UN Transitional Administration in East Timor (UNTAET) in October 1999 to independence in May 2002. This period represents the first phase of the formation of East Timor's legal system. This section examines this formative period in Timor-Leste's history in order to determine: (1) the nature of the model of the rule of law that was bequeathed by UNTAET to the independence governments, and; (2) UNTAET's approach to the question of legal pluralism.

Under UN Security Council Resolution 1272, the Transitional Administrator (TA) was given the mandate to exercise all legislative, executive and judicial power on behalf of the Security Council. The duty of establishing the rule of law was not included in the mandate although the Resolution does endorse the UN Secretary-General's report of 4 October 1999, which states that one of the mission's objectives was "to ensure the establishment and maintenance of the rule of law and to promote and protect human rights".⁴¹ The wide scope of the TA's powers arguably placed his position in tension with the rule of law: in a candid reflection, the TA, Sergio Vieira de Mello, labelled his position as one of "benevolent despotism", and compared his "quasi-dictatorial powers" with the powers

³⁸ Hohe and Nixon, above n 3, 26-7.

³⁹ Ibid, 19, 26.

⁴⁰ Berlie, above n 17, 149. This is confirmed by Taylor who states that the "two political systems, the colonial and the indigenous co-existed" but in a "rather uneasy truce": above n 18, 12.

⁴¹ *Report of the Secretary-General on the Situation in East Timor*, [29(h)], UN Doc S/1999/1024, (4 October 1999).

exercised by colonial regimes.⁴² Pointing out the obvious democratic deficit, in that the UN Secretary-General appointed him with little or no consultation with the local population, he added: “There is no separation of the legislative or judicial from the executive authority. There are no positive models on how to exercise such broad powers.”⁴³

During his mandate the TA made efforts to mitigate this problem by appointing a consultative body of local leaders, the National Council,⁴⁴ and setting up bodies such as the Office of the Inspector General to provide a means of scrutinising the efficiency of the administration. But in the absence of elections and strong powers of scrutiny, it proved difficult to boost the local perception of legitimacy in his administration. At the end of UNTAET’s mandate, one respected Timorese NGO, La’o Hamutuk, commented on UNTAET’s legacy in relation to its governance model. It stated:

Although UNTAET preached good governance, transparency, accountability, democracy and the rule of law to the East Timorese, it showed little of these in itself. UNTAET is a government without a constitution, with all power residing in one man, the Transitional Administrator Sergio Vieira de Mello.⁴⁵

This comment singles out a constitution as a mechanism that would have enabled the overly broad powers of the administration to be properly limited and regulated by the law in line with the concept of the rule of law. Although the idea of a constitution at this point of time is somewhat fanciful, such a mechanism would have ideally given guidance to both UN administrators and the local population as to the applicable laws.

⁴² Sergio Vieira de Mello, “How Not to Run a Country: Lessons for the UN from Kosovo and East Timor” (2000, on file with author) 4, 7.

⁴³ Ibid 4.

⁴⁴ The “National Consultative Council” was set up by UNTAET Regulation 1999/2 (2 December 1999) to bolster the democratic local legitimacy of the TA’s mandate to make and execute laws. This body was reformed in mid 2000 so as to make the body more broadly representative. The “National Council” was formed by UNTAET Regulation 2000/24 (14 July 2000). See also UNTAET Regulation 2000/33 (26 October 2000). The body comprised 36 members from sectors of the East Timorese community including 10 politicians and a representative from each of the 13 districts.

⁴⁵ La’o Hamutuk, “East Timor Faces-Post UNTAET Challenges: What is to be done?” (2002) 3/4 *La’o Hamutuk Bulletin* 9 see <<http://www.laohamutuk.org/Bulletin/2002/May/lhv3n4en.pdf>> at 25 May 2007.

4.1 *The Rule of Law and the Alves Case*

A case in the newly established Timorese courts that highlighted the absence of such a constitutional mechanism was that of Viktor Alves.⁴⁶ Alves had been arrested by the UN's International Force for East Timor and held in detention beyond the legal limit of 110 days permitted by the Indonesian Code of Criminal Procedure. Twelve days after his lawyers filed an application challenging his prolonged detention and a day before his hearing, UNTAET enacted Regulation 2000/14, which came into immediate effect. The Regulation included a provision that replaced the time limits imposed by Indonesian law with provisions allowing a panel of judges to extend detention periods beyond six months in particular circumstances.⁴⁷ At the hearing regarding Alves' prolonged detention, Judge Rui Perreira dos Santos, sitting alone, ruled that Regulation 2000/14 was invalid partly on the basis that it was inconsistent with section 3 of UNTAET Regulation 1999/1, which provided that the applicable law was subject to international human rights law. While the judge may have been correct in this particular respect, he failed to understand that section 3 was not intended to guide or constrain the enactment of all future law, such as the regulations passed by UNTAET. Instead, it was intended to act as a filter for all *past* legislation, namely Indonesian legislation that applied during the occupation. This meant that, strictly speaking, law enacted by UNTAET did not need to comply with international human rights law. As a consequence the judgment was ignored. The *Alves case* underlined the poor model provided by the UN administration in regard to the rule of law: here UNTAET was attempting to use retroactive legislation to validate a period of detention that was unlawful under the Indonesian code and that appeared to violate Articles 9 and 14 of the *International Covenant on Civil and Political Rights* which set out the right to liberty and fair trial. This model was arguably dangerous in light of the fact that most Timorese leaders were part of the military resistance to Indonesian rule, a culture which, broadly speaking, does not generate respect for the idea of dispersing and limiting power according

⁴⁶ Unreported, District Court of Dili, Judge Perreira dos Santos, 17 May 2000; Putusan Nomor: 01/Pen.Pra/2000/PD.DIL. For an excellent discussion and analysis of this case, see Suzannah Linton, "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor" (2001) 25 *Melbourne University Law Review* 122, 140ff.

⁴⁷ Linton, *ibid* 141.

to a superior law. The focus of resistance culture is on subverting state structures of power and law rather than on upholding them.

One commentator asserts that following the *Alves case*, the executive attempted to interfere with the judiciary. Citing a personal communication with the presiding judge, Dionisio Babo-Soares claims:

Days later, the head of the Justice Department intervened and warned the presiding judge to comply with UNTAET's rules of the game and not to repeat the same mistake in the future.⁴⁸

If true, this precedent perverted the concept of the rule of law and the separation of powers because it constituted interference with the manner in which the courts interpret and apply the law. More broadly, it created a very weak model for Timor's future independent governments.

4.2 UNTAET and Local Customary Law

UNTAET was caught unprepared in regard to the issue of local customary law which did not register on UNTAET's radar until well into its mission. Under the mandate given by SC Resolution 1272, UNTAET began the process of rebuilding Timor-Leste's formal legal system with its first regulation in late November 1999, setting out that the applicable law was the Indonesian law that operated prior to 25 October 1999, subject to its own regulations and international human rights law.⁴⁹ A few days later a third regulation set out

⁴⁸ Dionisio Babo-Soares, *Law and Order: Judiciary Development in East Timor* (2001) 14 <<http://www.caec-asiaeuropa.org/Conference/Publications/soareslaw.PDF>> at 25 June 2008.

⁴⁹ This was the date of UNTAET's establishment. Indonesian law was to apply in so far as it did not conflict with standards set out in the *Universal Declaration on Human Rights* and the six core UN human rights treaties: see Sections 2 and 3 of UNTAET Regulation No 1999/1 On the Authority of the Transitional Administration in East Timor. The six core treaties are: the 1966 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and its Protocols; 1966 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976); 1965 *International Convention for the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); 1979 *Convention on the Elimination of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); 1989 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2

the powers of the TA to appoint judges.⁵⁰ In March 2000 the TA issued Regulation 2000/11 for the organisation of courts in Timor-Leste, stating in section 1 that: “judicial authority in East Timor shall be *exclusively* vested in courts that are established by law and composed of judges who are appointed to these courts in accordance with UNTAET Regulation No 1999/3”.⁵¹ Subsequently UNTAET established four district courts in Dili, Bacau, Suai and Oecusse, an arrangement, mirroring pre-UNTAET administration,⁵² with a Court of Appeal at the apex.⁵³ These initiatives attracted admiration from commentators at the time. For example, in 2001 Babo-Soares praised “the success of UNTAET in laying the foundation of a legal infrastructure which has attracted the confidence of the population” and he called the justice sector a “prestigious asset for East Timor”.⁵⁴

Despite the manifold demands on its resources, UNTAET clearly gave some thought to the establishment of Timor-Leste’s formal legal system. However, the Administration believed it was building the justice system from scratch. UNTAET’s Acting Principal Legal Advisor from this period, Hansjörg Strohmeier, writes that the “empty shell” metaphor was often used in UNTAET’s early days in Timor-Leste.⁵⁵ While there was an awareness that some areas, such as education, only needed “resuscitation”, there was the belief that a new legal framework had to be built in order to “avoid a law vacuum”.⁵⁶ Despite this,

September 1990). In addition, six Indonesian statutes were declared inapplicable and capital punishment was abolished.

⁵⁰ UNTAET Regulation No 1999/3, On the Establishment of a Transitional Judicial Service Commission. For analysis of the establishment of East Timor’s formal criminal legal system, see Linton, above n 46.

⁵¹ (Emphasis added). UNTAET subsequently established District Administrations in the thirteen districts established by Indonesia and created sub district offices numbering sixty, each of which contain about eight villages.

⁵² UNTAET Regulation No 2000/11 initially stipulated the establishment of eight district courts (s 7) but this was later amended to four courts by UNTAET Regulation No 2000/14 (s 2).

⁵³ East Timor’s highest court is the Supreme Court of Justice but under Article 164 of the Constitution, the Court of Appeal can exercise its functions until such time as it is established.

⁵⁴ Babo-Soares, above n 48, 19.

⁵⁵ Hansjörg Strohmeier, “Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor” (2001) 25/2 *Fletcher Forum of World Affairs* 107, 109. Other reports use similar language that is potentially misleading and could be misread as suggesting a terra nullius doctrine. For example, the description “complete legal vacuum” is used in the report by King’s College, London. However, only a few paragraphs later there is discussion of “the continued widespread reliance on traditional or customary justice mechanisms”: King’s College London, *A Review of Peace Operations: A Case for Change- East Timor* (10 March 2003) [217, 219].

⁵⁶ Strohmeier, *ibid* 109, 111. It is more correct to say that a legal vacuum existed in regards to the treatment of serious crimes.

Strohmeier recognised that the viability of the new state legal system depended on “the integration of customary law and traditional forms of dispute resolution”.⁵⁷ Overall, however, such beliefs were not transformed into policy and there is no evidence of any UNTAET regulation or policy regarding the role of local customary law and how it could assist in maintaining law and order.⁵⁸ Possibly this was due to the initial dearth of detailed knowledge of the local justice systems and how they function.⁵⁹

On the ground, the result of this initial UN policy vacuum in regard to the role of local customary law was that a range of approaches was used in relation to local law by various UN staff. For example, some UN Civilian Police officers used local law, while others refused to do so.⁶⁰ This led to confusion: while locals were uncertain as to which law was applicable, UN personnel were unable either to distinguish local customary law from other structures or to identify customary law leaders on a consistent basis.⁶¹ In January 2001, UNTAET’s Language and Training Unit issued a booklet entitled *Working in East Timor: Culture, Customs and Capacity Building* in which a detailed account was given of local customary law.⁶² According to Hohe and Nixon, this emergence of interest in local

⁵⁷ Hansjörg Strohmeier, “Building a New Judiciary for East Timor: Challenges of a Fledgling Nations” (2001) 11 *Criminal Law Forum* 259, 271.

⁵⁸ Note that there is some evidence that by the end of 2000 UNTAET had developed a proposal for using local customary law in resolving land disputes. Daniel Fitzpatrick, who spent three months with UNTAET’s Land and Property Unit, states: “In general terms, a three-tier system is proposed: traditional processes, then mediation and, failing that, judicial determination.”: (2000) 15 *Pacific Economic Bulletin* 152, 158.

⁵⁹ The first detailed report on local law came out in 2001. See David Mearns *Variations on a Theme: Coalitions of Authority in East Timor* (2001) (Report prepared for Australian Legal Resources International). See also Mearns, above n 8; Hohe and Nixon, above n 3, 40. Presumably this initial policy vacuum resulted from a combination of a lack of resources and poor communication channels between the local community and the UN administration.

⁶⁰ See Hohe and Nixon, above n 3, 40. Note that from early 2000 onwards, UNTAET showed interest in traditional mechanisms of conflict resolution in its approach to policing: see *Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the period 27 January-26 July 2000)*, [46], UN Doc S/2000/738, (26 July 2000).

⁶¹ Strohmeier, above n 57, 277.

⁶² Copy on file with author. In September 2001, almost two years into UNTAET’s mission, a workshop was held to discuss the manner in which local customary law could be used to complement the formal justice system: *Report of the Secretary General on the United Nations Transitional Administration in East Timor (for the period from 25 July to 15 October 2001)*, [18] UN Doc S/2001/983 (2001).

customary law related not simply to law and order but was largely due to pressure relating to land disputes.⁶³

In the remote enclave of Oecusse, an initiative was developed by the UN district administration to divert minor crimes from the state legal system to a modified form of local customary law.⁶⁴ UNTAET headquarters apparently gave the Oecusse Diversionary Justice Programme “conditional and partial” approval to operate a model that strived for consistency with human rights norms and emphasised community service in the place of exchange of livestock and other material wealth, which is the norm of local customary law.⁶⁵ This hybrid programme operated until early 2002 when a guideline was passed discouraging the diversion of matters from the state legal system.⁶⁶

In regard to land disputes, UNTAET organised for a system of mediation on an interim basis. It encouraged local officials to assist parties to reach interim agreements on principles such as non-resort to violence, and to negotiate “temporary use agreements”.⁶⁷ This system of mediation operated on an informal basis and presumably it worked to aid the maintenance of law and order and to divert cases from the courts.

On a technical level, Strohmeyer observed the difficulty in many regions of distinguishing “customary law from other, more recent, structures for resolving disputes outside the formal court system (including Indonesian, CNRT, or Falintil structures)”.⁶⁸ For Strohmeyer, a further complication was “the possible bias of traditional justice against ‘marginalised’ groups such as women, children or minorities”.⁶⁹ Such bias ran counter to

⁶³ Hohe and Nixon, above n 3, 41. In the drafting of the Constitution, this question of land ownership and management appears to have been one of the main drivers for the inclusion of the recognition of customary “norms” in Article 2(4): see article on environmental activist Demetriou do Amaral de Carvalho <<http://www.goldmanprize.org/node/95>> at 2 October 2008.

⁶⁴ Hohe and Nixon describe this programme, above n 3, 47-49. See also Nixon, *Integrating Indigenous Approaches into a ‘New Subsistence State’* above n 1 at Ch 8.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Daniel Fitzpatrick, *Land Claims in East Timor* (2002) 177.

⁶⁸ Strohmeyer, above n 57, 277. The National Council of Timorese Resistance (CNRT) was established in early 1999 as an umbrella organisation for the different nationalistic political parties in order to assist East Timor in its transition to a democratically elected government. Falintil was the armed wing of Fretilin, the main resistance party.

⁶⁹ Ibid.

the guarantees of non-discrimination found in international human rights law which UNTAET introduced in its first regulation.

From a broad perspective, UNTAET may not have been in the position to give state recognition to aspects of local customary law given that it was a foreign and transitional administrator. Its focus necessarily lay with setting up structures that would assist Timor reach independence and assist the state to function in the short term; it was envisaged that Timor's elected leaders would enjoy the legitimacy to pass legislation for the medium-to-long-term functioning of the state.

4.3 UNTAET and International Law

UNTAET's ostensible concern regarding the legitimacy of enacting laws with long-term consequences did not prevent it from introducing two strands of international law, largely for the purpose of assisting the state in establishing the rule of law. The first strand, international human rights law, was brought in so as to erase the discriminatory and substandard aspects of Indonesian law and to herald in a new era. The UN wanted the people of East Timor to "embrace a national political culture based on respect for human rights and accountability".⁷⁰ For example, Strohmeier declared in 2001:

UNTAET is ... attempting to mark a radical departure from the culture of the judiciary which existed under Indonesian rule by committing the new judiciary to international human rights standards.⁷¹

UNTAET aimed "to establish a credible system of justice in which fundamental human rights are respected".⁷² International human rights standards were thus being held up as central to the project of building the rule of law in East Timor. The second strand was international criminal law, which was introduced through the establishment of the Special Panels for Serious Crimes (SPSC), an arm of the Dili District Court empowered by UNTAET Regulation 2000/15 to hear a list of crimes similar to that found in the *Statute for*

⁷⁰ *Report of the Security Council Mission to East Timor and Indonesia (9-17 November 2000)*, [29], UN Doc S/2000/1105 (21 November 2000).

⁷¹ Strohmeier, above n 57, 267.

⁷² *Report of the Secretary General on the United Nations Transitional Administration in East Timor (for the period 27 January – 26 July 2000)*, [68], UN Doc S/2000/738, (26 July 2000).

the International Criminal Court.⁷³ International criminal law is often associated with the rule of law because it enables the prosecution of international humanitarian law and thus provides a path to secure accountability and end impunity for serious crimes.

The implementation of international standards is, however, a challenge that does not always operate to strengthen the rule of law in a post-conflict context. The introduction of international law raised four main problems in Timor-Leste. First, there was the problem of attempting to implement international standards that are very complex and difficult to execute in a context where there is only a basic legal system in operation. The difficulty of implementing these standards can be seen in the UNTAET period through the *Alves case*, discussed above, where UNTAET was attempting to balance respect for Articles 9 and 14 of the *International Covenant on Civil and Political Rights*, relating to the deprivation of liberty and the right to fair trial, with the practical realities on the ground - primarily a weak and slow state legal system. In regard to detention periods, UNTAET was accused of failing to fulfil international standards,⁷⁴ a perception which failed to commend its rule-of-law model.

A second challenge is that the broad introduction of international law can bring considerable uncertainty and unpredictability to the law. This is seen through UNTAET's own attempt to introduce international human rights law as a device to filter the application of Indonesian law. An initial problem was that the *Universal Declaration of Human Rights* (UDHR) and the six core human rights treaties⁷⁵ were not annexed to the Regulation. The annexation of these instruments could have assisted in clarifying which law was being referred to. Moreover, UNTAET's legal team did not have sufficient time or resources to examine all Indonesian law to ascertain which laws should be eliminated. This meant that the process of elimination had to take place 'on the run'. An example is the case of Takeshi Kashiwagi, a Japanese activist who in 2000 was detained and charged with criminal

⁷³ Established in June 2000, the Special Panels for Serious Crimes exercised jurisdiction over genocide, war crimes, crimes against humanity and torture. In addition, it had jurisdiction over the 'serious crimes' of murder and sexual offences committed between 1 January 1999 and 25 October 1999.

⁷⁴ Linton, above n 46, 145.

⁷⁵ For the six core treaties, see above n 49.

defamation under the Indonesian Penal Code.⁷⁶ Only after Kashiwagi had spent eighteen days in detention and issued proceedings against a host of high ranking legal officials, including the Investigating Judge, the Head Prosecutor of Dili District Court, the Deputy General Prosecutor for Ordinary Crimes, the Minister for Justice and the Transitional Administrator, was action taken to clarify the applicable law in this respect. The Transitional Administrator issued an Executive Order that criminal defamation was inconsistent with international human rights law and hence inapplicable. This case demonstrates the strong level of confusion present even in the offices of the Prosecutor and the Investigating Judge as to the applicable law in light of international human rights law.

A third challenge is that the introduction of international law often heightens the expectations of the population to a level that it is difficult to meet. This is seen in the Serious Crimes Process, which after ten months was criticised by a group of NGOs in a letter to the UN Security Council. The letter states:

The East Timorese people's patience and expectation with this avenue of justice is understandably wearing thin. Meanwhile, the rule of law seems as hard to find at this stage of the process as it was under colonial rule.⁷⁷

This last line is a strong condemnation of the process's contribution to the building of the rule of law by UNTAET. Overall there have been mixed conclusions as to whether the process has contributed to the establishment of the rule of law. For example, the International Center for Transitional Justice doubts whether the process has boosted the rule of law because the SPSC's inability to prosecute the main perpetrators has led to perceptions of arbitrary and selective state justice.⁷⁸

⁷⁶ This case is discussed by Amnesty International, above n 34, [5.3] and Carla Bongiorno, "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor" (2002) 33 *Columbia Human Rights Law Review* 623, 666.

⁷⁷ Letter to UNSC from NGOs re: "Urgent Steps to Establish Justice for Crimes Against Humanity in East Timor" dated 24 October 2001. See <<http://www.etan.org/news/2001a/10etngo.htm>> at 26 June 2008, 20.

⁷⁸ The International Center for Transitional Justice (Caitlin Reiger and Marieke Wierda), *The Serious Crimes Process in Timor-Leste: In Retrospect* (March 2006) 33, 36.

A fourth challenge is the fact that these international standards invoke values that are considered alien by many people. A local lawyer interviewed during the UNTAET period expresses this latter concern thus:

The UN have a mandate to provide stability, but they should not just impose these human rights laws from New York and Geneva. People felt strange having these laws imposed. The UN should have consulted with the communities to ask the leaders what ideas they had about implementing UN laws.⁷⁹

This comment questions the legitimacy of UNTAET's introduction of international human rights standards on the basis of the lack of consultation with the community.⁸⁰

4.4 UNTAET's Legacy

At the end of UNTAET's period of administration, a report by King's College London stated that: "it is widely acknowledged that the fragility of the rule of law remains one of the greatest challenges for East Timor after UNTAET's departure".⁸¹ It further observed that:

access to and awareness of the transitional court system remain minimal for many in East Timor, raising real questions about the relevance of the processes that were put in place by UNTAET. ... As a result, many people still have no contact with the formal justice system and rely on customary law structures.⁸²

The impact of UNTAET's attempt to build a state legal system and establish the rule of law can also be partly measured by the comment of some local village heads in 2002 to the

⁷⁹ Quoted by Hohe and Nixon, above n 3, 57.

⁸⁰ On the ground UNTAET may have had little opportunity to consult with communities before issuing Regulation 1999/1 but the point remains that the UN simply assumed that these international legal norms would contribute to the building of the rule of law in East Timor and hence be acceptable to the population.

⁸¹ King's College London, *A Review of Peace Operations: A Case for Change- East Timor* (10 March 2003) [214].

⁸² *Ibid* [252].

effect that they believed there was “no law at present”.⁸³ Thus the first phase of the formation of Timor-Leste’s legal system was marked by three things: failure to penetrate much beyond the capital Dili, little consideration of the complexities of legal pluralism and an inconsistent and weak model of the rule of law.

At the end of 2000, Xanana Gusmão, when speaking to a local audience, expressed concern regarding the “critical acculturation to standards that hundreds of international experts try to convey to the East Timorese”.⁸⁴ After discussing the values of democracy and gender equality, Gusmão said:

what seems absurd is that *we absorb standards just to pretend we look like a democratic society and please our masters of independence*. What concerns me is that *non-critical absorption of (universal) standards ... [and] that the East Timorese may become detached from their reality and, above all, try to copy something which is not yet clearly understood by them*.⁸⁵

Less than two years later, while speaking as the President of Timor-Leste at an international conference, Gusmão declared:

We were lucky to become independent in an environment in which the entire world, the people, and above all the government, are able to use a common language: democracy, human rights, civil society, good governance, anti-corruption policy, social justice ... *in summary, the rule of law*.⁸⁶

He then went on to explain that the Timor-Leste Constitution proclaims a “sovereign and independent state, based on the rule of law”. These two speeches reveal the ambivalence of

⁸³ Mearns, above n 8, 38. This comment illustrates the amount of time that it takes to communicate to locals the existence and relevance of the new formal legal system, as well as the degree of community consultation that took place in the drafting and enactment of East Timor’s Constitution.

⁸⁴ 2000 New Year’s Speech quoted in Hilary Charlesworth and Mary Woods, “Women and Human Rights in the Rebuilding of East Timor” (2002) 71 *Nordic Journal of International Law* 325, 335.

⁸⁵ Ibid (emphases added).

⁸⁶ 8 November 2002, Bangkok, quoted in Xanana Gusmão, *Timor Lives! Speeches of Freedom and Independence* (2005) 93.

Gusmão and other Timorese leaders regarding the “universal standards” promoted by UNTAET and their understanding that it is necessary to pay lip service to these standards within the international community. A sceptic might say that they provide evidence that UNTAET’s legacy was that Timor’s independence leaders learnt to “copy” the “common language” of the rule of law in order to legitimise the state and “please [its] masters of independence”, the international community.

5. The ‘Mother Law’ and its Sources of Legitimacy

Dubbed the “mother law”, Timor-Leste’s Constitution was formally drafted within the very short timeframe of six months.⁸⁷ Before this six-month period, the Fretilin party had drafted a constitution, the final version of which differs little from this Fretilin draft because Fretilin won a majority of the seats in the drafting body, the Constituent Assembly.⁸⁸ Nevertheless, some semblance of public consultation was conducted, albeit possibly as a “public relations” event.⁸⁹ Prior to the election of the Constituent Assembly in August 2001, the UN conducted the first set of public consultations in July 2001. In late February 2002, the Constituent Assembly also conducted public consultations in relation to its penultimate draft, rejecting the UN consultations on the basis that they were not conducted by a body with democratic legitimacy.⁹⁰ In early March 2002, the limited consultation and the lack of a feeling of local ownership over the process drew the attention of the UN High Commissioner for Human Rights who commented:

⁸⁷ See Anthony Regan, “Constitution-Making in East Timor: Missed Opportunities” in Babo Soares et al (eds), *Elections and Constitution-Making in East Timor* (2003) 39; Alipio Baltazar, “An Overview of the Constitution Drafting Process in East Timor” (2004) 9 *East Timor Law Journal* 1.

⁸⁸ The Carter Center reports: “Observers suspected that the Assembly did not intend to make any significant changes to the constitutional draft, and ultimately they did not.”: *The East Timor Political and Election Observation Project Final Report* (2004) 45. Note that 4 other parties also submitted draft constitutions when the assembly began its process but that Fretilin’s draft was chosen as a result of its majority.

⁸⁹ Brandt writes that some members of the Constituent Assembly privately maintained that the consultation process was an exercise in public relations only: Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (2005) (Report for UNDP) 17.

⁹⁰ Baltazar comments that the members of the Constitutional Commissions were concerned that the Constituent Assembly would not read their reports and hence requested to participate in the sessions so as to brief the Assembly: Alipio Baltazar, “An Overview of the Constitution Drafting Process in East Timor” (2004) 9 *East Timor Law Journal* 5. The Assembly never made the results of the second local consultations available to the public.

[I]n emphasising the ‘representative democratic’ model of government, the work of the Assembly itself seems to minimise the right of individuals in East Timor to participate in political life by contributing to political debate surrounding the Constitution. ... [T]here is a popular perception that, to a larger extent, the drafting process has focussed on the prepared drafts of political parties, rather than incorporating comments or suggestions from ongoing consultations or the public hearings. As a result, there appears to be a limited sense of ownership of the process amongst civil society and already a questioning of the responsiveness of the Assembly to its constituents.⁹¹

While local consultation was not considered a priority, the Constitution shows levels of influence emanating from the international sphere, specifically the United Nations, the Constitutions of Timor’s lusophone kin, Portugal and Mozambique, and the resistance and diaspora politics of the Fretilin party, which relates to the Cold War divide. Little influence from local norms and traditions is apparent.

The Timor-Leste Constitution invokes the rule of law three times, twice in a mirror image of the Mozambican Constitution, which in turn draws on the Portuguese Constitution. The rule of law is first stated in Timor’s constitutional preamble, which provides:

Fully conscious of the need to build a democratic and institutional culture proper of *a State based on the rule of law* where respect for the Constitution, (própria de um Estado de Direito onde o respeito pela Constituição) for the laws and for democratically elected institutions constitute its unquestionable foundation;⁹²

⁹¹ *Situation of Human Rights – Report of the High Commissioner*, [46], UN Doc E/CN.4/2002/39 (1 March 2002). The report continues: “there were serious concerns regarding the extent to which the Assembly members were receptive to the submissions of those outside the political party members”.

⁹² (Emphasis added). All three lusophone preambles show the influence of socialist constitutional models exemplified in the constitutions of China and the Soviet Union. However, they differ from these two models of China and the Soviet Union in that they are narratives of a new beginning based on the modern political values of democracy, equality and the rule of law. Mozambique is one of a number of African countries (such as Angola and Guinea-Bissau) to pursue the Soviet model of constitutionalism: see Luis B Serapaio and Mohamed A El Khawas, *Mozambique in the Twentieth Century: From Colonialism to Independence* (1979).

Second, it is articulated as a foundational concept in Article 1:⁹³

The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary *State based on the rule of law*, (é um Estado de direito democrático, soberano, independente e unitário) the will of the people and the respect for the dignity of the human person.⁹⁴

The principle of constitutionalism is set out in Article 2,⁹⁵ which is textually very close to Article 3 of Portugal's Constitution.⁹⁶ Third, the rule of law is articulated as a state objective in Article 6. While Article 6's list of state objectives are on the whole fairly similar to those set out in the Portuguese and Mozambican Constitutions,⁹⁷ the Timorese list is extended to reiterate the rule of law.⁹⁸ This divergence from the two lusophone models can perhaps be explained by the influence of other actors such as the United Nations or the World Bank and the strong desire of the newly independent state to affirm its legitimacy and sovereignty at the international level. Overall, however, most of the machinery provisions of Timor-Leste's Constitution have been 'cut and pasted' from the constitutions of its lusophone friends with few modifications.

5.1 International Norms and Local Norms

Overall, international norms are strongly articulated in the Constitution. In entrenching a Bill of Rights, Timor-Leste's Constitution incorporates most parts of the *UDHR*, thus

⁹³ (Emphasis added). Article 2 of the Portuguese Constitution provides: "The Portuguese Republic is a democratic *State based on the rule of law*, (A República Portuguesa é um Estado de direito democrático,) the sovereignty of the people, plurality of both democratic expression and democratic political organization as well as respect for and the safeguarding of fundamental rights and freedoms; its aim is to achieve economic, social, and cultural democracy and to push participatory democracy further." (emphasis added).

⁹⁴ (Emphasis added).

⁹⁵ Article 2, entitled "Sovereignty and constitutionality", provides: "1. Sovereignty rests with the people, who shall exercise it in the manner and form laid down in the Constitution. 2. The State shall be subject to the Constitution and to the law. 3. The validity of the laws and other actions of the State and local Government depends upon their compliance with the Constitution. 4. ..."

⁹⁶ This is with the exception of Article 2(4).

⁹⁷ Generally Article 6 mirrors provisions in Portugal's Constitution (Article 9) and Mozambique's Constitution (Article 6). Note that the listing of a state's goals is a feature of socialist constitutions. See Julian Go, "Modelling the State: Postcolonial Constitutions in Asia and Africa" (2002) 39/4 *Southeast Asian Studies* 558.

⁹⁸ Article 6 provides: "The fundamental objectives of the State shall be: ... b) To guarantee and promote fundamental rights and freedoms of the citizens and the respect for the principles of the democratic State based on the rule of law".

showing the influence of the United Nations.⁹⁹ The Constitution's Bill of Rights is extensive, including a number of provisions protecting due process.¹⁰⁰ Timor's leaders, particularly its then Foreign Minister,¹⁰¹ José Ramos-Horta, were eager for Timor's Constitution to be considered "very progressive" on the world stage.¹⁰² Ramos-Horta and other community leaders such as Bishop Belo were proud in announcing that the Constitution's Bill of Rights was to be interpreted in accordance with the *UDHR*.¹⁰³ Bishop Belo stated: "It is our dream to build a society founded on the values enshrined in the *UDHR*. These are the values that guided and inspired our struggle for independence."¹⁰⁴ At this time Ramos-Horta added that on independence, Timor-Leste intended to accede to "the greatest possible number of international human rights treaties", a promise that was fulfilled shortly after independence.¹⁰⁵

In addition to the extensive Bill of Rights, Article 9 of the Constitution elevates international law, as a source of law, to a position that is superior to the laws made by Timor-Leste's own Parliament. Article 9(1) provides: "The legal system of East Timor shall adopt the general or customary principles of international law."¹⁰⁶ Article 9(3) states that the rules of international treaties approved by the state are empowered to trump internal state laws.¹⁰⁷ The provision leaves the relationship between customary international law

⁹⁹ For a detailed analysis of this Bill of Rights in relation to the International bill of rights, see Hilary Charlesworth, "The Constitution of East Timor, May 20, 2002" (2003) 1 *International Journal of Constitutional Law* 325.

¹⁰⁰ See Articles 31-34, 136.

¹⁰¹ At this time, Ramos-Horta was the East Timor Transitional Administration Cabinet Member for Foreign Affairs.

¹⁰² "Ramos-Horta Addresses the UN Security Council" (Media Release 30 January 2002) found at <<http://members.pcug.org.au/~wildwood/02janhorta.htm>> at 21 July 2008.

¹⁰³ Article 23.

¹⁰⁴ "To Forge a Future, Timor Needs Justice for the Past", *Sydney Morning Herald*, 28 August 2001. According to the Executive Summary of the Constitutional Commissions, "it was widely felt that these should be based on the universal principles of the declaration of the United Nations Charter of 1948" (ie the *UDHR*): Constitutional Affairs Branch, Office of Political Affairs, UNTAET, Executive Summary of the Constitutional Commission Public Hearings, Dili, September 2001, 8.

¹⁰⁵ "Ramos Horta Addresses the UN Security Council" (Media Release 30 January 2002).

¹⁰⁶ The content of these principles of international law is left open, providing no guidance to the population, which has little familiarity with such law. Note that Article 9 is similar to Article 8 of the Portuguese Constitution.

¹⁰⁷ This provision cannot be traced to any lusophone influence as an equivalent provision to Article 9(3) does not exist in the Portuguese Constitution and the Mozambican Constitution does not articulate the status of international law. This indicates that the drafters of Timor-Leste's Constitution must have given some consideration to the internal status of international law and did not 'cut and paste' in this instance.

and state law vague¹⁰⁸ but it appears that this mechanism may in some cases enable the executive to bypass the Parliament in introducing new law.¹⁰⁹ This constitutional embrace of international law appears to be connected not only to the desire for Timor-Leste to be part of the international community but also to the belief that the standards set out by international law can assist the state in establishing the rule of law. However, a closer look at the UNTAET experience of introducing and implementing international law would have dispelled this belief.

In contrast to the general community support for the *UDHR* to be the constitutional yardstick for human rights, there is no evidence to show support for the wider provision of Article 9. The extent to which the Constituent Assembly consulted with the local population regarding the drafting of Article 9 is not clear from the available documents. The drafters of the Constitution, such as Fretilin party leader Mari Alkitiri, must have believed that as a parallel power structure, international law posed little threat to the democratic state structures of power.

Local norms are less visible in the Constitution; it makes minimal attempt to reach out and connect with local traditions. Section 2(4) states: “The State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.”¹¹⁰ From examining the drafts of the Constitution it appears that the recognition of local customary “norms” in Article 2(4) was an afterthought and the provision fails to give unambiguous recognition to local customary

¹⁰⁸ Article 9(2) of the Constitution provides: “Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.” “Competent organs” is not defined. Charlesworth notes that the Constitution’s unitary approach to international law means that as soon as an international agreement is formally accepted through accession or ratification, its provisions become part of the law of the land: Charlesworth, above n 99, 330.

¹⁰⁹ There is little clarity in Timor-Leste’s Constitution as to the division of authority over the treaty making process. Article 115(1)(f) appears to give the Government the power to negotiate treaties while Article 95 appears to empower the National Parliament to ratify such treaties and to pass a resolution to that effect. However, Article 116(d) appears to give some residual power to the Council of Ministers, thus undermining parliamentary sovereignty in this regard in some instances. Note that Article 69 enshrines the principle of separation of powers.

¹¹⁰ The Portuguese version reads: “4.O Estado reconhece e valoriza as normas e os usos costumeiros de Timor-Leste que não contrariem a Constituição e a legislação que trate especialmente do direito costumeiro.”

law as part of the state's applicable law. The ambiguity arises from the drafters' use of the expression "customary law" at the end of the provision but "law" is not used in the first part of the provision in relation to the state's recognition.

This minimal attention to local customary law is noteworthy given that the first set of popular consultations indicated that there was strong local support for aspects of local customary law to be included in the Constitution. The Executive Summary of the UN consultations states:

There was wide support for the continued use of traditional forms of law making and law-enforcement to complement conventional laws. The role of the "Adat" (unwritten customary law) in relation to the state justice system was a common topic. The people, in general, emphasised that the preservation of "Adat" should be reflected in the future constitution.¹¹¹

The drafters of the Constitution appear to have made a conscious choice when entrenching international norms and ignoring local norms. International norms such as social and gender equality, as well as the rule of law, have been given primacy over local *adat* norms, which, amongst other things, favour authority based on descent, gender and age.¹¹² The following section offers some explanations for why these latter norms were not considered relevant to the constitution of a modern state.

5.2 Political Dynamics of the Resistance and the Diaspora

The sidestepping of local customary law in the Timor-Leste Constitution can perhaps be traced to the political dynamics of the Fretilin party, which operated in resistance mode for quarter of a century and was supported during the Cold War mainly by Marxist-Leninist ideology as well as finance from Marxist regimes. As the main resistance party, Fretilin

¹¹¹ See Constitutional Affairs Branch, Office of Political Affairs, UNTAET, Executive Summary of the Constitutional Commission Public Hearings, Dili, September 2001: <<http://www.un.org/peace/etimor/DB/db190901.htm>> at 30 June 2006. The Executive Summary sets out sixteen issues that were clearly a concern at the local level such as the flag, the name of the country as well as more substantive issues such as language, defence and security, the structure and system of government, and human rights. The Constitutional Assembly ignored the results of this consultation on the ground it was conducted by unelected members of the UN.

¹¹² David Hicks, "Community and Nation-State in East Timor" (2007) 23 *Anthropology Today* 13, 14.

looked to the international sphere for condemnation of Indonesia's invasion and continuing occupation. In this sphere it sought to establish, partly through legal argument, that Indonesia's invasion lacked legitimacy and that its occupation government failed to respect the rights of the Timorese population and the rule of law broadly.¹¹³ In regard to the rule of law during the occupation, the International Commission of Jurists repeatedly investigated and publicised the absence of the rule of law in Indonesia at this time.¹¹⁴ During this period, many of Timor's leaders spent years in exile in Portugal and Mozambique, when both countries were ruled by Marxist governments. One consequence of this exile was that leaders lost a degree of connection with local values back in Timor.

After East Timor's first democratic election in August 2001, Timor's resistance leaders were able to draw on an additional source of power apart from their role in the resistance, namely, democracy. This democratic legitimacy effectively allowed Timor's leaders to bypass a more traditional source of leadership in Timor, local customary law relating to ancestry.¹¹⁵ Given that Timor's leaders did not derive their power from the path set out by local customary law, and they foresaw that such law could have the potential to undermine their democratic role, it is hardly surprising that the drafters chose to sidestep the question of giving local customary law formal recognition. Instead they made a vague gesture towards recognising local "norms and customs" in Article 2(4), which has no impact on the existing sources of applicable law. Indeed, there is some anecdotal evidence that on the opening day of the constitutional drafting process, Fretilin leader Alkitiri objected to the performance of a ceremony by local customary leaders to hand the keys of the capital to the elected Constituent Assembly. Alkitiri, who was to become Timor's first Prime Minister, possibly objected to the ceremony on the grounds that it would imply parallel power structures where in his view there was only one legitimate power structure, the

¹¹³ See for example the annual resolutions on East Timor adopted by the UN General Assembly between 1975-1982 and the resolutions adopted by the UN Commission on Human Rights in 1993 and 1997. See Carmel Budiardjo and Liem Soei Liong, *The War Against East Timor* (1984) 150-153; International Commission of Jurists, above n 36.

¹¹⁴ Ibid.

¹¹⁵ According to Hohe, "political legitimacy in traditional Timorese societies derives from appointment through ritual authorities, the leaders that are connected to the ancestors.": Tanja Hohe, "Totem Polls: Indigenous Concepts and 'Free and Fair' Elections in East Timor" (2002) 9 *International Peacekeeping* 69, 81.

democratically elected Constituent Assembly.¹¹⁶ Alkitiri's objection is interesting in light of the fact that the resistance movement itself previously operated as a parallel authority structure that aimed to subvert the state. In its new life as the governing body, the former resistance movement has tended towards strong centralisation of power. However, in contrast to the aim of the resistance movement, it is not apparent that Timor's customary power structures were attempting to do more than complement the power of the state through performing the key ceremony.

This is not to say that Fretilin has lacked interest in tradition altogether. To the contrary, Hohe argues that Fretilin played upon tradition in its election campaign leading up to the August 2001 election. She claims that it manipulated indigenous values and symbols, as well as the history of the resistance fight to gain election.¹¹⁷

Overall it is curious that some former resistance leaders such as Alkitiri failed to acknowledge that parallel structures of authority do not disappear or lose their local legitimacy simply because the state refuses to give them recognition. As the resistance movement itself proved, this refusal by the state can often work to strengthen these parallel structures and allow deep legal pluralism to flourish.

5.3 Tension between Local Norms and Constitutional Human Rights

Another possible reason why Timor's leaders have been reluctant to recognise local customary law is that such law may come into conflict with the human rights standards entrenched in the Constitution, which may in turn undermine efforts to establish the rule of law. It is worth noting that around the time of the constitutional drafting process in 2001, Amnesty International issued a report expressing disquiet over the use of "non-judicial mechanisms of justice" in various districts and the impact of these mechanisms on the human rights of the vulnerable, particularly women and children. Amnesty International

¹¹⁶ Personal communication from Annemarie Devereux, August 2007. In 2001 Devereux was a legal advisor in UNTAET's Human Rights Unit. Note that the anxiety that local customary law could operate to rival and undermine state law is not shared by all former members of the resistance movement. While the concern has been particularly apparent among those Timorese leaders that belong to the Fretilin party, in contrast, non-Fretilin leaders such as Xanana Gusmão and Jose Ramos-Horta have both made public efforts to investigate whether local customary law could be harnessed to complement state law.

¹¹⁷ Hohe, above n 115, 70.

was concerned that such mechanisms would undermine law and order and the development of the state's legal institutions.¹¹⁸ It is possible that this negative report had some influence to bear on the decision not to recognise local customary law.

In 2001 the Constituent Assembly was alerted to the potential conflict between local customary law and human rights standards by a network of women's groups who attempted to influence the drafting process through submitting a petition entitled *The Women's Charter*, which set out a list of rights deemed important for women's equality.¹¹⁹ Through the petition the women's groups requested that the Constitution regulate systems of local customary law and its impact on women. Article Eight of *The Women's Charter*, which carried 8000 signatures, stated:

The Constitution must guarantee equal rights to inheritance, and regulate the dowry system to prevent violence against women. Women must be guaranteed participation in traditional decision-making processes.

This concern appears to have been ignored by the Constituent Assembly. Possibly the view was it was unnecessary for the state to regulate local customary law given that the system had no formal state recognition and human rights guarantees were to be entrenched in the Constitution. According to Babo-Soares, all parties in the Constituent Assembly unanimously approved provisions dealing with human rights "despite fears that traditional groups might refuse to back them, since women and children have a unique place in traditional customary law".¹²⁰ Nevertheless, the failure of the Constituent Assembly to address the concern of *The Women's Charter* in relation to women's participation in local customary law ignores the concrete impact that such law can have on women's lives.

There was some pressure from within the Constituent Assembly itself in regard to the future role of local customary leaders. Some of the minor parties involved in the drafting process, such as KOTA, the traditionalist party with two seats, suggested the Constitution

¹¹⁸ Amnesty International, above n 34, 41.

¹¹⁹ The Charter was prepared by the Gender and Constitutional Working Group. It appears in (2001) 2 *La'o Hamutuk Bulletin* 2. Note that versions of some of these Charter rights were incorporated into the Constitution but many have weak enforcement mechanisms.

¹²⁰ Dionisio da Costa Babo-Soares, "The Challenges of Drafting a Constitution" in Babo-Soares et al (eds), *Elections and Constitution-Making in East Timor* (2003) 27.

set up an Upper House of traditional leaders (called *liurais*),¹²¹ possibly in a similar vein to South Africa's advisory upper house called the National House of Traditional Leaders. The form in which this body was proposed is uncertain,¹²² but it appears to have been dismissed with little, if any, debate. Timor-Leste's local customary leaders were unable to mobilise much pressure to bear on this proposal, partly because, unlike their South African counterparts, they had neither a history of institutional standing nor an organised and vocal lobby group.¹²³

The decision of the Constituent Assembly not to include state recognition of local customary law in Timor's Constitution is surprising in the context of the Asia-Pacific region where most of the recently drafted constitutions do incorporate some form of recognition of local customary law.¹²⁴ Interestingly, the model for Timor's Constitution, the Constitution of Mozambique, does not include such recognition despite the fact that such law exists in this African state.

¹²¹ Rod Nixon, "Indonesia West Timor: The Political-Economy of Emerging Ethno-Nationalism" (2004) 34/2 *Journal of Contemporary Asia* 163 at 177. KOTA stands for Klibur Oan Timor Asuwain (Association of Timorese Heroes).

¹²² It is not clear whether the proposed body would function along the lines of the pre-1958 House of Lords in the United Kingdom, or of a more limited nature like a Council of Traditional Leaders in South Africa.

¹²³ While the Indonesian Government conscripted many traditional leaders to assist in governing local districts, this did not take place on the same uniform institutional basis as in South Africa under apartheid.

¹²⁴ Constitutional recognition of customary law has been chosen by most Pacific Island states. While some have chosen to assign customary law a rank in the hierarchy of laws, others have left this question somewhat vague. Only the *Tongan Constitution of 1875* makes no express mention of custom. In all other Pacific states, the written law expressly provides for customary law to be used in relation to land disputes. In the Solomon Islands, Samoa, Tuvalu, Kiribati, Nauru and Vanuatu, written law provides for the broader application of customary law. See, eg, the *Constitution of the Solomon Islands*, Section 76 and schedule 3, [3(1)] which states "subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands". Paragraph 3(2) states that [3(1)] "shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with the Constitution or an Act of Parliament". The *Constitution of Samoa 1962*, Art. III(1) provides: "Law ... includes any custom or usage which has acquired the force of law in Samoa ... under the provisions of any Act or under a judgment of a court of competent jurisdiction." In the *1975 Papua New Guinea Constitution*, customary law is recognised as part of the underlying law by Sch 2 in conjunction with s 20 of the Constitution and the *Underlying Law Act 2000*. See New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific* (2006) App 4; Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd ed, 2007) Ch 3; Owen Jessep and Anthony Regan, "Developing a Coherent Underlying Law – Integrating Custom and Common Law, Pts 1-2" in Regan and Jessep (eds), *Twenty Years of the Papua New Guinea Constitution* (2001) Ch 9 and 10.

However, the drafters did not foreclose the possibility of future legislation recognising and monitoring local customary law: Article 2(4) mentions “any legislation dealing specifically with customary law”. In addition, there is a curious provision in the part of the Constitution that deals with the structure of the state legal system, which sets a path by which local customary mechanisms can be incorporated. Article 123 provides:

Article 123 Categories of courts
1. There shall be the following categories of courts in the Democratic Republic of East Timor:
a) The Supreme Court of Justice and other courts of law;
b) The High Administrative, Tax and Audit Court ...;
c) Military Courts. ...
5. *The law may institutionalise means and ways for the non-jurisdictional resolution of disputes.* (emphasis added)

One interpretation of paragraph 5 is that it is an opening for legislation to allow a formal engagement with local systems of dispute resolution, which are clearly beyond the present jurisdiction of the formal court system. “Non-jurisdictional” appears to refer to non-state law and thus the provision allows for a state of legal pluralism.

5.4 *Questioned Legitimacy*

The process of drafting a constitution is in large part about establishing a state’s legitimacy. It is thus essential that the constitution itself be widely considered to be legitimate. In the case of Timor’s Constitution, it appears that the emphasis was in establishing the state’s *external* legitimacy, its legitimacy as a sovereign state in the international community. The large-scale importation of international norms into the Constitution shows that the process was weighted heavily towards establishing this external legitimacy. The Constitution’s preamble shows the continuing power of this preoccupation in that it is a narrative of the past resistance movement rather than a map for the country’s future. Both this recent past and the international norms invoked by the Constitution constitute the main sources of legitimacy for the country’s new leaders. In the second public consultation and in the drafting process, little consideration was given to the Constitution’s *internal*, local legitimacy. This was simply assumed. Hence the sidestepping of local customary law was not considered controversial amongst Timor’s national leaders. It is also possible that the drafters of the Constitution did not understand the extent of legal pluralism.

Following the enactment of the Constitution in May 2002, a few surveys were conducted in order to gauge the degree to which the population understands and uses state law and local customary law. The first large-scale survey was conducted six months after independence, in late 2002, by the Asia Foundation and involved more than 1000 citizens across all the districts.¹²⁵ It found that *adat* rated much higher than state courts in terms of confidence in the institution and comfort in dealing with it, with language difficulties, cost and inaccessibility being cited as relevant factors militating against use of the courts.¹²⁶ A third of the interviewees said that they would avoid using the state court system if possible.¹²⁷ Twenty per cent believed there are times when it is reasonable to take law into their own hands.¹²⁸ The second study, conducted by Avocats Sans Frontières about two years later, was smaller, more limited in regional scope and it focussed on access to legal aid.¹²⁹ It found that although most interviewees recognised that only state courts have the formal power to hear cases,¹³⁰ almost half generally sought help from local authorities, such as the village head and council of elders, rather than go to a lawyer or the state courts to resolve a dispute.¹³¹ Of this group, a third had used local authorities to resolve disputes while only twelve per cent had had any contact with the state court system.¹³² Interviewees believed state courts were not functioning well, citing delay, cost and inaccessibility as factors that made them reluctant to use the state court system. However, the survey showed that preference for one system over another depended on whether the matter was considered

¹²⁵ Asia Foundation, *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor* (2004). The survey results partly reflect local perception of the manner in which UNTAET administered the legal system.

¹²⁶ Those most comfortable with the *adat* system are the older generation, are less educated and live in the remoter regions. In contrast, those less comfortable are the more educated, younger and tend to live in or near the capital. Ibid 49.

¹²⁷ Ibid 43.

¹²⁸ Ibid.

¹²⁹ Avocats Sans Frontières, *Access to Legal Aid in Timor-Leste – Survey Report* (November 2006). The survey involved a total of 163 interviewees living in five different districts. The two surveys posed different questions and used different methodology and hence a direct comparison is not possible.

¹³⁰ Ibid 10, fn 22.

¹³¹ Ibid 5.

¹³² Ibid 11, 8.

serious or minor, with the courts being the preferred forum for the former and the *adat* system preferred for the latter.¹³³

These two surveys indicate that Timorese people use and value both forms of law, state law and local customary law, although it is clear that the latter is used more widely, is better understood and is generally the preferred form of law for most matters. They indicate that the population generally approaches the two systems of law in a complementary manner. The first survey stated:

The East Timorese concept of justice clearly includes a *continuum* that encompasses both the *adat* system and the formal legal system. For more ‘minor’ offences, people are most likely to seek justice from the traditional *adat* system, while for more ‘serious’ crimes, the formal system seems appropriate.¹³⁴

The surveys attest that the rule of customary law remains an important part of the lives of most East Timorese. In 2003 Aisling Swaine conducted interviews with locals in three districts that indicated there was a strong feeling that “if local justice was abolished as a method for resolving community disputes, they would lose a way of life and culture – and would have nothing to pass on to future generations”.¹³⁵ This implies that local customary law is important to an overall sense of identity, which is generated at the local level rather than the national level. Thus the rule of customary law is still more integral to local identity than the rule of state law.

¹³³ Ibid 10. Note, however, that local Timorese laws draw different distinctions as to what is serious. Hohe and Nixon explain that while theft is considered a serious crime, violence is not unless it leads to homicide: above n 3, 63, and Hohe, “Justice Without Judiciary in East Timor”, above n 3, 346. Jennifer Laakso reports anecdotal evidence that murder is sometimes ‘resolved’ through local customary law: *Justice, Order and Peace: Transitional Justice and Peacebuilding in Timor-Leste* (D Phil Thesis, University of Queensland, 2007) 213. According to Amnesty International, rape is frequently referred to local customary law for ‘resolution’: *Amnesty International Report 2004 – Timor Leste* (2004). On the crime of rape, see above n 10.

¹³⁴ Asia Foundation, above n 125, 36 (emphasis added). More specifically, citizens prefer the state legal system for cases of assault involving family members, sexual assault, motor vehicle accidents, incidents of extended incarceration and conflicts involving outsiders, business or government. This continuum approach appears to have developed since first contact with the Portuguese colonial administration and flowed on during the Indonesian occupation and UNTAET period to the present.

¹³⁵ Swaine, above n 9, 63-4.

Timorese consultant Josh Trindade argues that many Timorese view the Constitution “as illegitimate”.¹³⁶ He states: “The constitution is too foreign for a common East Timorese person to understand. It is a tool of alienation for most East Timorese and does not reflect the needs of the people.”¹³⁷ To some degree, this comment is supported by the findings of the Asia Foundation survey where a third of participants stated that they did not know what the Constitution meant.¹³⁸ Less than a third understood that it was the source of law or the country’s basic law.¹³⁹ In regard to public participation in the constitutional drafting process, a large number of young Timorese, particularly women, felt there was insufficient genuine public participation,¹⁴⁰ presumably on the basis that it does not reflect their needs.

Trindade reports that a *lia nain* (traditional elder) from Viqueque commented that: “our constitution is not strong here, it must be accepted by all and be blessed by elders – converted into a sacred object (*sasan lulik*) and be part of our culture.”¹⁴¹ Trindade supports this suggestion that the Constitution be transformed through ritual into a national sacred object.¹⁴² He also recommends the establishment of a council of *luirai* (elders) to ritualise and inaugurate the elected national leaders because, he argues, “in the eyes of the Timorese [the *luirai*] are still the legitimate leaders”.¹⁴³ Such a ceremony would legitimate the power of the elected leaders as the temporary trustees of power and assist in showing respect to the ‘Timorese worldview’.¹⁴⁴ Trindade reasons that this reconciliation between the two paradigms would mean that leaders would exercise their power subject to both the rule of law *and* the prohibition of the ancestors (*bandu*). He asserts:

if the national leaders abuse or misuse their political power and legitimacy,
they will fear ancestral sanction as in Timorese traditions as well as

¹³⁶ Trindade, above n 22, 167.

¹³⁷ Open letter from Josh Trindade to the Prime Minister of Timor-Leste, 10 August 2006 (on file with author).

¹³⁸ Asia Foundation, above n 125, 32.

¹³⁹ Ibid 32-33.

¹⁴⁰ Ibid 33-34.

¹⁴¹ Trindade, above n 22, 167.

¹⁴² Ibid 181-182.

¹⁴³ Ibid 181.

¹⁴⁴ Trindade makes frequent reference to “the Timorese worldview”: eg, *ibid*.

consequences from the modern formal justice system. The first one will worry the Timorese leaders more than the later one.¹⁴⁵

This lack of respect for the state justice system amongst Timor's national leaders is examined in the following chapter. Trindade sharply contrasts this disregard with the reverence shown towards the power of ancestral sanctions and ancestral legitimacy that drives local orders (and local legal systems). However, this authority does not fit with the Weberian conception of legitimate and rational legal authority: ancestral sanctions are connected to the spiritual world and lack any semblance to legal rationality, the basis of the rule of law. Hence there is tension between the rule of law on the one hand, and legal pluralism's acceptance of these local orders based on ancestral sanctions on the other. However, in this relationship, the rule of law is an aspiration and ideal to which Timor's leaders have committed the state while legal pluralism is a fact, which Timor's leaders have tried to ignore, possibly in the hope that it will wither and die. As Trindade and Swaine point out, however, this strategy of ignoring local customary law and traditional leaders may be undermining both the legitimacy of the Constitution and a sense of identity valued by many Timorese.

6. Conclusion

Legitimacy is a prime concern in regard to the state and state law in Timor-Leste. This chapter shows that while the international legitimacy of the newly independent state was given some attention in the drafting of the Constitution, little consideration was given to shoring up the internal legitimacy of the new state, so that its legal institutions and constitutional norms would have traction and resonance with local norms and with the population, many of who continue to live largely under the influence of the local paradigm of customary law.

While it is apparent that Timor-Leste is undergoing a transition from a period of foreign colonisation and occupation, conflict and international administration, the nature of the legal order to which it is aiming to transition is not clear. Opacity surrounds Timor's 'new legal order'. In passing, Mearns has referred to Timor's "transition to an international

¹⁴⁵ Ibid 182.

standard of law”.¹⁴⁶ Under some international pressure Timor-Leste has arguably committed to an ‘international standard of law’ despite its severely limited capacity to ever deliver this standard to its expectant population.

The following chapter considers the relationship between the rule of law and deep legal pluralism in Timor’s “transition to an international standard of law”. In particular it scrutinises the role of the international community in promoting the rule of law and examines the agenda of this international intervention. It questions whether this promotion of the rule of law serves the needs of the Timorese population in the post-independence era.

¹⁴⁶ Mearns, above n 8, 50.

Chapter 7. Timor's "Transition to an International Standard of Law": The Rule of Law and Local Customary Law in Post-Independence Timor-Leste

1. Introduction

Timor-Leste's Constitution sets out a raft of major rule-of-law institutions. However, six years into independence, there is consensus among international organisations that the rule of law remains one of the state's "most serious challenges".¹ For example, in 2007 the UN noted that there is "a public perception that the entire rule of law system is not functioning well".² Despite assistance from the international community, particularly the UN and the World Bank, state law is struggling to garner public confidence and resonate with local norms. State institutions exercise little reach in many parts of the country, with the result that local customary law and other forms of non-state law are effectively functioning to fill the gaps and gaping holes left by Timor-Leste's weak state institutions. For most people in Timor-Leste, deep legal pluralism is strong while the concept of the rule of (state) law is difficult to discern.

Unlike in South Africa, state law pluralism is absent in the relationship between the rule of law and legal pluralism in Timor-Leste because local customary law is not explicitly recognised in the Constitution as part of the applicable state law. The absence of state law pluralism means that Timor-Leste's Constitution does not directly influence or regulate the contact between these two paradigms. Timor-Leste's "transition to an international standard of law"³ also differs from South Africa's as it has been the subject of extensive, direct and continuing international intervention and assistance, which inevitably affects the relationship between the rule of law and legal pluralism. This international influence can be seen in relation to the issue of the future function of local customary law in Timor's formal legal system. While circles of legal anthropologists and local NGOs have been debating this issue since 1999, international organisations such as the World Bank and the

¹ USAID, Freedom House and American Bar Association Rule of Law Initiative, *The Rule of Law in Timor-Leste* (June 2007) 4.

² *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 27 January to 20 August 2007)*, [2], UN Doc S/2007/513 (28 August 2007).

³ David Mearns, *Looking Both Ways: Models for Justice in East Timor* (2002) 50 (Report prepared for Australian Legal Resources International).

United Nations only started weighing into the debate in 2006 and Timor-Leste's government is also now on the brink of addressing this question.

This chapter is a case study of the relationship between the rule of law and legal pluralism in Timor-Leste's first six years as a state, beginning from 20 May 2002, the day the Constitution came into force. The chapter starts in Part 2 by sketching the marginalised role played by two of Timor's rule-of-law institutions, the courts and the Provedor for Human Rights and Justice ("the Provedor"). It analyses their operation and their role in relation to two events, the 2006 crisis and the attempt to apprehend Major Alfredo Reinado in 2007-2008. Part 3 then moves to questioning the degree to which state law offers legal certainty to Timor-Leste's state actors and population. It shows that confusion wracks the courts and the police force in applying the 'applicable state law' as well as the local population in attempting to access state justice. In Part 4 the chapter examines the various initiatives which aim to give state law greater resonance with the population by linking it to customary legal mechanisms and norms. One example is the temporary mechanism of the Commission for Reception, Truth and Reconciliation ("the CAVR"). Despite the success of the CAVR, the government has failed to address the position of customary law more broadly, which has caused some concern within the international community. Part 5 turns its focus on the role of the international community and its mixed contribution to promoting the rule of law in Timor-Leste.

This chapter argues that there is a disconnection between the state and the populace when the modern state paradigm ignores the relationship between legal pluralism and the rule of law. It observes that the mode used by South Africa to address the relationship between the rule of law and legal pluralism may be worth consideration when Timor-Leste drafts up its plan for addressing the future function of customary law. The chapter concludes by arguing that it is imperative that all the costs of such a project be fully weighed given the likelihood that both the rule of law and customary law will be compromised to some degree in such a project.

2. Timor-Leste's Rule-of-Law Institutions

Timor-Leste's formal rule-of-law institutions comprise the state's courts,⁴ the Provedor, the Office of the Inspector General (OIG), as well as the Parliament, the President and the Executive.⁵ With the exception of the OIG,⁶ all these institutions are set out in the Constitution alongside important principles such as the separation of powers.⁷ Before the 2006 crisis there was concern among some international organisations that on the ground the Executive was too strong, that if a proper balance was to be achieved, the other rule-of-law institutions needed strengthening.⁸ This section argues that the 2006 crisis highlighted the marginal role the courts play in Timor's governance. It examines some of the reasons underlying this marginality, and the weakness of the courts and the Provedor in relation to the Executive. It then sets out the various approaches to the rule of law among Timor's leaders by sketching the dispute regarding the apprehension of Major Alfredo Reinado following the 2006 crisis when the courts were undermined by parts of the Executive and the international community. It observes that since the constitution-making process there has been much rhetoric surrounding the concept of the rule of law among Timor's leaders as well as international actors and it argues that the lack of respect shown by all these actors for the state legal system may be encouraging ordinary Timorese to place even greater reliance on non-state mechanisms for resolving disputes.

⁴ These include the Supreme Court of Justice and other courts; the High Administrative, Tax and Audit Court and other courts of first instance; and military courts. Of these courts, only the Court of Appeal and district courts have been established. The former acts as the Supreme Court of Justice.

⁵ Informal rule-of-law institutions include the independent media and civil society which scrutinise government actions, and arguably, officials involved in dispute resolution at the community level.

⁶ The OIG began under UNTAET in 2000 and since independence derives its power from Article 4 in the Government's *Decree Law No 03* (20 September 2002). It investigates government operations and promotes best practices, transparency and anti-corruption measures. The office is not independent as investigations may only be conducted with the consent of the Prime Minister. Investigations may be in response to requests by either state institutions or citizens. In May 2008 the government announced that the powers of the OIG will be boosted so as to transform the position into an independent Auditor General reporting to the National Parliament.

⁷ Article 69 of the Constitution.

⁸ World Bank, *Strengthening the Institutions of Governance in Timor-Leste* (April 2006) 1, 6. In 2007 the World Bank expressed concern that Parliament was widely seen as an extension of executive power because it is not fulfilling some constitutional functions, such as scrutinising draft laws, which would provide a check on the executive: World Bank Group and Asian Development Bank, *Economic and Social Development Brief* (August 2007) 28.

2.1 *The Courts and the Provedor*

As Timor's highest court, the Court of Appeal should, according to dominant understandings of the rule of law, be considered one of Timor-Leste's main rule-of-law institutions because its role is to uphold the Constitution and keep a check on other state institutions such as the Executive so as to ensure they are not abusing or exceeding their constitutional power. There are indications that within Timor-Leste the Court of Appeal is not consistently treated with respect or understood as a major player in the state's governance. For example, in 2003, the Court of Appeal heard its first case of constitutional judicial review when the President referred the Draft Immigration and Asylum Law to it.⁹ The Court of Appeal ruled that the limitations placed on the activities of non-citizens by the Draft Law went beyond the scope permitted by the Constitution's human rights guarantees, and hence it held two important provisions, Articles 11 and 12 which place limitations on the rights of foreigners, to be unconstitutional. The draft law was then returned to Parliament for amendment but, according to the NGO the Judicial Systems Monitoring Programme (JSMP), Parliament simply passed the Law without making any substantial revisions,¹⁰ showing its lack of respect for both the "Mother Law" and the Court of Appeal.¹¹ Within the court system itself there is also a trace of disregard as the JSMP reports that in a number of cases, the Dili District Court "refused to follow or ignored" the Court of Appeal's decisions regarding the legality of deporting suspects.¹²

⁹ Court of Appeal, File No 02/2003 (Review of Constitutionality) (30 June 2003) (on file with author). Under Article 126(1)(b) of the Constitution, the Court of Appeal, exercising the competencies of the Supreme Court of Justice, has the power "to provide an anticipatory verification of the legality and constitutionality of the statutes".

¹⁰ See JSMP, *The Constitutionality of East Timor's Immigration and Asylum Law* (undated); see <<http://www.jsmp.minihub.org/Reports/jsmpreports/Constitutionality%20of%20ET.pdf>> at 25 May 2007.

¹¹ Binchy points out that in these circumstances, Article 88 of the Constitution allows the Parliament to circumvent the effect of such a ruling by confirming its vote on the statute by a majority of two thirds of the members present where that majority exceeds an absolute majority. However, he argues that the courts must continue to insist on the unconstitutionality of the legislation where they are given the opportunity to do so, pursuant to Articles 150 and 152 of the Constitution: William Binchy, "The Constitution of Timor Leste in Comparative Perspective" in William Binchy (ed) *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past* (2009) 287.

¹² JSMP Report, *The Role, Practice and Procedure of the Court of Appeal* (28 June 2005) 8. The JSMP discuss the two cases of *Wilfred Jan Reiner Mentik v Public Prosecutor* decided in 2003 and 2004.

Chronic delay has marked both the establishment and the continuing operation of Timor's court system. In the first two months following independence, the entire court system suffered a "virtual shutdown"¹³ because the appointment of most judges had lapsed on independence.¹⁴ The Court of Appeal did not start functioning after independence until mid 2003. This inevitably affected the heavy case-load¹⁵ inherited by the court system which meant that criminal matters were given priority at the expense of civil matters.¹⁶ Until late 2004, only the Dili District Court consistently functioned as the three other district courts were plagued by a lack of judges and other court staff as well as ordinary resources such as petrol.¹⁷ Until mid 2007, the courts were virtually run by international actors.¹⁸ One year into independence, in April 2003, the UN noted that these problems were "favour[ing] an increased reliance on the traditional dispute settlement mechanisms, even when they may not provide adequate protection for the rights of minorities, vulnerable groups and women".¹⁹ There is, for example, evidence that delay has encouraged many victims, such as victims of domestic violence, to withdraw their cases from the state legal system and seek a resolution from local customary law.²⁰

The judicial system still faces a serious backlog of criminal cases, mainly as a result of the understaffing of the prosecution service.²¹ There are reports that this backlog is

¹³ King's College London, *A Review of Peace Operations: A Case for Change- East Timor* (10 March 2003) [249].

¹⁴ Ibid.

¹⁵ According to UNMIT, in mid 2007 the case-load of the Dili district Prosecution Office was 2413 cases: *Report on Human Rights Developments in Timor-Leste, (August 2006-August 2007)* (2007), 21. In contrast, USAID estimates it as 1658 cases: USAID, above n 1, 28. In July 2008 the UN estimated that the backlog of criminal cases to be 4700, a third of which involve gender-based crimes: *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 8 January to 8 July 2008)* [34], UN Doc S/2008/501 (29 July 2008).

¹⁶ According to the JSMP, no civil cases were heard in any Timorese court till after September 2004: JSMP, *Overview of the Justice Sector: March 2005*, (March 2005) 24.

¹⁷ JSMP, *Overview of the Courts in East Timor in 2004*, (17 December 2004) 6.

¹⁸ In mid 2007, 27 Timorese judges, prosecutors and public defenders finally completed their training and probationary periods: USAID, above n 1, 16, 20.

¹⁹ *Report of the Secretary-General on the United Nations Mission of Support in East Timor (21 April 2003)*, [18], UN Doc S/2003/449.

²⁰ The JSMP reports that in 2003, out of 148 domestic violence cases reported, 104 of the complaints were withdrawn, partly due to the lengthy delays. See JSMP, *Women in the Formal Justice Sector: Report on the Dili District Court* (April 2004) 16; JSMP, *Access to Justice for Women Victims* (July 2004) 21.

²¹ UNDP, *Strengthening the Justice System in Timor-Leste – Semi-Annual Progress Report, 1 January 2007-31 July 2007* (August 2007) 23. See also 20.

encouraging some courts to "disregard due process in the interests of fast-tracking cases".²² Progress is even slower in the civil section of the courts, making Timor-Leste one of the hardest countries in the world in which to enforce a contract using state law.²³ The district courts are still not functioning consistently outside the capital and women in particular continue to have difficulties in accessing formal justice and having domestic violence matters resolved in this sphere.²⁴ In 2007 the President of the Court of Appeal confirmed that the state court system would not cope if all matters were brought to it for resolution.²⁵ Thus the persistence of these problems in the state legal system are pushing people towards reliance on customary law, marginalising the role of the courts, and weakening public confidence in the concept of the 'rule of law'.

Delay has also affected the establishment of the independent office of the Provedor. The Provedor's role is to investigate corruption, maladministration and human rights abuses by state institutions and make recommendations to the government.²⁶ The Office is to function both as the Ombudsman and the Human Rights Commission and its mandate includes the promotion of the rule of law²⁷ and the oversight of the police force. It took Timor's Parliament three years to agree on a candidate for the Office and another year before the Office came into operation. With the assistance of the World Bank, USAID and the UN and its various agencies, the Office began operating in March 2006. This coincided with the publication of a report by international NGO, Human Rights Watch, that gave further support to the UN's 2005 allegation that Timorese police were using arbitrary and excessive detention, torture and other illegal methods against suspects and ordinary

²² USAID, above n 1, 24.

²³ UNDP, above n 22, 20; World Bank, *Doing Business Report for 2008* (2008). See specifically, <http://www.doingbusiness.org/ExploreEconomies/?economyid=209> at 15 October 2008.

²⁴ JSMP, *Key Themes in Legal Development: A JSMP Retrospective, 27 April 2001-27 April 2008* (2008); JSMP, *Overview of the Justice Sector 2006-2007* (2007); *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 8 January to 8 July 2008)*, [28], UN Doc S/2008/501 (29 July 2008). Note that some positive development has been shown during the course of 2008: JSMP, *Overview of the Justice Sector 2008* (January 2009) 26, 28.

²⁵ USAID, above n 1, 40.

²⁶ See Article 27 of the Constitution and *Law No 7 of 2004 of May 2004 Approving the Statute of the Office of the Ombudsman for Justice and Human Rights*.

²⁷ See the preamble and Articles 1 and 47 for references to the rule of law in *Law No 7 of 2004*.

civilians.²⁸ Based on a tide of complaints, the report asserted that: "abuse of powers by the police remains a serious challenge to the rule of law in East Timor".²⁹ Arguably the Provedor's Office was created too late to prevent a cycle of impunity from damaging the reputation of one of the state's core institutions, the police force. This problem also undercut faith in other state institutions because none had been able and willing to address these complaints of the police abuse of state power. The low level of confidence generated by state institutions inevitably means that people prefer to use non-state institutions.

2.2 *The 2006 Crisis*

Timor-Leste's rule-of-law institutions were tested when law and order collapsed in the crisis of April-May 2006 and the security forces, namely the police and the army, opened fire on each other. The crisis began in February 2006 when almost 600 members of the Defence Force went on strike, asserting that the government was ignoring their claims of discrimination in areas of promotion and accommodation. This led to a series of demonstrations in late April 2006 where it was apparent that the police was unable to control the protestors. The Prime Minister, Mari Alkitiri, then called out the Defence Force to back up the police force, arguably breaching various legal procedures,³⁰ and the Minister for the Interior, Rogerio Lobato, illegally distributed weapons to the civilian population. In late May 2006, a confrontation took place between the Defence Force and the police, which had differing allegiances to members of the Executive,³¹ leaving eight members of the police force dead.

²⁸ Human Rights Watch, *Tortured Beginnings: Police Violence and the Beginnings of Impunity in East Timor* Vol 18, No 2(c), (April 2006); *Progress Report of the Secretary General on the United Nations Office in Timor Leste*, [4, 7] UN Doc S/2005/533 (18 August 2005).

²⁹ Human Rights Watch, *ibid*, 6.

³⁰ *Report of the UN Independent Special Commission of Inquiry* (Geneva 2 October 2006) [164-168].

³¹ Damien Kingsbury and Michael Leach, "Introduction" in Kingsbury and Leach (eds), *East Timor: Beyond Independence* (2007) 5. The authors argue that coordination and cooperation were lacking between the security sector forces; instead of working together in a politically neutral fashion so as to fulfil the state's objectives, each force worked in a politicised manner towards its own goals. The "indications of political loyalty and affiliation to different executive actors" of each institution set them on a collision course.

During the crisis, Timorese leaders frequently invoked the rule of law as a guiding value.³² Furthermore, it is also noteworthy that during the crisis the major players such as the Prime Minister and the President consistently upheld the Constitution, despite the call from one Member of Parliament for the President to suspend the Constitution's operation.³³ However, much of this talk of the rule of law appears to be rhetoric as no attempt was made to involve the courts in providing a legal, non-violent resolution to the crisis.. On the other hand, the newly opened Provedor's office was able to play a slightly greater role by monitoring the human rights violations that took place, which may have assisted the subsequent inquiry conducted by the UN.³⁴

The assessment of the crisis by the UN Independent Special Commission of Inquiry for Timor-Leste predictably found that the crisis could be explained largely by the weak nature of state institutions and the rule of law.³⁵ It stated: "Governance structures and existing chains of command broke down or were bypassed; roles and responsibilities became blurred; *solutions were sought outside the existing legal framework.*"³⁶ The UN's assessment identified weak accountability mechanisms as undermining the efficacy of Timor's security forces.³⁷ However, the assessment is short on detail as to how the existing legal framework could have been better used to resolve the soldiers' grievances and to prevent the escalation of violence.

In contrast to the UN assessment, Josh Trindade takes a non-state centric approach to explaining the 2006 crisis, an approach he claims is more in line with 'traditional' Timorese

³² See, eg, Gusmão's comment quoted in "E Timor President Vows to Protect Constitution" *Independent Weekly*, AAP, 14 June 2006; comment of Ana Pessoa (then Minister for State) quoted in Stephen Fitzpatrick, "Ramos Horta Resigns but PM Hangs On", *The Australian*, 26 June 2006.

³³ Within Timor-Leste, pressure was mounted by Opposition MP Manuel Tilman, and reportedly also fugitive Alfredo Reinado, for President Gusmão to suspend a part of the Constitution so that he could dismiss the Prime Minister. Gusmão ignored this pressure and pledged to uphold the Constitution, saying that "to be a guardian of the Constitution of the republic basically means to safeguard the democratic state based on the rule of law". See "East Timor's President to Address Parliament on Crisis" *Agence France Presse* 13 June 2006; "Officials Welcome Gusmão's Parliamentary Address" *Australian Broadcasting Commission News*, 15 June 2006; "UN Prepares to Start New Peacekeeping Mission in East Timor", *New York Times* 14 June 2006; "E Timor President Vows to Protect Constitution" *Independent Weekly*, AAP, 14 June 2006.

³⁴ Guteriano Nicolau, "Ombudsman for Human Rights: The Case of Timor-Leste" (2007) 47 *Asia Pacific News* 3.

³⁵ *Report of the UN Independent Special Commission of Inquiry*, above n 30, [136].

³⁶ *Ibid* 2; (emphasis added).

³⁷ *Ibid* [142, 151].

perspectives.³⁸ Trindade argues that the confrontation between the police and the Defence Force illustrates the weak hold that the concept of the state has on Timor's main institutional actors.³⁹ He asserts that the crisis was precipitated by the failure of Timor's leaders to connect with local spiritual values. Arguing that the problem lies with the fact that Timor's leaders derive their legitimacy from elections rather than their connection to ancestors and sacred objects (*sasan lulik*), Trindade writes:

Arguably, the 2006 crisis may be resulted from the fact that, wrong leaders were installed at national level from 2002-2006 without proper local legitimacy. There is little trust towards leaders that are not connected to sacred items and ancestral legitimacy.⁴⁰

Trindade's logic is that the introduction of "the imported new values of human rights and democracy" has undermined the common values and traditions of Timor as well as the "cultural identity" of the Timorese.⁴¹ Many in the international community may dismiss this approach as 'backward or uncivilised',⁴² because the explanation is starkly at odds with that of the international community, which appears to have redoubled its efforts to promote the rule of law after the 2006 crisis. The two explanations of the 2006 crisis illustrate the construction of "conflicting paradigms" of the international and the local in Timor-Leste.⁴³

³⁸ Josh Trindade, "Reconciling the Conflicting Paradigms: An East Timorese Vision of the Ideal State" in David Mearns (ed), *Democratic Governance in Timor-Leste: Reconciling the Local and the National* (2008) 160, 172.

³⁹ Ibid, 161. Indeed, the UN Independent Special Commission of Inquiry noted the problem of Timor's "poorly defined national identity": above n 30, [21].

⁴⁰ Trindade, *ibid*, 172. See also, Josh Trindade and Bryant Castro, *Rethinking Timorese Identity as a Peacebuilding Strategy: The Lorosa'e-Loromu Conflict from a Traditional Perspective* (2007) 17-18, 22 (Report for the EU Rapid Reaction Mechanism Programme).

⁴¹ Trindade, "Reconciling Conflicting Paradigms", 173, above n 38. It seems that Trindade is attempting to use the customary sphere as the focal point for national self-definition. This inevitably involves a reinterpretation of the customary sphere and the assumption that culture is pure and homogenous. This shows little recognition that the customary sphere has been in the process of hybridisation since at least the beginning of colonisation and the importation of a human rights culture is simply one more step in this process.

⁴² Trindade and Castro, above n 40, 26 quoting an interview with a 'political leader'. See also, Damian Grenfell, "Making Modernity in Timor-Leste" (2007) 90 *Arena Magazine* 9.

⁴³ Trindade uses this terminology of "conflicting paradigms", drawing on the work of Tanja Hohe.

2.3 *The Reinado Affair and Various Approaches to the Rule of Law*

One of the key recommendations made by the UN Independent Special Commission of Inquiry was that Major Alfredo Reinado, the former Commander of the Military Police, be prosecuted for his role in an armed confrontation in May 2006, which left five people dead and ten injured.⁴⁴ At this time, Reinado opposed the Fretilin Government and attempted to align himself with President Gusmão. The events leading to Reinado's death in early 2008 provide a window into the competing approaches to the rule of law among some of the main actors in Timor-Leste, including the UN, Fretilin, the Prime Minister and the President.

The basic facts of the case are as follows: after a failed attempt by the Australian-led International Stabilisation Force (ISF) to apprehend Reinado resulted in the death of five of his followers in March 2007, the ensuing months of 2007 saw a protracted battle between two state institutions to determine the best path to bring Reinado to justice.

The main tension regarding Reinado lay between the Presidency, held by Ramos-Horta, and the courts, specifically Ivo Rosa, a Judge of the Dili District Court who arrived in mid 2006 from Portugal and occupied a UN-funded position. After some negotiations with Reinado wherein he gave written indication of his readiness to face justice, Ramos-Horta suspended Rosa's court warrant for the arrest of Reinado and his men on the grounds that the group would surrender voluntarily and he issued them with a letter allowing them freedom of movement. The President further requested that all international and national institutions in Timor-Leste "fully respect, comply with and implement the present order".⁴⁵ Judge Rosa challenged this order as unconstitutional and questioned the power of the President to suspend a court order for arrest. On 9 October 2007, Judge Rosa issued a written notice of ruling to the effect that the actions of the President were violating the guarantee of separation of powers entrenched in the Constitution. Moreover, he stated that the actions to suspend the arrest warrant were undermining the courts and the rule of law. Judge Rosa

⁴⁴ UN Independent Special Commission of Inquiry, above n 35, [117, 64-66].

⁴⁵ Order "Freedom of Movement for Major Alfredo Reinado and his Group" quoted in UNMIT Report, *UNMIT Internal Review Panel, Conducted From 1 April to 24 April 2008*, 7. This report can be accessed at <<http://wikileaks.org/leak/unmit-ramos-horta-shooting-2008.pdf>> 20 February 2009. See the International Crisis Group, *Timor-Leste: No Time for Complacency* (9 February 2009) 2.

ordered that the ISF and the UN, which was legally the head of enforcement in the country, comply with the court order and arrest Reinado. This ruling was made in the face of some possible intimidation: a few days before, the Minister of Justice reportedly stated that those foreign judges who were not performing well would have their contracts terminated.⁴⁶ In addition, a few days after the ruling, the President reportedly advised foreign judges in Timor-Leste to show more respect for the country's democratically-elected leaders.⁴⁷ Reinado's trial was set for late January 2008 but by this time neither the ISF nor the police, for which the UN had responsibility, had apprehended Reinado. From one angle, what would appear to be a reluctance to comply with a court order shown by the relevant actors could be interpreted as indicating some disregard for Timor's 'Mother Law'.

The failure to arrest Reinado in a timely fashion symbolised a major problem of impunity. Reports of the UN Mission in Timor-Leste (UNMIT) give little detail as to the internal wrangling between the President and the courts. In August 2007 the UN Secretary-General's report on UNMIT's operation broadly stated that there is "a public perception that the entire rule of law system is not functioning well".⁴⁸ Four months later the UN Security Council conducted its first visit to the country, and its report also brushed over the rift developing between the state's institutions.⁴⁹ The Reinado case takes up half of the report's short entry on "Justice and the Rule of Law" but it focused mainly on the President's views on the case and it glosses over the internal problems – the constitutional problems – that the case raises. For example, the report states:

⁴⁶ "Minister threatens to sack foreign judges" (Fretilin Media Release, 5 October 2007). Note that there was earlier tension between the Minister and Judge Rosa regarding the Court's approval of convicted prisoner Rogerio Lobato's request to travel to Malaysia for surgery.

⁴⁷ This is reported in Fretilin's media release dated 23 November 2007 and entitled "Australian Military Commander Under Fire in East Timor".

⁴⁸ *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 27 January to 20 August 2007)* [22], UN Doc S/2007/513, (28 August 2007).

⁴⁹ *Report of the Security Council Mission to Timor-Leste, 24 to 30 November 2007*, UN Doc S/2007/711, (6 December 2007).

The resolution of these issues ... would also demonstrate that justice is being done and seen to be done, *reinforce the primacy of the rule of law in the country* and thus counter the perception of impunity.⁵⁰

This sentence illustrates that, as an external actor, the UN understands the rule of law in relation to perceptions of impunity. Arguably in these circumstances the UN's approach to the rule of law is restricted, as it has no mandate as such to monitor the constitutional complexities of Timor-Leste; hence it must understand the rule of law in an accountability and impunity framework. The UN reasons that it must take its cue from the country's leaders and hence the constitutionality of various orders is not for international actors to determine.⁵¹ It is possible to detect some tension in this position in the following statement of the Security Council's mission Report: "[T]he mission was concerned that UN and international assistance *should be seen to be encouraging the strengthening of democratic institutions, the rule of law and self-reliance in Timor-Leste*".⁵² This sentence implies that the UN was aware that the international actors might not be seen by the local population to be strengthening the rule of law.

Fretilin presents an alternative approach to the rule of law: this approach is internally focussed and is based closely on adherence to the text of the Constitution. For example, in its media release dated 13 November 2007, Fretilin cites Article 118 of the Constitution, which states, in part, that: "The decisions of the courts are to be compulsorily obeyed and prevail over the decisions of all other constitutional state institutions."⁵³ In a later media release, it invokes the concept five times, almost always in relation to the Constitution,

⁵⁰ Ibid, [24], emphasis added. Note that at [22] it refers obliquely to internal matters: "Central to the crisis were issues of governance, the separation of powers and the building of sustainable institutions." This refers to the 2006 crisis.

⁵¹ Presumably the logic here is that state sovereignty is symbolised more through state leaders than state courts. However, it is ironic that following the attempted assassination on Ramos-Horta and Reinado's death in February 2008, the UN congratulated Timor's leaders on having "adhered to the Constitution in this time of crisis": UN News Service, "TL: UN Envoy Decries Political Attacks, Hails Government Response", 12 February 2008.

⁵² Above n 50, [27].

⁵³ On file with author.

even though its main target is the ISF and its "decision to ignore" Reinado's arrest warrant.⁵⁴ For example, the media release states:

Fretilin's position is ... to uphold the rule of law and ensure no constitutional entity, be it the president, the government or the parliament, is permitted to interfere with the independent administration of justice. ... the rule of law has almost been lost in Timor Leste. Justice is no longer functioning in accordance with the constitution.⁵⁵

In this media release, Fretilin does not mention any concern regarding impunity; its interest lies in scrutinising whether the Constitution is being upheld in all its detail and that the law be enforced in an impartial and non-political manner.⁵⁶ Fretilin's concern, shared in part by the courts, is that external actors such as the UN and ISF and state institutions such as the Presidency are not giving full respect to the checks on power entrenched into the Constitution.

President Ramos-Horta's approach to the rule of law can only be surmised in this instance. His actions in attempting to arrange for Reinado's voluntary surrender to justice appear to favour reconciliation and stability of the state over strict adherence to the constitutional text. Around the time that Judge Rosa issued his notice of ruling, Reinado held one of a number of rallies that attracted hundreds of supporters, showing that the Timorese culture of supporting clandestine and resistance actors did not disappear upon independence. Reinado's continuing refusal to face the ordinary justice system attracted a large number of unemployed and disaffected male youths in particular. According to an unconfirmed report, at the time that Reinado was set to be tried, President Ramos-Horta negotiated a secret deal with Reinado, offering him a Presidential decree of amnesty if he surrendered

⁵⁴ Fretilin's media release dated 23 November 2007, "Australian Military Commander Under Fire in East Timor", (on file with author).

⁵⁵ Ibid.

⁵⁶ One aspect colouring this media release is the trial and conviction of former Fretilin Minister of the Interior, Rogerio Lobato, earlier that year for his role in the 2006 crisis. Judge Rosa presided over this trial. Fretilin has also expressed concern regarding the impartiality of the Prosecutor-General.

and faced justice.⁵⁷ His approach to the rule of law gives primacy to peace and reconciliation, values more commonly characterised as pertaining to informal justice.

Ramos-Horta's approach to the rule of law is in line with that of Xanana Gusmão: after the 2006 crisis Gusmão placed more emphasis on reconciliation rather than on justice and accountability,⁵⁸ which is consistent with his approach to the crimes committed during the occupation and the post-ballot period.⁵⁹ Gusmão describes reconciliation as "a very positive trait in traditional justice" as it prevents problems being "dragged on into the future by the parties".⁶⁰ Speaking before the UN Security Council in 2006 Gusmão explained his preference for reconciliation and 'restorative justice' over punitive justice, by drawing on South Africa's experience, which he read as illustrating the notion that reconciliation is not antithetical to a democratic society.⁶¹ Like Ramos-Horta, Gusmão appears to understand reconciliation as compatible with the rule of law. This diverges from common understandings of the rule of law in the West, which equate the concept with legal predictability, due process, accountability and individual rights. More critically, the

⁵⁷ Paul Toohey, "Timor Rebel was to be Pardoned" *The Australian*, 1 March 2008; Lindsay Murdoch, "Ramos Horta and Reinado had Amnesty Deal", *The Age*, 16 February 2008. Note that Mark Dodd reporting for *The Australian* newspaper has claimed that the President offered Reinado a Presidential decree of amnesty in mid 2007: Mark Dodd, "Judge Revokes Reinado Amnesty", *The Australian*, 24 July 2007. On 20 May 2008, Ramos-Horta gave pardons and commutations of sentence to 94 sentenced prisoners, nine of whom were serving sentences for crimes against humanity committed in 1999. This sparked concerns regarding the rule of law and a petition from human rights groups to the Court of Appeal to declare the presidential decree invalid, which was rejected: see Jesse Wright, "Freedom to Kill in East Timor" *Asia Times*, 25 June 2008; "East Timor Court Rejects Petition Against President", Radio Australia, 8 September 2008.

⁵⁸ In an Asia Foundation survey, most East Timorese respondents appear to have understood the term "justice" as connoting the state legal system encapsulating law enforcement and human rights. A noteworthy 22 per cent responded that they did not know what "justice" means. In contrast, there was a very high understanding of the term "reconciliation": Asia Foundation, *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor* (2004) 30-31.

⁵⁹ *Report of the Secretary-General on Timor-Leste pursuant to Security Council Resolution 1690* [22, 49] UN Doc S/2006/628, (8 August 2006). This emphasis is consistent with the support of most of Timor's leadership for the Commission on Truth and Friendship between Timor-Leste and Indonesia. See also, Xanana Gusmão's First Speech to the National Parliament: Considering a Policy of National Reconciliation (21 October 2002) printed in *Timor Lives! Speeches of Freedom and Independence* (2005) 97-138. The priority given to reconciliation at the expense of justice and accountability appears to have discomfited the UN: see *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 9 August 2006 to 26 January 2007)*, [24], UN Doc S/2007/50 (1 February 2007).

⁶⁰ Quoted in *Timor Lives!* ibid 219.

⁶¹ See Gusmão's speech to the UN Security Council: UNSCOR, provisional sess, 5351st mtg, 6-7, UN Doc S/PV.5351, (23 January 2005).

approach of Ramos-Horta and Gusmão is incompatible with that of the UN, which resolutely rejects the use of amnesty in respect of serious crimes and considers such mechanisms to be contrary to international law, and, by implication, the international rule of law.⁶²

In February 2008 the European Parliament expressed "its concern at the message of impunity and *disrespect for the rule of law which may have been conveyed, in an effort to promote national reconciliation, by the ambiguous attitude of the authorities of Timor-Leste*, UNMIT and international security forces towards people who are summoned to face justice".⁶³ This resolution diplomatically questions Ramos-Horta's and Gusmão's approach to the rule of law and the willingness of international actors to follow their lead. From some angles it may appear that there is tension between the versions of the rule of law extolled by Western and international organisations and those embraced by Timor's leaders. However, the Reinado affair shows that both Timor's leaders and the international community may be inadvertently undermining state courts as a major rule-of-law institution.

In May 2008 it became public knowledge that the former defence minister, Roque Rodrigues, had been hired as a presidential security adviser at the request of President Ramos-Horta.⁶⁴ The appointment was made despite that fact that the 2006 UN Independent Special Commission of Inquiry had recommended that Rodrigues, alongside Reinado, face prosecution because he was reasonably suspected of having committed a serious crime during the 2006 crisis. The appointment of Rodrigues to this high-level

⁶² This principled approach was spelt out in mid 2006 by the UN Secretary General in relation to the terms of reference of the Joint Commission on Truth and Friendship that allowed for amnesty for some crimes. The report states that such amnesty is inconsistent with the bar in international law on amnesties for serious violations of international law, crimes against humanity, war crimes and other serious crimes. See *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, [30], UN Doc S/2006/580, (26 July 2006).

⁶³ European Parliament, *Resolution on Timor-Leste*, (21 February 2008) [N4] at http://www.europarl.europa.eu/document/activities/cont/200803/20080317ATT24398/20080317AT_T24398EN.pdf at 15 October 2008.

⁶⁴ "UN on Defensive over Controversial E Timor Appointment", Australian Broadcasting Commission News, 14 May 2008. According to Stephen Fitzpatrick, the appointment was also requested by Prime Minister Gusmão and Fretilin Opposition leader Mari Alkitiri: Fitzpatrick, "UN Forces Sack Timor Advisor Roque Rodriguez" *The Australian*, 12 June 2008.

position shows that Timorese leaders are paying little heed to the recommendations of the international community.

In regard to the Reinado affair, the international community appears to be sending mixed messages about the rule of law, its meaning and its implications, which may be encouraging Timorese leaders to skew the concept for their own political ends. The appointment of Rodrigues and the Reinado affair have made ordinary Timorese question the level of regard of their leaders for an impartial and independent state justice system. For example, Timorese writer Naldo Rei comments: "People are confused by the justice system here because it applies only to those who are not close allies of the leaders. Justice should apply to all."⁶⁵ In this context, it would be unsurprising if disaffection with state institutions and leaders, as well as international organisations, led the population to embrace non-state institutions.

3. Legal Uncertainty and Confusion regarding the Applicable State Law

One of the major problems in relying on state law to regulate and limit state power is that the identity of the applicable state law has been confused, uncertain and unstable. Upon UNTAET's departure, the Constitution of Timor-Leste became the guide to the applicable law. However, the Constitution is vague on the applicable law. Article 165 simply states: "Laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein." The reference to the "laws and regulations in force in East Timor" hides the many layers of complexity. During colonisation, Portuguese law applied but Indonesian law then replaced it during the 25 year Indonesian occupation. UNTAET enacted Regulations, decrees and executive orders of its own and it set out Indonesian law as the applicable subsidiary law during its transitional administration, subject to UNTAET regulations and international human rights law.⁶⁶ This caused little protest at the time: most people are likely to have known only Indonesian law, the application of Portuguese law being too distant in history.⁶⁷ The final layers of laws are the laws enacted by Timor-

⁶⁵ Naldo Rei, "Where Now for East Timor?" *The Advertiser*, 23 February 2008.

⁶⁶ See Chapter 6 at n 49.

⁶⁷ For example, when the courts began operating in mid 2000, most of the newly appointed judges held degrees in Indonesian law. There were two practical problems with this choice of applicable law

Leste's Parliament and government.⁶⁸ This becomes a complex web of laws when account is taken of the pragmatic and *ad hoc* approach used by the state's courts and police in resolving disputes.⁶⁹ The following section shows that while state courts have been reluctant to embrace international law, like the police the courts have been seeking solutions from outside the existing legal framework by mixing and matching state law and non-state law in order to resolve disputes expeditiously.

3.1 Indonesian or Portuguese Law

In mid 2003, one year into independence, Article 165 became the subject of contention before the Court of Appeal in the *dos Santos case*.⁷⁰ This case followed an eighteen-month hiatus in the operation of the Court of Appeal, which was broken only by the appointment of foreign judges mainly from Portugal to the Court. The matter was an appeal from the Special Panels for Serious Crimes, an arm of the Dili District Court hearing serious crimes, concerning the applicable law in relation to the conviction of Armando dos Santos for three counts of murder committed under the Indonesian Penal Code. The offences were alleged to have been committed early in 1999. The Prosecution argued that dos Santos should have been convicted of murder as a crime against humanity under UNTAET Regulation 2000/15 rather than offences under the Indonesian law. The majority, comprising two judges from Portugal, decided that contrary to popular belief, Indonesian law did not apply because it has never been validly in force in East Timor as a result of the occupation being illegal under international law. The majority then proceeded to decide that dos Santos was guilty of 'genocide' under the Portuguese Criminal Code, a decision that was met with a strenuous dissent from the sitting Timorese judge. The practical implications of this majority judgment on the applicable law were vast: all legal transactions conducted from

which meant the new courts had a troubled start: one was a lack of experience in that there were no experienced practitioners of Indonesian law remaining in East Timor, and the second was a lack of knowledge of the law in that UNTAET did not possess a full copy of Indonesian law until ten months into its mission. See Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations in Kosovo and East Timor" (2001) 95 *American Journal of International Law* 46, 53-54; Annemarie Devereux, "Searching for Clarity: A Case Study of UNTAET's Application of International Human Rights Norms" in Nigel D White and Dirk Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (2005) 293, 302.

⁶⁸ Article 96 allows the Government to pass laws by decree: for a critical analysis of this process, see JSMP, *Overview of the Justice Sector 2005* (January 2006) 5-6.

⁶⁹ USAID, above n 1, 24.

⁷⁰ Court of Appeal Decision, *Prosecutor v Armando dos Santos*, (unpublished, 15 July 2003).

1976 to 2003 would be potentially invalid and all people already convicted by the Special Panels under Indonesian Law and UNTAET Regulation 2000/15 in the previous three years would need to be released.⁷¹ Uncertainty as to the applicable state law reigned for two and a half months before the Parliament enacted legislation countering the majority judgment in *dos Santos*.⁷² Thus, through the decision of the Court of Appeal, state law and the state court system suffered a severe blow in public confidence, rupturing legal predictability.

Since independence, little legislation has been enacted to replace Indonesian law⁷³ and there is little community knowledge of this new law, partly because it is written in Portuguese, an official language spoken by a small percentage of the population.⁷⁴ The World Bank has described much of it as "more of less 'off the shelf' of laws that prevail in countries with very different challenges from those present in Timor-Leste".⁷⁵ Only a handful of statutes have been translated into Tetum, the other official language with which a majority of Timorese are conversant. For some state institutions, the practical effect of this linguistic policy favouring Portuguese is that the institution believes it can choose between the various UN, Indonesian and Timorese regulations it prefers to follow.⁷⁶ During the Fretilin government (2002-2007), many laws were enacted by government decree rather than through Parliamentary legislation. Opportunities for community consultation on legislation were thus curtailed with the result that the community has little knowledge of the existence and operation of some recently enacted laws. The Asia Foundation argues that:

East Timorese have limited knowledge of the substance of the law and the procedures for accessing legal services. ... For most of the population the Constitution and the laws enacted by the government are remote. This is reflected by the East Timorese expression ... [the mother of law

⁷¹ JSMP, *Report on the Court of Appeal Decision in the Case of Armando dos Santos*, (August 2003) 4.

⁷² JSMP, *East Timorese Parliament Passes New Legislation on the Applicable Subsidiary Law* (Press Release, 1 October 2003).

⁷³ Since 2002, about eighty pieces of legislation have been passed.

⁷⁴ Timor-Leste's 2004 Census estimates 13.6 per cent of the population speak Portuguese while the Asia Foundation estimates less than 7 per cent: Asia Foundation, above n 58, 3.

⁷⁵ World Bank, above n 8, 8.

⁷⁶ Human Rights Watch, above n 28, 47.

(constitution) is there, but we have not yet seen the children (organic law)].⁷⁷

Outside the capital, this lack of awareness extends to state officials and members of civil society. For example, according to a 2007 report, a district administration chief in Suai was unaware that the Suai District Court had been functioning since 1999.⁷⁸ As a whole the state legal system risks looking irrelevant to the lives of ordinary people because little information is disseminated about it.⁷⁹ In addition, there are no laws or regulations that guarantee access to judicial information.⁸⁰ The JSMP argues that the difficulty in accessing information about the state legal system "constitutes a major problem in relation to the development of the legal system and the rule of law in Timor Leste".⁸¹ In these circumstances it is not surprising that many people turn to the law with which they are more familiar, namely customary law.

3.2 International Law

The introduction of international law as a source of applicable law in Timor-Leste has also produced a degree of confusion. UNTAET Regulations 1999/1 and 2000/15 respectively introduced international human rights law and international criminal law.⁸² Article 9 of the Constitution then introduced international law more comprehensively into the legal system. Article 9(1) provides: "The legal system of East Timor shall adopt the general or customary principles of international law." The provision is vague as to whether all principles of international law that are either general or customary are to be adopted.⁸³

⁷⁷ Asia Foundation, above n 58, 11.

⁷⁸ *UNDP Strengthening the Justice System in Timor-Leste Programme – Independent/External Mid-Term Evaluation Report* (September 2007) [4.2.9].

⁷⁹ JSMP, *New Players in Timor-Leste's Justice System* (August 2006) 7.

⁸⁰ JSMP, *The Role, Practice and Procedure of the Court of Appeal* (28 June 2005) 20-21.

⁸¹ *Ibid.*

⁸² The former is constituted by the six core human rights treaties (see below) while the latter relates only to the serious crimes perpetrated in 1999 before UNTAET's arrival.

⁸³ Note that it would be difficult for Timorese courts to follow Portuguese precedents in interpreting this provision as the equivalent provision in the Portuguese Constitution (Article 8(1)) is worded slightly differently. It provides: "(1) The rules and principles of general or ordinary international law are an integral part of Portuguese law."

One year after independence, in 2003, Timor-Leste acceded to six core UN human rights conventions.⁸⁴ Paragraph 2 of Article 9 provides that the act of accession to an international treaty transforms it into state law:

Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.

This means that all state law needs to be consistent with the above international human rights conventions. Article 9(3) invalidates any state law that is inconsistent with such conventions. Thus while Timor's embrace of international law has been widely applauded, there is potential for confusion resulting from the layer of complexity that international law adds to the applicable state law.

In practical terms, international law has played little role in the operation of ordinary state justice despite the fact that Timor-Leste is a monist state where international law is a source of state law. Since 2002 state courts have rarely considered international law. In 2005 the JSMP reported a case where various defendants were charged under sections 106 and 107 of the Indonesian Penal Code with attempting to bring the state, or part of the state, under foreign domination.⁸⁵ The JSMP noted that defence counsel did not mount any argument of potential inconsistency with Article 19 of the *International Covenant on Civil and*

⁸⁴ See Chapter 6 at n 49 for the six core treaties. Except for the ICCPR, accession to these international treaties took place on 16 April 2003. The ICCPR was acceded to on 18 September 2003. On 30 January 2004 Timor-Leste acceded to the *International Convention on the Protection of the Rights of All Migrant Workers*, opened for signature 18 December 1990, 45 UN GAOR Supp (No 49A) 262, (entered into force 1 July 2003). It has also acceded to the 1989 *Second Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 15 December 1989, 29 ILM 1464 (1990) (entered into force 11 July 1991) on 18 September 2003; the two optional protocols to the Convention on the Rights of the Child (*Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts*, opened for signature 25 May 2002, 54 UN GAOR Supp (No 49) 7, (entered into force 12 February 2002); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, opened for signature 25 May 2000, 54 UN GAOR Supp (No 49) 6, (entered into force 18 January 2002) on 25 May 2000 and 16 April 2003 respectively, and the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 54 UN GAOR Supp (No 49) 5, (entered into force 22 December 2000) on 16 April 2003.

⁸⁵ JSMP, *Oppressive Indonesian Law Applied by the Court of Appeal*, (30 June 2005).

Political Rights, which guarantees the right to hold opinions without interference, and the matter was not raised by Timor's highest court, the Court of Appeal.

The courts' reluctance to consider and apply international law as a source of law may relate to the minimal knowledge or understanding of the operation of international law among Timor's local judges and foreign judges.⁸⁶ This can be seen in the operation of the Special Panels for Serious Crimes (SPSC).⁸⁷ International criminal law proved difficult to implement because the legal complexity of offences such as crimes against humanity was beyond the competence and training of the inexperienced local legal officers.⁸⁸ The recruitment of foreign judges to sit on the SPSC alongside local judges did little to address this problem because none had any specific prior experience in the application of international criminal law or humanitarian law.⁸⁹ The inexperience of the judiciary was demonstrated by the *dos Santos case* referred to above.⁹⁰ Besides causing confusion as to the applicable state law, the majority of the Court of Appeal decided that *dos Santos* could not be convicted for a crime against humanity under UNTAET Regulation 2000/15 on the ground that the law violates the prohibition of retroactive application of criminal laws in Article 31(5) of the Constitution. The majority failed to understand that offences such as crimes against humanity exist under customary international law and hence they do not violate the principle of *nullem crimen sine lege*. Article 9(1) of the Constitution recognises customary international law as a source of law.⁹¹ The *dos Santos case* is one of a number

⁸⁶ The JSMP discusses two other unpublished cases in which the Court of Appeal failed to consider Timor-Leste's international obligations: the case of Alberto Pires (Case No 46/2004, decided in 15 September 2004) and the cases of Benny Ludji and Others, (Case Number 40/2003) – JSMP, *Overview of the Justice Sector: March 2005* (March 2005) 20-21. See also, JSMP, *Analysis of Decisions Issued by the Baucau District Court in Cases Involving Female Victims: July 2007-December 2008* (December 2008) 18.

⁸⁷ The SPSC is discussed in Chapter 6 at n 73.

⁸⁸ Strohmeyer comments that of the initial pool of East Timorese lawyers in 1999, "these were believed to be so inexperienced as to be unequal to the task of serving in a new East Timorese justice system": Strohmeyer, above n 67, 50. He also observed that the factual and legal complexities involved in hearing crimes against humanity means that such matters should not be left to largely inexperienced lawyers": "Making Multi-Lateral Inventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor" (2001) 25 *Fletcher Forum of World Affairs* 107, 118. These statements are curious given Strohmeyer's championing of the decision to recruit locally.

⁸⁹ The International Center for Transitional Justice (Caitlin Reiger and Marieke Wierda), *The Serious Crimes Process in Timor-Leste: In Retrospect* (March 2006) 14.

⁹⁰ Court of Appeal Decision, *Prosecutor v Armando dos Santos*, (unpublished, 15 July 2003).

⁹¹ Article 9(1) states: "The legal system of East Timor shall adopt the general or customary principles of international law."

of cases in which the Court of Appeal drew criticism for its misapplication of international law.⁹² The decision highlights the danger of asking an inexperienced judiciary to deal with a sophisticated regime of international law.

The idea that the nascent Timorese judiciary could follow the example set by international bodies such as UNTAET in applying international law was dispelled by the *Alves case*, mentioned in the previous chapter, where UNTAET failed to fulfil international human rights law standards in detaining Alves beyond the acceptable period. In the Serious Crimes Process heard by the SPSC, the principles of international human rights law were meant to guide the Serious Crimes Process. However, from the start, the right to fair trial set out in the *International Covenant on Civil and Political Rights* was arguably jeopardised in that no defence witnesses were called in any of the first 14 trials heard by the SPSC that led to convictions.⁹³

In this chapter of Timor's history, part of the problem was that the state was attempting to implement a complex form of international law while at the same time propping up a struggling system of ordinary state justice. Given the scarcity of resources and capacity, the attempt to run these two programmes simultaneously was overly ambitious. The result has been a lack of enthusiasm on the part of Timor's judiciary to interact with international law. Overall, many Timorese feel that international law has failed to serve justice, as the SPSC closed before it tried seventy-five per cent of indicted suspects, particularly those 'big fish' that were beyond the SPSC's jurisdiction. According to various NGOs, this

⁹² According to the JSMP, the Court of Appeal's application of international law was incorrect in other cases. See, eg, Court of Appeal, *Case of Paulino de Jesus*, (unpublished 4 November 2004) at <http://socrates.berkeley.edu/~warcrime/ET-special-panels-docs.htm> at 15 October 2008; JSMP, *The Paulino De Jesus Decisions* (April 2005).

⁹³ The International Center for Transitional Justice (Megan Hirst and Howard Varney), *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (June 2005) 20. JSMP, *Digest of the Jurisprudence of the Special Panels for Serious Crimes*, (April 2007) 15; Amnesty International and the JSMP, *Indonesia – Justice for Timor-Leste: The Way Forward* (April 2004) 17-18. Defence counsel were the weakest aspect of the process due to the fact that most of UNTAET's attention was being directed at the judiciary and the prosecution.

process has seriously undermined public confidence in the state legal system and the concept of the rule of law.⁹⁴

3.3 Local Customary Law

At the ground level, the question of whether local customary law is applicable in any shape or form is more urgent and has created greater confusion for the local population than the complexity posed by international law. Article 2(4) of the Constitution states: "The State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law." The section gives recognition to "norms and customs" rather than customary law, leading to uncertainty in the courts as to whether customary law is applicable to sentencing or to defences in criminal law.⁹⁵ State courts have been grappling in an *ad hoc* fashion with questions such as whether local law can be legitimately used as a criminal law defence, as a ground for dismissing a case, to mitigate a sentence, or in sentencing generally. The constitutional provision contemplates the possibility of the Parliament enacting legislation dealing with customary law but this has not yet taken place.

One documented case of customary law being invoked in Timor's highest court was the 2003 case of Raimundo Soares who appealed his conviction and one-year sentence for the maltreatment of his wife before the Court of Appeal.⁹⁶ Amongst Soares' grounds of appeal was that the conduct of his adulterous pregnant wife violated local traditions and provoked his attack. The Court of Appeal completely failed to either address this ground of appeal or to explain the relationship between local norms and customs and women's rights under the Constitution and international law.

⁹⁴ JSMP, *The JSMP's Submission to the UN Commission of Experts* (6 April 2005) 6; The International Center for Transitional Justice (Caitlin Reiger and Marieke Wierda), *The Serious Crimes Process in Timor-Leste: In Retrospect* (March 2006) 41.

⁹⁵ These cases have been the subject of JSMP reports and a press release: *The Role, Practice and Procedure of the Court of Appeal* (28 June 2005) 15; *Overview of the Justice Sector: March 2005* (March 2005) 14-15; *Judge Applies Customary Law in a Criminal Case* (Press Release, 19 May 2005).

⁹⁶ Raimundo Soares, Case 14a/2001, (unpublished, 21 October 2003), discussed in JSMP, *The Role, Practice and Procedure of the Court of Appeal* (28 June 2005) 14-15.

In the lower courts, however, there is an increasing trend to take notice of out-of-court agreements reached through local customary law mechanisms. In 2005 the JSMP reported on three examples that took place in Suai and Oecusse,⁹⁷ remote districts of Timor-Leste, where the district courts operate only sporadically and there is less knowledge of state laws.⁹⁸ All three cases were criminal in nature: the first involved a large fight between rival martial arts gangs, the second involved the sexual assault of a minor by an adult relative and the third involved maltreatment of a woman by a minor. In the first case, the judge expressly acknowledged customary law as something the court could consider but she found it inapplicable in this case because of the serious implications that such fights pose to public security. In the second case the Oecusse District Court decided that the seriousness of the matter meant the case could not be dismissed but in the sentencing process the judge took into account the defendant's out-of-court agreement to pay compensation of livestock and buffalo to the victim's family. The third case was dismissed by the Oecusse District Court on the ground that it had already been resolved in accordance with local customary law as the offender had paid the victim compensation. In this last case the presiding judge was a foreign judge and, according to the JSMP, during the proceedings the judge made no reference to the applicable formal law, the Indonesian Penal Code.⁹⁹

From a strictly technical point of view, the consideration of these extra-legal factors, particularly in the third case, undermines the rule of law. On the other hand, the courts' cautious use of customary law in the first two cases can be understood as assisting to build

⁹⁷ JSMP, *The Interaction of Traditional Dispute Resolution with the Formal Justice Sector in Timor-Leste* (November 2005); JSMP, "Judge Applies Customary Law in a Criminal Case" (Press Release, 19 May 2005). In 2004 the JSMP also observed a pre-trial hearing of an assault charge in the Dili District Court in which both the investigating judge and the Prosecutor asked whether the matter had been resolved between the families involved: *Overview of the Justice Sector: March 2005* (2005) 14. On the interface between local customary law and state courts, see also Laakso, in Chapter 6 at n 133.

⁹⁸ According to the 2004 Asia Foundation survey, few people in Oecusse were aware of state legislation: Asia Foundation, above n 58, 42. Note that a mobile court is now operating in the Suai region.

⁹⁹ What is interesting in the second Oecusse case discussed above is that the presiding judge was not local and yet was confident that he had sufficient understanding of the local legal system to be sure that the matter had been satisfactorily resolved according to local custom. Given the large number of foreign judges, this raises a number of questions relating to judges' source of understanding of local law. Ultimately this problem has proven to be controversial across the world where customary law operates.

confidence in the state legal system: at a symbolic level the integration of customary law by state institutions such as the courts makes the state legal system more relevant to the local population. Many Timorese consider the processes used by the state legal system to be alien and remote to their understanding of law, which means that in some areas, decisions of the district courts are not necessarily considered to be legitimate at the local level. Legitimacy in local legal systems depends on who made the judgment, whether the punishment delivers the desired result, and whether compensation has been arranged.¹⁰⁰ Thus district courts are making an effort to take into account some of these factors, particularly the issue of compensation and reconciliation. The problem is that this process is *ad hoc*, unmonitored and outside of the existing legal framework.

At the ground level, other state institutions are less cautious than the courts and they actively promote the use of non-state institutions to assist in dispute resolution, thus sending mixed messages about the state legal system. As the first point of contact with the state legal system, the police frequently take an *ad hoc* and pragmatic approach, possibly because they do not trust the formal legal system.¹⁰¹ For example, the police often encourage victims of domestic violence to take their case to local leaders despite the fact that enforcement is often weak at this level.¹⁰² Less than a quarter of cases of gender-based violence reported to the police are sent to prosecution in the court system.¹⁰³ Some members of the police force have even referred complaints of police mistreatment to local customary mechanisms.¹⁰⁴ Of concern in these particular cases is the lack of parity between the parties to the dispute. Such practice could be read as an indication that the police do not have faith in the courts, thus undermining the state's rule-of-law institutions. Swaine argues that the effect of this informal interaction between state and non-state

¹⁰⁰ Tanja Hohe and Rod Nixon, *Reconciling Justice: 'Traditional' Law and State Justice in East Timor (Final Report)* (2003) 64 (Report for the United States Institute of Peace).

¹⁰¹ Above n 1, 22.

¹⁰² Aisling Swaine, *Traditional Justice and Gender Based Violence* (August 2003) 22 (Report for the International Rescue Society). See also, *Report of the Secretary-General on Timor-Leste pursuant to Security Council Resolution 1690*, [103], UN Doc S/2006/628, (8 August 2006).

¹⁰³ *Report of the Secretary-General on Timor-Leste pursuant to Security Council Resolution 1690*, [103], UN Doc S/2006/628, (8 August 2006).

¹⁰⁴ Human Rights Watch, above n 28, 45.

institutions "has caused much confusion for women users who are caught in the interface between the two systems".¹⁰⁵

While the parallel systems of justice are creating some disorder, it is also the case that this situation allows victims of domestic violence a choice between systems, sometimes called forum shopping. In some circumstances this can be beneficial to women where one of the two systems fails to address the serious nature of domestic violence. In 2003 Swaine observed that Timorese women interviewed for her research expressed strong support for a combination of the two systems.¹⁰⁶ Presumably this support for a hybrid model of law results from the fact that women face bias in engaging with local law; local biases and cultural beliefs regarding women's status in society often inform rulings at the local level. For example, the local legal systems are seen "to often blame women for the cases of [domestic] violence presented".¹⁰⁷ Generally women victims and offenders feel that their needs and input into the process are ignored.¹⁰⁸ Thus women are more likely to show interest in hybrid models of law that bring together the best elements of customary law and state law.

The overall effect of the approach taken by the police is that they are generally not considered to be the guardians of law and order at the community level; according to a 2004 survey, between 80-90 per cent of Timorese regard community authorities such as customary elders, and not the police, as responsible for maintaining law and order.¹⁰⁹ This means that people are continuing to depend on non-state institutions to address their daily problems.¹¹⁰ At this village and *suco* (village administrative unit) level, the rule of *customary law*, and not the rule of law, remains for most disputes. Adding to this is the fact

¹⁰⁵ Swaine, above n 102, 4.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid. For examples, see *ibid* 27-33. Swaine states: "The systems are inherently biased towards women's status, decision making capabilities and their roles within their communities.": 3.

¹⁰⁸ Interview with Manuela Leong Pereira, the Director of Fokupers, Dili, 17 June 2005. The potential for bias also lies in the fact that most disputes are dealt with initially in the family sphere. Of such a forum for dispute resolution, Celestine Nyamu Musembi explains that "embedded ideas about authority and gender roles seem to constrain open deliberation on the facts, and to dictate a resort to idealised statements of custom that necessitate a particular outcome.": "Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights", in Abdullahi Ahmed An-Na'im (ed), *Cultural Transformation and Human Rights in Africa* (2002) 126, 139.

¹⁰⁹ Asia Foundation, above n 58, 5, 39.

¹¹⁰ These problems generally do not include serious crimes such as murder or business matters but see Chapter 6 at n 133.

that some *suco* chiefs give out misinformation about the formal legal system and its cost, which discourages its use.

In some respects the Timorese Government has condoned this state of affairs by decreeing in 2004 that elected *suco* chiefs and village heads "should provide for the creation of grassroots structures for the settlement and resolution of minor disputes" at the *suco* and village level.¹¹¹ The Decree also assigns village heads the function of facilitating mechanisms to prevent and resolve cases of domestic violence.¹¹² The Decree does not clarify whether customary law can be used for these purposes although this would seem the logical source of law for such community leaders to apply given that they are unlikely to be either trained in state law or even fully literate. However, section one, ambitiously entitled "Community authorities and the rule of law", states that these functions must be performed "with due respect for the Constitution and laws regarding State property, especially ... natural resources".¹¹³ The Decree falls under the purview of the Ministry of State Administration, but according to USAID, the Ministry provides "limited oversight" of these local justice mechanisms, which "represents a significant risk to the legitimacy and effectiveness of dispute resolution at the Suco level".¹¹⁴ In response to this, NGOs, mostly funded by the international community, have been assisting community authorities by engaging with these local justice mechanisms and in setting up services for legal aid and mediation in Timor's thirteen districts.¹¹⁵ For example, the women's NGO, Fokupers, has

¹¹¹ *Decree Law No 5/2004 of April 2004*, ss 3(2)(c) and 8(a). Note that 'suco' refers to a group of villages. For a brief analysis of this decree, see Simon Butt, Natalie David and Nathan Laws, *Looking Forward: Local Dispute Resolution Mechanisms in Timor-Leste* (2004) (Draft Report for Australian Legal Resources International) (on file with author) 70-71. On the status of decree laws, see above n 68.

¹¹² Section 8(g) states that this must be performed "for the protection of the domestic violence victims and for the condemnation and repression of domestic violence perpetrators".

¹¹³ *Ibid* s 1(2).

¹¹⁴ USAID, above n 1, 27.

¹¹⁵ *Ibid*. For eg, the Asia Foundation, which is funded largely by international organisations, is supporting six legal aid organisations across Timor-Leste. See also Santina Soares and Jennifer Laakso, "Mediation in Timor-Leste: Opportunities and Challenges" (2007) 1 *World Arbitration and Mediation Review* 361, 363, 367. The JSMP observes that private lawyers often preside over mediations taking place in the districts. Legislation regulating the conduct and training of private lawyers was enacted mid 2008 but it appears to hold that mediation is incompatible with the level of impartiality required of private lawyers. See JSMP, *The Private Lawyers Statute: Overview and Analysis* (18 September 2008). Note that GTZ, in conjunction with Advocats Sans Frontières, is currently providing mediation training to approximately 600 members of local governance structures in two districts.

been involved in mediating domestic violence matters alongside community leaders for a number of years.¹¹⁶ Overall the Decree is a pragmatic approach to addressing the absence of the rule of law at the local level.

At a broad level, the Decree is concerned with local development and the appropriate use of natural resources. One example of a grassroots initiative devised by local leaders and NGOs has been the enactment in a village in the Ermera district of ritual prohibition laws (known as *tara bandu*), a form of customary law. In this case, the laws decrease the amount of goods and offerings that are required to be exchanged during ritual ceremonies and for dowries, prohibit pre-marital sex, the burning of land and cutting of young trees and impose obligations to seek permission before taking another's crops. The aim of this *tara bandu* is to alleviate poverty and conserve natural resources so as to ensure a more reliable food supply and to maintain law and order. This project was undertaken by local leaders in collaboration with a Timorese student-based NGO, HaKDea, which was responsible for transforming the *tara bandu* into a signed formal agreement, a first, according to researcher Lisa Palmer.¹¹⁷ She relates that government officials such as the Secretary of State for Youth and Culture were present as the law was sung, danced and then signed. While the Secretary of State was not willing to sign the agreement on the pretext of lacking authority, the local sub-district administrator signed it while indicating that the onus lay with the community to implement the agreement.¹¹⁸

This event illustrates four points. First, it illustrates that local customary law has continued to be a dynamic form of law in Timor: it is an example of living customary law. Second, it

¹¹⁶ Interview with Manuela Leong Pereira, the Director of Fokupers, in Dili on 17 June 2005. Fokupers offer the option of mediation to women victims in the view that it should be left to the victim to choose which mechanism she prefers, given the high risk of divorce and social stigma threatened by taking the matter to the formal legal system.

¹¹⁷ Lisa Palmer, "Developing Timor-Leste: The Role of Custom and Tradition" in Lisa Palmer, Sara Niner and Lia Kent (eds), *Exploring the Tension of Nation-Building in Timor-Leste* (SSEE Research Paper No.1/2007) 35-40 <<http://www.social-environmental.unimelb.edu.au/research/researchpapers/SSEEResearchPaper1-EastTimor.pdf>> at 26 June 2008.

¹¹⁸ Ibid 38. According to newspaper and radio reports, the Secretary of State for the Environment, Abilio de Jesus Lima, is taking a less cautious approach and encouraging the use of local customary law in the districts, even in relation to gender-based crimes such as rape. See Radio Australia, 26 September 2008 at <<http://www.radioaustralia.net.au/programguide/stories/200809/s2375674.htm>> at 1 October 2008; "Water Buffalo Justice Reigns in East Timor" Deutsche Presse Agentur, 28 September 2008.

shows that living customary law regulates aspects of life, such as consensual adult sex, that are generally avoided by the modern legal state. Third, the process of building legitimacy is understood to be a two-way process: both local state representatives and local customary leaders saw something beneficial in their mutual participation in this event. Fourth, it highlights the problem of who makes the law: the *tara bandu* cannot be considered the product of a democratic process and yet, as an agreement made by local leaders, it arguably enjoys considerable local legitimacy. This raises the question as to whether it would be legitimate in local eyes for a state judge sitting in the Dili District Court, the closest court to this village, to uphold the agreement.

As we have seen, there is currently much uncertainty as to the relationship between state law and local customary law. However, there is clear support from most parts of the population for hybrid models that fuse the two sources of law. The following section considers some of these models.

4. Initiatives Linking Customary Law with State Law

The idea of a hybrid model of justice based on legal pluralism, driven by the dual problems of perceived gender bias in local customary law and chronic delay in the state legal system, has inspired a number of initiatives. This section examines the relationship between the rule of law and legal pluralism in these models.

The hybrid models proposed and tested in Timor-Leste since 1999 relate to both civil disputes and criminal offences. The tension apparent in these models is the need to modify local customary law so as to be consistent with international human rights norms while retaining sufficient local and spiritual legitimacy that is important to a sense of East Timorese identity.

4.1 Mediation Initiatives: Land Law Disputes and General Civil Cases

Many key NGO initiatives on non-state justice have focused on civil rather than criminal matters because these matters have been largely neglected by the struggling state court system. To reduce the burden on the state legal system, NGOs are proposing the formal use of mediation so as to divert these matters from the long waiting lists in the courts.

Mediation is favoured because it is seen as a vehicle that focuses on the similarities in procedure in Timor-Leste's diverse local customary law systems. This section sets out these initiatives and argues that they are useful in highlighting some of the compromises to the rule of law that international and state actors deem to be acceptable.

4.1.1 Land Law Disputes

One particularly pressing area of civil disputes involves land law: land disputes are numerous and pose considerable potential to fuel conflict. This problem of land law is exacerbated by the legacy of a complex framework of laws from the country's history of colonisation, occupations and administration.¹¹⁹ The majority of land disputes are resolved outside the state legal system using a process of arbitration or mediation.¹²⁰ These disputes comprise a significant proportion of all disputes addressed at the local level.¹²¹ The importance of legal pluralism to land law is confirmed by research conducted by US-AID funded Associates in Rural Development (ARD) into local forms of mediation and alternative dispute resolution in relation to land law. This research found that local forums are overwhelmingly preferred to formal state courts for settling land tenure disputes because the former are faster, cheaper, easier to access and more sensitive to local norms. In its final report the ARD describes these systems of customary mediation and arbitration as "sophisticated and effective".¹²²

State law has a role to play, particularly in relation to land tenure of non-residents in rural areas. The ARD report argues that in this area there is "a surprising and encouraging appreciation for rule of law throughout the country". It explains:

The research indicated that Timorese by and large recognised land ownership claims based on laws even when those laws were promulgated and applied by former regimes. Those same respondents by contrast roundly criticised land claims based on expropriation by force,

¹¹⁹ See Daniel Fitzpatrick, *Land Claims in East Timor* (2002).

¹²⁰ JSMP, *Land Law Report* (27 September 2005) 11. Mediation is used in approximately one third of all disputes with the assistance of community leaders and officers of the government's Directorate of Land and Property (DNTP). The involvement of the DNTP appears to have no legislative backing.

¹²¹ Edwin Urresta and Rod Nixon, Timor-Leste Land Law Program, *Report on Research Findings and Policy Recommendations for a Legal Framework for Land Dispute Mediation* (February 2004).

¹²² ARD Inc, *USAID Land Law Program II Timor-Leste – Final Report* (April 30, 2006) 5.

demonstrating their clear grasp of the distinction between the rule of law and rule of men (force). Their willingness to apply rule of law principles even-handedly to non-national claimants reveals a strong desire to live consistently by those principles.¹²³

Despite the predominance of local customary law in the determination of land disputes, this study asserts that state law is nevertheless respected in relation to land parcels subject to claim by non-residents and that law generally is a respected concept amongst East Timorese. Presumably this aspect of the research is driven by the concern of international financial institutions regarding the possibility that the predominance of customary tenure may discourage foreign investment.¹²⁴

The ARD has proposed that the state give legal recognition to state-assisted local mediation by requiring that it be the first option for land dispute resolution, followed by the court system in the case that mediation is unsuccessful or impossible. This programme of state-assisted mediation was initiated during the UNTAET period and is currently operating without formal state sanction. To give this process formal state endorsement, the ARD has drafted a number of pieces of legislation for the government to consider, including a decree law, which is still being considered by the Council of Ministers.¹²⁵

The World Bank has praised the ARD land project as an "excellent" example in consultation.¹²⁶ One of the sidelined policy concerns of the ARD project has been the inheritance rights of women. This issue highlights the tension between international norms and local value systems. Most societies in Timor-Leste are patrilineal which affects and limits the inheritance rights to land of unmarried women and women upon marriage.¹²⁷ On this problem, the ARD report comments:

¹²³ Ibid 5.

¹²⁴ Daniel Fitzpatrick argues that the World Bank has changed its views on the role of customary tenure in economic development: see Daniel Fitzpatrick, *Land Claims in East Timor* (2002) Ch 7.

¹²⁵ The draft Decree is entitled *Official Mediation Process of Land Conflicts*.

¹²⁶ World Bank, above n 8, 8.

¹²⁷ Note that these rights relate to access and use to land rather than ownership. The customary land tenure system holds that land belongs to lineages (ie collectives) and hence cannot be privately owned by individuals: Dionisio da C Babo-Soares, "A Brief Overview of the Role of Customary

Policymakers may be tempted to consider the loss of a woman's inheritance rights at marriage an injustice, yet to ignore existential components of Timorese life ... could be counterproductive in terms of the overall well-being of the population of Timor-Leste and could compromise popular support for state-formulated policies, laws and rules.¹²⁸

This comment implies that the rights of individual Timorese women should be compromised and sacrificed for the stability and cohesion of Timorese society. In its readiness to embrace a seemingly uncontested version of the "existential components of Timorese life", the ARD fails to mention the constitutional guarantees of the rule of law and equality or Timor-Leste's ratification of various human rights treaties relating to equality and women's rights.¹²⁹ The project also glosses over the tension between individual rights, generally promoted by the international community, and collective rights, seemingly prioritised by the Timorese worldview. The ARD seems to rely on the government and courts taking a pragmatic approach in the application and enforcement of constitutional and international norms that promote equality. Furthermore, the support of USAID and the World Bank for this project indicates that they condone this compromising of formal equality, which is a key component of the rule of law.

4.1.2 A Mediation Model for General Civil Disputes

Another initiative was spearheaded by the Peace and Democracy Foundation (PDF), a NGO founded by the then Minister for Foreign Affairs, Ramos-Horta. The initiative aimed to establish and formalise a mediation model for civil cases generally,¹³⁰ so as to improve

Law in East Timor", (paper presented at a symposium on East Timor, Indonesia and the Region organised by the Universidade Nova de Lisboa, July 2000) 6 (on file with author).

¹²⁸ Urresta and Nixon, above n 121, 36.

¹²⁹ See Articles 15 and 16 of the *Convention on the Elimination of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) and Article 26 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹³⁰ Peace and Democracy Foundation, *Report about Research on Customary Dispute Resolution and Proposed Mediation Model for the Democratic Republic of Timor-Leste* (November 2004) (document on file with author). The pilot for this project was completed in 2005 but there is no evidence of any follow-up. Since mid 2008, GTZ has been operating a similar programme which trains mediators in two districts, Cova Lima and Viqueque. In contrast to the PDF model, GTZ does not train representatives of women, youth and religion as it only trains representatives from existing local governance structures (aldeia, suco and subdistrict levels). Furthermore, each mediation panel

local dispute resolution and "correct the problems with the customary practice".¹³¹ The idea was that a mediation model could become the "one common model to be used in all communities".¹³² The initiative recognised the negative aspects of local customary law and sought to remedy them while retaining the core of the customary process. Thus the model sought to implement an alternative mechanism that makes decision-making "more transparent" and "can reduce discrimination" suffered by women and young people who are traditionally excluded from dispute resolution in the local legal sphere.¹³³

The model used mediation instead of the system of arbitration most commonly used at the local customary level because mediation would allow parties to a conflict to find a solution to their problem with the assistance of a mediation team made up of customary leaders, as well as representatives of women, youth and religion. If the parties could reach an agreement, it was then to be put in writing and signed by the parties and the mediation panel as the witnesses. Copies of the agreement were to be given to the parties as well as the *suco* chief and sub-district administrator and it could be registered with the state court. The chief had the responsibility of submitting to the court a monthly report regarding the number of cases mediated, the number of cases resolved by other means and the agreements. It is unclear how the overburdened courts would be expected to deal with this report and provide proper oversight and monitoring. If the parties could not reach an agreement, they could opt to proceed to court. In other words, there would be an official alternative option; this does not exist in the current framework of local customary law where people generally accept unfair or excessive fines "because they are afraid to defy the sacred traditional house and sacred word. ... afraid of losing their identity, because the traditional ceremony is part of that identity".¹³⁴ The pioneers of this model presumably counted on the participation of local customary leaders as giving sufficient spiritual legitimacy to this process.

consists of only two members so as to make the process more efficient. According to Soares and Laakso, mediation was compulsory for civil cases under Indonesian law and is sometimes promoted at the first instance by state judges hearing criminal cases: above n 115, 368.

¹³¹ Ibid 5.

¹³² Ibid 9.

¹³³ Ibid.

¹³⁴ Ibid 9.

The project is consistent with Ramos-Horta's other attempts to bridge the two paradigms of the state and the local. Upon becoming Prime Minister in mid 2006, Ramos-Horta acknowledged that the government must work with institutions like the Catholic Church and customary authorities given the nascent nature of the state's institutions. He stated his intention to meet with "heads of villages [so as] to mobilise the society towards the development process".¹³⁵ Commentators Damien Kingsbury and Michael Leach argue that for Timor-Leste, this "indicated a major change of direction" and a possible step away from the centralisation of power in Dili.¹³⁶ It is noteworthy that the PDF's report did not make any grandiose claims that the mediation model would help build the rule of law. It merely stated that state recognition would reduce confusion within the community and constitute "ways to follow the constitution and uphold the law".¹³⁷

4.2 *The CAVR*

The largest-scale initiative that has drawn together legal pluralism and the rule of law is the Commission for Reception, Truth and Reconciliation, known by its Portuguese acronym CAVR, which began formally in mid 2001.¹³⁸ CAVR was a temporary transitional justice mechanism that aimed to assist in the reintegration of perpetrators of minor crimes back into the community through the process of truth telling and reconciliation. It was designed to work hand in hand with the Serious Crimes Process (SCP), which was set up to prosecute perpetrators of serious crimes before the SPSC. CAVR was largely the initiative of local leaders after consultation with the districts and support from international experts and UNTAET. While the SCP was intended to achieve 'justice' for serious crimes including murder and rape that took place in 1999 up until UNTAET's arrival, the CAVR aimed to bring about 'reconciliation' within communities and between individuals for

¹³⁵ *Suara Timor Lorosae* Newspaper 2006, quoted in Sara Niner, "A Reassertion of Customary Practices in Timor Leste" in Lisa Palmer, Sara Niner and Lia Kent (eds), *Exploring the Tension of Nation-Building in Timor-Leste* (SSEE Research Paper No.1/2007) 41, 46.

¹³⁶ Damien Kingsbury and Michael Leach, "Introduction" in Kingsbury & Leach, above n 31, 9.

¹³⁷ Peace and Democracy Foundation, above n 126, 4. In addition, it "can promote perception of legitimacy for the mediation process, provide standards to maintain accountability of mediators and transparency of the mediation process, and help reduce the instance of forum shopping.": 7.

¹³⁸ For a history of its inception, see the CAVR Report, *Chega!* Part 1.

minor crimes such as arson and assault committed during the Indonesian occupation and the post-UN ballot period.¹³⁹

The central feature of the CAVR was the Community Reconciliation Process (CRP) programme, which operated in each of the 13 districts from mid 2002 to early 2004. The CRP was a hybrid legal process that fused together elements of the state legal system and local systems of customary law. The CRP programme heard confessions from 1371 perpetrators and, in all, approximately 40,000 people, roughly five per cent of the population, attended and participated in the CRP hearings, making it the most visible face of state-endorsed justice for the local population since at least 1999.

The legitimacy of the CRP programme drew on two sources. The first was the state in the form of UNTAET Regulation 2001/10.¹⁴⁰ However, the CAVR styled itself as an independent body that did not rely on the state for funding.¹⁴¹ The second source of legitimacy was local *lisan* practices. *Lisan* is a term that covers traditional practices; it encompasses local customary law but it is broader than it. The incorporation of *lisan* was achieved in two ways: through the inclusion of local ceremonial practices to begin each CRP hearing and through the integration of some aspects of local customary law into the design of the process.¹⁴² The ceremonial practices generally involved the elders (known as the *lia nain*) rolling out a large mat on which the parties were seated. This symbolic process is known as *nahe bitit*.¹⁴³ In addition, the *lia nain* began the hearings by summoning their ancestors to be witnesses to the ceremony so as to validate the

¹³⁹ According to *Chega!*, the dual process of transitional justice mechanisms gives paramourcy to justice over reconciliation by allowing the Office of the Prosecutor General to distinguish serious crimes from minor crimes on a case-by-case basis: Part 9, [37].

¹⁴⁰ See UNTAET Regulation 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET Regulation No 2001/10.

¹⁴¹ For an analysis of the CAVR's funding, see La'o Hamutuk, "Reviewing the East Timor Commission for Reception, Truth and Reconciliation (CAVR)" (2003) 4 *La'o Hamutuk Bulletin* 6-7. See the final list of foreign donors at *Chega!* Annex 4, 3.

¹⁴² According to Patrick Burgess, who was the CAVR's Principal Legal Counsel, the importance of local customary law developed during the CRP programme to an degree not anticipated during the design of the CAVR: Burgess, "A New Approach to Restorative Justice – East Timor's Community Reconciliation Processes" in Naomi Roht Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century – Beyond Truth Versus Justice* (2006) 189.

¹⁴³ For an explanation of how this relates to the term 'reconciliation', see Dionisio Babo-Soares, "*Nahe Bitit*: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor" (2004) 5 *The Asia and Pacific Journal of Anthropology* 15-33.

proceedings. An example of the inclusion of aspects of local law is that perpetrators were required to admit their actions publicly¹⁴⁴ and the community was able to offer its points of view.¹⁴⁵ The hearings gave victims an opportunity to participate in the hearing.¹⁴⁶ These aspects were uniformly carried out in the CRP programme but the use of local ceremonial practices varied from district to district¹⁴⁷ and depended on whether the reconciliation was an intra-community matter. None of these *lisan* practices were detailed or even referred to in the Regulation.¹⁴⁸

While the Regulation gave much leeway to the process, it set out aspects of due process to be satisfied as the base line of the programme. For example, the process worked whereby a CRP hearing would only take place if a perpetrator made a full and voluntary confession of their crime.¹⁴⁹ Once an oral confession was given in front of the community and the CRP panel had determined an act of reconciliation to be carried out by the perpetrator,¹⁵⁰ then the agreement was registered at the district court but only if the form of reconciliation was proportionate to the crime and there was no violation of human rights.¹⁵¹ If the agreement was fulfilled, then the perpetrator had immunity from prosecution in the state legal

¹⁴⁴ The process was that a confession took place before the community and a 3-5 person panel comprised of a Regional Commissioner, community and *lisan* leaders (the *lia nain*), and one or two women. Each panel had to have "appropriate gender representation" (section 26.1). This provision was necessary given that in most districts, political and spiritual leaders are male.

¹⁴⁵ *Chega!* Part 9, [92].

¹⁴⁶ *Ibid* [159-161].

¹⁴⁷ For example, in some hearings public apologies were made in front of sacred objects that symbolised links with the ancestors. In other hearings palm wine mixed with animal blood was used to symbolise the sincerity of the person's apology: *ibid* [96-98].

¹⁴⁸ The procedure for CRPs was left to the discretion of the CAVR by section 27(2) of the Regulation, above n 139. See generally Part IV of the Regulation. For a description of this hybrid procedure, see *Chega!*, *Report of the Commission for Reception, Truth and Reconciliation*, Part 9.1.1, [2].

¹⁴⁹ Note that perpetrators could not be compelled to participate in the process. This confession was initially set out in writing and referred to the Office of the General Prosecutor (OGP) to check that it dealt only with minor offences. Where there was evidence of a serious crime, the matter had to be adjourned and referred to the OGP.

¹⁵⁰ One conflict between the two systems of law occurred in relation to the participation of victims in the agreement reached by the panel. According to local customary law, the victim must consent to the settlement and has the power to veto it. Given the practical problem that some crimes such as arson involved numerous victims, section 27.7 of the Regulation did not follow local customary law in requiring this consent. This caused tension in a few cases where the consent was refused: according to Patrick Burgess, the local rule was observed here and the matters were then forwarded to the Office of the General Prosecutor for resolution: Burgess, above n 142, 190-191.

¹⁵¹ Section 28 of the Regulation, above n 140, stipulated judicial consideration of agreements. See also, ss 30-32. According to section 1 of the Regulation, international human rights standards means the rights set out in the 6 core human rights treaties – see above n 65.

system.¹⁵² Thus the CRP programme brought together aspects of local customary law and practice with core safeguards of the state legal system.

In regard to the dual legitimacy of the CAVR, some participants emphasised the importance of "the fact that CAVR comes to communities as an outsider".¹⁵³ Researcher Sandra Scheeringa relates that in the village of Mouris Dame, the CAVR was understood as an authority sent by the government and hence it was entitled to solve the community's problems.¹⁵⁴ However, the use of *lisan* practices made the CRP accessible in that participants were encouraged to speak in their local language and were able to use a familiar process.

The decision to fuse aspects of the two systems appears to have been a largely pragmatic one. At the time of the CAVR's creation, it was clear that the state legal system would struggle to prosecute all the serious crimes and would not be able to deal with the minor crimes. The alternative was "complete impunity" and immunity for perpetrators of minor offences and the possibility of vigilante justice and revenge attacks. Local customary law, on the other hand, was not designed to deal with such a massive scale of harmful acts. Instead it "evolved to address isolated cases at the community level".¹⁵⁵ The effect was the bridging of an individualised approach to justice with a more collective understanding of justice based on reconciliation at the community level.

The CRP has been criticised for its failure to accord full due process to perpetrators and its failure to consider fully the needs of victims. For example, Patrick Burgess points out that perpetrators were not given legal advice before making voluntary confessions despite the possibility that these confessions could have been used in later prosecutions.¹⁵⁶ Another factor is that a perpetrator's non-compliance with an agreement could lead to one-year

¹⁵² Sections 30-32 of the Regulation, above n 140.

¹⁵³ Sandra Scheeringa, "Enhancing the Local Legitimacy of Transnational Justice Institutions: Local Embeddedness and Customary Law in CAVR" in Damien Kingsbury and Michael Leach (eds), *East Timor: Beyond Independence* (2007) 137.

¹⁵⁴ Ibid.

¹⁵⁵ Part 9, [52]. Furthermore, the manipulation of local customary law during the Indonesian Occupation had harmed the law's legitimacy in some areas: see Burgess, above n 142, 183.

¹⁵⁶ See Burgess, above n 142, 155. Note that while the Regulation provided for legal representation (section 18), this was not a practical reality in the districts outside Dili where lawyers are extremely scarce – on the scarcity of legal aid, see Avocats Sans Frontières, *Access to Legal Aid in Timor-Leste – Survey Report* (November 2006) 22.

imprisonment.¹⁵⁷ The 2005 CAVR report, *Chega!*, acknowledged these weaknesses by stating: "the CRP was not able to offer the same depth of investigation, legal certainty or uniformity of application and guarantees of due process and fairness that the courts can provide".¹⁵⁸ Another criticism is that the CRP programme failed to pay sufficient attention to the needs of victims; some victims felt that the CRP was overly focussed on the community and complained that their needs had been sacrificed for the collective good.¹⁵⁹ These complaints show some contestation as to whether such sacrifice is necessarily part of the Timorese 'worldview'.¹⁶⁰

Overall, *Chega!* claimed that the CRP mechanism was a success and it attributed this success to its mixing of the two legal systems and its inclusion of a range of stakeholders.¹⁶¹ Furthermore, it asserted that "the success of the CRP was an example for the new nation of the value of the rule of law".¹⁶² Indeed, it argued that the CRP programme "reinforced the value of the rule of law".¹⁶³ Paradoxically, at the same time, the use of *lisan* practices in the CRP reportedly helped to reinvigorate local customary law.¹⁶⁴ During the Indonesian occupation, Indonesian security forces had manipulated many customary procedures for their own purposes but some of this damage was washed away by the CRP's incorporation of *lisan* practices and by the ceremonial and mediation role played by *lisan* leaders. *Chega!* stated that some of the participants in the programme said "that the prominence given to *lisan* within the CRP, including the element of official recognition had helped to restore its place as a unifying force within communities".¹⁶⁵ Thus the report appears to be claiming that the CRP programme managed to simultaneously

¹⁵⁷ Section 30 of the Regulation, above n 140.

¹⁵⁸ Part 9, [157]. Here the irony is that the courts, through the SCP, have also failed to guarantee due process for all defendants.

¹⁵⁹ JSMP, *Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process* (August 2004) 33, 45.

¹⁶⁰ Ibid 45. The contested nature of the East Timorese 'worldview' means it may not be sufficiently stable as a base upon which to ground conceptions of national identity.

¹⁶¹ *Chega!* Pt 9, [50-51].

¹⁶² Ibid [143].

¹⁶³ Ibid [164]. In its invocation of the rule of law, *Chega!* contrasts with the *Final Report of South Africa's Truth and Reconciliation Commission* (SATRC); nowhere in its seven volumes does the Final Report of the SATRC claim that the Truth and Reconciliation Commission contributed to the building of the rule of law in South Africa. Presumably the Commissioners of South Africa's TRC considered it sufficient that the TRC assisted in bringing about a degree of reconciliation.

¹⁶⁴ *Chega!*, Part 9, [52].

¹⁶⁵ Ibid [9].

strengthen both the rule of law and legal pluralism. According to the logic of *Chega!*, legal pluralism can be used as a tool for the establishment of the rule of law.

The CRP programme is never characterised in *Chega!* as a restorative justice mechanism, but as a "unique approach to justice".¹⁶⁶ It emphasised that the process was able to achieve "some degree of accountability for harmful acts that otherwise would not have been dealt with"¹⁶⁷ in that the CRP programme offered a non-violent and state-endorsed forum for communities to voice concerns, address harmful acts, and reintegrate perpetrators. In this regard Gusmão declared to the UN Security Council: "It is as a result of our efforts at reconciliation that there has not been a single revenge killing of suspected elements implicated in the occupation of our country."¹⁶⁸ Overall the CAVR approach exemplified 'sustainable justice': through a temporary form of state law pluralism the state was able to enjoy a stake in the process of reconciliation at the grass-roots level and was able to offer participants a measure of the rule of law, albeit compromised.

The level to which due process and the rule of law were compromised in the CRP is similar to that legislated for customary courts in South Africa. The feasibility of providing a raft of procedural safeguards such as legal advice to defendants is perceived as unrealistic in the transitional context where the modern state paradigm is weak and the customary law paradigm is strong. This means that international norms relating to individual rights are being compromised in order to achieve broader state aims, such as reconciliation, which are more in tune with local norms. As we saw above in the area of land law, this balancing of individual and collective rights as well as international norms and local norms can have serious economic consequences for some groups in society. In this balancing process the involvement of the international community can be both beneficial and problematic.

5. The International Community, Legal Pluralism and the Rule of Law

Chega! was addressed in part to the international community;¹⁶⁹ in January 2006 it was presented to the UN Security Council. Arguably its invocation of the rule of law is an

¹⁶⁶ Ibid Part 9.6.4.

¹⁶⁷ Ibid [132] (emphasis added).

¹⁶⁸ Gusmão's speech to the UN Security Council UNSCOR, provisional sess, 5351st mtg, 5, UN Doc S/PV.5351, (23 January 2005).

¹⁶⁹ See the recommendations made to the International Community in *ibid*, Part 11, 3-4.

attempt to engage the international community, which, through its funding, appears to drive the rule-of-law agenda in weak states such as Timor-Leste. While some of the promotion of this agenda is direct,¹⁷⁰ much of it is performed through indirect means such as the funding of NGOs and Timor's formal rule-of-law institutions such as the courts and the Provedor.

Thus far the international community's strategy of promoting the rule of law has made a mixed contribution to the plight of the Timorese people. Despite the evidence that a small percentage of Timor's population comes into contact with formal rule-of-law institutions, much of the international community's analysis and funding is skewed toward focussing on these institutions. For example, in its 2006 report on Timor-Leste's institutions, the World Bank reasoned that: "if the *State's monopoly on coercive power* is used in a restrained and legal manner, citizens will feel they can trust the State".¹⁷¹ It is important to question whether "the State" in Timor-Leste has a "monopoly of coercive power": it is likely that the World Bank is presenting only half the picture in that non-state local leaders at the village and *suco* level continue to hold much of this power, especially where the state and its frail institutions fail to reach communities. The World Bank's inability to look beyond state power in this case shows the lack of nuance in international approaches to the problems faced by Timor-Leste. In contrast, some of the programmes funded by USAID have a focus on non-state law and yet in its 2007 Rule of Law Report USAID examined the "legitimacy" of Timor's laws without considering in any depth whether these state laws are considered to be legitimate within the broader East Timorese 'worldview'.¹⁷² The report sidelines this question and focuses on whether formal institutions are fulfilling international standards.

The international community also makes highly ambitious claims regarding the power of the concept of the rule of law. For example, the UN Development Programme, which is the

¹⁷⁰ For example, the UN often stresses the need to "reinforce the primacy of the rule of law in the country": *Report of the Security Council Mission to Timor-Leste, 24 to 30 November 2007*, [24], UN Doc S/2007/711 (6 December 2007).

¹⁷¹ World Bank, above n 8, 3. Presumably this issue of the "appropriate and consistent use of coercive power" relates largely to the manner in which the courts and particularly the executive, through the police force, are exercising their power.

¹⁷² US AID, above n 1, 23-4.

lead international donor working on Timor's court system, asserts via a "Fact Sheet" designed for Timor-Leste that the rule of law can "protect" the "poor and disadvantaged".¹⁷³ Moreover, it claims that the "rule of law creates a predictability that facilitates investment and poverty reduction. A strong judicial system is therefore necessary for peace, stability and nation-building."¹⁷⁴ In the context of a weak state with little reach, these claims regarding the rule of law simply cannot meet the expectations of the Timorese people. On the other hand, the Fact Sheet is at least direct in revealing that the international community connects the rule of law with the interests of "stability and nation-building". This connection appears to drive the international community's agenda in promoting the rule of law. The problem lies in the fact that the international community purports to promote the rule of law as a means to protect the "poor and disadvantaged" without acknowledging that this is partly a fallacy. The international community must be careful not to over inflate the ability of the rule of law. In the short term the rule of law can do little for the "poor and disadvantaged" sections of Timorese society who receive minimal protection from the state. In the long term, strengthening the state and its institutions may assist these people but this cannot be guaranteed.

Since the winding up of the CAVR, the international community has become increasingly involved in debating the future of legal pluralism. For example, in 2006 the World Bank joined local NGOs in calling for the Timorese government to establish a legal framework for permanently linking customary practice to the formal justice system.¹⁷⁵ A year later, in mid 2007, UNMIT's Human Rights and Transitional Justice Section reiterated this call by recommending that traditional "mechanisms" be formalised so that they operate in a more transparent and human rights-abiding way.¹⁷⁶ In October 2007 Timor-Leste's AMP-

¹⁷³ UNDP Project Fact Sheet, *Justice System Project* see http://202.72.107.141/justice/docs/justice_fs.pdf at 24 June 2008. The Fact Sheet declares: "Usually it is the weaker party in a conflict – often the poor and disadvantaged – who need the protection which comes from the rule of law."

¹⁷⁴ Ibid 1.

¹⁷⁵ World Bank, above n 8, [60]. Note that in late 2006 the authors of a USAID Report recommended that such links be made: USAID, *The Crisis in Timor-Leste: Causes, Consequences and Options for Conflict Management and Mitigation* (12 November 2006) 30.

¹⁷⁶ Recommendation made by UNMIT's Human Rights and Transitional Justice Section, *Report on Human Rights Developments in Timor-Leste, August 2006-August 2007* (2007) 29, 15, 17, 23. Added to this is an Independent Evaluation of UNDP, written by experts on Timor-Leste and transitional justice, which called for recognition of informal law: see *UNDP Strengthening the*

coalition government embraced legal pluralism by publicly announcing a new policy of justice that is no longer centred on the exclusiveness of the courts.¹⁷⁷ The government then formally approached the UN for assistance in integrating the state and non-state systems of dispute resolution.¹⁷⁸ For the UN, this request for assistance poses a conundrum because, based on South Africa's experience, the operation of strong legal pluralism in Timor-Leste means that there are few avenues to avoid compromising the rule of law at some level. In this regard, it is likely that UN assistance may affect its reputation as an international organisation that is at the forefront of promoting the rule of law as a universal norm. However, on the positive side, it may lead the international community towards a more nuanced understanding of the rule of law and its implications in transitional countries where legal pluralism has a strong presence.

For many actors and agencies in the international community, legal pluralism is an inconvenient fact that hinders its rule-of-law enterprise. The sudden interest shown in legal pluralism by the World Bank for example, indicates that it has realised that there is a connection between legal pluralism and the projects of nation-building and securing regional security. However, there are ways in which the international community can assist Timor-Leste. For example, in reaching a strong understanding of the costs of any plan for state law pluralism, and second, in fully weighing up these costs with the aimed outcomes as well as the option of continuing to ignore legal pluralism. Drawing on the experience of South Africa, it is clear that state law pluralism entails compromises to both the rule of law and customary law. For example, South Africa shows that state recognition and codification of customary law can potentially destroy both its local legitimacy and its dynamic nature. On the other hand, it is difficult to guarantee human rights standards and the rule of law if customary law and informal mechanisms are fully recognised and incorporated. However, the cost of doing nothing may be the fragmentation of the state, a possibility glimpsed through the unfolding of the 2006 crisis in Timor-Leste. Overall, the rule-of-law enterprise driven by the international community should give close

Justice System in Timor-Leste Programme – Independent/External Mid-Term Evaluation Report (September 2007) 31, 36, 71.

¹⁷⁷ Democratic Republic of East-Timor, Presidency of the Ministers' Office, *IV Constitutional Government Program, 2007-2012* (October 2007) 71. See <http://www.laohamutuk.org/misc/AMPGovt/07AMPGovt.htm> at 6 February 2008.

¹⁷⁸ UNMIT, above n 176, [36].

consideration to the problems encountered by South Africa in seeking to balance the rule of law and legal pluralism.

6. Conclusion

Through analysing Timor's Constitution, its main rule-of-law institutions, the applicable state law, the current hybrid law initiatives and the role of the international community, this case study shows the complexity of promoting the rule of law in a transitional state where legal pluralism and a paradigm of customary law are strong. Timor's "transition to an international standard of law" has arguably diverted much attention away from addressing the relationship between the rule of law and legal pluralism and establishing the legitimacy of the state at the local level. While there is no straight-forward and compromise-free path for Timor-Leste in this respect, it is clear that if it continues to ignore this relationship it is likely to keep on struggling to function as a state.

With the assistance of the international community, the government of Timor-Leste needs to inform the population in a clear and systematic manner as to the nature of the formal legal system, how this system compares with local legal systems and how the government intends to bridge the two spheres. This would represent a first step in reducing the misinformation and distrust that mark the formal legal system and prevent people from enjoying the benefits of legal pluralism.

Chapter 8. Conclusion

AV Dicey would have been surprised that in the twenty-first century governments in every corner of the world invoke the concept of the rule of law, largely in an attempt to establish the legitimacy of their legal order within the international community. This thesis has highlighted how the rule-of-law enterprise has spread across the world in the name of advancing development, legal empowerment of the poor, investment and human rights.

This thesis focuses on the nature of the relationship between the rule of law and legal pluralism and whether sufficient attention is being given to the dynamics of this relationship in the post-conflict context. It argues that if those actors and institutions that promote the rule of law pay more attention to legal pluralism, the promotion of the rule of law will become more relevant and useful to those who most need its assistance. Despite the apparently extensive reach of the rule of law, the concept has retained a parochial edge as little consideration is given to how it fits within post-conflict situations where customary law prevails and legal pluralism has a strong presence. As Chapter Two illustrates, the approaches taken by those promoting the rule of law do not recognise the strength of the rule of customary law in post-conflict states in Africa and the Asia-Pacific region. These approaches fail to see or fully comprehend the operation of legal pluralism and its benefits. In both South Africa and Timor-Leste large parts of the population live under the rule of customary law and have only limited access to state legal institutions. For many people, the rule of state law is remote.

Legal pluralism has been ignored in the rule-of-law enterprise because the enterprise is shaped and driven largely by Western states which have interests in sidelining the fact of legal pluralism. As shown in Chapter 2, in 2007 the United States, Canada, New Zealand and Australia voted against the adoption of the *UN Declaration on the Rights of Indigenous People* in the UN General Assembly, partly due to a concern regarding the possible elevation of indigenous customary law to the level of state law. In this forum Australia's representative asserted that: "Customary law is not 'law' in the sense that modern

democracies use the term; it is based on culture and tradition.”¹ To some extent this shows that legal pluralism is capable of disrupting the cherished concept of state sovereignty in international law: the existence of legal pluralism points to the contested nature of sovereignty in many regions of the world. Legal pluralism is also sidelined because Western states would like post-conflict states to be “modern democracies” where law is not “based on culture and tradition” but is more predictable and relies on a range of modern institutions. In this, Western states consider themselves suitable models for post-conflict states. Furthermore, it is apparent that Western states continue to understand customary law to be backward, anachronistic, static and in serious tension with human rights.

Legal pluralism cannot be so easily dismissed by leaders in post-conflict states such as South Africa and Timor-Leste. In these states there is an urgency to recognise the fact of legal pluralism and to engage with customary. In South Africa this urgency arises from the government’s understanding that it must connect with people in rural and remote areas: the government uses customary law as a pragmatic tool for establishing this connection and for strengthening its support base. In Timor-Leste this realisation has been slower in that only in 2007 did the government announce a policy embracing legal pluralism. Presumably the events of 2006 brought some urgency to this decision as the crisis highlighted the need for the state to establish greater legitimacy at the local level.

Legal pluralism needs to be fully understood by the rule-of-law enterprise. Chapter 2 points out that behind the rule-of-law enterprise there are a myriad of institutions, agendas and forces which have an interest in portraying the rule of law as a non-ideological and technical solution. The World Bank, the UN and Western states such as the United States, United Kingdom, Canada and Australia are at the forefront of this enterprise which has succeeded in making the rule of law the dominant paradigm in the international sphere. Despite this, the rule of law has played a relatively marginal and ambiguous role in the lives of the poor and vulnerable sections of society. It is difficult to see how the rule of law, as understood by these Western institutions, can by itself provide a solution to the

¹ Explanation of Australia’s vote against the UN GA adoption of the *UN Declaration on the Rights on Indigenous Peoples* by the Hon. Robert Hill Ambassador and Permanent Representative of Australia to the United Nations, 13 September 2007 <<http://www.australiaun.org/unny/GA%5f070913.html>> at 15 October 2008.

massive challenges facing post-conflict states such as Rwanda, where hundreds of thousands of prisoners still await trial for their part in the 1994 genocide and victims wait for redress. Rwanda's decision to harness legal pluralism so as to set up a more accessible form of justice through *gacaca* courts attracted condemnation from some Western institutions, largely because such courts fail to conform to dominant understandings of the rule of law. This illustrates that where the rule of law is promoted without sufficient consideration of the context, the rule-of-law enterprise is capable of hindering the development of avenues of accessible justice that serve the most vulnerable sections of society.

I have argued that in the context of post-conflict states, the rule-of-law enterprise needs to be rethought. In 2004 the UN Secretary-General's Report on the rule of law in post-conflict societies acknowledged that "no rule of law reform ... imposed from the outside can hope to be successful or sustainable".² The UN now accepts that for rule-of-law reform to have a chance of success there must be some impetus for such reform *within* the state. This thesis argues that the next step, after recognising that the rule of law needs local ownership, is for those actors promoting the rule of law where legal pluralism is strong to study closely the dynamics between the state's formal and informal spheres of law. While consideration is often given to a country's history and its formal legal framework, insufficient attention is being paid to the relationship between the rule of law and legal pluralism, in particular, the reach of state law and how it interacts with the rule of customary law. Currently the rule-of-law enterprise understands legal pluralism as something of a distraction and fails to recognise its full implications. To rethink the rule-of-law enterprise, this thesis argues that it is important to understand that in a post-conflict context the relationship between the two concepts is a process of balance and compromise which transforms both concepts.

Chapter Three argues that while the rule of law and legal pluralism are generally understood as incompatible concepts, their relationship is transformed in post-conflict states where legal avenues of redress are particularly critical and urgent. The case studies

² *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, [17], UN Doc S/2004/616 (23 August 2004).

on South Africa and Timor-Leste show that the particular dynamics of legal pluralism in each country are affecting that state's sense of the rule of law. In each country it is important to understand the relationship between the rule of law and legal pluralism in order to determine whether, and how, the two concepts can be balanced. Krygier points out that where the rule of law is balanced with other values, "there is no reason *a priori* to imagine compromise on either or both is impossible or unattractive".³ Through studies on South Africa and Timor-Leste this thesis argues that in certain contexts where legal pluralism is strong, "compromise" is an unavoidable part of the relationship between the rule of law and legal pluralism.

Chapter Four examines how leaders in South Africa entrenched both the rule of law and legal pluralism in South Africa's Final Constitution. In South Africa the concept of the rule of law became an international symbol of its constitutional revolution. Previously the concept was manipulated by the propaganda of the apartheid regime for external purposes and within legal circles it was denigrated as a purely political concept. Meanwhile, legal pluralism, which during colonialism and apartheid had become debased as a means of establishing and maintaining racial segregation, was elevated in South Africa's Constitution as a symbol of the country's new-found recognition of its African identity. The fact that both concepts were entrenched into South Africa's Final Constitution means that the two concepts need to be balanced by the state's institutions. Chapter Five argues that in relation to customary law and customary courts, South Africa's state institutions are attempting to uphold the rule of law through the prism of customary law. This can be seen in the work of South Africa's Law Reform Commission, which has largely sidelined Western conceptions of the rule of law in order to insulate customary law. The Commission deems the insulation of customary law as necessary at both a symbolic level and practical level because customary courts provide access to justice in rural areas, a service that the state is simply unable to provide in other ways. South Africa's Parliament shares this approach to the rule of law. This is shown by the Traditional Courts Bill 2008, which allows for Western conceptions of due process to be disregarded in customary courts.

³ Martin Krygier, "The Rule of Law: An Abuser's Guide" in András Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (2006) 129, 151.

South Africa's formal courts are also taking this approach, as seen in their generous delimitation of the powers of customary courts. According to this approach, certain principles such as a separation of powers can be muted in the context of customary law and customary courts in order to safeguard the latter from the imposition of, and destruction by, Western values. The Constitutional Court case of *Bhe*⁴ illustrates the reluctance on the part of South Africa's leading legal institutions to openly invoke the constitutional concept of the rule of law in the context of legal pluralism, and in particular customary law. In *Bhe* the majority of the Court determined the remedy based on the need for legal certainty but it failed to articulate that the basis for legal certainty is the constitutional "founding value" of the rule of law, presumably because the concept is widely viewed as a Western value. Case-law in South Africa shows that equality is the one value connected to the rule of law that South Africa's legal institutions are vigilantly upholding because it is at the core of South Africa's transformation. Thus the historical context and present dynamics of legal pluralism in South Africa are producing a version of the rule of law that mutes some principles, such as due process and the separation of powers, but illuminates others, such as equality. To some commentators this may represent a compromised version of the rule of law while to others it may illustrate that South Africans are finding their own sense of the rule of law. Regardless, it shows that attempts to promote the rule of law in a post-conflict state in Africa must place an understanding of the dynamics of legal pluralism at the forefront. Without such an understanding, efforts to promote the rule of law may inadvertently damage existing avenues of accessible justice and further marginalise the justice forums used by large sections of the community in post-conflict states.

Chapter Six highlights that leaders in Timor-Leste are keen to appeal to the rule of law: both the drafters of Timor-Leste's Constitution and the leaders of successive governments have invoked the concept of the rule of law while fully cognisant that the state is far from enjoying a monopoly of law. The concept of the rule of law was largely absent in Timor-Leste during the 400 years of Portuguese colonisation and the 25 years of Indonesian occupation. Chapter Six argues that in its two-and-a-half-year administration of East Timor the UN espoused the rule of law but failed to provide a sound model of it for Timor's future

⁴ 2005 (1) SA 580 (CC)

leaders. Furthermore, the UN gave scant attention to the dynamics of legal pluralism and this was compounded by the failure of the drafters of Timor-Leste's Constitution to give sufficient consideration to the future role of customary law in the state's legal system. The sidelining of the customary realm and the wide-scale promotion of Western values in Timor-Leste's Constitution has led some commentators to cast doubt on the local legitimacy of the Constitution as a road map for the future. Overall the local relevance of the Constitution appears thin as the state enjoys little reach and its formal legal system has minimal impact on the lives of large sections of the population.

Chapter Seven examines how Timor-Leste's leading rule-of-law institutions have been operating since independence in 2002. In particular, it focuses on two recent events, the 2006 crisis and the indictment of Reinado, in order to argue that the formal courts have been marginalised not only as a result of their own operational difficulties but also as a result of the actions of leading actors such as the Parliament and President Ramos-Horta. The President has been instrumental in undermining the role of the courts and has downplayed the need for accountability via the courts. He is one of a group of non-Fretilin Timorese leaders who use the concept of the rule of law in relation to the need for reconciliation. This position stands in strong contrast to the approach taken by most international actors involved in the rule-of-law enterprise who understand the concept as requiring accountability. For some international actors this divergence may be a cause for concern and represent a severely compromised version of the rule of law. However, it may be more constructive to view this divergence as an impetus to reconsider the goals of promoting the rule of law in a context where the state and its legal system are very weak and have little reach. It is possible to argue that in Timor-Leste the rule of law is being transformed into a concept that may be more useful and attuned to national interests as well as to the local situation where accountability along the lines of Western retributive justice is difficult and possibly unattainable.

There are signs that Timor-Leste is moving towards a policy of state law pluralism, by which the state may officially recognise some aspects of customary law or customary dispute resolution. Chapter Seven argues that in this event it is necessary that the aims of such a project be clear so as to fully assess its costs. It is critical that Timorese leaders

consider the experience of other transitional states where legal pluralism is strong. While at an economic and institutional level South Africa greatly differs from Timor-Leste, its experience in attempting to balance the rule of law and legal pluralism can nevertheless be valuable and potentially instructive. In particular, the approach taken by South Africa's courts in negotiating the rule of law and legal pluralism shows a path forward in dealing with legal pluralism.

This thesis illustrates some of the difficulties of comparing the experiences of transitional states. A comparison of the legal systems of South Africa and Timor-Leste produces few jurisprudential insights due to the nascent nature of Timor-Leste as a state. Nevertheless, some important commonalities are apparent in the comparison: South Africa and Timor-Leste face the same dilemmas as transitional states attempting to attain legitimacy on dual fronts, on both an internal, local level as well as an external, international level. In neither state did the constitutional drafters directly turn their minds to the future relationship between the rule of law and legal pluralism. This has forced political and legal institutions in both states to pick out a pragmatic path to balancing the two concepts. Timor-Leste's experience shows that when insufficient attention is given to the attainment of local legitimacy, a nascent transitional state is likely to struggle to function as a state. In other words, a state's failure to address legal pluralism can threaten its social and political stability because the state's legitimacy is very weak, or even absent, at the local level.

The case studies each show that the reach of the transitional state is limited, even in South Africa with its strong economy and long-standing institutions. The post-apartheid South African state has realised that in order for it to have traction in rural areas, it needs to continue a policy of state law pluralism that respects customary law and customary courts. However, to preserve its external legitimacy in the international community, it is essential that it reach a pragmatic compromise between legal pluralism and the rule of law that does not threaten the fundamental principle of equality upon which the transformation of the state is based. Timor-Leste has not yet reached a balance between the two concepts, as up until late 2007 it attempted to ignore the operation of legal pluralism. This failure to negotiate legal pluralism and to balance it with the rule of law appears to have contributed to the instability of the state and made constitutional invocations of the rule of law as a

“state objective” ring hollow. For those drafting constitutions of transitional countries, it is advisable that consideration be given to the extent of legal pluralism operating in the state and its future relationship with the rule of law.

The two case studies suggest that, partly as a result of legal pluralism, each transitional state is producing its own sense of the rule of law that differs from versions espoused by dominant Western states and global institutions. While this is not surprising, it is rarely acknowledged or understood by policy makers and practitioners working to promote the rule of law across the world. The idea that there is a commonly-agreed, universal understanding of the rule of law must be put to rest as a myth. It is more useful and relevant to understand the rule of law as a cluster of values; from this cluster, communities choose, via their constitution or elected head of state, to elevate particular values according to the context. As this thesis shows, the choice of these values can be compatible with legal pluralism but such choices are often criticised by Western institutions as overly compromising the rule of law. Chapter 2 outlines the international controversy surrounding the decision of the Rwandan Government to establish the *gacaca* system so that victims would receive some form of redress and all prisoners could have access to justice within a reasonable time period. The case study of South Africa shows that its legal institutions have chosen to interpret the South African Constitution as singling out and elevating the value of equality, thus allowing the programme of legal pluralism involving customary courts to be insulated from all other rule-of-law values. In Timor-Leste the government has chosen to interpret the rule of law as requiring reconciliation, a value more commonly associated with customary law. These choices have produced international debate because the compromise with legal pluralism means that the rule of law does not conform to dominant understandings. This debate must be embraced as useful and constructive as it ultimately forces some global rethinking of what the rule of law entails in different contexts. The idea of a *contextualised understanding of the rule of law* may spell danger in the minds of some scholars and practitioners, but the alternative to this understanding, at least in post-conflict states such as South Africa and Timor-Leste, is that the rule of law becomes completely empty and redundant.

A contextualised understanding of the rule of law should not be equated with a cultural relativist approach to the rule of law because the former is anchored to a constitutional document. Like constitutions, the rule of law is a long-term project: both constitutions and the rule of law aim for long-term cultural resonance which cannot be achieved between electoral cycles. The values that inform the context of the rule of law should be drawn from a state's constitution where that constitution is the product of a strong participatory process. This is shown by the case study of South Africa where the emphasis on equality in the South African understanding of the rule of law is drawn from the South African Constitution which upholds equality as the foremost constitutional value. In most cases this constitutional anchoring means that a contextualised understanding of the rule of law is not open to easy manipulation by a state leader. In Timor-Leste the current understanding of the rule of law is not drawn from the Constitution, but, as I have argued in Chapter 6, the Timorese Constitution does not appear to enjoy great local legitimacy because of its weak participatory process. However, the current emphasis on reconciliation in the government's approach to the rule of law does take account of the state's socio-economic challenges.

A contextualised understanding of the rule of law requires that actors involved in the rule-of-law enterprise refine their thinking in order to have a more informed approach to understanding how populations in Africa and the Asia-Pacific region experience law. Many rule-of-law actors assume that state law is important to, or should be part of, this experience; they act unaware that many people in these regions have minimal contact with the state and are unable to access its resources. This means that, in the short term, rule-of-law programmes that focus solely on state institutions may be largely irrelevant to the lives of the majority of the population.

The rule-of-law enterprise needs rethinking so as to make it more relevant and useful in the context of post-conflict states where legal pluralism is strong. Drawing on the case studies analysed in this thesis, there are five elements to rethinking the rule-of-law enterprise. The first is to recognise the existence and extent of the fact of legal pluralism. This involves gauging the means by which communities resolve disputes and acknowledging that "justice

[takes place] in many rooms”, to borrow the phrase of pioneer Marc Galanter.⁵ In this string of rooms, the state legal system is often not the primary locus of regulation, a situation that is true, to some extent, in all regions of the world. A second connected element is to assess the state’s role in this process. If the state is a secondary or tertiary locus for regulation in most cases, then it is necessary to examine whether the state is able to harness aspects of non-state law, in order to widen the state’s reach and, more importantly, to monitor the quality of justice being meted out in the non-state sphere, without causing irreparable harm to this form of non-state law. While the existence and extent of legal pluralism has long been understood and recognised in South Africa, this is not the case in Timor-Leste where both the UN administration and the Fretilin Government showed little interest in the fact of legal pluralism. Both South Africa and Timor-Leste have entrenched an extensive list of human rights in their Constitutions but only in South Africa are the courts able to monitor the quality of justice operating in customary courts in relation to these rights. However, it must be noted that, in practice, this monitoring process is weak because appeals from customary courts to higher courts are infrequent, records are poorly kept and traditional leaders are not necessarily well versed in constitutional human rights. Clearly these mechanisms in South Africa need strengthening but this will only take place within a framework that aims to protect customary law while respecting certain core aspects of the rule of law such as equality. In Timor-Leste the state’s courts play no formal part in monitoring customary law as the state has not formally recognised this form of law. This means that the state has little influence on the primary locus of regulation: monitoring the quality of justice falls to NGOs, who, supported by the international community, perform this role on an informal and *ad hoc* basis with insufficient consistency and accountability. Given the weakness of Timor-Leste’s state institutions, transferring this monitoring role to state courts will not necessarily improve the quality of monitoring in the short term. As in South Africa, it will take Timor-Leste’s courts many years to find a path that can successfully balance the rule of law and legal pluralism.

A third critical element in rethinking the rule-of-law enterprise is to inform communities fully as to the choices they have in accessing justice so as to allow them to enjoy the

⁵ Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” (1981) 19 *Journal of Legal Pluralism* 1.

benefits of legal pluralism. As we saw in both case studies, communities in South Africa and Timor-Leste are hindered from accessing justice largely as a result of misinformation as well as a lack of information about their available choices. While a lack of information relates mostly to geographical remoteness, misinformation can often be traced to certain actors, such as local chiefs and magistrates, who have vested interests in protecting their sphere of power. In the view of these actors, disputes are best settled at the local level by the community. This is a problem where there are insufficient safeguards against abuse of power at the local level. It must be recognised that access to information is a form of empowerment. Furthermore, a choice of legal mechanisms and processes is fundamental in enabling individuals and communities to enjoy some autonomy. NGOs, particularly in Timor-Leste, are at the forefront of attempting to remedy the problem of misinformation and lack of choice, but once again these efforts are often limited by the breadth of the task and the lack of sufficient resources.

A fourth element is to recognise the limitations of the rule-of-law enterprise as it currently operates; to understand that in a context where the state is nascent or weak, such as in Timor-Leste, a state-focused enterprise that is geared to working with state institutions cannot offer all the solutions that are promised on its behalf. In this context, non-state law and non-state actors such as NGOs, play a central role in providing avenues towards legal empowerment. However, as this thesis shows, non-state law can be manipulated and abused, while non-state actors can work to both impede and advance the rule-of-law enterprise. Despite this, the rule-of-law enterprise must direct greater attention to the local level and the operation of customary law at that level. The dismissive attitude toward customary law, shown by Western states such as Australia, is not conducive to effective promotion of the rule of law. It is a mistake to believe that the rule of law can achieve its aims while focussing so narrowly on legal institutions and law at the national level or at the international level. The question is not whether customary law should be considered a legitimate form of law: the question is what effect and control customary law exerts over the most vulnerable sections of the community where the state has no reach. If the main goal of the rule of law is to check the abuse of power, then the assistance of non-state actors must be sought so as to engage and monitor all levels of law-making, whether or not this law-making forms part of a state's formal legal system.

And finally, a fifth element in rethinking the rule of law in the post-conflict context is to give sufficient consideration to the social and economic realities faced by the most vulnerable sections of society. Examples of such vulnerable sections of society are those women and children in Timor-Leste and South Africa who hold little power and status within their community and are unable to access state legal institutions due to poverty, remoteness and a lack of information. These sections of society are most in need of the protection provided by the rule of law and yet they are least able to access the state legal system because the state struggles to reach them. While the post-conflict state is able to exert only a limited influence over the formal sphere, it is unable to reach the informal sphere where the most vulnerable sections of society live. In the long term it may be prudent for rule-of-law actors to be involved in building up state institutions so as to develop the reach and capacity of the state and to promote the rule of law as a protection for all. However, in the short term, these efforts should not be allowed to impede the development of avenues of accessible justice that serve the most vulnerable sections of society. In this sense the rule of law needs to be balanced with the need for accessible justice, in other words, legal pluralism. This is a balance that both South Africa and Rwanda have been actively seeking. As Raz says in this regard, “[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty”.⁶ It is possible that without a carefully-considered balance between the rule of law and legal pluralism, the most vulnerable sections of society may turn to taking perceived injustices into their own hands through mob action.

Raz advises that we must consider whether it “does more harm than good” to impose the rule of law in societies where communal law is the ideal.⁷ What is apparent is that a state-based approach to the rule of law, the kind favoured by Western states, is simply ineffective where legal pluralism is strong. Instead, a more holistic, contextualised and pragmatic approach that takes into account the socio-economic realities of the post-conflict setting needs to be accepted, if the rule-of-law enterprise is to avoid causing harm and to progress towards its main goal of checking the abuse of power. These five elements require rule-of-law actors to broaden their understanding of law and to redirect their focus to the main goal

⁶ Joseph Raz, “The Rule of Law and Its Virtue” in Raz, *The Authority of Law* (1979) 210, 211.

⁷ Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 356.

Conclusion

of the rule of law. This thesis encourages all actors working in this context to take a deeper look at the relationship between the rule of law and legal pluralism.

Bibliography

1. Articles, Books, Theses and Reports

1.1 Articles

- African National Congress, "Constitutional Guidelines for a Democratic South Africa" (1989) 5 *South African Journal on Human Rights* 129
- African National Congress, "Mass Action for People's Power: Statement of the National Executive Committee of the ANC, 8 January 1989", [February 1989] *Sechaba* 2
- Adelman, Sammy, "Constitutionalism, Pluralism and Democracy in Africa" (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 73
- Andrews, Penelope, "Women's Rights and Traditional Law: A Conflict" (1994-1995) 9 *Third World Studies* viii
- Andrews, Penelope, "From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa" (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 693
- Anghie, Antony, "Time Present and Time Past: Globalisation, International Financial Institutions, and the Third World" (1999-2000) 32 *New York University Journal of International Law and Politics* 243
- Aucoin, Louis, "The Role of International Experts in Constitution-Making: Myth and Reality" (2004) 5 *Georgetown Journal of International Affairs* 89
- Babo-Soares, Dionisio, "*Nahe Biti*: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor" (2004) 5 *The Asia and Pacific Journal of Anthropology* 15
- Baltazar, Alipio, "An Overview of the Constitution Drafting Process in East Timor" (2004) 9 *East Timor Law Journal* 1
- Beauvais, Joel, "Benevolent Despotism: A Critique of UN State-Building in East Timor" (2001) 33 *New York Journal of International Law and Politics* 1101
- Bekker, J C, "Administration of Justice by Traditional Leaders in Post-Apartheid South Africa" (2002) 16 *Speculum Juris* 240
- Bell, Christine and Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay" (2007) 1 *The International Journal of Transitional Justice* 23

Bibliography

- Bell, Christine, Colm Campbell and Fionnuala Ni Aoláin, “Justice Discourses in Transition” (2004) 13 *Social and Legal Studies* 305
- Bell, Christine, Colm Campbell and Fionnuala Ni Aoláin, “Foreword - Transitional Justice: (Re)conceptualising the Field” (2007) 3 *International Journal of Law in Context* 81
- Bennett, Tom W and T Vermeulen, “Codification of Customary Law” (1980) 24 *Journal of African Law* 206
- Bennett, Tom W, “The Compatibility of African Customary Law and Human Rights” [1991] *Acta Juridica* 18
- Berlie, Jean A, “A Concise Legal History of East Timor” (2000) 3 *Studies in Languages and Cultures of East Timor* 138
- Berman, Paul Schiff, “Global Legal Pluralism” (2007) 80 *Southern California Law Review* 1155
- Bhuta, Nehal, “Great Expectations – East Timor and the Vicissitudes of Externalised Justice” (2001) XII *Finnish Yearbook of International Law* 165
- Bingham, Lord, “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67
- Blau, Loammi C, “The *Rechtsstaat* Idea Compared with the Rule of Law as a Paradigm for Protecting Rights” (1990) 107 *South African Law Journal* 76
- Bongiorno, Carla, “A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor” (2002) 33 *Columbia Human Rights Law Review* 623
- Bronstein, Victoria, “Reconceptualizing the Customary Law Debate in South Africa” (1998) 14 *South African Journal on Human Rights* 388
- Brooks, Rosa Ehrenreich, “The New Imperialism: Violence, Norms and the Rule of Law” (2003) 101 *Michigan Law Review* 2275
- Burgess, Patrick, “Justice and Reconciliation in East Timor – The Relationship Between the Commission for Reception, Truth and Reconciliation and the Courts” (2004) 15 *Criminal Law Forum* 135
- Burman, Sandra, and Wilfried Schärf, “Creating People’s Justice: Street Committees and People’s Courts in a South African City” (1990) *Law and Society Review* 693
- Carothers, Thomas, “The Rule of Law Revival” (1998) 77 *Foreign Affairs* 95

Bibliography

- Chandler, David, "Imposing the 'Rule of Law': The Lessons of BiH for Peacebuilding in Iraq" (2004) 11 *International Peacekeeping* 312
- Chanock, Martin, "Law, State and Culture: Thinking About 'Customary Law' After Apartheid" [1991] *Acta Juridica* 52
- Charlesworth, Hilary, and Mary Wood, "Women and Human Rights in the Rebuilding of East Timor" (2002) 71 *Nordic Journal of International Law* 325
- Charlesworth, Hilary, "The Constitution of East Timor, May 20, 2002" (2003) 1 *International Journal of Constitutional Law* 325
- Chesterman, Simon, "Rough Justice: Establishing the Rule of Law in Post-Conflict Territories" (2005) 20 *Ohio State Journal on Dispute Resolution* 69
- Chesterman, Simon, "Imposed Constitutions, Imposed Constitutionalism and Ownership" (2005) 37 *Connecticut Law Review* 947
- Chesterman, Simon, "The Spy Who Came in From the Cold War: Intelligence and International Law" (2006) 27 *Michigan Journal of International Law* 1071
- Chesterman, Simon, "An International Rule of Law?" (2008) 56 *American Journal of Comparative Law* 331
- Chiba, Masaji, "Other Phases of Legal Pluralism in the Contemporary World" (1998) 11 *Ratio Juris* 228
- Chopra, Jarat, "Building State Failure in East Timor" (2002) 33 *Development and Change* 979
- Claasens, Aninka, "Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act" [2005] *Acta Juridica* 42
- Cockrell, Alfred, "Rainbow Jurisprudence" (1996) 12 *South African Journal on Human Rights* 1
- Comaroff, Jean and John Comaroff, "The Struggle Between the Constitution and 'Things African'" (2004) 1 *The Wiser Review* 6
- Constitutional Committee of the African National Congress, "A Bill of Rights for a Democratic South Africa: Working Draft for Consultation" (reprinted) [1990] *Monitor* 64
- Corder, Hugh, "South Africa's Transitional Constitution: Its Design and Implementation" [1996] *Public Law* 291

Bibliography

- Corder, Hugh, "Towards a South African Constitution" (1994) 57 *Modern Law Review* 491
- Corell, Hans, "A Challenge to the United Nations and the World: Developing the Rule of Law" (2004) 18 *Temple International and Comparative Law Journal* 391
- Cornell, Drucilla, and Karin van Marle, "Exploring *Ubuntu*: Tentative Reflections" (2005) 5 *African Human Rights Law Journal* 195
- Costa, Anthony, "The Myth of Customary Law" (1998) *South African Journal on Human Rights* 525
- Craig, Paul, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467
- Craig, Paul, "Constitutional Foundations, the Rule of Law and Supremacy" [2003] *Public Law* 92
- Currie, Iain, "The Future of Customary Law: Lessons from the Lobolo Debate" [1994] *Acta Juridica* 146
- Daly, Erin, "Between Punitive and Reconstructive Justice" (2002) 34 *New York University Journal of International Law and Politics* 355
- Daniels, Ron J and Michael Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries" (2005) 26 *Michigan Journal of International Law* 99
- Davies, Margaret, "The Ethos of Pluralism" (2005) 27 *Sydney Law Review* 87
- Davis, D M, "Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience" (2003) 1 *International Journal of Constitutional Law* 181
- Davis, Kevin E, and Michael J Trebilcock, "Legal Reforms and Development" (2001) 22 *Third World Quarterly* 21
- Davis, Kevin E "What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?" (2004-2005) 26 *Michigan Journal of International Law* 141
- Diamond, Stanley, "The Rule of Law Versus the Order of Custom" (1971) 38 *Social Research* 42
- Dixon, Rosalind, "Constitutional Transitions: Lessons for East Timor from Namibia, Cambodia and South Africa" (2000) 3 *Constitutional Law and Policy* 50
- Dlamini, CRM, "The Role of Customary Law in Meeting Social Needs" [1991] *Acta Juridica* 71

Bibliography

- Drumbl, Mark, "Law and Atrocity: Settling Accounts in Rwanda" (2005) 31 *Ohio Northern University Law Review* 41
- Du Bois, François, "The Influence of Foreign Law in South Africa" (2003) 13 *Transnational Law and Contemporary Problems* 593
- Du Bois, François, "The Past and Present of South African Law" (2004) 32 *International Journal of Legal Information* 217
- Dugard, John, "International Law and the South African Constitution" (1997) 8 *European Journal of International Law* 77
- Dugard, John, "The South African Judiciary and International Law During the Apartheid Era" (1998) 14 *South African Journal on Human Rights* 110
- Dworkin, Ronald, "Political Judges and the Rule of Law" (1978) 64 *Proceedings of the British Academy* 259
- Dyzenhaus, David, "Transitional Justice: Review Essay" (2003) 1 *International Journal of Constitutional Law* 163
- Dyzenhaus, David, "Judicial Independence, Transitional Justice and the Rule of Law" (2003) 10 *Otago Law Review* 345
- Dyzenhaus, David, "The Pasts and Future of the Rule of Law in South Africa" (2007) 124 *South African Law Journal* 734
- Elster, Jon, "Forces and Mechanisms in the Constitution-Making Process" (1996) 45 *Duke Law Journal* 364
- English, Rosalind, "Ubuntu: The Quest for An Indigenous Jurisprudence" (1996) 12 *South African Journal on Human Rights* 641
- Fallon, Richard H, "'The Rule of Law' As A Concept in Constitutional Discourse" (1997) 97 *Columbia Law Review* 1
- Faundez, Julio, "The Rule of Law Enterprise: Promoting a Dialogue Between Practitioners and Academics" (2005) 12 *Democratization* 567
- Feldman, Noah, "Imposed Constitutionalism" (2005) 37 *Connecticut Law Review* 857
- Fierens, Jacques, "Gacaca Courts: Between Fantasy and Reality" (2005) 3 *Journal of International Criminal Justice* 896
- Fitzpatrick, Daniel, "Re-establishing Land Titles and Administration in East Timor" (2000) 15 *Pacific Economic Bulletin* 152

Bibliography

- Fitzpatrick, Daniel, Andrew McWilliam and Susana Barnes, "Policy Notes on Customary Land in Timor-Leste" (2008) 5 *East Timor Law Journal*
- Fitzpatrick, Peter, "Law and Societies" (1984) 22 *Osgoode Hall Law Journal* 115
- Frankenberg, Günter, "Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative" (2006) 4 *International Journal of Constitutional Law* 439
- Fuller, Chris, "Legal Anthropology, Legal Pluralism and Legal Thought" (1994) 10 *Anthropology Today* 9
- Fuller, Lon, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 593
- Galanter, Marc, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 *Journal of Legal Pluralism* 1
- Ghai, Yash, "A Journey Around Constitutions: Reflections on Contemporary Constitutions" (2005) 122 *South African Law Journal* 804
- Gibson, James L and Amanda Gouws, "Support for the Rule of Law in the Emerging South African Democracy" (1997) 152 *International Social Science Journal* 173
- Go, Julian, "Modelling the State: Postcolonial Constitutions in Asia and Africa" (2002) 39/4 *Southeast Asian Studies* 558
- Golding, Martin P, "Transitional Regimes and the Rule of Law" (1996) 9 *Ratio Juris* 387
- Golub, Stephen, "The Rule of Law and the UN Peacebuilding Commission: A Social Development Approach" (2007) 20 *Cambridge Review of International Affairs* 47
- Gopal, Mohan Gopalan, "Law and Development: Toward a Pluralist Vision" (1996) 90 *American Society of International Law Proceedings* 231
- Grant, Evadne, "Human Rights, Cultural Diversity and Customary Law in South Africa" (2006) 50 *Journal of African Law* 2
- Graydon, Carolyn, "Local Justice Systems in Timor-Leste: Washed Up, or Watch This Space?" (2005) 68 *Development Bulletin* 66
- Grenfell, Damian, "Making Modernity in Timor-Leste" (2007) 90 *Arena Magazine* 9
- Grenfell, Laura, "Legal Pluralism and the Rule of Law in Timor-Leste" (2006) 19 *Leiden Journal of International Law* 305

Bibliography

- Griffiths, Anne, "Reconfiguring Law: An Ethnographic Perspective from Botswana" (1998) 23 *Law and Social Inquiry* 587
- Griffiths, John, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism* 1
- Harper, Erica "Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice" (2005) 10 *Journal of Conflict and Security Law* 149
- Hart, H L A, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593.
- Henkin, Louis, "A New Birth of Constitutionalism" (1992) 14 *Cardozo Law Review* 533
- Hicks, David, "Community and Nation-State in East Timor" (2007) 23 *Anthropology Today* 13
- Himonga, Chuma and Craig Bosch, "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?" (2000) 117 *South African Law Journal* 306
- Himonga, Chuma et al, "Uncovering Reality: Excavating Women's Rights in African Family Law" (1993) 7 *International Journal of Law and the Family* 314
- Himonga, Chuma, "African Customary Law in South Africa – Many Faces of *Bhe v Magistrate Khayelitsha*" [2005] *Recht in Afrika* 163
- Himonga, Chuma, "The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession" [2005] *Acta Juridica* 82
- Hoexter, Cora, "The Principle of Legality in South African Administrative Law" (2004) 4 *Macquarie Law Journal* 165
- Hohe, Tanja, "Totem Polls: Indigenous Concepts and 'Free and Fair' Elections in East Timor" (2002) 9 *International Peacekeeping* 69
- Hohe, Tanja, "The Clash of Paradigms: International Administration and Local Political Legitimacy in East Timor" (2002) 24 *Contemporary South East Asia* 569
- Hohe, Tanja, "Justice Without Judiciary in East Timor" (2003) 3/3 *Conflict, Security and Development* 335
- Jenkins, Catherine, "A Truth Commission for East Timor: Lessons from South Africa" (2002) 7 *Journal of Conflict and Security Law* 233

Bibliography

- Kaganas, Felicity and Christina Murray, "The Contest Between Culture and Gender Equality under South Africa's Interim Constitution" (1994) 21 *Journal of Law and Society* 409
- Kairys, David, "Searching for the Rule of Law" (2003) 36 *Suffolk University Law Review* 307
- Katzenstein, Suzanne, "Hybrid Tribunals: Searching for Justice in East Timor" (2003) 16 *Harvard Human Rights Journal* 245
- Kennedy, David, "The International Human Rights Movement: Part of the Problem?" (2002) 15 *Harvard Human Rights Law Journal* 101
- Kerr, A J, "Customary Law, Fundamental Rights and the Constitution" (1994) 111 *South African Law Journal* 720
- Kerr, A J, "The Bill of Rights in the New Constitution and Customary Law" (1997) 114 *South African Law Journal* 346
- Kerr, A J, "Inheritance in Customary Law under the Interim Constitution and under the Present Constitution" (1998) 115 *South African Law Journal* 262
- Klare, Karl, "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal on Human Rights* 146
- Kleinhaus, Martha-Marie and Roderick A MacDonald, "What is *Critical Legal Pluralism*?" (1997) 12 *Canadian Journal of Law and Society* 25
- Könz, Peider, "Legal Development in Developing Countries" (1969) 63 *Proceedings of the American Society of International Law* 91
- Koskenniemi, Martti, "The Fate of Public International Law: Between Technique and Politics" (2007) 70 *Modern Law Review* 1
- Krygier, Martin, "Marxism and the Rule of Law: Reflections After the Collapse of Communism" (1990) 15 *Law and Social Inquiry* 633
- Krygier, Martin, "Transitional Questions about the Rule of Law: Why, What, and How?" (2001) 28 *East Central Europe-L'Europe du Centre Est. Eine Wissenschaftliche Zeitschrift* 1
- Kuper, Adam, "The Kgalagari and the Jural Consequences of Marriage" (1970) 5 *Man (New Series)* 466
- La'o Hamutuk, "East Timor Faces-Post UNTAET Challenges: What is To Be Done?" (2002) 3 *La'o Hamutuk Bulletin* 1

Bibliography

- La'o Hamutuk, "Reviewing the East Timor Commission for Reception, Truth and Reconciliation (CAVR)" (2003) 4 *La'o Hamutuk Bulletin* 1.
- Leggett, Ted, "Just Another Miracle: A Decade of Crime and Justice in Democratic South Africa" (2005) 74 *Social Research* 581
- Linton, Suzannah, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice" (2001) 12 *Criminal Law Forum* 185
- Linton, Suzannah, "Prosecuting Atrocities at the District Court in Dili" (2001) 2 *Melbourne Journal of International Law* 414
- Linton, Suzannah, "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor" (2001) 25 *Melbourne University Law Review* 122
- Ludsin, Hallie, "Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law" (2003) 21 *Berkeley Journal of International Law* 62
- Maloka, Tshidiso and David Gordon, "Chieftainship, Civil Society, and the Political Transition in South Africa" (1996) 22 *Critical Sociology* 37
- Malone, Ross L, "The American Lawyer's Role in Promoting the Rule of Law" (1959-1960) 43 *Marquette Law Review* 3
- Manderson, Desmond, "Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory" (1996) 20 *Melbourne University Law Review* 1048
- Manji, Ambreena S, "Imagining Women's 'Legal World': Towards a Feminist Theory of Legal Pluralism in Africa" (1999) 8 *Social and Legal Studies* 435
- Mutua, Makau, "Savages, Victims and Saviors: The Metaphor of Human Rights" (2001) 42 *Harvard International Law Journal* 201
- McAuliffe, Pádraig, "East Timor's Community Reconciliation Process as a Model for Legal Pluralism in Criminal Law" (2006) 2 *Law, Society and Global Development Journal* 1
- McNamara, Luke, "'Equality Before the Law' in Polyethnic Societies: The Construction of Normative Criminal Law Sanctions" (2004) 11 *Murdoch University Electronic Journal of Law*
- McWilliam, Andrew, "Introduction: Restorative Custom: Ethnographic Perspectives on Conflict and Local Justice in Timor" (2007) 8 *The Asia Pacific Journal of Anthropology* 1
- Merry, Sally Engle, "Legal Pluralism" (1988) 22 *Law and Society Review* 869

Bibliography

- Merryman, John Henry, "Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement" (1977) 25 *American Journal of Comparative Law* 457
- Middleton, A J, "When 'Why'?' is 'Who?'" [1999] *Obiter* 176
- Mokgoro, Yvonne, "Traditional Authority and Democracy in the Interim South African Constitution" (1996) 3 *Review of Constitutional Studies* 60
- Mokgoro, Yvonne, "The Customary Law Question in the South African Constitution" (1997) 41 *Saint Louis University Law Journal* 1279
- Mureinik, Etienne, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31
- Murray, Christina, "One Law for One Nation: South Africa's New Constitution" (1997) 8 *Public Law Review* 10
- Murray, Christina, "A Constitutional Beginning: Making South Africa Final Constitution" (2001) 23 *University of Arkansas at Little Rock Law Review* 809
- Murray, Christina, "South African's Troubled Royalty: Traditional Leaders after Democracy" (2004) 23 *Law and Policy Paper Series* (Centre for Public and International Law, the Australian National University)
- Nhlapo, Thandabantu, "The African Family and Women's Rights: Friends of Foes?" [1991] *Acta Juridica* 135
- Nhlapo, Thandabantu, "Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously" (1994-1995) 9 *Third World Legal Studies* 49
- Ni Aoláin, Fionnula, "Political Violence and Gender During Times of Transition" (2006) 15 *Columbia Journal of Gender and the Law* 829
- Nicolau, Guteriano, "Ombudsman for Human Rights: The Case of Timor-Leste" (2007) 47 *Asia Pacific News* 3
- Nixon, Rod, "Indonesia West Timor: The Political-Economy of Emerging Ethno-Nationalism" (2004) 34 *Journal of Contemporary Asia* 163
- Nyamu Musembi, Celestine, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41 *Harvard International Law Journal* 381
- Nyamu Musembi, Celestine, "Ruling out Gender-Equality? The Post-Cold War Rule of Law Agenda in Sub-Saharan Africa" (2006) 27 *Third World Quarterly* 1193

Bibliography

- Orentlicher, Diane, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency” (2007) 10 *International Journal of Transitional Justice* 1
- Orth, John V, “Exporting the Rule of Law” (1998) 24 *North Carolina Journal of International Law and Commercial Regulation* 71
- Palmer, Lisa and Demetrio do Amaral de Carvalho, “Nation Building and Resource Management: The Politics of ‘Nature’ in Timor Leste” (2008) 39 *Geoforum* 1321
- Paris, Roland, “International Peacebuilding and the ‘Mission Civilisatrice’” (2002) 28 *Review of International Studies* 637
- Paterson, D E, “South Pacific Customary Law and Common Law: Their Interrelationship” (1995) 21 *Commonwealth Law Bulletin* 660
- Peerenboom, Randall, “Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China” (2002) 23 *Michigan Journal of International Law* 471
- Peerenboom, Randall, “Human Rights and the Rule of Law: What’s the Relationship?” (2005) 36 *Georgetown Journal of International Law* 809
- Pieterse, Marius, “Killing It Softly: Customary Law in the New Constitutional Order” (2000) 33 *De Jure* 35
- Pieterse, Marius, “The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin?” (2000) 117 *South African Law Journal* 627
- Pieterse, Marius, “It’s a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism” (2001) 17 *South African Journal on Human Rights* 364
- Pistor, Katharina, “The Standardisation of Law and its Effect on Developing Economies” (2002) 50 *American Journal of Comparative Law* 97
- Posner, Eric A and Adrian Vermeule, “Transitional Justice as Ordinary Justice” (2004) 117 *Harvard Law Review* 761
- Pritchard, Sarah, “United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor” (2001) 24 *University of New South Wales Law Journal* 183
- Rajagopal, Balakrishnan, “Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination” (2007-2008) 49 *William and Mary Law Review* 1347

Bibliography

- Rakate, Phenyó Keiseng, "The Status of Traditional Courts under the Final Constitution" (1997) XXX *Comparative and International Law Journal of Southern Africa* 175
- Reilly, Niamh, "Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women's Human Rights Approach" (2007) 3 *International Journal of Law in Context* 155
- Richmond, Oliver and Jason Franks, "Liberal Peacebuilding in Timor-Leste: The Emperor's New Clothes?" (2008) 15 *International Peacekeeping* 185
- Rittich, Kerry, "The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social" (2004-2005) 26 *Michigan Journal of International Law* 199
- Roberts, Simon, "Law and the Study of Social Control in Small-Scale Societies" (1976) 39 *Modern Law Review* 663
- Rosenfeld, Michel, "The Rule of Law and the Legitimacy of Constitutional Democracy" (2001) 74 *Southern California Law Review* 1307
- Sachs, Albie, "The Creation of South Africa's Constitution" (1997) 41 *New York Law School Law Review* 669
- Sachs, Albie, "South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power" (1997) 41 *Saint Louis University Law Journal* 1249
- Sarkin, Jeremy, "The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions" (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 176
- Sarkin, Jeremy, "The Drafting of South Africa's Final Constitution From a Human Rights Perspective" (1999) 47 *American Journal of Comparative Law* 67
- Sarkin, Jeremy and Erin Daly, "Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies" (2004) 35 *Columbia Human Rights Law Review* 661
- Senior, Amy, "Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law" (2006) *Al Nakhlah* 1
- Shoesmith, Dennis, "Divided Leadership in a Semi-Presidential System" (2003) XLIII *Asian Survey* 231
- Siegel, Richard Lewis, "Transitional Justice: A Decade of Debate and Experience" (1998) 20 *Human Rights Quarterly* 431

Bibliography

- Snyder, Francis G, "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal" (1981) 19 *Journal of Legal Pluralism* 49.
- Soares, Santana and Jennifer Laakso, "Mediation in Timor-Leste: Opportunities and Challenges" (2007) 1 *World Arbitration and Mediation Review* 361
- Stahn, Carsten, "Justice Under Transitional Administration: Contours and Critique of a Paradigm" (2005) *Houston Journal of International Law* 311
- Stahn, Carsten, "The Geometry of Transitional Justice: Choices of Institutional Design" (2005) 18 *Leiden Journal of International Law* 425
- Stover, Eric, Hanny Megally and Hania Mufti, "Bremer's 'Gordian Knot': Transitional Justice and the US Occupation of Iraq" (2005) 27 *Human Rights Quarterly* 830.
- Strohmeier, Hansjörg, "Building a New Judiciary for East Timor: Challenges of a Fledgling Nations" (2001) 11 *Criminal Law Forum* 259
- Strohmeier, Hansjörg, "Collapse and Reconstruction of a Judicial System: The United Nations in Kosovo and East Timor" (2001) 95 *American Journal of International Law* 46
- Strohmeier, Hansjörg, "Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor" (2001) 24 *University of New South Wales Law Review* 171
- Strohmeier, Hansjörg, "Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor" (2001) 25 *Fletcher Forum of World Affairs* 107
- Sunder, Madhavi, "'Enlightened Constitutionalism'" (2005) 37 *Connecticut Law Review* 891
- Tamale, Sylvia, "The Right to Culture and the Culture of Rights: A Critical Perspective of Women's Sexual Rights in Africa" (2008) 16 *Feminist Legal Studies* 47
- Tamanaha, Brian, "The Folly of the 'Social-Scientific' Concept of Legal Pluralism" (1993) 20 *Journal of Law and Society* 192
- Tamanaha, Brian, "The Lessons of Law-and-Development Studies" (1995) 89 *American Journal of International Law* 470
- Tamanaha, Brian, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 375
- Teitel, Ruti, "Transitional Jurisprudence: The Role of Law in Political Transformation" (1997) 106 *Yale Law Journal* 2009

Bibliography

- Teitel, Ruti, “Transitional Justice Genealogy” (2003) 16 *Harvard Human Rights Journal* 69
- Teitel, Ruti, “Transitional Justice in a New Era” (2003) 26 *Fordham International Law Journal* 893
- Teubner, Gunther, “The Two Faces of Janus: Rethinking Legal Pluralism” (1991) 13 *Cardozo Law Review* 1443
- Thomas, Ph J and DD Tladi, “Legal Pluralism or a New Repugnancy Clause” (1999) XXXII *Comparative and International Law Journal of Southern Africa* 354
- Tolbert, David and Andrew Solomon, “United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies” (2006) 19 *Harvard Human Rights Journal* 29
- Tondini, Matteo, “The Role of Italy in Rebuilding the Judicial System in Afghanistan” (2006) 45 *Revue de Droit Militaire et de Droit de la Guerre* 79
- Tondini, Matteo, “From Neocolonialism to a ‘Light-Footprint Approach’: Restoring Justice Systems” (2008) 15 *International Peacekeeping* 237
- Trubek, David, “Max Weber on Law and the Rise of Capitalism” [1972] *Wisconsin Law Review* 720
- Trubek, David, “Toward a Theory of Law: An Essay on the Study of Law and Development” (1972) 82 *Yale Law Journal* 1
- Trubek, David and Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” [1974] *Wisconsin Law Review* 1062
- Trubek, David, “Law and Development: Then and Now” (1996) 90 *American Society of International Law Proceedings* 223
- Ugo Mattei, “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems” (1997) 45 *American Journal of Comparative Law* 5
- Van der Vyer, JD, “Human Rights Aspects of the Dual System Applying to Blacks in South Africa” (1982) XV *Comparative and International Law Journal of Southern Africa* 306
- Van Niekerk, Gardiol J, “Indigenous Law and Narrative: Rethinking Methodology” (1999) XXXII *Comparative and International Law Journal of Southern Africa* 208
- Van Niekerk, Gardiol J, “Indigenous Law, Public Policy and Narrative in the Courts” (2000) *Tydsknf vir Hedendaagse Romeins – Hollandse Reg* 403.

Bibliography

- Van Niekerk, Gardiol J, "Succession, Living Indigenous Law and *Ubuntu* in the Constitutional Court" (2005) 26 *Obiter* 474
- Venter, Francois, "The Withering of the 'Rule of Law'" (1973) 8 *Speculum Juris* 69
- Villa-Vicencio, Charles, "Whither South Africa? Constitutionalism and Law-Making" (1991) 40 *Emory Law Journal* 141
- Von Bogdandy, Armin et al, "State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches" (2005) 9 *Max Planck Yearbook of United Nations Law* 579
- Waldron, Jeremy, "The Rule of Law in Contemporary Liberal Theory" (1989) 2 *Ratio Juris* 79
- Waldron, Jeremy, "Is the Rule of Law An Essentially Contested Concept (in Florida)?" (2002) 21 *Law and Philosophy* 137
- Walker, Neil, "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 317
- Wardak, Ali, "Building a Post-War Justice System in Afghanistan" (2004) 41 *Crime, Law and Social Change* 319
- Waylen, Georgina, "Constitutional Engineering: What Opportunities for the Enhancement of Gender Rights?" (2006) 27 *Third World Quarterly* 1209
- Whitson, Sarah Leah, "Neither Fish, nor Flesh, Nor Good Red Herring. *Lok Adalats*: An Experiment in Informal Dispute Resolution in India" (1992) 15 *Hastings International and Comparative Law Review* 391
- Widner, Jennifer, "Courts and Democracy in Post-Conflict Transitions: A Social Scientist's Perspective on the African Case" (2001) 95 *American Journal of International Law* 64
- Williams, George and Devika Hovell, "A Tale of Two Systems: International Law in Constitutional Interpretation in Australia and South Africa" (2005) 29 *Melbourne University Law Review* 95
- Woodman, Gordon R, "Legal Pluralism and the Search for Justice" (1996) 40 *Journal of African Law* 152
- Yasuaki, Onuma, "In Quest of Intercivilizational Human Rights: 'Universal' vs 'Relative' Human Rights Viewed from an Asian Perspective" (2000) 1 *Asia-Pacific Journal on Human Rights* 53

1.2 Books and Book Chapters

- Abel, Richard L, *The Politics of Informal Justice: Volume 1, The American Experience* (1982)
- Abel, Richard L, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (1995)
- Albertyn, Catherine, “Women and the Transition to Democracy in South Africa” in Christina Murray (ed), *Gender and the New South African Legal Order* (1994) 39
- Allan, Trevor RS, *Constitutional Justice. A Liberal Theory of the Rule of Law* (2001)
- Allen, Tim, “Ritual (Ab)Use? Problems with Traditional Justice in Northern Uganda” in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) 47
- Anderson, Gavin W, *Constitutional Rights After Globalization* (2005)
- Andrews, Penelope, “The Stepchild of National Liberation: Women and Rights in the New South Africa” in Penelope Andrews and Stephen Ellmann (eds), *Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Laws* (2001) 326
- Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law* (2005)
- An-Na’im, Abdullahi Ahmed, “Protecting Human Rights in Plural Legal Systems of Africa: A Comparative Overview” in An-Na’im (ed), *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa* (1999) 39
- Aristotle, *The Politics* (George A Kennedy trans, 1991 ed)
- Armstrong, Alice, “Rethinking Women’s Law in Southern Africa” in Welshman Ncube and Julie Stewart (eds), *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa* (1995) 116
- Arthurs, Harry W, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (1985)
- Atkinson, Doreen, “Principle Born of Pragmatism?: Central Government in the Constitution” in Steven Friedman and Doreen Atkinson (eds), *South African Review 7: The Small Miracle, South Africa’s Negotiated Settlement* (1994) 92
- Austin, John, *The Province of Jurisprudence Determined* (1954)

Bibliography

- Babo-Soares, Dionisio, “The Challenges of Drafting a Constitution” in Babo-Soares et al (eds), *Elections and Constitution-Making in East Timor* (2003) 25
- Baghramian, Maria and Attracta Ingram (eds), *Pluralism: The Philosophy and Politics of Diversity* (2000)
- Banda, Fareda, *Women, Law and Human Rights: An African Perspective* (2005)
- Bassiouni, M Cherif, *Post-Conflict Justice* (2002)
- Baxi, Upendra, “Discipline, Repression and Legal Pluralism” in Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (1986) 51
- Beinart, William, *Twentieth-Century South Africa* (2001)
- Bellamy, Richard (ed), *The Rule of Law and the Separation of Powers* (2005)
- Bennett, Tom W, *A Sourcebook of African Customary Law for Southern Africa* (1991)
- Bennett, Tom W, *Human Rights and African Customary Law under the South African Constitution* (1995)
- Bennett, Tom W, “Boundaries Between African Customary Law and the Constitution in South Africa” in Michael Rösler and Tobias Wendl (eds), *Frontiers and Borderlands: Anthropological Perspectives* (1999) 187
- Bennett, Tom W, *Customary Law in South Africa* (2004)
- Bennett, Tom W, and Christina Murray, “Traditional Leaders” in Stuart Woolman and Theunis Roux (eds), *Constitutional Law of South Africa* (2005) 26-20
- Bennett, Tom W, “The Conflict of Laws” in JC Bekker, Christa Rautenbach and NMI Goolam (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) 15
- Bennett, Tom W, “The Contribution of Legal Theory and Judicial Practice to the Future Development of Customary Law” in Graham Glover (ed), *Essays in Honour of AJ Kerr* (2006) 181
- Benton, Lauren, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002)
- Bentzon, Agnete, et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women’s Law* (1998)

Bibliography

- Binchy, William, "The Constitution of Timor Leste in Comparative Perspective" in William Binchy (ed) *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past* (2009)
- Blagg, Harry, *Crime, Aboriginality and the Decolonisation of Justice* (2008)
- Bond, Patrick, *Against Global Apartheid: South Africa Meets the World Bank, IMF and International Finance* (2nd ed, 2003)
- Bowles, Edith and Tanja Chopra, "East Timor: State-Building Revisited" in Charles T Call (ed), *Building States to Build Peace* (2008)
- Budiardjo, Carmel and Liem Soei Liong, *The War Against East Timor* (1984)
- Bull, Carolyn, *No Entry Without Strategy: Building the Rule of Law under UN Transitional Administration* (2008)
- Burgess, Patrick, "A New Approach to Restorative Justice – East Timor's Community Reconciliation Processes" in Naomi Roht Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century – Beyond Truth Versus Justice* (2006) 176
- Burns, Yvonne, *Administrative Law under the 1996 Constitution* (2nd ed, 2003)
- Carothers, Thomas, *Aiding Democracy Abroad: The Learning Curve* (1999)
- Carothers, Thomas (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006)
- Chandler, David, *Empire in Denial: The Politics of State-Building* (2006)
- Chanock, Martin, "The Law Market: The Legal Encounter in British East and Central Africa" in W J Mommsen and J A De Moor (eds), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th Century Africa and Asia* (1992) 279
- Chanock, Martin, "The South African Native Administration Act of 1927: Reflections on a Pathological Case of Legal Pluralism" in Oliver Mendelsohn and Upendra Baxi (eds), *The Rights of Subordinated Peoples* (1994) 295
- Chesterman, Simon, *You, the People: The United Nations, Transitional Administration and State Building* (2004)
- Chesterman, Simon, Michael Ignatieff and Ramesh Thakur (eds), *Making States Work: State Failure and the Crisis of Governance* (2005)

Bibliography

- Chiba, Masaji, "Introduction" in Chiba (ed), *Asian Indigenous Law in Interaction with Received Law* (1986) 1
- Chopra, Jarat and Tanja Hohe, "Participatory Peacebuilding" in Tom Keating and W Andy Knight (eds), *Building Sustainable Peace* (2004) 241
- Anninka Claasens and Sizani Ngubane "Women, Land and Power: The Impact of the Communal Land Rights Act" in Anninka Claasens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 154
- Comaroff, John and Simon Roberts, *Rules and Process* (1981)
- Coomaraswamy, Radhika, "Broken Glass: Women, Violence and the Rule of Law" in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (2003) 143
- Corder, Hugh, "Judicial Policy in a Transforming Constitution" in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition and Human Rights* (2007) 91
- Corrin, Jennifer and Don Paterson, *Introduction to South Pacific Law* (2nd ed, 2007)
- Currie, Iain and Johann de Waal, *The New Constitutional and Administrative Law Vol 1* (2001)
- Currie, Iain, and Johan De Waal, *The Bill of Rights Handbook* (5th ed, 2005)
- Czarnota, Adam, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law After Communism* (2005)
- David, Rene and John E C Brierly, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd ed, 1978)
- Dam, Kenneth W, *The Law-Growth Nexus: The Rule of Law and Economic Development* (2006)
- De Brito, Alexandra Barahona, Carmen González-Enríquez and Paloma Aguilar (eds) *The Politics of Memory: Transitional Justice in Democratizing Societies* (2001)
- De Villiers, Francois, *Selected South African Legislation on Customary Law and Traditional Authorities* (1998)
- Devenish, GE, *A Commentary on the South African Constitution* (1998)

Bibliography

- Devereux, Annemarie, "Searching for Clarity: A Case Study of UNTAET's Application of International Human Rights Norms" in Nigel D White and Dirk Klaasen (eds), *The United Nations, Human Rights and Post-Conflict Situations* (2005) 293
- Dicey, AV, *An Introduction to The Study of The Law of the Constitution* (first published 1885, 10th ed, 1959)
- Donzwa, Beatrice et al, "Which Law? What Law? Playing with the Rules" in Welshman Ncube and Julie Stewart (eds), *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa* (1995) 73
- Dow, Unity and Puseletso Kidd, *Women, Marriage and Inheritance* (1994) Ch 7
- Dugard, John, "Retrospective Justice: International Law and the South African Model" in A James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (1997) 269
- Dugard, John, *Human Rights and the South African Legal Order* (1978)
- Dunn, James, *Timor: A People Betrayed* (1996)
- Dunn, James, *East Timor: Rough Passage to Independence* (2003)
- Dyzenhaus, David, *Recrafting the Rule of Law: The Limits of Legal Order* (1999)
- Dyzenhaus, David, "Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review?" in Christopher Forsyth (ed), *Judicial Review and the Constitution* (2000) 141
- Ehrlich, Eugen, *Fundamental Principles of the Sociology of Law* (1975)
- Ellis, Stephen and Tsepo Sechaba, *Comrades Against Apartheid: The ANC and the South African Communist Party in Exile* (1992)
- Falk Moore, Sally, *Law as Process: An Anthropological Approach* (1978)
- Farrall, Jeremy, *United Nations Sanctions and The Rule of Law* (2008)
- Faundez, Julio, "Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America" in Caroline Mary Sage and Michael Woolcock (eds), *The World Bank Legal Review: Law, Equity and Development, Vol 2* (2006) 113
- Fitzpatrick, Daniel, *Land Claims in East Timor* (2002)
- Fox, James J, (ed), *The Flow of Life: Essays on Eastern Indonesia* (1980)

Bibliography

- Fuller, Lon, *The Morality of Law* (1967)
- Gahima, Gerald, “Alternatives to Prosecution: The Case of Rwanda” in Edel Hughes, William Schabas and Ramesh Thakur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (2007) 159
- Galanter, Marc, “The Modernization of Law” in Myron Weiner (ed), *Modernization: The Dynamics of Growth* (1967)
- Galanter, Marc and Jayanth K Krishnan, “Debased Informalism: *Lok Adalats* and Legal Rights in Modern India” in Erik G Jensen and Thomas C Heller (eds) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003)
- Gardner, James A, *Legal Imperialism and Foreign Aid in Latin America* (1980)
- Ginsburg, Tom, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003)
- Golub, Stephen “A House Without a Foundation” in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 105
- Griffiths, Anne, *In the Shadow of Marriage: Gender and Justice in An African Community* (1997)
- Griffiths, Anne, “Legal Pluralism” in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (2002) 289
- Gumede, William Mervin, *Thabo Mbeki and the Battle for the Soul of the ANC* (2005)
- Gusmão, Xanana, *Timor Lives! Speeches of Freedom and Independence* (2005)
- Gutteridge, William, “South Africa: Apartheid’s Endgame” in William Gutteridge (ed), *South Africa: From Apartheid to National Unity, 1981 to 1994* (1995) 147
- Hahlo, HR and Ellison Kahn, *The Union of South Africa: The Development of its Law and Constitution* (1960)
- Hamnett, Ian, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (1975)
- Harvey, William B, *Introduction to the Legal System in East Africa* (1975)
- Hayek, Friedrich, *The Political Ideal of the Rule of Law* (1955)
- Hayek, Friedrich, *The Constitution of Liberty* (1960)

Bibliography

- Hayek, Friedrich, *Road to Serfdom* (1975)
- Himonga, Chuma, “Law and Gender in Southern Africa: Human Rights and Family Law” in York Bradshaw and Stephen N Ndegwa (eds), *The Uncertain Promise of Southern Africa* (2000) 275
- Himonga, Chuma and R Manjoo, “What’s in a Name?: The Identity and Reform of Customary Law in South Africa’s Constitutional Dispensation” in Manfred O Hinz (ed), *The Shade of New Leaves: Governance in Traditional Authority, A Southern African Perspective* (2006) 329
- Himonga, Chuma, “Taking Stock of Changes to Customary Law in a New South Africa” in Graham Glover (ed), *Essays in Honour of AJ Kerr* (2006) 215
- Hohe, Tanja, “Delivering Feudal Democracy in East Timor” in Edward Newman and Roland Rich (eds), *The UN Role in Promoting Democracy: Between Ideals and Reality* (2004) 302
- Hooker, MB, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975)
- Hund, John, “African Witchcraft and Western Law – Psychological and Cultural Issues” in John Hund (ed), *Witchcraft Violence and the Law in South Africa* (2003) 1
- Hurwitz, Agnès “Civil War and the Rule of Law: Towards Security, Development and Human Rights” in Agnès Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law: Security, Development, Human Rights* (2008) 1
- Jackson, Vicki C and Mark Tushnet, *Comparative Constitutional Law* (1999)
- Jagwanth, Saras and Christina Murray, “‘No Nation Can be Freed When One Half of it is Enslaved’: Constitutional Equality for Women in South Africa” in Beverly Baines and Ruth Rubio-Marin (eds), *The Gender of Constitutional Jurisprudence* (2004)
- Jennings, William Ivor, *The Law and the Constitution* (1933)
- Jensen, Erik G and Tomas C Heller, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003)
- Jensen, Erik G, “Justice and the Rule of Law” in Charles T Call (ed), *Building States to Build Peace* (2008)
- Jessep, Owen, and Anthony Regan, “Developing a Coherent Underlying Law – Integrating Custom and Common Law, Pts 1-2” in Anthony Regan and Owen Jessep (eds), *Twenty Years of the Papua New Guinea Constitution* (2001) 114, 134

Bibliography

- Katz, Stanley N, *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience* (1994)
- Kennedy, David, “Laws and Developments” in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the Twenty-First Century – Essays in Honour of Peter Slinn* (2003) 17
- Kennedy, David, “The ‘Rule of Law,’ Political Choices, and Development Common Sense” in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 95
- Kingsbury, Damien, and Michael Leach, “Introduction” in Kingsbury and Leach (eds), *East Timor: Beyond Independence* (2007)
- Kingson, Jeff, “East Timor’s Search for Justice, Reconciliation and Dignity” in Edel Hughes, William A Schabas and Ramesh Thankur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (2007) 81
- Kleinfeld, Rachel, “Competing Definitions of the Rule of Law” in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 31
- Klug, Heinz, *Constitutional Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000)
- Klug, Heinz, “Participating in the Design: Constitution-making in South Africa” in Penelope Andrews and Stephen Ellmann (eds), *Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Laws* (2001) 128
- Klug, Heinz, “Hybrid(ity) Rules: Creating Local Law in a Globalized World” in Yves Dezalay and Bryant G Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (2002) 276
- Klug, Heinz, “South Africa: From Constitutional Promise to Social Transformation” in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 266
- Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001)
- Koyana, D S, J C Bekker and R B Mqoke, “Traditional Authority Courts” in J C Bekker, Christa Rautenbach and N M I Goolam (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) 131
- Krastev, Ivan, “Corruption, Anti-Corruption Sentiments, and the Rule of Law” in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (2005) 323

Bibliography

- Kritz, Neil (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes – Country Studies* (1995)
- Kritz, Neil, “The Rule of Law in Conflict Management” in Chester A Crocker, Fen Osler Hampson and Pamela Aall (eds), *Unleashing the Dogs of War: Conflict Management in a Divided World* (2004) 401
- Krygier, Martin and Adam Czarnota (eds), *The Rule of Law After Communism: Problems and Prospects in East-Central Europe* (1999)
- Krygier, Martin, “The Rule of Law” in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social and Behavioural Sciences* (2001) 13404
- Krygier, Martin, “False Dichotomies, True Perplexities, and the Rule of Law” in András Sajó (ed), *Human Rights with Modesty: The Problem with Universalism* (2004) 251
- Krygier, Martin, “The Rule of Law: An Abuser’s Guide” in András Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (2006) 129
- Lawrence, Peter, “The State versus Stateless Society in Papua and New Guinea” in BJ Brown (ed), *Fashion of Law in New Guinea: Being an Account of the Past, Present and Developing Systems of Laws in Papua and New Guinea* (1969) 15
- Longman, Timothy, Phuong Pham and Harvey M Weinstein, "Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda" in Harvey Weinstein and Eric Stover (eds), *My Neighbor, My Enemy: Justice and Social Reconstruction in Rwanda and the Former Yugoslavia* (2004) 206
- Longman, Timothy, “Justice at the Grassroots? Gacaca Trials in Rwanda” in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2007) 206
- Lugard, Frederick, *The Dual Mandate in British Tropical Africa* (first published 1922, 5th ed, 1965)
- Lutz, Ellen, “Transitional Justice: Lessons Learned and the Road Ahead” in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (2007) 325
- MacKinnon, Aran S, *The Making of South Africa: Culture and Politics* (2003)
- Malinowski, Bronislaw, *Crime and Custom in Savage Society* (1926)

Bibliography

- Mamdani, Mahmood, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996)
- Mani, Rama, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002)
- Mani, Rama, "Exploring the Rule of Law in Theory and Practice" in Agnès Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law: Security, Development, Human Rights* (2008) 23
- Marriot, Andrew, "Justice in the Community, Justice in the Courts: Bridging East Timor's Legal Divide" in David Mearns (ed), *Democratic Governance in Timor-Leste: Reconciling the Local and the National* (2008) 21
- Mathews, Anthony, *Law, Order and Liberty in South Africa* (1972)
- Mathews, Anthony, *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* (1978)
- McAuslan, Patrick, "Law, Governance and the Development of the Market: Practical Problems and Possible Solutions" in Julio Faundez (ed), *Good Government and Law: Legal and Institutional Reform in Developing Countries* (1997) 25
- McEvoy, Kieran, "Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice" in McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (2008) 15
- McGregor, Lorna, "International Law as a 'Tiered Process': Transitional Justice at the Local, National and International Level" in Kieran McEvoy and McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (2008) 47
- Menski, Werner, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd ed, 2006)
- Merry, Sally Engle, "Legal Pluralism and Transnational Culture: The *Ka Ho'okolokolonui Kanaka Maoli* Tribunal, Hawai'i, 1993" in Richard A Wilson (ed), *Human Rights, Culture and Context: Anthropological Perspectives* (1997) 28
- Merry, Sally Engle, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006)
- Michelman, Frank I, "The Rule of Law, Legality and the Supremacy of the Constitution" in Stuart Woolman and Theunis Roux (eds), *Constitutional Law of South Africa* (2nd ed, 2005) 11-1

Bibliography

- Migdal, Joel S, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (1988)
- Migdal, Joel S, *State in Society: Studying How States and Societies Transform and Constitute One Another* (2001)
- Moreira, Adriano, "Portuguese Territories in Africa: Customary Law in the Portuguese Overseas" in Peter Idenburg (ed), *The Future of Customary Law in Africa* (1956) 229
- Morris, HF, and James S Read, *Indirect Rule and the Search for Justice: Essays in East African Legal History* (1972).
- Murray, Christina, "Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court" in Penelope Andrews and Stephen Ellmann (eds), *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Laws* (2001) 103
- Neumann, Michael, *The Rule of Law: Politicising Rights* (2002)
- Nhlapo, Thandabantu, "African Customary Law in the Interim Constitution" in Sandra Liebenberg (ed), *The Constitution of South Africa from a Gender Perspective* (1995) 157
- Niner, Sara, "A Reassertion of Customary Practices in Timor Leste" in Lisa Palmer, Sara Niner and Lia Kent (eds), *Exploring the Tension of Nation-Building in Timor-Leste* (SSEE Research Paper No 1/2007) 41
- Nixon, Rod, "Non-State Actors as Agents of Order: *Suco* Justice and Dispute Resolution Systems in East Timor" in William Binchy (ed) *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past* (2009)
- North, Douglass C, *Institutions, Institutional Change and Economic Performance* (1990)
- Ntsebeza, Lungisile, *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2006)
- Nyamu-Musembi, "Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights", in Abdullahi Ahmed An-Na'im (ed), *Cultural Transformation and Human Rights in Africa* (2002) 126.
- O'Connor, Vivienne and Colette Rausch, *Model Codes for Post-Conflict Criminal Justice Volume I: Model Criminal Code* (2008)
- Odinkalu, Chidi Anselm, "Poor Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa" in Caroline Mary Sage and

Bibliography

- Michael Woolcock (eds), *The World Bank Legal Review: Law, Equity and Development, Vol 2* (2006) 141
- Okoye, Ada O, “The Rule of Law and Sociopolitical Dynamics in Africa” in Paul Tiyambe Zeleza and Philip J McConaughay (eds), *Human Rights, the Rule of Law, and Development in Africa* (2004) 71
- Oomen, Barbara, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005)
- Palmer, Lisa, “Developing Timor-Leste: The Role of Custom and Tradition” in Lisa Palmer, Sara Niner and Lia Kent (eds), *Exploring the Tension of Nation-Building in Timor-Leste* (SSEE Research Paper No.1/2007) 35
- Pereenboom, Randall, “Varieties of Rule of Law: An Introduction and Provisional Conclusion” in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the United States* (2004) 1
- Piron, Laure-Hélène, “Time to Learn, Time to Act in Africa” in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 275
- Plunkett, Mark, “Re-establishing the Rule of Law” in Gerd Junne and Willemijn Verkoren (eds), *Post Conflict Development: Meeting New Challenges* (2005) 78
- Ratmapala, Suri, *Australian Constitutional Law: Foundations and Theory* (2002)
- Rautenbach, Christa, “Law of Succession and Inheritance” in JC Bekker, JC Bekker, Christa Rautenbach and NMI Goolam (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) 97
- Raz, Joseph, “The Rule of Law and Its Virtue” in Raz, *The Authority of Law* (1979) 210
- Raz, Joseph, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994)
- Regan, Anthony, “Constitution-Making in East Timor: Missed Opportunities” in Babo Soares et al (eds), *Elections and Constitution-Making in East Timor* (2003) 39
- Roberts, Simon, *Order and Dispute: An Introduction to Legal Anthropology* (1979)
- Robson, William, *Justice and Administrative Law* (2nd ed 1947)
- Sadurski, Wojciech, “Transitional Constitutionalism: Simplistic and Fancy Theories” in Czarnota, Adam, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law After Communism* (2005) 9

Bibliography

- Santos, Alvaro, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" in David Trubek and Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 253
- Santos, Boaventura de Sousa, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (1995)
- Santos, Boaventura de Sousa, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2nd ed, 2002)
- Schapera, Isaac, *A Handbook of Tswana Law and Custom* (2nd ed, 1955)
- Scharf, Wilfried, and Daniel Nina (eds), *The Other Law: Non-State Ordering in South Africa* (2001)
- Scheeringa, Sandra, "Enhancing the Local Legitimacy of Transnational Justice Institutions: Local Embeddedness and Customary Law in CAVR" in Damien Kingsbury and Michael Leach (eds), *East Timor: Beyond Independence* (2007) 137
- Schreiner, Oliver, *The Contribution of English Law to South Africa; and the Rule of Law in South Africa* (1967)
- Schreuder, Deryck, "The Commonwealth and Peacemaking in South Africa" in Norman Etherington (ed), *Peace, Politics and Violence in the New South Africa* (1992) 73
- Seekings, Jeremy, "Social Ordering and Control in the African Townships of South Africa: An Historical Overview of Extra-State Initiatives from the 1940s to the 1990s" in Wilfried Schärff and Daniel Nina (eds), *The Other Law: Non-State Ordering in South Africa* (2001) Ch 4.
- Selznick, Philip, *The Moral Commonwealth: Social Theory and the Promise of Community* (1992)
- Sen, Amartya, *Inequality Re-examined* (1992)
- Sen, Amartya, *Development as Freedom* (1999)
- Serapaio, Luis B and Mohamed A El Khawas, *Mozambique in the Twentieth Century: From Colonialism to Independence* (1979)
- Shihata, Ibrahim, *The World Bank in a Changing World: Selected Essays*, compiled and edited by Franziska Tschofen (1991)
- Shklar, Judith N, "Political Theory and the Rule of Law" in Allan Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (1987) 1

Bibliography

- Snyman, Johannes Henrik, *South Africa and the Rule of Law: Testimony of a Supreme Court Judge* (1970)
- Spitz, Richard, and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2000)
- Stewart, Ann, "Should Women Give Up on the State? – The African Experience" in Shirin M Rai and Geraldine Lievesley (eds), *Women and the State: International Perspectives* (1996) 23
- Stewart, Ann, "Juridifying Gender Justice: From Global Rights to Local Justice" in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century* (2003) 36
- Stromseth, Jane, David Wippman and Rosa Brooks, *Can Might Make Rights: Building the Rule of Law after Military Interventions* (2006)
- Tamanaha, Brian, *A General Jurisprudence of Law and Society* (2001)
- Tamanaha, Brian, *On the Rule of Law: History, Politics, Theory* (2004)
- Tamanaha, Brian, "Rule of Law in the United States" in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the United States* (2004) 56
- Tan, Poh-Ling (ed), *Asian Legal Systems: Law, Society and Pluralism in East Asia* (1997)
- Taylor, Ian, *Stuck in Middle GEAR: South Africa's Post-Apartheid Foreign Relations* (2001)
- Taylor, John G, *Indonesia's Forgotten War: The Hidden History of East Timor* (1991)
- Teitel, Ruti, *Transitional Justice* (2000)
- Thompson, Edward Palmer, *Whigs and Hunters: The Origins of the Black Act* (1977)
- Thompson, Leonard, *A History of South Africa* (Rev Ed, 1995)
- Traube, Elizabeth, *Cosmology and Social Life* (1986)
- Trebilcock, Michael J and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (2008)
- Trindade, Josh, "Reconciling the Conflicting Paradigms: An East Timorese Vision of the Ideal State" in David Mearns (ed), *Democratic Governance in Timor-Leste: Reconciling the Local and the National* (2008) 160

Bibliography

- Trubek, David, "Law and Development" in Neil J Smelser and Paul B Baltes (eds), *2001 International Encyclopedia of the Social and Behavioural Sciences* (2001) 8443
- Trubek, David, "The Rule of Law in Development Assistance" in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 74
- Trubek, David, and Alvaro Santos, "Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Approach" in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 1
- Tshela, Boyane, *Traditional Justice in Practice: A Limpopo case Study* (2005)
- Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995)
- Twining, William, *Globalisation and Legal Theory* (2000)
- United Nations and Boutros Boutros-Ghali, *The United Nations and Apartheid, 1948-1994* (1994)
- Upham, Frank, "Mythmaking in the Rule-of-Law Orthodoxy" in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 75
- Van Binsbergen, Wim (ed), *The Dynamics of Power and the Rule of Law: Essays on Africa and Beyond* (2003)
- Van Niekerk, Gardiol J, "Legal Pluralism" in JC Bekker, JC Bekker, Christa Rautenbach and NMI Goolam (eds), *Introduction to Legal Pluralism* (2nd ed, 2006) 3
- Van Wyck et al (eds), *Rights and Constitutionalism: The New South African Legal Order* (1996)
- Van Wouden, FAE, *Types of Social Structure in Eastern Indonesia* (Rodney Needham trans, 1968 ed)
- Weber, Max, *The Theory of Social and Economic Organization* (AR Henderson & T Parsons trans, 1947 ed)
- West, Robin, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights and the Rule of Law* (2003)
- Wet, Ronald A, "Lawyers, Guns and Money: Justice and Security Reform in East Timor" in Charles T Gall (ed), *Constructing Justice and Security After War* (2007) 313

Bibliography

- White, Nigel D, "Towards a Strategy for Human Rights Protection in Post-Conflict Situations" in Nigel White and Dirk Klaasen (eds), *The United Nations, Human Rights and Post-Conflict Situations* (2005) 463
- Widner, Jennifer, *Building the Rule of Law* (2001)
- Wilson, Richard A, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001)
- Zifcak, Spencer (ed), *Globalisation and the Rule of Law* (2005)
- Zifcak, Spencer, "Combining Community Reconciliation and Local Justice: A Modest Proposal for Reform" in William Binchy (ed) *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past* (2009)

1.3 Theses

- Dlamini, CRM, *The Role of Chiefs in the Administration of Justice in Kwazulu* (D Phil Thesis, University of Pretoria 1983)
- Forsyth, Miranda, *A Bird That Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (D Phil Thesis, The Australian National University, 2007)
- Harper, Erica Jane, *(Re)Constructing a Legal System in East Timor: Challenges to Introducing International Legal Norms and Principles into Post-Conflict States Under UN Administration* (D Phil Thesis, University of Melbourne, 2007)
- Harris-Rimmer, Susan, *Transitional Justice and the Women of East Timor* (SJD Thesis, The Australian National University, 2008)
- Laakso, Jennifer, *Justice, Order and Peace: Transitional Justice and Peacebuilding in Timor-Leste* (D Phil Thesis, University of Queensland, 2007)
- Nixon, Rod, *Integrating Indigenous Approaches into a 'New Subsistence State': The Case of Justice and Conflict Resolution in East Timor* (D Phil Thesis, Charles Darwin University 2008)
- Therik, Gerzon, *Wehali: The Four Corners Land: The Cosmology and Traditions of A Timorese Ritual Centre* (D Phil Thesis, The Australian National University, 1995)
- Yoder, Laura Meitzner *Custom, Codification, Collaboration: Integrating the Legacies of land and Forest Authorities in Oecusse Enclave, East Timor* (D Phil Thesis, Yale University, 2005)

1.4 Reports

1.4.1 General Reports

Afghanistan Human Development Report 2007, *Bridging Modernity and Tradition: Rule of Law and the Search for Modernity* (2007)

Amnesty International, *Rwanda: The Troubled Course of Justice* (April 2000)

Amnesty International, *East Timor: Justice Past, Present and Future* (July 2001)

Amnesty International, *Rwanda: Gacaca: A Question of Justice* (December 2002)

Amnesty International and the JSMP, *Indonesia – Justice for Timor-Leste: The Way Forward* (April 2004)

Amnesty International, *Amnesty International Report 2004 – Timor Leste* (2004)

ARD Inc, *USAID Land Law Program II Timor-Leste – Final Report* (30 April 2006)

Asia Foundation, *Timor Lorosa'e National Survey of Citizen Knowledge* (2002)

Asia Foundation, *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor* (2004)

Avocats Sans Frontières, *Access to Legal Aid in Timor-Leste – Survey Report* (November 2006)

Barfield, Thomas, Neamat Nojumi and J Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* (2006) (Report for the United States Institute of Peace)

Brandt, Michele, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (2005) (Report for UNDP)

Butt, Simon, Natalie David and Nathan Laws, *Looking Forward: Local Dispute Resolution Mechanisms in Timor-Leste* (2004) (Draft Report prepared for Australian Legal Resources International) (on file with author)

Carter Center, *The East Timor Political and Election Observation Project Final Report* (2004)

Chesterman, Simon, *East Timor in Transition: From Conflict Prevention to State Building* (2001) (Report for the International Peace Academy)

Bibliography

- Chesterman, Simon, *Justice under International Administration: Kosovo, East Timor and Afghanistan* (2002) (Report for the International Peace Academy)
- Chirayath, Leila, Caroline Sage and Michael Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (July 2005) (Report prepared as a background paper for the *World Development Report 2006: Equity and Development*)
- Commission on Legal Empowerment of the Poor and UNDP, *Making the Law Work for Everyone: Volume 1, Report of the Commission on Legal Empowerment of the Poor* (2008)
- Danish Ministry for Foreign Affairs and Danida, *Evaluation: Danish Support to Promotion of Human Rights and Democratisation, Volume 2: Justice, Constitution and Legislation* (2000)
- Democratic Republic of East-Timor, Presidency of the Ministers' Office, *IV Constitutional Government Program, 2007-2012* (October 2007)
- Department of Foreign Affairs of the Republic of South Africa, *South Africa and the Rule of Law* (1968)
- Garrison, Randall, *The Role of Constitution-Building in Democratization: Case Study – East Timor* (2005) (Report for the International Institute for Democracy and Electoral Assistance)
- Gesellschaft für Technische Zusammenarbeit, *Local Perspectives: Foreign Aid to the Justice Sector* (2000)
- Ghai, Yash and Guido Galli, *Constitution Building Processes and Democratization* (2006) (Report for the International Institute for Democracy and Electoral Assistance)
- Government of the Islamic Republic of Afghanistan (Ministry of Justice), *Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan* (2005)
- Government of the Islamic Republic of Afghanistan, *Afghan National Development Strategy (ANDS). An Interim Strategy for Security, Governance, Economic Growth and Poverty Reduction* (2006)
- Government of the Islamic Republic of Afghanistan, *Afghanistan National Development Strategy 2008-2013 (ANDS). A Strategy for Security, Governance, Economic Growth and Poverty Reduction* (2008)
- Hohe, Tanja, and Rod Nixon, *Reconciling Justice: 'Traditional' Law and State Justice in East Timor (Final Report)* (2003) (Report prepared for the United States Institute of Peace)

Bibliography

- Honeyman, Catherine, et al, *Gacaca Jurisdictions: Transitional Justice in Rwanda – Observations from 10 June-8 August 2002* (2002)
- Human Rights Watch, *Tortured Beginnings: Police Violence and the Beginnings of Impunity in East Timor* Vol 18, No 2(c), (April 2006)
- Independent Evaluation of SDC’s Human Rights and Rule of Law Guidance Documents: Influence, Effectiveness and Relevance within SDC* (March 2004)
- Ingelaere, Bert, “The Gacaca Courts in Rwanda” in Luc Huyse and Mark Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 24 (Report of the Institute for Democracy and Electoral Assistance)
- International Center for Transitional Justice (Megan Hirst and Howard Varney), *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (June 2005)
- International Center for Transitional Justice (Caitlin Reiger and Marieke Wierda), *The Serious Crimes Process in Timor-Leste: In Retrospect* (March 2006)
- International Commission of Jurists, *African Conference on the Rule of Law: A Report on the Proceedings of the Conference* (1961).
- International Commission of Jurists, *Erosion of the Rule of Law in South Africa* (1968)
- International Commission of Jurists and the Netherlands Institute of Human Rights, *Indonesia and the Rule of Law: Twenty Years of ‘New Order’ Government* (1987)
- International Commission of Jurists, *South Africa and the Rule of Law* (1988)
- International Commission of Jurists, *Ruler’s Law: Mission to Indonesia* (1999)
- International Council on Human Rights Policy, *Local Perspectives: Foreign Aid to the Justice Sector* (2000)
- International Crisis Group, *Timor-Leste: No Time for Complacency* (9 February 2009)
- JSMP, *Report on the Court of Appeal Decision in the Case of Armando dos Santos*, (August 2003)
- JSMP, *The Constitutionality of East Timor’s Immigration and Asylum Law* (undated)
- JSMP, *Women in the Formal Justice Sector: Report on the Dili District Court* (April 2004)
- JSMP, *Access to Justice for Women Victims* (July 2004)

Bibliography

- JSMP, *Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process* (August 2004)
- JSMP, *Overview of the Courts in East Timor in 2004* (17 December 2004)
- JSMP, *Overview of the Justice Sector: March 2005* (March 2005)
- JSMP, *The JSMP's Submission to the UN Commission of Experts* (6 April 2005)
- JSMP, *The Role, Practice and Procedure of the Court of Appeal* (28 June 2005)
- JSMP, *Oppressive Indonesian Law Applied by the Court of Appeal* (30 June 2005)
- JSMP, *Overview of the Justice Sector: March 2005* (2005)
- JSMP, *Land Law Report* (27 September 2005)
- JSMP, *The Interaction of Traditional Dispute Resolution with the Formal Justice Sector in Timor-Leste* (November 2005)
- JSMP, *Overview of the Justice Sector 2005* (January 2006)
- JSMP, *New Players in Timor-Leste's Justice System* (August 2006)
- JSMP, *Overview of the Justice Sector 2006-2007* (2007)
- JSMP, *Digest of the Jurisprudence of the Special Panels for Serious Crimes* (April 2007)
- JSMP, *Key Themes in Legal Development: A JSMP Retrospective, 27 April 2001-27 April 2008* (2008)
- JSMP, *The Private Lawyers Statute: Overview and Analysis* (18 September 2008)
- JSMP, *Analysis of Decisions Issued by the Baucau District Court in Cases Involving Female Victims: July 2007-December 2008* (December 2008)
- JSMP, *Overview of the Justice Sector 2008* (January 2009)
- King's College London, *A Review of Peace Operations – A Case for Change* (2003)
- Lau, Martin, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards, Final Report* (2003) (Report for the International Commission of Jurists).
- Mearns, David, *Variations on a Theme: Coalitions of Authority in East Timor* (2001) (Report for Australian Legal Resources International)

Bibliography

- Mearns, David, *Looking Both Ways: Models for Justice in East Timor* (2002) (Report for Australian Legal Resources International)
- Open Society Foundation for South Africa, *South Africa: Justice Sector and the Rule of Law* (2005)
- Organisation of Economic Cooperation and Development, *Economic Assessment of South Africa 2008* (15 July 2008)
- Ospina, Sofi, and Tanja Hohe, *Traditional Power Structures and Local Governance in East Timor: A Case Study of the Community Empowerment Project* (2002)
- Peace and Democracy Foundation, *Report about Research on Customary Dispute Resolution and Proposed Mediation Model for the Democratic Republic of Timor-Leste* (November 2004)
- Potter, Antonia, *The Rule of Law as the Measure of Peace? Responsive Policy for Reconstructing Justice and the Rule of Law in Post-Conflict and Transitional Environments* (2004) (Report for the Centre for Humanitarian Dialogue)
- Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (November 2000)
- Pigou, Piers, *Crying Without Tears - In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations* (2003) (Report for the International Center for Transitional Justice)
- Pigou, Piers, *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation* (2004) (Report for UNDP Timor-Leste)
- Quast, Shelley R, *Report on East Timor* (March 2002) (Report for the International Legal Assistance Consortium).
- Samuels, Kirsti, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt*, World Bank Social Development Papers, Paper No 37, (October 2006)
- Schlicher, Monika, *East Timor Faces Up to its Past: The Work of the Commission for Reception, Truth and Reconciliation* (2005) (Report for Watch Indonesia!)
- Swaine, Aisling, *Traditional Justice and Gender Based Violence* (August 2003) (Report for the International Rescue Society)
- Trindade, Josh, and Bryant Castro, *Rethinking Timorese Identity as a Peacebuilding Strategy: The Lorosa'e-Loromu Conflict from a Traditional Perspective* (2007) (Report for the EU Rapid Reaction Mechanism Programme)

Bibliography

- UK Department for International Development, *Justice and Poverty Reduction*, DFID Issues Paper (2000)
- UK Department for International Development, *Safety, Security and Accessible Justice: Putting Policy into Practice* (July 2002)
- UK Department for International Development, *Non-State Justice and Security Systems*, DFID Briefing, (May 2004)
- UN Population Fund, *Gender-Based Violence in Timor-Leste* (2005)
- Urresta, Edwin, and Rod Nixon, Timor-Leste Land Law Program, *Report on Research Findings and Policy Recommendations for a Legal Framework for Land Dispute Mediation* (February 2004)
- USAID, *Alternative Dispute Resolution: Practitioners' Guide* (March 1998)
- USAID, *At Freedom's Frontiers: A Democracy and Governance Strategic Framework* (2005)
- USAID, *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Court and Informal Bodies* (2005)
- USAID and US Department of State, *Strategic Plan: Fiscal Years 2007-2012 – Transformational Diplomacy* (2007)
- USAID, *The Crisis in Timor-Leste: Causes, Consequences and Options for Conflict Management and Mitigation* (12 November 2006)
- USAID, Freedom House and American Bar Association Rule of Law Initiative, *The Rule of Law in Timor-Leste* (June 2007)
- Wijkowska, Ewa, *Doing Justice: How Informal Justice Systems Can Contribute* (December 2006) (Report for UNDP and the Oslo Governance Centre)
- Wolfensohn, James, *A Proposal for a Comprehensive Development Framework* (May 1999)
- World Bank, *Land Reform: Sector Policy Paper* (1975)
- World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth – A Longterm Perspective Study* (1989)
- World Bank, Legal Vice Presidency, *Legal and Judicial Reform Observations, Experiences and Approach of the Legal Vice Presidency* (2002)

Bibliography

World Bank, *Land Policies for Growth and Poverty Reduction*, World Bank Policy Research Report (2003)

World Bank, *Strengthening the Institutions of Governance in Timor-Leste* (April 2006)

World Bank Group and Asian Development Bank, *Economic and Social Development Brief* (August 2007)

World Bank, *Doing Business Report for 2008* (2008)

1.4.2 Reports of Law Commissions and Other Commissions

Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986)

Law Reform Commission of Western Australia, *Aboriginal Customary Laws – Final Report: The Interaction of WA Law with Aboriginal Law and Culture* (2006)

New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific* (2006)

Ralushai Commission, *Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic of South Africa* (1996)

South African Law Commission, *Simplification of Criminal Procedure (Access to the Criminal Justice System)* Issue Paper 6 Project 73 (1997)

South African Law Commission, *Harmonisation – Conflicts of Law*, Discussion Paper 76, Project 90 (1998)

South African Law Commission, *Report on Conflicts of Law* Project 90 (1999)

South African Law Commission, *Traditional Courts and the Judicial Function of Traditional Leaders*, Discussion Paper 82 Project 90 (1999)

South African Law Commission, *Community Dispute Resolution Structures*, Discussion Paper No 87 Project 94 (1999)

South African Law Commission, *Customary Law: Succession*, Discussion Paper 93, Project 90 (2000)

South African Law Commission, *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90 (2003)

Bibliography

South African Truth and Reconciliation Commission, *Final Report of the South African Truth and Reconciliation Commission* (1998)

Timor-Leste Commission for Reception, Truth and Reconciliation, *Chega!*, *Report of the Commission for Reception, Truth and Reconciliation* (2005)

2. Reported Case Law

Affordable Medicines Trust and Others v Minister of Health and Another 2006 (3) SA 247 (CC)

Alexkor Ltd and Anor v Richtersveld Community and Others 2004 (5) SA 460 (CC)

Bangindawo v Head of Nyanda Regional Authority 1998 (3) SA 262 (Tk)

Bhe and Others v The Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC)

Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

Certification of the Amended Text of the Constitution of The Republic Of South Africa 1997 (2) SA 97 (CC)

Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409 (CC)

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)

Mhlekwana and Feni v Head of the Western Transvaal Regional Authority & Anor 2001 (1) SA 574 (Tk)

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others In re: Application for Declaratory Relief 2005 (3) SA 238 (CC)

Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC)

Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC)

Bibliography

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

R v Valente [1985] 2 SCR 673

Retroactive Criminal Legislation Case, Hungarian Constitutional Court, decision 11/1992 (III.10.) AB hat.

S v Makwanyane 1995 (3) SA 391 (CC)

Shilubana and Ors v Mwamitwa 2008 (9) BCLR 914 (CC)

South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC)

3. Constitutions and Legislation

Botswana Constitution (Independence Order 1171 of 1966)

Constitution of Fiji Islands

Constitution of Mozambique 1990

Constitution of Portugal 1976

Constitution of Solomon Islands

Constitution of South Africa 1993

Constitution of South Africa 1996

Constitution of Timor-Leste

Constitution of Tuvalu

Constitution of Zambia (Act 1 of 1999).

Swaziland Constitution (1377 of 1968)

Zimbabwe Constitution (Order 1600 of 1979)

Black Administration Act 38 of 1927

Chiefs' and Headmen's Civil Courts: Rules R2082 of 1967

Communal Land Rights Act 11 of 2004

Intestate Succession Act 81 of 1987

Law of Evidence Amendment Act 45 of 1988

Natal Code, Law 19 of 1891

Recognition of Customary Marriages Act 120 of 1998

Repeal of the Black Administration Act and Amendment of Certain Laws Act No 28 of 2005

Traditional Courts Bill 2008

Traditional Leadership and Governance Framework Act 41 of 2003

4. Treaties and Declarations

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)

Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), entered into force 5 September 1991, 72 ILO Official Bulletin 59

Convention on the Elimination of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, opened for signature on 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970)

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

First Additional Protocol to the Geneva Conventions opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978)

International Convention for the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)

Bibliography

International Convention on the Protection of the Rights of All Migrant Workers, opened for signature 18 December 1990, 45 UN GAOR Supp (No 49A) 262 (entered into force 1 July 2003)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976)

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 10 December 1999, 54 UN GAOR Supp (No 49) 5 (entered into force 22 December 2000)

Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflicts, opened for signature 25 May 2002, 54 UN GAOR Supp (No 49) 7 (entered into force 12 February 2002)

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, 54 UN GAOR Supp (No 49) 6 (entered into force 18 January 2002)

Second Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 15 December 1989, 29 ILM 1464 (1990) (entered into force 11 July 1991)

Universal Declaration on Human Rights GA Res. 217A (III), UN Doc A/810, 71 (10 December 1948)

Declaration on Apartheid and its Destructive Consequences in Southern Africa, UN Doc A/RES/S-16/1 (14 December 1989)

Declaration of the OAU Ad Hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe (21 August 1989)

5. Other Sources

5.1 General UN Sources

UN Department of Peacekeeping Operations, *United Nations Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (December 2006)

UN Development Programme (in conjunction with RDTL) Project Fact Sheet *Justice System Project* (undated)

Bibliography

- UN Development Programme, *Access to Justice – Practice Note* (2004)
- UN Development Programme, *Programming for Justice: Justice For All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005)
- UN High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Mapping the Justice Sector* (2006)
- UN Secretary-General, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (23 August 2004)
- UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights For All, Report of the Secretary General*, UN Doc A/59/2005 (2005)
- UN Secretary-General, *Uniting our Strengths: Enhancing United Nations Support for the Rule of Law, Report of the UN Secretary-General*, UN Doc A/61/636-S/2006/980, (14 December 2006)
- United Nations, *Report of the Panel on United Nations Peace Operations*, UN Doc A/55/305-S/2000/809 (21 August 2000)
- 5.2 UN Reports on Timor-Leste*
- UN Development Programme, *Strengthening the Justice System in Timor-Leste – Semi-Annual Progress Report, 1 January 2007-31 July 2007* (August 2007)
- UN Development Programme, *Strengthening the Justice System in Timor-Leste Programme – Independent/External Mid-Term Evaluation Report* (September 2007)
- UN High Commissioner for Human Rights, *Situation of Human Rights – Report of the High Commissioner*, UN Doc E/CN.4/2002/39 (1 March 2002)
- UN Independent Special Commission of Inquiry, *Report of the UN Independent Special Commission of Inquiry* (Geneva 2 October 2006)
- UN Mission in Timor-Leste, *Report on Human Rights Developments in Timor-Leste, (August 2006-August 2007)* (2007)
- UN Mission in Timor-Leste, *UNMIT Internal Review Panel, Conducted From 1 April to 24 April 2008* (2008)
- UN Transitional Administration in East Timor, Constitutional Affairs Branch, Office of Political Affairs, *Executive Summary of the Constitutional Commission Public Hearings* (September 2001)

Bibliography

- Report of the Secretary-General on the Situation in East Timor*, UN Doc S/1999/1024, (4 October 1999)
- Report of the Secretary- General on the United Nations Transitional Administration in East Timor (for the period 27 January – 26 July 2000)*, UN Doc S/2000/738, (26 July 2000)
- Report of the Security Council Mission to East Timor and Indonesia (9-17 November 2000)*, UN Doc S/2000/1105 (21 November 2000)
- Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the period from 25 July to 15 October 2001)* UN Doc S/2001/983 (2001)
- Report of the Secretary-General on the United Nations Mission of Support in East Timor (21 April 2003)*, UN Doc S/2003/449
- Progress Report of the Secretary-General on the United Nations Office in Timor Leste*, UN Doc S/2005/533 (18 August 2005)
- Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, UN Doc S/2006/580, (26 July 2006)
- Report of the Secretary-General on Timor-Leste pursuant to Security Council Resolution 1690*, UN Doc S/2006/628, (8 August 2006)
- Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 9 August 2006 to 26 January 2007)*, UN Doc S/2007/50 (1 February 2007)
- Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 27 January to 20 August 2007)*, UN Doc S/2007/513 (28 August 2007)
- Report of the Security Council Mission to Timor-Leste, 24 to 30 November 2007*, UN Doc S/2007/711 (6 December 2007).
- Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 August 2007 to 7 January 2008)*, UN Doc S/2008/26 (17 January 2008)
- Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 8 January to 8 July 2008)*, UN Doc S/2008/501 (29 July 2008)

5.3 Media Sources

5.3.1. Unauthored Media

- “E Timor President Vows to Protect Constitution” *Independent Weekly*, AAP, 14 June 2006
- “East Timor Court Rejects Petition Against President”, Radio Australia, 8 September 2008
- “East Timor’s President to Address Parliament on Crisis” *Agence France Presse* 13 June 2006
- “Officials Welcome Gusmão’s Parliamentary Address” Australian Broadcasting Corporation News, 15 June 2006
- “To Forge a Future, Timor Needs Justice for the Past”, *Sydney Morning Herald*, 28 August 2001
- “UN on Defensive over Controversial E Timor Appointment”, Australian Broadcasting Corporation News, 14 May 2008
- “UN Prepares to Start New Peacekeeping Mission in East Timor”, *New York Times* 14 June 2006
- “Water Buffalo Justice Reigns in East Timor” *Deutsche Presse Agentur*, 28 September 2008
- “‘Witches’ Murdered in E Timor”, Australian Broadcasting Corporation News, 9 January 2008

5.3.2 Authored Media

- Dodd, Mark, “Judge Revokes Reinado Amnesty”, *The Australian*, 24 July 2007
- Fitzpatrick, Stephen, “Ramos Horta Resigns but PM Hangs On”, *The Australian*, 26 June 2006
- Fitzpatrick, Stephen, “UN Forces Sack Timor Advisor Roque Rodriguez”, *The Australian*, 12 June 2008
- Murdoch, Lindsay, “Ramos Horta and Reinado had Amnesty Deal”, *The Age*, 16 February 2008
- Rei, Naldo, “Where Now for East Timor?” *The Advertiser*, 23 February 2008
- Rickard, Carmel, “Equality for Women? No Thanks”, *Sunday Times* 8 August 1993

Toohey, Paul, “Timor Rebel was to be Pardoned”, *The Australian*, 1 March 2008

Wright, Jesse, “Freedom to Kill in East Timor”, *Asia Times*, 25 June 2008

5.3.3 Press Releases

Amnesty International, “Rwanda: Gacaca – Gambling with Justice” (Press Release, 19 June 2002)

Amnesty International, “Rwanda: Suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice” (Press Release, 2 November 2007)

Fretilin, “Minister Threatens to Sack Foreign Judges” (Media Release, 5 October 2007).

Fretilin, “Australian Military Commander Under Fire in East Timor” (Media Release, 23 November 2007)

Human Rights Watch, “Elections May Speed Genocide Trials” (Press Release, 2001)

JSMP, “East Timorese Parliament Passes New Legislation on the Applicable Subsidiary Law” (Press Release, 1 October 2003)

JSMP, “Judge Applies Customary Law in a Criminal Case” (Press Release, 19 May 2005)

“Ramos-Horta Addresses the UN Security Council” (Media Release, 30 January 2002)

UN News Service, “TL: UN Envoy Decries Political Attacks, Hails Government Response” (12 February 2008)

5.4. Miscellaneous: Unpublished Papers and Correspondence

Babo-Soares, Dionisio, “A Brief Overview of the Role of Customary Law in East Timor”, (paper presented at a symposium on East Timor, Indonesia and the Region organised by the Universidade Nova de Lisboa, July 1999) (on file with author)

Babo-Soares, Dionisio, *Law and Order: Judiciary Development in East Timor* (2001) <<http://www.caec-asiaeuropa.org/Conference/Publications/soareslaw.PDF>> at 25 June 2008

De Mello, Sergio Vieira, “How Not to Run a Country: Lessons for the UN from Kosovo and East Timor” (on file with author) (2000)

Bibliography

- Fletcher, Laurel, and Harvey M Weinstein, *Justice, Accountability and Social Reconstruction: An Interview of Bosnian Judges and Prosecutors* (2000) see http://www.law.berkeley.edu/clinics/ihr/c/pdf/JUDICIAL_REPORT_ENGLISH.pdf at 11 August 2008
- Memorandum addressed to “Members of the Theme Committee #5 of the Constitutional Assembly” from Fikile Kobese, Martin Monyela and Daniel Nina, Re Community Courts, 9 February 1995 (on file with author)
- Trindade, Josh, Open Letter to the Prime Minister of Timor-Leste, 10 August 2006 (on file with author)
- The Government of Rwanda, *Genocide and Justice* see <http://www.gov.rw/government/genocide.html> at 11 August 2008
- Republique Du Rwanda, Cour Supreme, *Mise au Point au Sujet du Rapport et Differentes Correspondences d’Amnesty International* (2003) see <http://www.inkiko-gacaca.gov.rw/pdf/repamnistry.pdf> 10 June 2008
- Verhelst, Thierry, *Safeguarding African Customary Law: Judicial and Legislative Processes for Its Adaptation and Integration* Occasional Paper, No 7 (1968) see <http://repositories.cdlib.org/international/asc/ops/verhelst/> at 23 October 2008