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PART I

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Introduction

While it was at the end of the nineteenth century that English scholar A. V. 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 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, misdescribed 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 decades of the twenty-first; in this period it developed into one of the key concepts promoted by global institutions such as the United Nations (UN) 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

¹ Dicey, *An Introduction to the Study*. See Chapter 3, section 2.2 for a brief discussion of Dicey's definition.

² Shklar, 'Political Theory and the Rule of Law', 5–6.

³ Robson, *Justice and Administrative Law*, 345. Robson also criticised Dicey for misinterpreting the English legal system: 343. See also Jennings, *The Law and the Constitution*, 54–60.

used interchangeably in this book.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 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 has overlooked 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

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 section 5 of Chapter 2. The interchangeable use of the two terms is not to imply that all transitional states are post-conflict. Indeed, those states emerging from authoritarianism have many different priorities. South Africa is primarily understood as a transitional state but the term 'post-conflict' is not inapt as conflict between the security forces of the apartheid state and the armed wings of the liberation movements did take place, albeit largely outside of South Africa. While the term 'post-conflict' will be used in this book, it is acknowledged that the term is problematic in characterising many situations, as transitions from conflict to peace are rarely clear-cut.

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. 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. During the height of decolonisation, the concept was marginalised 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. In the past, scholars and practitioners in this field have generally neglected legal pluralism and overlooked the need to consider 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. Similarly, in the past, international organisations such as the UN and the World Bank have given little consideration to legal pluralism, preferring to focus their rule-of-law efforts on formal, state institutions and state legal systems.

In many regions of the world this sidelining of legal pluralism has been a problem in that it has meant that the experiences of large swathes of the global population have been ignored. The UK's Department for International Development observes that, 'in many developing countries, traditional or customary legal systems account for 80 per cent of total cases'.⁸ This means that a sizeable proportion of the world's population relies on non-state law. For example, according to Abdullahi Ahmed An-Na'im, customary law is the most important source of law for the majority of Africans.⁹ 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.¹⁰

⁵ Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, 153–8.

⁶ Könz, 'Legal Development in Developing Countries', 96.

⁷ Teitel, *Transitional Justice*.

⁸ UK Department for International Development, *Safety, Security and Accessible Justice*, 58.

⁹ This statement is based on a survey of 15 African countries undertaken in 1997: An-Na'im, 'Protecting Human Rights in Plural Legal Systems of Africa', 47.

¹⁰ Mamdani, *Citizen and Subject*; Chanock, 'The Law Market' 279.

Indeed, in many parts of Africa, customary law is arguably enjoying a resurgence,¹¹ serving up to 90 per cent of the population.¹² In one post-conflict state, Afghanistan, the Government acknowledges that the official court system is able to resolve only approximately 10 per cent of cases.¹³ In another post-conflict state, Timor-Leste, the Government concedes that ‘a very substantial proportion of conflicts are addressed through traditional justice mechanisms’.¹⁴ This means that in these regions and post-conflict states, 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.¹⁵ For populations in these regions, their lived experience is one of ‘justice in many rooms’.¹⁶ These figures show that legal pluralism is a factor that cannot be ignored by those actors involved in promoting the rule of law.

In 2002 Rama Mani observed that, in the context of rule-of-law reform, customary law had received inadequate consideration.¹⁷ The sheer scale of legal pluralism in parts of Asia and Africa indicates that Mani diagnosed a serious problem. Since the beginning of the twenty-first century a number of organisations have been grappling to understand how legal pluralism interrelates with efforts to establish the rule of law in these regions.¹⁸ In this time practitioners in the field of transitional

¹¹ 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: Oomen, *Chiefs in South Africa*, 27. For greater explanation, see Chapter 5 below.

¹² Chirayath et al., *Customary Law*, 3.

¹³ Government of the Islamic Republic of Afghanistan (Ministry of Justice), *Justice for All*, 12.

¹⁴ Democratic Republic of Timor-Leste, *Justice Sector Strategic Plan*, 10.

¹⁵ The calculation of these percentages by international development agencies and the Afghan state assumes that if state institutions were stronger they might 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’, 1.

¹⁶ Galanter, ‘Justice in Many Rooms’. This is not to say that the prevalence of legal pluralism and informal justice mechanisms necessarily reflects popular satisfaction with the ability of these mechanisms to achieve justice.

¹⁷ Mani, *Beyond Retribution*, 80.

¹⁸ From 2004 onwards the United Nations Development Programme (UNDP) has been working on programmes to improve access to justice while in 2002 the World Bank began its Justice for the Poor programme; both programmes have partly focused on customary law because it is the avenue taken by those people who are unable or unwilling to access the formal state legal system. Other organisations have been working more specifically on the interface between customary justice and the rule of law, including the Centre for Humanitarian Dialogue (HD Centre), the US Institute of Peace (USIP) and the International Development Legal Organisation (IDLO): see, e.g., Dexter and Ntahombaye, *The Role of Informal Justice Systems*; Thorne, *Rule of Law through Imperfect Bodies*; Ranheim, *Legal Pluralism in East Timor*; Isser, *Customary Justice*

justice have begun to see the benefits of harnessing legal pluralism to prevent a state relapsing into conflict.¹⁹ In 2011 the UN finally recognised the ‘potential of informal mechanisms in strengthening the rule of law’ in post-conflict states.²⁰ At the same time the World Bank, in its *World Development Report 2011: Conflict, Security and Development* (WDR 2011), recommended that post-conflict states consider harnessing traditional justice institutions so as to supplement formal justice institutions.²¹ On this basis these international organisations have started assisting post-conflict states to build linkages between such informal justice mechanisms and the state legal system so as to give formal recognition of the fact of ‘justice in many rooms’. This gradual reconceptualisation of the rule-of-law enterprise is spreading to the field of development more broadly²² where hybridity in both political and legal orders is also becoming understood as the norm.²³

This book argues that a significant shift is taking place whereby practitioners and policymakers who promote the rule of law through national initiatives and international programmes in post-conflict and transitional countries are giving some serious consideration to legal pluralism by engaging with its dynamics. It is becoming accepted that policies and programmes that aim to advance the rule of law 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. No longer is it the orthodox view that customary law will disappear. International organisations, governments and development agencies are slowly coming to realise that they cannot continue to sidestep customary law if the rule of law is to be established. Furthermore, they are beginning to encourage and support post-conflict states to formally engage with legal pluralism as part of the state-building process.

This book focuses on the state-building process in which post-conflict states draft new constitutions in their aspiration to establish or strengthen the rule of law. Post-conflict states hope that these

and the Rule of Law; Harper, *Customary Justice*; Harper, *Working with Customary Justice Systems*; Ubink and McInerney, *Customary Justice*.

¹⁹ Huyse and Salter, *Traditional Justice and Reconciliation*.

²⁰ UN Doc S/2011/634 (12 October 2011) Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, [39].

²¹ World Bank, *World Development Report 2011*, 155, 257.

²² See, e.g., Sage et al., *Legal Pluralism and Development*.

²³ Baker and Scheye, ‘Multi-layered Justice’.

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constitutions will assist in reconciling groups, providing stability and avenues of redress and in avoiding a relapse into conflict. In this context, post-conflict constitutions are seen as tools that can both reflect the post-conflict consensus and also aim to transform it.²⁴ This book argues that, in situations where legal pluralism is strong, it is critical for post-conflict constitutions to enjoy legitimacy with those parts of the population that live outside the state's reach. One means of achieving this legitimacy is for a post-conflict constitution to articulate the state's relationship with non-state institutions and authorities. Giving constitutional attention to non-state actors can affect the state's efforts to establish the rule of law. Ideally a post-conflict constitution needs to set out guidelines and non-violent spaces through which any tensions between the rule of law and legal pluralism can be incrementally debated and reconciled. Through highlighting the multifaceted interplay between the rule of law and legal pluralism in constitutional contexts, this book aims to promote a stronger understanding of the relationship between the two concepts in post-conflict situations.

In order to reveal the complexity of the relationship between the rule of law and legal pluralism, this book turns its lens 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 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, informal law takes many forms and derives from many sources; these are variously described as 'traditional', 'customary', 'indigenous', 'living' or 'local' law and are at times used interchangeably.²⁵

South Africa and Timor-Leste are sometimes linked because they are post-colonial states that are undergoing dramatic transitions. Both countries were chosen by the World Bank to feature as models of post-conflict states in its *WDR 2011* because 'these societies have achieved considerable successes in preventing violence from escalating or recovering from

²⁴ Teitel, 'Transitional Jurisprudence', 2075.

²⁵ While this book uses a range of these terms, it does acknowledge the debates as to their appropriateness in certain contexts. In common, these terms denote that these forms of law are distinct from state law but the two forms of law are inevitably interconnected to varying degrees.

its aftermath'.²⁶ In the course of their transitions both states have experimented with similar transitional justice mechanisms, such as truth commissions, and have drafted new constitutions. In 2010 the President of Timor-Leste described to the UN Human Rights Council how South Africa provided a model to his nation in regard to transitional justice and the need to 'compromise on justice'.²⁷ He said:

South Africa is a ... recent inspiring example of how national leaders and our societies address the complex legacies of the past in creative and dignified ways that do justice to the victims, reconcile the divided communities, heal the wounds, and move on. We are not doing differently in Timor-Leste ... moving small steps at a time in building democracy and the rule of law, and a durable peace.²⁸

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.²⁹ 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.³⁰ 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. They are very different in terms of population, economy, state legal culture and infrastructure. South Africa has a population of about fifty 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 in Africa because, in contrast to most of its neighbours, it has a relatively robust economy and long-established state institutions, most of which

²⁶ They are two of the eleven post-conflict states chosen by the World Bank: *WDR 2011*, 11.

²⁷ Ramos-Horta, 'Timor-Leste: The Decade of Peace and Prosperity'.

²⁸ *Ibid.*

²⁹ South African Truth and Reconciliation Commission, *Final Report* (1998), Vol 4, Ch. 4, [18, 32].

³⁰ International Commission of Jurists and the Netherlands Institute of Human Rights, *Indonesia and the Rule of Law*, 61ff; International Commission of Jurists, *Ruler's Law*, 42–50; Amnesty International, *East Timor* (2001) 13.

have continued to play a role in the post-apartheid era.³¹ In this respect, South Africa's transition is similar to those of Latin American states from the 1980s onwards. Timor-Leste has a population of just over 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.³²

In their other key differences, South Africa and Timor-Leste are useful 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 constitutional transformation while Timor-Leste's transition to independence was largely ushered in under UN administration. Critically, South Africa's Constitution recognises legal pluralism and traditional leaders, which means that 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 had a limited formal relationship with non-state forms of law.

This book focuses particularly on one important commonality between South Africa and Timor-Leste in their promotion of the rule of law: they are both currently attempting to enhance access to justice by developing institutional links between informal customary mechanisms and state law though introducing laws to link the two systems. In South Africa such linkage laws have a long colonial history and today the process of transforming existing linkage laws is being guided by South Africa's Constitution whereas in Timor-Leste the first ever linkage law is being produced through UN assistance. This book shows that for both post-conflict states, these linkage laws pose a myriad of challenges and cannot be considered a quick fix. The geographical and institutional differences and commonalities 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 book is divided into three parts. Part I examines the globalised and conceptual relationship between the rule of law and legal pluralism and it

³¹ For a recent survey of South Africa's economy, see Organisation of Economic Cooperation and Development, *Economic Assessment of South Africa 2008*.

³² Timor-Leste is the third lowest ranked country in the East-Asia and Pacific region according to the UNDP Human Development Index 2011.