

# The Rule of Law: Theoretical, Cultural and Legal Challenges for Timor-Leste

## 1. Introduction

The ‘rule of law’ is a pervasive phrase with contrasting views and usages. This paper attempts to respond to Warren Wright’s comments that Timor-Leste’s political leaders have not always demonstrated a clear comprehension of the rule of law and essential democratic principles.<sup>1</sup> This poses two main challenges: first, the assumption that there is a clear accepted notion of the rule of law that political leaders, democratic ones at least, should understand and demonstrate in their public life; and second, as *comprehension* is the ‘capacity of the mind to perceive and understand’<sup>2</sup> it is unrealistic to speculate on the mental capacities of these leaders. Hence, this paper will focus on some theoretical and historical underpinnings of the rule of law followed by cultural, legal and leadership challenges facing post-conflict Timor-Leste. Where appropriate, the name “East Timor” will be used instead of Timor-Leste.

## 2. Comprehension of the rule of law: history and theory

The history of the rule of law spans over two millennia. Professor Tamanaha traced Greek, Roman, and Medieval underpinnings, revealing pre-modern liberal conceptions that shaped present day Western democracies.<sup>3</sup>

In 5<sup>th</sup> century BC, popular democracy in Greece required males over the age of thirty to engaged in the *polis*, the political community and to serve as magistrates in a governing Council. To ensure accountability magistrates could be charged with violations of the law following complaints by citizens.<sup>4</sup> Legislation could not be changed arbitrarily and laws were

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<sup>1</sup> Warren Wright, ‘The Rule of Law in East Timor: Death by a Thousand Cuts’ *Peace and Collaborative Development Network* (2009) <[http://www.internationalpeaceandconflict.org/profiles/blogs/the-rule-of-law-in-east-timor?xg\\_source=activity](http://www.internationalpeaceandconflict.org/profiles/blogs/the-rule-of-law-in-east-timor?xg_source=activity)> at 7 August 2010.

<sup>2</sup> The Collaborative International Dictionary of English v.0.48, *Dictionary.com* (1913 Webster) <<http://www.dictionary.net>> at 28 October 2010; entry (3) other meanings: ‘the power, act, or process of grasping with the intellect; perception; understanding; as, a comprehension of abstract principles’.

<sup>3</sup> Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (2006), 5.

<sup>4</sup> *Ibid.*, 7.

framed in general terms. Citizens enjoyed equality before the law, except women, children and slaves<sup>5</sup>.

In Roman times, Cicero emphasized that the supreme status of law was its consistency with natural law, which was the rule of reason. Law was for the good of the community and to preserve happiness. He held that harmful and unjust rules did not qualify as law and were not supreme. He did not advocate popular democracy but preferred a mixed constitution of unequal power among the classes. In its closing period, Roman law derogated from the rule of law in the *Lex Regia*, where the people purportedly granted absolute power to the ruler for the preservation of the state. In the *Corpus Iuris Civilis* (Justinian Code), law-making power was conferred upon the emperor and placed him above the law, but the law still constrained imperial conduct.<sup>6</sup>

The collapse of Roman Empire ushered the Medieval period of a 1,000 years, eclipsing the Dark Ages by several centuries. This period was characterized by marauding Germanic and Asian (Huns) tribes, and the Saracens (followers of Mohammed) who overran much of Europe. Compared to the Greco-Roman civilizations, these invasions were seen as barbarian and primitive. But, the rule of law tradition gradually emerged again during this time, through various contributing sources and in an unplanned manner. In particular, it came about in contests for supremacy between kings and popes, and Germanic customary law.

In the 6<sup>th</sup> century AD kings and emperors saw themselves as divinely ordained with authority that extended over the sacred. Conversely, popes demanded their ultimate authority over secular rulers since the sacred prevailed over the secular. Despite opposition to papal authority from monarchs, oath-taking became a ritualistic part of coronation in the 11<sup>th</sup> century. The monarch as a Christian ruler was bound by oath to a higher authority that included divine, natural, and customary law. Positive law also bound the king. Thus, in Medieval times the rule of law manifested itself in the idea of the supremacy of law.<sup>7</sup>

Germanic customary law was largely unwritten but obtained its legitimacy by ancient tradition, widespread recognition and compliance. In other words, there developed a culture

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<sup>5</sup> Ibid., 8.

<sup>6</sup> Ibid., 12-13.

<sup>7</sup> Ibid., 19-23.

of legality. The primacy of customary law did not forbid changes but it required consent from those affected by the change. The law ‘recognized’ but did not ‘create’ justice and right. The “right of resistance” existed as a check on the king’s power since breaching the law could mean rejection by his people.<sup>8</sup>

The *Magna Carta* signed in 1215, did not carry the idea of liberty for all but simply restrained the king’s land claims against powerful barons. Supporters later asserted that whilst the original participants were the king and barons, the *Magna Carta* vested interests on all free persons. In addition to subduing the king under the law, it was also credited with the right to ‘due process of law’, and overtime it extended to the ‘right to be heard’.<sup>9</sup>

From the 12<sup>th</sup> century onwards, as the social landscape of Europe began to change through the growing merchant class -- the bourgeoisie,<sup>10</sup> towns and commercial centres began to develop and the accumulation of wealth eventually undermined the feudal system. The transition into the modern era, following Renaissance and Enlightenment, experienced some challenges to the rule of law before the dawn of liberalism. Absolutist monarchies emerged during the 17<sup>th</sup> century imposing the doctrine of the “Divine Right of Kings”, positioning kings ‘above the law’, since they made the laws and were responsible only to God. Fortunately for others, in the kings’ own interests, they ruled within the restraints of law.<sup>11</sup>

Primarily, liberalism embraced *individual liberty*, the freedom of ‘pursuing our own good in our own way’ but not ‘deprive others of theirs, or impede their efforts to obtain it’.<sup>12</sup> Liberal systems and the rule of law were mutual dependent, though the rule of law could exist outside the liberal system. None of the previous historical notions of the rule of law pointed to liberal ideas. Greek and Medieval constructions advocated collective self-rule, the good of the community, or communitarianism, and constraint on rapacious rulers.

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<sup>8</sup> Ibid., 24.

<sup>9</sup> Ibid., 27.

<sup>10</sup> ‘Capitalist’ class according to Karl Marx.

<sup>11</sup> See above n 3, 28.

<sup>12</sup> John Stuart Mill, *On Liberty and Other Writings* (1989), 16.

The rise of the bourgeoisie demanded accompanied recognition and protection of interests in politics and law, hence liberalism of the pre-modern era was born in late 17<sup>th</sup> century to fill this need.<sup>13</sup>

The argument that the rule of law is necessary to protect individuals from the violence of others in society, each tending their own interests in a ‘war against each other’,<sup>14</sup> has led to the supposition that individuals ought to give up some of their freedom and self-interest, and succumb to a ‘social contract’,<sup>15</sup> which governments enforce. Ultimately, since individuals are prone to arbitrary and wanton interference at various levels: life, liberty, and property<sup>16</sup>, there is need not only for ‘a rule among citizens’ but also ‘a rule among rulers’<sup>17</sup> protecting against tyranny. Owing to its individual rights emphasis, the underlying liberal foundation is fear. Fear of interference by others and fear of the state.<sup>18</sup>

This means that all persons need to be protected by, and have obligation to law. All are destined to the rule of law in the liberal paradigm. But the rule of law is not something of a political ideal for best governance. Rather, it is the strength of its formal and substantive requirements which directs how people will govern and are governed, with the degree of certainty that allows individuals to plan their life affairs<sup>19</sup>. The business of governing often requires managerial approaches<sup>20</sup> to solve specific problems or issue directives to individuals, distinct from the generalist approach of the rule of law.

From this historical account, the rule of law is not a modern invention but has evolved over the centuries through struggles for power. Overall, even though not completely free, people

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<sup>13</sup> Among the many competing theories of liberalism are, not only politics and systems of government, but also culture, economics, psychology, ethics, and theories of knowledge.

<sup>14</sup> Thomas Hobbes, *Leviathan* (1651) Chapter XIII [8]  
<[http://www.infidels.org/library/historical/thomas\\_hobbes/leviathan.html](http://www.infidels.org/library/historical/thomas_hobbes/leviathan.html)> at 28 October 2010.

<sup>15</sup> *Ibid.*; also see above n 3,1 47. (Tamanaha)

<sup>16</sup> Augusto Zimmermann, ‘The Rule of Law as a Culture of Legality: Legal and Extra-legal Elements for the Realisation of the Rule of Law in Society’ (2007) 14 (1) *Murdoch University E Law Journal*, 10.

<sup>17</sup> Sir Ivor Jennings, *The Law and the Constitution* (5th ed, 1959), 45.

<sup>18</sup> See above n 3, 33. (Tamanaha)

<sup>19</sup> Joseph Raz, ‘The Rule of Law and Its Virtue’ (1977) 93 *Law Quarterly Review*, 195; refers to Hayek’s quote.

<sup>20</sup> David Luban, ‘The Rule of Law and Human Dignity: Re-examining Fuller’s Canons’ (2010) 2 *Hague Journal on the Rule of Law*, 41.

can benefit under a modern liberal democracy because it fosters freedom through mutual restraints, and accommodates difference and change.

## 2.1 Philosophical issues

According to Bennet<sup>21</sup> the way to understand the rule of law is to interpret it as Raz suggested, ‘literally what it says: the rule of the law’.<sup>22</sup> This is akin to ‘rule by law’, the thinner conception of the rule of law,<sup>23</sup> where the law is an instrument of government action and people are subject to the law,<sup>24</sup> the partial meaning of the German *Rechtsstaat*<sup>25</sup> (law state); this is distinct from Basic Law which contains substantive human rights<sup>26</sup>. Bennet advocates a ‘monism’ in line with Lon Fuller’s ‘formal legality’ account of law, inseparable from the rule of law,<sup>27</sup> arguing that separating the concept of law from the rule of law, a dualist position, is unhelpful. Also, according to Professor Sampford, a literal notion of the ‘rule of law’ conceived as an entity above the rule of imperfect mortals is nonsense, since laws for human consumption are not self-creating and self-enforcing edicts, they are not like the laws of gravity and thermodynamics which are discoverable,<sup>28</sup> human laws need human beings to create, interpret and enforce.<sup>29</sup>

Questioning the concept of law has contributed to a better comprehension of law. For soft positivists<sup>30</sup> like Hart, *obligation* to law challenged the Austinian hard view that law amounted to ‘commands by the sovereign backed by sanctions’;<sup>31</sup> it was counter argued that, ‘a gunman’s demand for the victim’s money could not amount to *authority* of the gunman

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<sup>21</sup> Mark Bennet, ‘“The Rule of Law” Means Literally What it Says: The Rule of Law’: Fuller and Raz on Formal Legality and the Concept of Law’ (2007) 32 *Australian Journal of Legal Philosophy*, 90-91.

<sup>22</sup> See above n 19, 196. (Raz)

<sup>23</sup> See below Table 1. *Modified Rule of Law Diagram*

<sup>24</sup> See above n 3, 91. (Tamanaha)

<sup>25</sup> *Ibid.*, 92.

<sup>26</sup> *Ibid.*, 109.

<sup>27</sup> See above n 21, 91. (Bennet)

<sup>28</sup> In some indigenous cultures laws may not be apparent but implicit.

<sup>29</sup> Charles Sampford, *Retrospectivity and the Rule of Law* (2006), 40.

<sup>30</sup> H L A Hart, *The Concept of Law* (1961), 51.

<sup>31</sup> Mark Murphy, *Philosophy of Law* (2007), 17; see also below n 50, 10. This definition of law was proposed by John Austin in 19<sup>th</sup> century.

and *obedience* by the victim',<sup>32</sup> rendering this definition untenable. It follows then that obligation to law leads to a better comprehension of the rule of law, but reaching consensus rests on what 'obligation' amounts to, and how best to achieve obligation from all sections of society.

Hence, scholars have debated the 'obligation to obey the law', and in reviewing this issue, Batnitzky<sup>33</sup> examined the claims of both Raz and Finnis. She concluded that there was agreement that law functioned as a 'co-ordinator of society' with 'general obligation to obey'. For Raz law was not a 'seamless web' connecting one to all, because this would obstruct the possibility of real pluralism. Conversely, Finnis argued that it is possible to make assumptions about human values and practical principles across communities and time.<sup>34</sup> All human societies show concern for human life and procreation, and restrict sexual activity in some way; all pursue a form of truth and display interest in co-operation; that this would have to constitute a primitive and rudimentary consensus of the rule of law.<sup>35</sup>

In sum, the dualist who is inclined to state that a bad rule violates formal legality 'violates the rule of law' (a positivist claim) is confronted with the monist (naturalist) view that 'a putative law is not law'.<sup>36</sup> It follows then that there is no point in stating that 'the rule of law is not law' or that it is separate from the concept of law, for it is trite to claim that a rule/action 'violates the rule of law' if it violates something that is not law. Therefore, it follows that the rule of law must be accepted as law, or meta-law, with authority to be obeyed. But the formulation that is best depends on how a society is composed and resourced.

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<sup>32</sup> See below n 50, 47. (Meyerson)

<sup>33</sup> Leora Batnitzky, 'A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law' (1995) 15 *Oxford Journal of Legal Studies*, 155.

<sup>34</sup> John Finnis, *Natural Law and Natural Rights* (1980), 86.

<sup>35</sup> See above n 33, 162. (Batnitzky)

<sup>36</sup> See above n 21, 92. (Bennet)

## Fuller's canons of the Rule of Law

Although formulations of the rule of law have been divided into *formal* and *substantive* notions, Professor Luban<sup>37</sup> has argued that Fuller's canons originally considered formal and procedural are essentially substantive in nature.

These canons not only govern the law-making enterprise but also impose certain conditions for practice:

1. *Generality*: laws must take the form of general rules.
2. *Publicity*: laws must be published and cannot be secret.
3. *Clarity*: laws must be comprehensible and not overly vague.
4. *Consistency*: laws must not contradict one another.
5. *Feasibility*: it must be possible for people to comply with the law.
6. *Constancy*: the law must not change too rapidly.
7. *Prospectivity*: the law cannot be retroactive - it cannot today declare yesterday's lawful behaviour unlawful.
8. *Congruence*: the law must be administered and enforced as it is written.<sup>38</sup>

In brief, Fuller's claims are:

- (i) the law is the enterprise of 'subjecting human conduct to the governance of rules'.<sup>39</sup> But Sampford claims that rules are subject to human scrutiny;
- (ii) the rule of law (formal legality, canons) enhance human dignity through an 'inner morality of law'. Luban confirms the canons deprive despotic devices of oppression and humiliation;<sup>40</sup>
- (iii) enactments that deviate significantly from the canons are not just bad law, but not law at all.<sup>41</sup> Raz claims unjust law is still law.

Luban points out that of the eight canons, *Congruence* deals with the administration of law whereas the rest deal primarily with lawmaking. This provides a standard for officials (police, judges, and arbitrators) engaged in enforcement and issuing directives, to exercise their

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<sup>37</sup> See above n 20, 29. (Luban)

<sup>38</sup> Ibid.

<sup>39</sup> Fuller, Lon L, *The Morality of Law* (2<sup>nd</sup> ed, 1969), 106.

<sup>40</sup> See above n 37, 41. (Luban)

<sup>41</sup> See above n 37, 31. (Luban)

powers impartially and fidelity.<sup>42</sup> Luban points that Raz's analysis of Congruence provides a good understanding of what it means: an independent judiciary with powers to review the actions of other institutions; adherence to procedural fairness, ready access to justice, and honest policing and prosecuting.<sup>43</sup>

### How are the 'canons' substantive?

Luban claims that when the other remaining canons are examined they form surprisingly substantive constraints on the content of law. Their 'inner morality' fosters human dignity and freedom, but not because the lawmakers are conscious of this end. Rather, it is a 'cunning of reason' which is at work.<sup>44</sup> The requirements of *clarity*, *consistency*, *feasibility*, and *prospectivity* are substantive in the sense that they constrain what the law can declare, what can be included or excluded in the *corpus juris* (body of law); it does not instruct the law-maker on how to go about making the law clear, etc., it simply states that the content must be clear.

Similarly, to say that a law cannot demand something that is inconsistent with another law in force, or to require the impossible, such as to change a person's behaviour retrospectively, places constraints on the law content and not on the procedure for enactment. As for *constancy*, it deals with the pace of change of laws; but it can be either procedural or substantive because if the law changes too rapidly, which they can do in cases where technology is concerned, the changes must be minor and easily complied with (a substantive constraint).<sup>45</sup> It is only the *publicity* requirement that appears procedural since it imposes no constraint on the content. But on close examination this too leads to content constraint, since placing laws under public scrutiny and criticism means that outrageous laws will have political consequences. Lastly, generality, does not mean that the law must apply general to everybody, but be applied to similarly situated individuals whose identity is not known in advance (or not relevant) for the purpose of enacting the law.<sup>46</sup>

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<sup>42</sup> Ibid., 33.

<sup>43</sup> See above n 19, 20. (Raz)

<sup>44</sup> See above n 37, 34. (Luban)

<sup>45</sup> See above n 37, 35. (Luban)

<sup>46</sup> See above n 37, 37. (Luban)

## Rule of law formulations

According to Tamanaha, the distinction between formal and substantive theories of the rule of law focuses respectively on (i) sources of law and formal legality, and (ii) requirements on the content of law. He cautions that this distinct should not be considered strictly dichotomous. Formal versions have substantive implications and vice-versa, as illustrated<sup>47</sup> by a slightly modified version of Tamanaha’s diagram.<sup>48</sup>

	Alternative Rule of law formulations		
	Thinner .....	To .....	Thicker
FORMAL VERSIONS:	<b>1. Rule by Law</b> - Law as instrument of government action	<b>2. Formal Legality</b> - Laws must be general, prospective, public, clear, certain...	<b>3. Democracy + Legality</b> - Consent determines content of law
SUBSTANTIVE VERSIONS:	<b>4. Individual Rights</b> - Property, contract, privacy, autonomy	<b>5. Right of Dignity and/or Justice</b>	<b>6. Social Welfare</b> - Substantive equality, welfare preservation of community

**Table 1. Modified Rule of Law Diagram**

These versions are understood to move from fewer (thinner) requirements to more requirements (thicker), with subsequent formulations being progressively cumulative (eg. ‘6. Social Welfare’ would contain 1 to 5 elements). In view of Luban’s contribution, cells 2 and 5 should overlap, and other cell combinations could also be contemplated. The ‘rule of law’ should be typically understood to include democracy, formal legality and individual rights. Without formal legality government officials can undercut the law, and without democracy formal legality loses its legitimacy.<sup>49</sup>

For those nations who accept the English legal history as their foundation, the rule of law symbolized in the *Magna Carta*, is a *grundnorm*<sup>50</sup>, the point at which ‘the enterprise of justifying legal statements must stop’. However, revising and advancing interdisciplinary

<sup>47</sup> See n 3, 92. (Tamanaha)

<sup>48</sup> See n 3, 91. (Tamanaha)

<sup>49</sup> Ibid., 99.

<sup>50</sup> Denise Meyerson, *Understanding Jurisprudence* (2007), 29; *grundnorm* is the ultimate norm in a hierarchy of norms, from ‘pure theory of law’ of Hans Kelsen; legal antecedents give law its authority.

notions can lead to a richer comprehension and adoption of the rule of law in countries without a liberal tradition. Zimmermann suggested that a ‘culture of legality’ is necessary for a successful acceptance of the rule of law but there is no one-size-fits-all solution.<sup>51</sup> This may amount to a legal pluralism that includes cultural and spiritual experiences prevalent in that society. If a ‘culture of legality’ means accepting the liberal model of the rule of law then there may be impediments to its exportation to non-Western countries. Another issue is attempts to democratize without a functional legal system. This has resulted in ‘social disorder’ in many countries including East Timor.<sup>52</sup> The HiiL<sup>53</sup> report indicated that success of the rule of law depends on the establishment of the thinner formulation and the societal conditions, such as a legal culture,<sup>54</sup> political and economic stability, and international law.

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<sup>51</sup> See above n 16, 24. (Zimmermann)

<sup>52</sup> Randall Peerenboom, ‘Human Rights and Rule of Law: What’s the Relationship?’ (2005) 36 *Georgetown Journal of International Law*, 813.

<sup>53</sup> *The Rule of Law Inventory Report*, Hague Institute for the Internationalisation of Law (HiiL), Hague Academic Coalition (2007), [5].

<sup>54</sup> Martin Krygier, ‘Marxism and the rule of law: Reflections after the collapse of communism’ (1990) 5 *Law and Social Inquiry*, 646.

## 2.2 Separation of Powers: Is it essential for the rule of law?

According to Bellamy,<sup>55</sup> representative government embodies two historical requirements for constitutionalism to operate, stated in the *French Declaration*<sup>56</sup> article 16: ‘A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.’ The doctrine of the separation of powers belongs to a tradition which perceives the constitution as a form of government, with the rule of law and the protection of rights at its core. Although the English model of the rule of law is exemplar of the liberal-democratic tradition, it is not a universal one.<sup>57</sup> The English Parliament has enjoyed absolute sovereignty which Dicey advocated as no threat to the rule of law.<sup>58</sup>

Most countries<sup>59</sup> have attained a limitation of powers on government through their written constitutions which embody the doctrine of separation of powers.<sup>60</sup> However, the English system does not have a written constitution as distinctive supreme law and Cabinet is part of the legislative branch.<sup>61</sup> Ideally, however, government should comprise separate executive, legislative and judiciary branches with independent functions to curb *ultra vires*.<sup>62</sup>

The rule of law is based on the notion that all in society including the state, are subject to the law. Bellamy identified four benefits that accompany this system, but points to two notorious problems. First, the benefits:<sup>63</sup>

1. Arbitrariness is controlled by the rule of law requiring laws to be, for instance, public, clear, constant and prospective. i.e. have formal legality.
2. Individual freedom is promoted by being able to plan life in a predictable environment.

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<sup>55</sup>Richard Bellamy, ‘The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy’ in Richard Bellamy (ed), *The Rule Of Law And The Separation Of Powers* (2004), 253.

<sup>56</sup> *French Declaration of the Rights of Man and of the Citizen of 1789*.

<sup>57</sup> See above n 17, 46. (Jennings)

<sup>58</sup> Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (1902), Part I.

<sup>59</sup> *Nationmaster.com* <[http://www.nationmaster.com/graph/gov\\_gov\\_typ-government-type](http://www.nationmaster.com/graph/gov_gov_typ-government-type)> at 30 October 2010; displays a list of all countries and their current government styles.

<sup>60</sup> See above n 17, 49. (Jennings)

<sup>61</sup> See above n 17, 62.

<sup>62</sup> See above n 17, 21.

<sup>63</sup> See n 55, 255. (Bellamy)

3. Separating functions fosters efficiency of division of labour as legislature is not involved with managerial duties.
4. Mutual accountability of the powers is safeguarded.

Second, strictly separating powers may not be practicable or possible, because:

1. When judges adjudicate they set precedents that constitute new rules which create law (case-law); similarly officials create policies and rules which implement a given law that evolve their own meaning; and the legislature cannot be certain about how the laws will be applied in particular cases. Thus, each branch of government finds itself in the role of the other to some degree.
2. Functional separation does not guarantee separation of interests and may not be enough to have different people running different agencies since they may well collaborate and act against the common good.<sup>64</sup>

Bellamy explains that these problems were originally considered by de Montesquieu and later by Madison, but were regarded as effective checking devices on the powers<sup>65</sup>. Some mutual power, for example, means that the legislature is restrained by the judiciary from enacting invalid laws.

Overall, people benefit from a liberal democracy and separation of powers because: (i) laws are created democratically, and the individual may be seen as ruler and ruled (sovereign); (ii) government officials are required to act according to pre-existing laws; (iii) individuals enjoy freedom as protections of civil rights and liberties under the law; (iv) the powers of government are restrained by separate horizontal branches of government as legislative, executive, and judicial; and vertical divisions as local, state and federal. This prevents accumulation of power in a single sphere and creates interdependence. It promotes freedom through accountability, efficiency and prediction.<sup>66</sup>

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<sup>64</sup> See n 55, 256. (Bellamy)

<sup>65</sup> See n 55, 268.

<sup>66</sup> See n 3, 34-35; see also n 2, 54, concerning *The Federalist Papers*. (Tamanaha)

### 3. Timor-Leste: history, culture, and the rule of law.

The history of Timor Leste is marred with continuous threats to its identity. As recounted by Professor Taylor, according to a Timorese myth, there existed from time immemorial a ritual ruler on whole of the Timor Island in the southern coastal plain. Prior to the Portuguese arrival in the region in 1511,<sup>67</sup> the ritual ruler reigned with three subordinate rulers, the *liurai*, each of whom exercised executive power over their own kingdom. These kingdoms consisted of territorial groups made up of princedoms and clans ruled by chiefs. At all levels of society there was a system of tributes and exchange of goods, people and sacred objects.<sup>68</sup>

Timor Island was known for its abundance of white sandalwood, a prized commodity in Indian and Persian markets coveted by the Portuguese. Chiefs who could organize labour to produce sandalwood received in exchange cloth, guns, and iron tools from the Portuguese. Thus there developed an external system of exchange of goods. This empowered coastal groups and produced changes in the distribution of power up to the 17<sup>th</sup> century.<sup>69</sup> Although the Timorese economy during this period was diverted to external needs and control, the real effects of these changes within local culture were limited. The indigenous Timorese economic, social and cultural systems were able to reproduce themselves, and this continued throughout the centuries. This is despite there being other competing colonial interests such as the *Topasse* (Dutch term for mixed-race Portuguese) and the Dominicans, who exercised considerable political and military influence. This aspect of Timorese resistance is of fundamental importance in understanding contemporary Timorese society.<sup>70</sup>

Through the 16<sup>th</sup> and 17<sup>th</sup> centuries, the Portuguese Crown had little authority on East Timor which was administratively ruled by a viceroy in Goa. The *Topasse* were the *de facto* rulers (in Solor, Flores, Timor) and challenged the viceroy's representatives when in conflict with their own interests. The first governor, Coelho Guerreiro, appointed only in 1701, began a strategy of divide and conquer characteristic of the Portuguese rule.<sup>71</sup>

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<sup>67</sup> Jose Ramos-Horta, *Funu: The Unfinished Saga of East Timor* (1987), 17.

<sup>68</sup> John G Taylor, *East Timor: The Price of Freedom* (1999), 1.

<sup>69</sup> *Ibid.*, 3.

<sup>70</sup> *Ibid.*, 9. (Taylor)

<sup>71</sup> See above n 67, 19. (Ramos-Horta)

At the end of the 19<sup>th</sup> century, faced with competition of growing European economies, Portugal attempted to boost its position by systematic exploitation of its colonies including Timor, until then only a trading post. It introduced ways of transforming subsistence economies into cash-crop systems for global markets through the use of forced labour for infrastructure.<sup>72</sup> To successfully implement development policies Portugal needed to undermine Timor's indigenous system of kinship alliances for systematic exploitation of the colony. The *liurai* united in resistance against the Portuguese but were eventually defeated in 1912. The colony was subsequently divided into administrative units which retained the 'princdoms', *sucos*, but formally abolished their kingdoms and kinship alliances. The Portuguese created two additional administrative levels: the *posto*, consisting of groups of *sucos*, and the *conselho* overseeing the *postos* via a Portuguese administrator.<sup>73</sup>

The Portuguese inspired the Dutch in a similar campaign of 'pacification' in the west part of the Timor Island, and both powers concluded border agreements in the *Sentença Arbitral* which was signed in 1915. The eastern half of the island and the enclave of Oecussi remains the present day Timor-Leste.<sup>74</sup>

Although it seemed that the Portuguese had finally established an effective colonial rule throughout East Timor, this was only superficial. The impact of cash-crop cultivation on the subsistence sector and its social effects were relatively minor. The *sucos* persisted with their alliances with the *liurais* (*régulos*) and the colonial and indigenous legal systems continued to co-exist.<sup>75</sup>

During the fascist regime in Portugal (1928-1974) spearheaded by Salazar, the *Estado Novo* (New State) began to formalize its 'civilization mission'. It created new institutions between the colonies and the *patria* (fatherland). The Portuguese *Colonial Act 1930*<sup>76</sup> centralized political control of all overseas territories under direct rule of Lisbon, which created legislative councils to represent local Portuguese interests: the administration, the Catholic

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<sup>72</sup> See above n 68, 10. (Taylor)

<sup>73</sup> *Ibid.*, 11.

<sup>74</sup> *Ibid.*, 12.

<sup>75</sup> *Ibid.*, 12.

<sup>76</sup> *Acto Colonial 1930* (2003-2010) Porto Editora <[http://www.infopedia.pt/\\$acto-colonial-1930](http://www.infopedia.pt/$acto-colonial-1930)> at 15 November 2010.

Church, Portuguese plantation owners, and the army.<sup>77</sup> The Act also created two categories of people: *indigenes* (indigenous) and *não indigenes*. In the second category were the *mestiços* (part-Portuguese) and the *assimilados* ('assimilated' natives). To attain the *assimilados* status a Timorese had to speak Portuguese, be able to support their family, and possess good character. These discriminatory policies were to have a profound effect on the indigenous political elites during the post Pacific War period and the later struggle for independence. Of similar importance and powerful influence on Timorese was the corporatist colonial system which incorporated the Catholic Church in charge of colonial education under state supervision.<sup>78</sup>

The fascist rule continued until in 1974 when it came to an abrupt end by a peaceful military coup, appropriately named the "Carnation Revolution".<sup>79</sup> It succeeded in deposing Marcello Caetano (Salazar's successor) and restoring democracy in Portugal. This brought about an end to the colonial wars in the overseas *estados* (overseas provinces) and launched the process of decolonization and independence.

Despite attempts at transformation during the colonial period and occupation, indigenous local law, *adat*, remained firmly in place in East Timor, and formal legal systems co-existed with local practices. The Portuguese were mainly interested in trade, the prevention of large-scale conflict, and in collecting taxes to finance the empire. They ruled through a system of 'indirect colonial rule' which conferred military power on local chiefs who returned strong loyalty to Portugal and provided law and order at the local level. This permitted the local law to continue with little interference.<sup>80</sup> However, indigenous dispute resolution approaches were considered inferior by colonial standards. Western-style courts were introduced to deal with serious cases and this resulted in a dual system of justice.<sup>81</sup> The Portuguese rule could be seen as 'rule by law' and the indigenous system as a complex of cosmic and communitarian rights and obligations, with the *liurai* as ritual authorities.

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<sup>77</sup> Ibid., 13. (Taylor)

<sup>78</sup> Ibid., 13.

<sup>79</sup> See above n 67, 26; "*Revolução dos Cravos*". (Ramos-Horta)

<sup>80</sup> Laura Grenfell, 'Legal Pluralism and the Rule of Law in Timor Leste' (2006) 19 *Leiden Journal of International Law*, 314.

<sup>81</sup> Tanja Hohe and Rod Nixon, *Reconciling Justice: 'Traditional' Law and State Judiciary in East Timor* (2003) [26] <<http://www.gsdr.org/docs/open/DS33.pdf>> at 7 December 2010.

## Indonesia's legacy and the UN

Unfortunately, despite claiming its independence, East Timor was invaded by Indonesia in 1975. The UN did not recognize Indonesia's sovereignty over the territory which remained on the General Assembly list of Portugal's 'non-self governing territories'. However, the invasion was not condemned<sup>82</sup> as an act of aggression or a breach of Article 2 (4) of the UN Charter.<sup>83</sup> The international community took no stance in view of the potential threat to Western interests in Indonesia, and the US even supplied armaments.<sup>84</sup> The situation only changed in the late nineties when a quick change of fate marked by Suharto's departure and Habibie's rise to power in Indonesia, and pressure from key political players, compelled the government to an offer of a referendum to decide the future of East Timor.<sup>85</sup>

During the Indonesian occupation local traditional institutions were not permitted to operate unless adopted by Indonesia's national legislative council. The Timorese avoided the formal legal system due to widespread arbitrariness, violence, and corruption. Police were seen as law-makers and enforcers, and the rule of law was not understood nor respected. Local law and Indonesian law worked in parallel without recognising each other.<sup>86</sup>

The Indonesian occupation marked East Timor's darkest period in history, with systematic and brutal attempts at annihilation through military terror campaigns: the *operasi*. These included bombings, starvation, disappearances, widespread imprisonment, and 'established procedures'. The latter involved the use of routine torture beginning with interrogation and classification, then decision to murder, imprison or release. The severity of torture increased as the occupation progressed.<sup>87</sup>

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<sup>82</sup> See above n 67, 106. (Ramos-Horta)

<sup>83</sup> *Charter of the United Nation (1945)*, article 2 (4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>84</sup> See above n 67, 91. (Ramos-Horta)

<sup>85</sup> Jani Purnawanty, 'Various Perspectives in Understanding the East Timor Crisis' (2000) *Temple International & Comparative Law Journal*, 66. This author should be viewed with great caution, many of his assertions come from *The Jakarta Post* and contradict other scholars on the subject. There is confusion on the exact position the author has taken.

<sup>86</sup> See above n 80, 315. (Grenfell)

<sup>87</sup> See n 68, 106. (Taylor)

An independent statutory commission known as CAVR<sup>88</sup> was established in July 2001 by the transitional administration UNTAET<sup>89</sup> to inquire into the conduct of both sides over the past 25 years. It completed a stark report in 2005 entitled *Chega!* which is over 2,800 pages long with around 8,000 testimonies;<sup>90</sup> *inter alia*, it covers reconciliation and truth-seeking on human rights violations between 25 April 1974 and 25 October 1999.

Among the vile assortment of torture reported by CAVR was the use routine sexual torture and rape by the Indonesian military. This included burning of genitals with cigarettes and application of electric shocks, and the use of snakes to inflict extreme terror on the victim. Men were also raped in the context sexual torture. According to the report:

The evidence also demonstrates how acceptance of abhorrent practices by commanders and officials encourages those under their command and control to continue and expand the use of such practices. The victims' testimonies clearly show that there was a widely accepted practice for members of the security forces to rape and sexually torture women while on official duty, in military installations and other official buildings.<sup>91</sup>

On 30 August 1999, a UN mission called UNAMET<sup>92</sup> supervised the referendum where the East Timorese rejected the special autonomy proposal and voted overwhelmingly for independence. The events immediately prior to and post referendum in 1999 marked another dark period of intense violence, propaganda, and terror intended to annihilate the country and fool the world. Ten of thousands of people suffered forced deportation.

*Masters of Terror*<sup>93</sup> documents the perpetrators' planning and execution of gross violations of human rights and humanitarian law in East Timor, in 1999. This is shown to have been orchestrated by elite members of the Indonesian Army (TNI)<sup>94</sup> including generals, majors and commanders. It involved direct violence from pro-integration militia who were trained and

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<sup>88</sup> *Comissão de Acolhimento, Verdade e Reconciliação* (Commission for Reception, Truth and Reconciliation in East Timor).

<sup>89</sup> UN SCOR, 4045<sup>th</sup> mtg, UN Doc S/RES/1264 (1999).

<sup>90</sup> The CAVR Report, *Chega!* <<http://www.cavr-timorleste.org/en/cheгаReport.htm>> at 27 September 2010.

<sup>91</sup> *Ibid.* Chapter 7.7: Sexual Violence, 11.

<sup>92</sup> UN SCOR, 4013<sup>th</sup> mtg, UN Doc S/RES 1246 (1999); United Nations Assistance Mission in East Timor.

<sup>93</sup> Hamish McDonald and Richard Tanter, 'Introduction' in Richard Tanter, Desmond Ball, and Guerry Van Klinken (eds) *Masters of Terror: Indonesia's Military and Violence in East Timor* (2006), 2-4.

<sup>94</sup> Tentara Nasional Indonesia (Indonesian National Armed Forces).

assisted by police, military and governing officials in East Timor. The large scale attacks on the population had three distinct phases:

- 1) To defer holding the referendum (by making East Timor unsafe).
- 2) If this failed, to intimidate the population into a pro-integration vote by fear.
- 3) Finally, to discredit the result of the ballot by orchestrating a violent exodus of people into neighbouring regions and West Timor.

McDonald and Tanter claimed that this crime was more than a series of massacres and murders, torture, rape, and violent assault. It involved mass deportation and flight of three quarters of the population by September 1999, the systematic destruction of the territory's infrastructure and housing stock, and the elimination of religious institutions. It was a full frontal attack on democracy, freedom, and rule of law, an evil attempt at destroying an emerging nation.<sup>95</sup>

On 15 September 1999, the UN Security Council acted on Resolution 1264<sup>96</sup> under Chapter VII of the UN Charter the establishment of INTERFET, a multinational peacekeeping force led by Australia.<sup>97</sup>

After Indonesia's formal recognition of the outcome of the referendum, UNTAET was established to exercise all administrative, legislative and judicial powers in East Timor, a unique undertaking in UN history. It was responsible for security and law and order throughout East Timor and the establishment the "hybrid" tribunals: the Serious Crimes Unit (SCU) with unlimited temporal jurisdiction to prosecute serious crimes;<sup>98</sup> and the Special Panels (SP) dealing with other crimes. It also mandated the Public Defenders' Office. SCU was restricted to crimes committed during 1999 due to lack of resources and destruction of evidence.<sup>99</sup> SCU and CAVR reflect the dual system of justice based on formal (international

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<sup>95</sup> See above n 93, 11. (Tanter)

<sup>96</sup> See above n 89. (SCRes 1264)

<sup>97</sup> Daniel Flitton, 'Australia's Shame over East Timor' *TheAge.com.au* (2008) <http://www.theage.com.au/opinion/australias-shame-over-east-timor-20080714-3f1p.html> at 27 September 2010.

<sup>98</sup> Namely: genocide, war crimes, crimes against humanity, and torture; also murder and sexual offences; covering only the period 1 January and 25 October 1999 conflict.

<sup>99</sup> Cheah Wui Ling, 'Forgiveness and Punishment in East Timor' (2005) 10 *UCLA Journal of International Law & Foreign Affairs*, 326.

criminal law) and local law (indigenous-religious justice), respectively. *Chega!* section 7.1 recommended that the tribunal mandates, which came to an end in May 2005, be renewed and resources increased to continue investigations and try cases.

After three years of UN transitional administration under Vieira de Mello<sup>100</sup> East Timor gained its independence in May 2002<sup>101</sup> and was renamed Timor-Leste. During this time the rule of law was not as expected, although the administration was described as a “benevolent despotism”. One of the criticisms was the lack of detailed human rights obligations and accountability of UN peacekeeping operations suggesting that a bill of rights be attached to its future missions.<sup>102</sup>

UNMISSET<sup>103</sup> was established in 2002 to provide further operational assistance towards self-sufficiency until 2005, but this was extended to 2006.<sup>104</sup> Thereafter, the UN has continued peacekeeping, justice monitoring, and co-ordination of funding programmes through UNMIT.<sup>105</sup>

In 2002, the key suspects in the crimes against humanity in East Timor were tried in an Indonesian *ad hoc* court. Only a few were sentenced, most were acquitted. Of those sentenced all but one were acquitted on appeal.<sup>106</sup> The trials were the result of devastating investigations by a special team of the Indonesian National Human Rights Commission KPP HAM<sup>107</sup> and UNCHR<sup>108</sup> in November 2000. Also because of intense pressure from foreign governments, the UN, and human rights groups, which have since quietened down.

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<sup>100</sup> Boris Kondoch, ‘The United Nations Administration of East Timor’ (2001) 6 *Journal of Conflict & Security Law*, 246, 248.

<sup>101</sup> Damien Kingsbury, *East Timor: The Price of Liberty* (2009) [EBL], 37-43.

<sup>102</sup> Carla Bongiorno, ‘A Culture of Impunity: Applying International Human Rights to the United Nations in East Timor’ (2002) *Columbia Human Rights Law Review*, 623, 677.

<sup>103</sup> UN SCOR, 4534<sup>th</sup> mtg, UN Doc S/RES/1410 (2002); United Nations Mission of Support in East Timor.

<sup>104</sup> This was replaced by UNOTL (United Nations Office in Timor-Leste) until 2006.

<sup>105</sup> UN SCOR, 5516<sup>th</sup> mtg, UN Doc S/RES/1704 (2006); United Nations Integrated Mission in Timor-Leste.

<sup>106</sup> See above n 93, 8. (Tanter)

<sup>107</sup> National Commission of Inquiry on Human Rights Violations in East Timor (*Komisi Penyelidik Pelanggaran HAM di Timor Timur*) established by Komnas HAM (*Komisi Nasional Hak Asasi Manusia*) on 22 September 1999.

<sup>108</sup> United Nations Commission on Human Rights; there was also an International Commission of Inquiry on East Timor, a panel of five jurists under authority of the UNCHR.

Whilst the Indonesian trials are a ‘slap on the face’ of the rule of law, some East Timorese victims have sought compensation at international forums such as in the US. Though the glimmer of hope was short-lived, perpetrators contemplating landing in the US may face the threat millions of dollars in victim compensation claims.

### *Doe v Lumintang*<sup>109</sup>

According to the provisions of two US laws, the *Alien Tort Claims Act 1789* (known as the ATS)<sup>110</sup> and the *Torture Victim Protection Act 1991*, courts can assert universal jurisdiction based on the universally accepted right to be free from torture. For the purposes of civil liability, the torturer is like the pirate and slave trader, *hostis humanis generis*, “an enemy of all mankind”.<sup>111</sup>

Since 1979, a series of civil actions in the US courts has offered a viable alternative to prosecution in domestic courts or international tribunals, which can be difficult due to legal and political vagaries.<sup>112</sup> Civil remedies are intended to express moral outrage for particular egregious conduct and to act as a deterrent of future behaviour.<sup>113</sup> At the time of this suit, East Timor and the UN had not set up the tribunals.

The case *Doe v Lumintang* involved six plaintiffs of East Timor, two of whom were murdered by the Indonesian military in 1999. Their real names of plaintiffs have been protected in the case reports, and they are not all related:

Jane Doe, 56, lost her house in the 1975 invasion and again in 1999 her home and community were destroyed. An Indonesian soldier warned that she would be killed after the ballot and forced her to flee to West Timor. Her son John Doe 1 was shot in the leg and later died in Dili from the infected wound. John Doe 2 was beaten on the face with a rifle and lost his leg after being shot for allegedly carrying packet of biscuits to the Falintil resistance. John Doe 3 was constantly threatened and put under surveillance because of his human rights involvement.

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<sup>109</sup> *Doe v. Lumintang* (2000), <<http://www.etan.org/news/2001a/10lumjudg.htm>> at 20 November 2010; *Doe v Lumintang* (2005), No. 04-7212, United States Court of Appeals for the District of Columbia Circuit, U.S. App.

<sup>110</sup> *Alien Tort Statute*

<sup>111</sup> See above n 93, 161. (Tanter)

<sup>112</sup> *Ibid.*, 160.

<sup>113</sup> *Alien Tort Claims Act 1789* (US), s 1350.

John Doe 5 was arrested and later his father John Doe 4, who had also been beaten, received a letter from a militia member telling him he had witnessed John Doe 5's torture, mutilation, execution and burning. He was first shot in the legs and then repeatedly stabbed; while still alive the Indonesian torturers severed his hand and ear, later his throat, and burnt his remains.<sup>114</sup>

The Plaintiffs claimed that Lieutenant General Lumintang had 'command responsibility' as a deputy chief of staff of the Indonesian Army in 1999. That placed him in a position of great public trust and responsibility. He had failed to take steps to exercise his legal authority and capacity to prevent, limit or punish criminal conduct of the Indonesian Army. As a result of his dereliction of duty he caused the plaintiffs enormous detriment and loss. Under the doctrine of command responsibility, the commander may be held responsible for acts even though the commander does not participate in any criminal actions. As emphasised in *Kadic v Karadzic*, "international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of atrocities."<sup>115</sup>

The case needed to show Lumintang's responsibility for the wrongs in East Timor, matters of fact and of law. Since most of the city was destroyed after the ballot it was difficult to gather much evidence. But in the charred remains of buildings, two critical pieces of evidence were collected by the East Timor human rights organization (Yayasan HAK), that tied Lumintang to the atrocities: a telegram and secret warfare manual. The telegram directed several commanders to 'be ready to confront all possibilities in the choice of options' and to use 'repressive/coercive actions as well as plans for moving back/evacuation' if this became a choice. What is odd about these orders is the scale of the operations. It was pre-emptive of violence on a massive scale that would not have been possible by the militia without professional military assistance, in the event of a vote for independence. The secret warfare manual was signed by Lumintang. It contained techniques taught to Kopassus<sup>116</sup> troops, on how they were to be tested on paper and on the field. The techniques included: war of

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<sup>114</sup> See above n 109, 38-98.

<sup>115</sup> 70 F.3rd 232 (2nd Cir. 1995), 242.

<sup>116</sup> Special Forces Command (feared elite forces).

nerves, propaganda, abduction, terror, agitation, sabotage, infiltration, surveillance, wiretapping, photo intelligence, and psychological operations.<sup>117</sup>

Lumintang could have done the following to protect himself from liability:

- investigated widespread allegations of extrajudicial killings;
- informed his superiors that the training manuals supplied by Army Headquarters used illegal methods under Indonesian and international law;
- initiated alternative non-criminal approaches to realizing TNI goals in East Timor;
- resigned from his position and made his reasons public.<sup>118</sup>

Judge Kay in the Federal District Court of Columbia awarded the six plaintiffs compensatory damages of \$6 million in total, and punitive damages \$60 million in total.<sup>119</sup>

In 2004, in the same Court, Judge Kessler decided that the Court did not have ‘personal jurisdiction’ over the defendant, even though he was served with a summons in a US airport waiting to board. Lumintang’s motion to set aside the default judgment was granted. Judge Kay’s report, recommendation and judgment on damages against him were overturned.<sup>120</sup>

The problem with this ruling suggests that application of the law in the US courts can be unpredictable and lacking in congruence. Precedent cases, for example, *Filartiga v Pena-Irala*<sup>121</sup> under the ATS, two Paraguayans succeeded against a former police chief resident in the US; he had tortured and murdered a member of their family. Other cases did not involve US residents, perpetrator visitors have also been prosecuted.<sup>122</sup> This would have indicated a similar result in *Lumintang*. The present situation is confusing and disturbing since restorative justice for victims is part of the local law in Timor-Leste, for less serious crimes. As it stands, this decision ignores substantive human rights and to some extent promotes a culture of impunity. It disrespects the rule of law at the thicker end of the spectrum (in Tamanaha’s schema); and creates distasteful false expectations of compensation. Prior to *Lumintang* there had been a series of cases to guide judicial decision-making -- *Filartiga* was

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<sup>117</sup> See above n 93, 167. (Tanter)

<sup>118</sup> See above n 93, 168.

<sup>119</sup> See above n 109, ‘III. Damages’.

<sup>120</sup> *The Centre for Justice and Accountability* < <http://www.cja.org/article.php?list=type&type=50> > at 22 November 2010.

decided in 1980. Issues of jurisdiction should have been clarified years ago, having regard to the universal jurisdiction assumed by US courts. This raises other issues. Whether this situation permits *erga omnes* obligations of international law to be violated, and whether the rule of law should stipulate another canon: *unconscionability*, to counteract mere procedural reasons for appeals.

#### 4. Timor-Leste's Constitution, the rule of law and political leaders

Timor-Leste boasts an impressive formal Constitution which came into force on 20 May 2002 upon international recognition of its Independence.<sup>123</sup> It contains a Preamble in plain language and seven major Parts with a total of 170 sections. Although the UNTAET attempted wide consultation through 13 district commissions, the people felt that there were areas that not adequately covered, for example, family.<sup>124</sup>

Part I lists the fundamental principles that constitutes the nation and advocates the rule of law. Part II describes fundamental rights of citizens; Part III creates the organization of political power; Part IV outlines economic and financial organization; Part V covers national defence and security; Part VI guarantees revision of the Constitution, and Part VII has transitional provisions of the institutions existing prior to the Constitution.

The rule of law is mentioned twice in Part I of the Constitution. In the Preamble it refers to the need to build a democratic State “based on the rule of law where respect for the Constitution, for the laws and for the democratically elected institutions constitute its unquestionable foundations”. Part III s 67 provides the sovereign organs of government shall comprise the President of the Republic, the National Parliament, the Government and the Courts. Section 69 stipulates full separation of powers in the observance of ‘the principle of separation and interdependence of powers established in the Constitution’. But s 96 states that the National Parliament may authorise the Government to make laws on a number of matters

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<sup>121</sup> 630 F.2d 876 (2d Cir. 1980);

<sup>122</sup> Sandra Colive, Jennie Green, and Paul Hoffman, ‘Holding Human Rights Violators Accountable by Using International Law in US Courts: Advocacy Efforts and Complementary Strategies’ (2005) 19 *Emory International Law Review*, 176.

<sup>123</sup> *Constitution of the Democratic Republic of East Timor 2002* [s 170] <<http://www.etan.org/etanpdf/pdf2/constfnen.pdf>> at 20 August 2010.

<sup>124</sup> Alipio Baltazar, ‘An Overview of the Constitution Drafting Process in East Timor’ (2004) 9 *East Timor Law Journal*.

including civil and criminal procedure. Similarly, under s 85 (i) the President has law-making power and has exercised it by issuing a decree pardoning war criminals, in 2008.<sup>125</sup>

According to reporter Lindsay Murdoch, President Ramos-Horta was quoted saying at the 10<sup>th</sup> anniversary of the referendum, that ‘the Timorese must forgive Indonesians who “committed heinous crimes against us”’,<sup>126</sup> and therefore there would be no international tribunal for prosecutions. The perpetrators are “the ones who have to live with these crimes and the ghosts of their victims haunting them for the rest of their lives”. He also stated that the tens of millions of dollars spent on the SCU and Panels could have been spent on training of the young judiciary; and that as Indonesia consolidates its democracy and rule of law it would bring to justice those who committed serious crimes in Indonesia and East Timor between 1974 and 1999.

Clearly, this falls short of the rule of law, it breaches ss 67 and 69 and disregards the role of Courts and the Judiciary under s 118 to ‘administer justice in the name of the people’. Also, it is inappropriate for the President to assume that justice will trickle-down to Timor-Leste as Indonesia matures democratically.

Another incident causing outrage was the release of Maternus Bere<sup>127</sup>, a Timorese-Indonesian war criminal responsible for a massacre of pro-independent supporters and priests in a church, in 1999. Bere returned “home” to attend his father’s funeral in 2009 and was spotted praying at the same church in Suai, where the massacre took place. He was subsequently arrested. Unfortunately, Prime Minister Gusmão was forced to deliver him to the Indonesian embassy after diplomatic blackmail ensued.

Section 35 (1) of the Constitution states that ‘extradition shall only take place following a court decision’. Section 9 (2) provides that international rules in ‘conventions, treaties and

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<sup>125</sup> Presidential decree N° 53/2008 of 19 of May.

<[http://www.eastimorlawjournal.org/Presidential Decrees/Decree of the President 53 of 2008 presidential pardons.html](http://www.eastimorlawjournal.org/Presidential_Decrees/Decree_of_the_President_53_of_2008_presidential_pardons.html)> at 30 October 2010.

<sup>126</sup> Lindsay Murdoch, ‘Forgive Indonesian crimes, Ramos-Horta urges East Timorese’ *Sydney Morning Herald* (Sydney) 31 August 2009, <<http://www.smh.com.au/world/forgive-indonesian-crimes-ramoshorta-urges-east-timorese-20090830-f402.html>> at 7 September 2010.

<sup>127</sup> Lindsay Murdoch ‘How an alleged war criminal in East Timor escaped justice’ *Brisbane Times* (Brisbane), 5 November 2009, <<http://www.brisbanetimes.com.au/opinion/politics/how-an-alleged-war-criminal-in-east-timor-escaped-justice-20091105-hyn1.html>> at 7 September 2010.

agreements shall apply in the internal legal system of East Timor' following their ratification. War criminals must be prosecuted in accordance with international law, in any case.<sup>128</sup> Further, Indonesia violated Timor-Leste's sovereignty by demanding the release of Bere and causing its leaders to breach section 2.

In 2006, a crisis arose after the then Prime Minister Mari Alkatiri dismissed 600 Falintil troops due to a strike for alleged discrimination against them. The army faction loyal to Alkatiri turned on the strikers and later shot dead unarmed police. There were also allegations of corruption involving petroleum companies and accusations of nepotism, against Alkatiri.<sup>129</sup>

Under s 6 (b) the objective of the state shall be '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'. Equality before the law is protected in Part II s 16 (1) 'All citizens are equal before the law'. Alkatiri was asked by Prime Minister to resign or be sacked given the seriousness of the allegations, but this action was criticized as being unconstitutional.<sup>130</sup>

In 2005, *Chega!* recommended an international war crimes tribunal which was opposed by the then President Gusmão, fearing "opening wounds" and threatening the fragile peace with Indonesia. CAVR personnel reported that participants gained relief from having their experiences recognized through the truth and reconciliation process, and naturally they welcome the tribunal.<sup>131</sup> Notwithstanding, some independent mental health workers reported that "opening wounds" can worsen symptoms of trauma survivors who comprise most of the population.<sup>132</sup>

Clearly, the Constitution of Timor-Leste is a fine example of the rule of law towards the 'thicker formulation' as it guarantees substantive rights which other constitutions omit. Its

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<sup>128</sup> Ilias Bantekas and Susan Nash, *International Criminal Law* (2007), 567.

<sup>129</sup> Peter Westmore, 'Timor crisis - Alkatiri's murky role' *News Weekly*, 10 June 2006, <[http://www.newsweekly.com.au/articles/2006jun10\\_edit.html](http://www.newsweekly.com.au/articles/2006jun10_edit.html)> at 10 September 2010.

<sup>130</sup> Michael Jones, 'Roles of The President And The Prime Minister in the Current Constitutional Crisis in East Timor' (2006) 6 *East Timor Law Journal*.

<sup>131</sup> Amnesty International, *Timor-Leste: 'We cry for justice': Impunity persists 10 years on in Timor-Leste* (2009) [4.3] <<http://www.amnesty.org/en/library/info/ASA57/001/2009/en>> at 15 September 2010.

<sup>132</sup> Derrick Silove, Anthony B Zwi and Dominique le Touzey, 'Do truth commissions heal? The East Timor experience' (2006) *The Lancet*, 1222.

format engenders understanding and its mandates are feasible. It is unfortunate that these political leaders have not demonstrated unequivocal compliance with its mandates.

### Challenges of Local law

In the past East Timor has maintained legal pluralism based on formal and local laws, and this trend persists to the present day.<sup>133</sup> But local law, which fills the gaps of the formal system, creates inconsistency and lacks uniformity of application, since different *sucos* have different remedies.

Section 2 (4) of the Constitution provides that 'the State shall recognise and value norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing with customary law'. Unfortunately, this does not provide for the method of incorporation into the formal system. Grenfell argues that there are two paths for legal pluralism to operate. One is to integrate local law into the formal system, and the alternative is to run a recognised parallel system with a common appeals process at the apex.<sup>134</sup> Both paths pose challenges. Codifying local rules ensures consistency and congruence for the rule of law. But this is an expensive and time-consuming undertaking since it requires anthropological expert work to extract common strands and principles from the local systems. Another problem is distortion of the rules since codification can de-emphasise the communitarian benefits and overemphasise patriarchal features.<sup>135</sup>

A dual path appears a feasible option for East Timor since it preserves the dynamic nature of local dispute resolution but allows for formal appeals. The benefits are: speed, accessibility, restorative justice, and low cost of local dispute resolution. Sensitivity to local context, acceptance of the resolution by *suco* councils, and promotion of reconciliation, are also important benefits.<sup>136</sup> The drawbacks can be: inconsistency of outcome, system open to corruption, enforcement problems, and practices that can fall below international human rights standards, particularly in relation of women's treaty rights and under-representation in local law councils.<sup>137</sup>

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<sup>133</sup> See above n 80, 313. (Grenfell)

<sup>134</sup> *Ibid.*, 328.

<sup>135</sup> Grenfell cites South African case *Bhe v Magistrate Anor* where customary law was distorted by codification.

<sup>136</sup> See above n 80, 318. (Grenfell)

<sup>137</sup> *Id.*

With respect to international law, East Timor is a monist country under s 9 (3) which means ratified treaties are directly binding, thus local laws need to be compatible with human rights treaties. Section 23 provides that interpretation of fundamental rights enshrined in the Constitution shall not exclude other rights and ‘shall be interpreted in accordance with the Universal Declaration of Human Rights’. Local law compensation in relation to gender based crimes is a problem, for example, renegeing on a marriage promise is considered more serious than violent rape, and these are treated as property offences, where the victim’s family receives the compensation, not the victim.<sup>138</sup> This situation needs reform since s 17 states: ‘Women and men shall have the same rights and duties in all areas of family, political, economic, social and cultural life’.

The Timor-Leste’s government needs to enact legislation setting out judicial guidelines for whether and when local law can be used. This should address the use of local law as criminal defences, grounds for dismissing a case, to mitigate a sentence, or sentencing generally.<sup>139</sup> This would ensure the formal legality canon of congruence and safeguard s 120 of the Constitution that, “The courts shall not apply rules that contravene the Constitution or the principles contained therein.”

There is also the crime of sorcery not recognized by the formal system, and for which murders and punishments are discharged in local law.<sup>140</sup> In general, equality before the law does not fit the experience of most Timorese who have never lived in a democratic society and whose expectations has always been unequal treatment, both in the indigenous community made up of distinct layers (*castas*) and past foreign domination and racism.<sup>141</sup>

These situations exemplify serious problems for the nascent democracy striving to achieve the mandates of the Constitution. This would have triggered Warren Wright’s comments. But this has to be kept in context of a new democratic post-conflict nation with teething problems, with cultural, legal, and language challenges (it operates in four official languages). It also faces international double standards. It is noted that other criminal tribunals received better

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<sup>138</sup> Ibid., 321. (Grenfell)

<sup>139</sup> Ibid., 322.

<sup>140</sup> David Mearns, ‘Variations on a theme: Coalitions of Authority in East Timor’ (2001) *Australian Legal Resources International*, 20.

<sup>141</sup> Ibid., 23.

funding, the ICTY received US\$223 million whereas East Timor hybrid Panels, only US\$6.3 million.<sup>142</sup>

### Transitional justice and impunity

Transitional justice is ‘justice adapted to societies transforming themselves after a period of pervasive human rights abuse’.<sup>143</sup> This can be quick or cover many decades, but usually involves various stages: criminal prosecutions, truth commissions, reparations, gender justice, security systems reform and memorization (museums and memorials). Timor-Leste’s post-conflict transitional justice has only been partly realised by SCU and CAVR. The fact that the main culprits of the violence have not been prosecuted is of grave concern to the population. Indonesia has refused to recognize SCU jurisdiction,<sup>144</sup> and invoked *prospectivity* of law to invalidate the *ad hoc* court’s indictments.<sup>145</sup> Notwithstanding, transitional justice, involving judicial and non-judicial responses, is critical in reclaiming the rule of law, but its role is to facilitate change rather than secure stability and certainty; reconstruction and nation building seem to take priority.<sup>146</sup>

Fernandes argues that amnesties for crimes against humanity engender politics of impunity. The *Rome Statute*<sup>147</sup> affirms that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ and the most effective prevention of these crimes in the future, is prosecution.<sup>148</sup> Despite the challenges, the trend in post-conflict transition justice has been (since early the 1990’s) to conduct criminal prosecutions of some atrocity perpetrators involving large-scale violence against civilians.<sup>149</sup>

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<sup>142</sup> Suzanne Katzenstein, ‘Hybrid Tribunals: Searching for Justice in East Timor’ (2003) 16 *Harvard Human Rights Journal*, 245, 258.

<sup>143</sup> *International Centre for Transitional Justice* <<http://www.ictj.org/en/tj/>> at 8 December 2010.

<sup>144</sup> Geoffrey Robinson, “*If you leave us here, we will die*”: *how genocide was stopped in East Timor* (2010), 214.

<sup>145</sup> See above n 99, 337. (Ling)

<sup>146</sup> UN Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies* (2004) <<http://www.undemocracy.com/S-2004-616.pdf>> at 20 November 2010.

<sup>147</sup> *Rome Statute of the International Criminal Court 1998*, Preamble.

<sup>148</sup> Clinton Fernandes, ‘Indonesia and East Timor: Against Impunity, For Justice’ *Austral Policy Forum* (2008) <<http://hass.unsw.adfa.edu.au/staff/Documents/Against%20Impunity.pdf>> at 20 August 2010.

<sup>149</sup> Jane Stromseth, ‘Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?’ (2009) 1 *Hague Journal of the Rule of Law*, 88.

If Timor-Leste leaders persist on wholesale forgiveness of serious crimes, they may face ostracism from both international and local communities. Forgiveness, according to biblical<sup>150</sup> and reconciliatory justice requires acknowledge of wrongdoing and repentance. This has been part of the reconciliatory process aiming at reintegrating offenders back into society.

According to Robinson, there are three problems with the current situation: (i) Indonesia's lack of co-operation and impunity; (ii) reluctance of Timor-Leste leaders to take primarily responsibility for prosecution; and (iii) the UN Security Council not accepting responsibility for prosecution.<sup>151</sup>

### ***Aut dedere aut judicare* : extradite or prosecute**

This principle in international law obligates States to prosecute international criminals. *Aut dedere aut judicare* is found in various international instruments: the *Geneva*<sup>152</sup>, *Genocide*<sup>153</sup> and the *Torture*<sup>154</sup> Conventions. The widespread ratification of these treaties demonstrates universal condemnation for certain crimes and forms customary international law.<sup>155</sup> Blanket amnesties foreclosing criminal prosecution violate the *erga omnes* nature of these obligations. Notwithstanding, the transition from authoritarian/military rule to democratic civilian rule is rarely achieved without promises of amnesty. Amnesties have also been used by international mediators engaged in conflict resolution.<sup>156</sup> Clearly, there needs to be better standards and principles for conflict prevention, prosecution, and post-conflict transitional justice mechanisms, to avoid continuous threats to peace and stability.

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<sup>150</sup> 1 John 1:9; Matthew 6:12 (The Lord's Prayer); James 5:16.

<sup>151</sup> See above n 144, 215. (Robinson)

<sup>152</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949*, 75 UNTS 287 (12 August 1949), article 147.

<sup>153</sup> *Convention on the Prevention and Punishment of the Crime of Genocide 1948*, 78 UNTS 277, (9 December 1948), article 4.

<sup>154</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984*, GA Res 39/46, UN GAOR, 39th Sess, UN Doc A/RES/39/46/Annex (10 December 1984), Annex article 4.

<sup>155</sup> See above n 999, 317. (Ling)

<sup>156</sup> *Ibid.*, 318.

The President of Timor-Leste stated that he would support an international criminal tribunal for crimes committed during 1975-1999, should the UN Security Council set it up.<sup>157</sup> This position alters his earlier statement that the Timorese must ‘forgive heinous crimes’. But the granting of pardons<sup>158</sup> to convicted criminals by presidential decree has caused confusion about the role of the rule of law and the judiciary system.<sup>159</sup>

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<sup>157</sup> Amnesty International, *Timor-Leste President would support international tribunal*, 8 March 2010 <<http://www.amnesty.org/en/news-and-updates/timor-leste-president-would-support-international-tribunal-2010-03-08>> at 10 December 2010.

<sup>158</sup> Presidential decree N° 53/2008 of 19 of May. <[http://www.eastimorlawjournal.org/Presidential\\_Decrees/Decree\\_of\\_the\\_President\\_53\\_of\\_2008\\_presidential\\_pardons.html](http://www.eastimorlawjournal.org/Presidential_Decrees/Decree_of_the_President_53_of_2008_presidential_pardons.html)> at 30 October 2010.

<sup>159</sup> Luis de Oliveira Sampaio, ‘JSMP: Competency of the President to Grant Pardons: Prerogative Right versus Credibility of the Justice System’ (2010) *East Timor Law and Justice Bulletin* <<http://easttimorlegal.blogspot.com/2010/09/jsmp-competency-of-president-to-grant.html>> at 13 December 2010.

## 5. Conclusion

This paper concludes that the rule of law is a complex notion but Tamanaha's schema assists comprehension of its various formulations. The problem illuminated by Luban is of seeing formal legality strictly in procedural terms. Ultimately, leaders of new democracies can adapt a formulation suitable for their contexts. The postulated minimum requirement is 'rule by law' where both government and people are subject to the law. Timor-Leste has been unable to operate at this level due to past foreign domination, diverse indigenous cultures, and transitional justice.

The rule of law safeguards liberal democracy which values and protects the rights of the individual. Timor-Leste's Constitution promotes the rule of law within this understanding and has an entrenched bill of human rights. Ratified international treaties are part of domestic law and prevail in conflict of laws with respect to human rights. The State is bound by law and the doctrine of separation of powers.

During the Portuguese colonial era and Indonesian occupation, two main justice systems co-existed, and a culture of resistance developed. Formal law and local law functioned in parallel and this continued after Independence. Local law tends to be restorative, rather than purely punitive, based on different customs and languages; it recognizes and punishes obscure crimes of sorcery and "black magic"; women are under-represented at local law councils and victim compensation is paid to the victim's family; sexual offences are construed as property offences and compensation varies in different *sucos*. There is an urgent need to formulate conflict rules to comply with constitutional rights and to install a dual system of legal pluralism. This could ensure a culture of legality based on workable values of both systems.

The UN sponsored hybrid tribunals for serious crimes during 1999 have not been able to complete their work. There is reluctance by Timor-Leste's leaders to follow up CAVR recommendations due to lack of resources, funding, "opening wounds", and fear of Indonesian hostilities. Although this situation contributes to a culture of impunity, this is characteristic of post-conflict transitional justice facing competing interests. The UN needs to set standards and principles for transitional justice and prosecution of serious international crimes, to avoid continuous threats to peace. These are major sources of challenges confronting the political leaders, the formal legal system and the rule of law in Timor-Leste, which will require priority assistance from developed nations and the UN.