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[Review of: L. Grenfell (2013) Promoting the rule of law in post-conflict states]

Hoekema, A.J.

DOI

[10.1080/07329113.2014.921982](https://doi.org/10.1080/07329113.2014.921982)

Publication date

2014

Document Version

Final published version

Published in

Journal of Legal Pluralism and Unofficial Law

[Link to publication](#)

Citation for published version (APA):

Hoekema, A. J. (2014). [Review of: L. Grenfell (2013) Promoting the rule of law in post-conflict states]. *Journal of Legal Pluralism and Unofficial Law*, 46(2), 278-282. <https://doi.org/10.1080/07329113.2014.921982>

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Review of Laura Grenfell, promoting the rule of law in post-conflict states, by André J. Hoekema, New York, NY, Cambridge University Press, 2013, vi + 324 pp., €74.00 (US\$114.00) (hardback), ISBN 9781107026193

Until recently in development circles, it was a mantra that customary law (I like to call it local law) always grossly violated values connected with the rule of law, not to mention the crass violation of human rights. This book deals with a rebellious topic; however, is it possible to officially recognize the factual presence and frequent use of local, non-state law while upholding and even strengthening the rule of law? This book is a welcome, easily readable and a bit revolutionary attempt to show if and how a factual situation of legal pluralism (“deep legal pluralism”, the author calls it) can be taken into account in the many development projects to promote the rule of law. She studies two recent, important development projects in pro of the rule of law, South Africa and Timor-Leste (former East Timor), and shows what meagre results emerge if people’s customary law and non-state justice are overlooked or brushed aside. She then explores whether you can have it both ways: promotion of the rule of law plus a serious consideration of legal pluralism by engaging with its dynamics (to paraphrase the author, page 7). I am pleased with this study, because I am also trying to go against the grain. Last year, for instance, I tried to

show how so-called corporal punishments in communitarian justice are not necessarily violating the human rights of the accused, provided that we develop an intercultural concept of those rights.¹

Laura Grenfell's study is aptly divided into three large sections. In Part I (two chapters), attention is paid to the general relationship between the rule of law and legal pluralism (particularly in post-conflict states). She shows how customary (local, non-state) law was completely left out in development projects but reappeared on the development agenda around a decade ago. This is the matter I described, for a particular social problem, in an essay titled: "Communal land tenure and development, is there a future for official legal pluralism?", Grenfell shows that, even for a far broader set of social problems, the question mark can be replaced by an exclamation mark!

Then, in Parts II and III, she presents the cases of South Africa and Timor-Leste, respectively. These two cases provide extensive materials with which she shows, clearly and in detail, how a rule of law was implemented and/or intensely discussed and how legal pluralism entered the reform focus. The struggle to combine the two legally is described at length. In post-conflict states like East Timor (Timor-Leste) or transitional states like post-apartheid South Africa, one of the common remedies to bring some stability and peace is the taking on board of "rule of law" requirements. This means a western-style transformation of state law, courts, procedure, the legal profession, the relation between the executive, judiciary and legislative powers in society and so on. This normally includes special constitutional and other means to promote adherence to human rights. Timor-Leste, emerging from the war against Indonesia, was visited by a huge mass of foreign advisers and received UN money to set up a rule of law type of state. But after 10 years of trying, this attempt had clearly failed. People kept going to local leaders to solve their problems and keep the peace, and the government did not feel strongly bound by the rule of law. By 2007, it was time to take a different course. In South Africa, its association with a state legal order that had served the white elite in suppressing the black population tainted the rule of law notion. Traditional chiefs with their customary justice mechanisms had retained a strong position in society and did not want to give it up. These controversies from the very beginning of the post-apartheid era beset the tedious and drawn-out debates on how to create a less arbitrary legal order that moreover would serve the local communities.

In the two cases, the message was clear. "Deep legal pluralism", as Grenfell calls the factual competition between two systems of law, has to be recognized formally and somehow built into the state legal order, to become state legal pluralism (also called formal or official legal pluralism). South Africa has already advanced on the road towards the official hybridization of these two types of law. Grenfell illustrates this process in a most interesting chapter (Chapter 5). In fact, this is primarily the question of how to link the two. I call such linkage norms "internal conflict rules", which lay down what kind of conflicts may be officially dealt with by local authorities, e.g. "only minor ones". She also shows what linkage norms have been developed to reconcile the two very different types of law. But I am suggesting too much here. In Chapter 5, she concludes that the linkage between rule of law plus human rights requirements and local law and procedure is *not* a linkage: in nearly all the many points to take into account, the end result is summarized as follows: "With the strong support of the state's main legal institutions, South Africa's parliament is actively insulating the world of customary law and customary courts from the rule of law, a founding value of the constitution, in order to establish a court system that is fast and cheap" (p. 178). The same goes for the promotion of human rights. The

author qualifies the end result as a patchwork rule of law (p. 177). I think this is a diplomatic formulation.

Timor-Leste, on the other hand, has not even seriously tried to link customary law and rule of law elements in its state law. We find only some dispersed experiments with platforms on which local authorities get some official competence to intervene in some specific conflicts. A draft law (anno 2012/13) to link the two laws on a broader scale has not yet been proposed to parliament.

I am not surprised that the making of linkage/conflict rules is so difficult (perhaps almost impossible). The matter of how to delineate the jurisdictions of the two different types of law is politically and socially very delicate, both for the national elite who do not want to further “backward practices” and for the spokespersons for the non-state legal institutions who do not want their legal semi-autonomy to be menaced.²

After these case studies, there is a relatively short conclusion. In it, she points to the extreme complexity of somehow combining or even harmonizing rule of law ideas as well as characteristics of customary justice. Indeed, her study and the enormous amount of detail delivered to the reader underline the almost hopeless nature of the venture to combine the two different types of law and do justice in an attempt to come to a satisfactory hybridization of the two. I want to comment a moment on this situation. Let us take just one example out of an endless list. In communitarian justice, the local judges cannot be compared with judges who preside over the courts, sitting and taking decisions alone. In local law, community members often deliberate together with the local authority, and the decisions are often based on some degree of consensus. So what can we say about a South African linkage law that precisely gives traditional authorities the competence to preside, sit and decide alone in what is called a communitarian court? Is this way of imposing rule of law elements on communitarian justice a smart compromise that will be legitimate in the eyes of the rank and file, as well as in the eyes of promoters of western rule of law conceptions? Or is it recognizing local law while changing it into something very different? And vice versa, the same complex problem pops up. The author has shown how customary law wins the match against the state rule of law. For instance, elements like respecting the independence of judges or providing any criminally accused person with a defence lawyer were sidelined in South Africa due to parliamentary initiatives and decisions of a constitutional court. Grenfell detects a contextualized understanding of the rule of law in this downplaying of rule of law values (p. 271). Is this shielding of customary justice against the rule of law and human rights claims a prudent compromise or an impossible one? Her answer is short. She quotes Krygier, who states with regard to this balancing of the rule of law with the values to be found in legal pluralism: “there is no reason *a priori* to imagine a compromise on either or both is impossible” (p. 268). I agree that it is not *a priori* impossible, but the road to such a compromise is so long, winding, and politically and socially charged that hardly any country has managed to go down even part of it. The most important reason for this doubt is the often fundamental difference between the two legal institutions, not only in terms of concrete norms, procedures and basic concepts (like the distinction between criminal and civil law, one of her examples), but also in the way that they are embedded in their society. Some commentators Grenfell quotes refer to customary law as an articulation of “the way we are”, as connected to a sense of belonging and identity. Various aspects of the community-based local law, although certainly not all, have a special spiritual and social charge. Changing those aspects by imposing a linkage rule might mean that the local people feel trampled upon. Or a social process may be set in motion in which the leadership and followers are split into two warring factions about whether to accept these changes or not and how to

develop their own system further. Local law, like state law, is constantly changing, so this need not be a drama. Nevertheless, the complexity of hybridizing the two cannot be exaggerated. I already wrote that I am not surprised that the making – and implementation – of linkage norms in countries recognizing official legal pluralism has hardly ever been proclaimed a success. This complexity did not escape Grenfell; she referred to these differences between what she called “two paradigms” many times. But this is not systematically connected with a discussion about what may be learned from her two cases in terms of her grand theme: how to relate western-type state and law institutions to local law, that is, legal pluralism. We know that this question can only be approached in full cognizance of the specific context of a country or even regions within it. So, perhaps it was a wise restriction not to dwell on all sorts of “practical recommendations”.

There is one aspect of this study that caused me a bit of worry. The book is fascinating reading, but Grenfell’s empirical material is limited. It mainly contains a smart analysis of legal debates, law making, legal interpretations and comments, and a description of the intricacies of some higher court sentences on appeal by people complaining about the decision of which law applies in some lower forum: state law or customary law. Basically, that is it. Here is a wealth of material of a legal and a legal–political kind but not much about, for example, judges’ behaviour, how traditional and state judges are living up to the linkage laws, and how they perceive the need for and quality of these laws. The question she seems to put (p. 128) of how far in South Africa traditional authorities live up to their constitutional requirement to promote the Bill of Rights is not answered. But I misread that question. It does not concern the everyday behaviour of judges. In Chapter 5, we see that it was meant to show how in legal drafts, contra drafts, legal comments, comments on adverse or positive social effects of specific formulations, attempts were made to create a linkage law (the Traditional Courts Bill) that would subject traditional courts to these rule of law and human rights requirements. We know the answer: this law failed to do this in practice. This result is important enough, but the study has remained on the level of the struggle between law makers. To be fair, she occasionally refers to judicial behaviour, and that is already important and worthwhile material. For example, for Timor-Leste, she shows how local state courts regularly applied customary law or referred cases to those authorities even without these authorities and their law having any official state recognition. I have observed exactly the same social process in Ethiopia, a country with many distinct peoples and communities, like the Afar. Local law and justice abound in many regions but without any official status. National judges said to me that they referred some cases regularly to local leaders or judges of such distinct peoples. So, there are processes of an unofficial linking of the two worlds. We also read fine examples about the consequences of ambiguous linkage law formulations that cause judges to come to quite different decisions. It is essential to conduct a more legal anthropological kind of study to find out if these internal conflict/linkage rules are implemented in the daily practice of administering justice; in either system of law, it is vital to see where hybridization of two so widely different laws is going in real life. So far, I believe there are only a few empirical studies of the ways the linkage rules are implemented in legal practice in this kind of hybrid system. For example, in the Mexican state of Quintana Roo, Israel Herrera studied the behaviour and outlook of the official Maya judges (*Unveiling the face of diversity: interlegalidad and legal pluralism in the Mayan area of the Yucatan peninsula*, 2011, Universidad Autónoma de Yucatan, also in Spanish). And Esther Sanchez studied how the Colombian Constitutional Court (and other courts as well as other authorities like child welfare agencies) interpret and apply the rules providing official jurisdiction to

indigenous justice in Colombia (In: *Entre el Juez Salomon y el Dios Sira: decisions interculturales e interés superior del niño*, 2006, UNICEF ISBN 958-97658-8-2).

A final word. In this book, Grenfell has amassed so much intriguing material that I strongly recommend her study to all who care about legal pluralism and the way it may interact with the promotion of the rule of law and human rights. After all, is there a future for official legal pluralism?

Notes

1. Her book ties in nicely with the recent conference at which I presented my views: how does legal pluralism interact with the promotion of human rights and the rule of law, to paraphrase the title of this conference in Oñati, Spain, held in 2013, and organized by Prof. Eva Brems and Dr Giselle Corradi (Ghent University).
2. In Colombia, where the notion and practice of formal legal pluralism are about the most advanced in the world, linkage rules have not succeeded in passing parliament, but were eventually developed by the Constitutional Court in a long series of cases. Bolivia and Ecuador are now engaged in a heated attempt to finalize linkage norms. In some states of the Mexican federal system, some indigenous jurisdictions are recognized and a set of linkage norms is found. In the Pacific region, there seems to be better chances of introducing these rules to recognize but also limit local jurisdictional competences (see this book, page 208, footnote 122).

Andre J. Hoekema

Legal Anthropology The Law Faculty of the Universiteit van Amsterdam Amsterdam, The Netherlands

A.J.Hoekema@uva.nl

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<http://dx.doi.org/10.1080/07329113.2014.921982>