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Local justice systems in Timor-Leste: Washed up, or watch this space?

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Formal justice: From marred beginnings to a modern mess

The aftermath of the 1999 Popular Consultation and resulting vote for independence by the people of Timor-Leste provided a unique opportunity for the development of a legal system tailored to the needs of the East Timorese population. The United Nations was empowered to provide interim administration prior to independence and to create key institutions, and embarked upon the process of developing a Western model of law. This process was commenced and continued based on limited consultation with East Timorese representatives and with little awareness of indigenous systems of dispute resolution (see Marshall paper, this issue). During the UN administration lasting from December 1999 until May 2002, little to no consideration was given to whether aspects of local justice systems which had serviced East Timorese communities for thousands of years, survived both Portuguese and Indonesian occupations and filled the legal vacuum between the departure of the Indonesian occupiers and the arrival of the UN could possibly be integrated with the nascent formal system to craft a legal system specifically for the social, cultural and historical context of Timor-Leste (Hohe 2003).

Members of the East Timorese Constituent Assembly, elected in August 2001 to write Timor-Leste's Constitution, decided to retain the UN established system of law and declined to give substantive formal recognition, in Section 2, to local justice systems beyond symbolic respect for traditional practices 'that are not contrary to the Constitution and to any legislation dealing specifically with customary law' (RDTL 2002). This was contrary to views expressed in a grassroots consultation process on the content of the Constitution, indicating that communities wanted local systems of justice to acquire substantive formal recognition and usage. As the transitional period came to an end, it became evident that the UN and the Ministry of Justice had in many ways failed to create a sustainable judiciary and legal system for Timor-Leste leaving the government in the unenviable position of attempting to build upon a fundamentally flawed system. A number of independent reports thoroughly dissected and documented key deficiencies in the legal institution and capacity building efforts of the transitional administration, many of which flowed from the lack of a coherent or comprehensive strategy. The continuing dysfunction of the formal legal system in Timor-Leste today can be explained by a range of factors whose genesis can be traced to the transitional period including a lack of planning and resources, inexperienced and poorly trained law enforcement, judicial and administrative personnel, confusion around the applicable law, the absence of critical legal institutions provided for under the Constitution, long delays in the recruitment of international judges and inadequate monitoring and enforcement of professional standards for court actors (King's College London 2003; Strohmeyer 2001a, 2001b).

More recent government efforts to 'undo' aspects of the transitional system have created further havoc in the already beleaguered system. Government language policy in the legal sector has further stretched already inadequate interpreting and translating services and is undermining the impact of training provided to court actors (JSMP 2004). The introduction of an evaluation system of court actors which all national court actors

failed (JSMP 2005b, 2005d), has had the effect of removing all the probationary national judges, prosecutors and public defenders from performing judicial and court functions for the next two years and further exacerbated the problem of the non-functioning of district courts. In short, things are likely to get worse before they, hopefully, get better. While still in its infancy, the formal legal system has so far proven unable to cope with even the relatively small number of cases before it. District courts in Oecussi, Baucau and Suai have virtually collapsed before they ever became fully functioning (JSMP 2005e), resulting in a highly centralised system where most administration of justice is conducted from the capital, leaving justice even less accessible to the vast majority of the rural based population. The important opportunity and challenge to win the confidence of the civilian population after decades of foreign rule and abuse by legal institutions, has essentially been squandered.

Inherent limitations of formal justice

Even if the formal system was functional, accessible, cheap to use and provided timely justice, it would remain marginal or be considered a mere adjunct to the core justice needs of the East Timorese population, as in some crucial aspects it remains irrelevant to some aspects of local culture and expectations of justice. One example which came up in a number of instances in rural areas during recent field research was the concept of imprisonment as punishment. Where the majority of the population is involved in backbreaking subsistence agricultural work, the notion of being provided with free accommodation and three meals a day with no work requirement, albeit with the loss of liberty and separation from community, is sometimes considered a privilege, not punishment. This perspective is magnified where a spousal violence perpetrator is incarcerated which often has the effect of removing all means of support for the victim and dependent children, a plight considered a far worse punishment than imprisonment. Another key cultural expectation of justice which is not met by the formal justice system is the need for reconciliation between the parties for the matter to be considered properly closed. Again, this came up continuously in recent field research where local justice leaders and victims alike expressed the view that reporting one's husband to the police for spousal violence was akin to filing for a divorce as it left little prospect of reconciliation between the parties and again left the woman and her dependents at risk of abandonment, again perverting the point of punishing the perpetrator. Many of the weaknesses of the formal justice sector are unlikely to diminish in the foreseeable future, not least the strict financial constraints of the East Timorese government which renders unaffordable a legal system capable of penetrating deep into Timor-Leste's rural heart. One virtually unavoidable conclusion is that alternative dispute resolution processes of some form are indispensable and will remain a core feature of the East Timorese legal system, whether formally acknowledged and recognised or not.

Timor-Leste's local justice systems

Local justice systems currently fill the legal void left by the teetering formal justice system. The literature emphasises the diversity and highly localised nature of these processes, hence no unified 'traditional legal system' exists in Timor-Leste but rather a collection of local practices (Mearns 2001; Hohe and Nixon 2003). However, there are a number of core traits or common values which enable more generalized characterisation. Common features of local justice systems include their predominantly oral practice and transmission and their use of similar procedures involving each of the parties providing their version of events, and a process of mediation or arbitration where

community leaders decide or mediate who is at fault and then oversee an agreement. Punishments most commonly consist of the payment of compensation but can include other sanctions such as oral or written undertakings to not re-offend, community work, public shaming or other restitution. Where agreement between the parties is reached, it is generally sealed by symbolic acts of reconciliation which includes drinking or eating together. The effectiveness or binding, compelling nature of the agreements depends upon the moral authority of the decision makers and the social pressure generated by the public nature of the proceedings occurring within small communities. Where agreement is not reached, either party can generally appeal to a higher local authority to reconvene the case (Mearns 2001, 2002; Hohe and Nixon 2003).

Another aspect of local justice systems which appears to be relevant to differing extents, is the notion that when a community member breaches a community or social norm they are also deemed to have trespassed upon the ancestral social order resulting in an imbalance within the overall cosmic system which must be replaced by the perpetrator through payment of compensation to, and reconciliation with, the victim/s. Failure to replace the lost value can result in punitive acts by the ancestors, such as the loss of crops or the death of a family member (Hohe and Nixon 2003; Hohe 2003). With the exception of murder and other serious physical assaults against the person (which may or may not include rape depending upon the circumstances), most see a role for the formal justice system only where local efforts have been exhausted and failed to produce an acceptable resolution. Those who bypass local justice mechanisms may in fact be penalised by local authorities for doing so.

People pulling power or a lack of alternatives?

Despite state legitimacy being withheld, local justice systems remain very popular, undoubtedly bolstered by the shortcomings of the formal justice system, but also due to being considered inherently valuable to grassroots communities. Features commonly cited in support of their popularity include their accessibility, affordability, immediacy, legitimacy and effectiveness within grassroots communities, use of local languages, understandability to the parties, promotion of strong family relationships, compensation based sanctions and their efficiency in bringing closure to disputes and promoting reconciliation between parties who live in small, close-knit communities. One recent study found that local justice mechanisms enjoy strong public confidence with more than 90 per cent of respondents believing that local justice mechanisms can be trusted as fair (Asia Foundation 2004). It is clear that the cases reaching the formal justice system represent only a tiny fraction of those occurring and that even out of those, a sizeable proportion are withdrawn from the formal system (JSMP 2005a), and referred back to local justice mechanisms by police, prosecutors and, in some instances, by courts, before being finally determined (JSMP 2005c). Ad hoc practices have developed outside of any law or regulation, hinging solely upon the judgements of individual bearers of authority. Another variation on this pattern is the increasing incidence of police and prosecutors diverting cases from the formal justice process and mediating matters themselves outside of the law, often in cases involving crimes against women or other vulnerable groups (Swaine 2003) (see Bere paper).

Local justice or injustice systems?

Local justice systems also present a number of key weaknesses which include the lack of safeguards against violations of human rights, inconsistency and lack of certainty of decision making, vulnerability to partiality and corruption of local decision makers, lack of

intellectual rigour in investigating claims and apportioning fault, absence of basic fair trial standards, limited enforceability of decisions through force of social conformity and the lack of fairness and accessibility concerning particular classes of persons including women, ethnic and religious minorities, poorer, less influential and new members of communities (JSMP 2002; Ranheim 2005; Mearns 2001, 2002). In light of the continuing failings of the formal justice system, there has been increased interest in examining possible models of accommodation of both justice systems, however in the rush to embrace local justice mechanisms as an answer to the formal justice systems' woes, its advocates can tend to gloss over some of the more troubling human rights issues faced especially by vulnerable groups, such as domestic violence victims. It is salient to recall that just as critical theorists have identified that modern law often privileges the needs and interests of dominant groups, custom based local justice systems may reflect an equally or more problematic alternative system for entrenching powerful social groupings at the expense of more vulnerable members of the society. In the process of enforcing social norms, local justice systems may further ensconce underlying values and practices which render vulnerable groups susceptible to violations of their rights (Sheleff 2000).

The need for, and challenge of, reform

Given the very significant challenges that may be faced by vulnerable groups seeking justice from local justice mechanisms, do they, or rather should they, have a role? An approach which is both pragmatic and normative may assist in answering this question. Pragmatic in recognising that indigenous justice systems offer an affordable and accessible forum of first resort and are likely to remain an essential part of the justice matrix in Timor-Leste for the foreseeable future, whether they are officially smiled upon or not. For many in Timor-Leste, especially vulnerable groups, formal legal enforcement is frequently an option only in theory. The lack of real alternatives means that indigenous justice systems should become a focus for reform and adaptation if they are currently incapable of delivering justice to vulnerable groups such as women (Nyamu-Musembi 2000).

Any approach should also recognise normative dimensions by acknowledging that any reform agenda should be focused at the grassroots level because people primarily draw norms to regulate their interpersonal relationships, including within families, from their immediate cultural setting (Sheleff 2000). The two legal systems are already highly interdependent but only through the improvised and unregulated decisions made by individuals. A more considered government-led process is essential to bridge the current gap between theory and practice, without which the prospects of the rule of law being firmly established in Timor-Leste continue to corrode. The lack of clarity regarding the legal system/s continues to create confusion amongst the populace, encourages 'forum shopping' between the two systems, and creates a risk of double jeopardy. Perhaps most importantly, failure to resolve this tension results in widespread abuses of human rights potentially putting Timor-Leste in breach of numerous constitutional and international treaty obligations which require the provision of adequate protection to its citizens against arbitrary exercises of power. While debate and research concerning local justice systems continues among non government organisations and individuals, Timor-Leste's government has so far rejected all overtures to give serious consideration to formalising a role for local justice systems; hence reform in this area remains a challenge consigned to the future. Lack of current government engagement on this issue does not alter the assessment that despite the great difficulties and challenge of doing

so, reform of indigenous justice systems should be a central part of any strategy aimed at strengthening the functioning and capacity of the justice system in Timor-Leste.

Transforming local justice to strengthen human rights practice

So what kinds of transformative processes could be contemplated to strengthen human rights practice in local justice systems? Such processes will be legitimate and most effective if they are internal to the cultures they operate within, for example by utilising a 'cultural transformation' (An-Na'im 1994, 2002) approach which recognises that culture is dynamic, responds to social change and undergoes transformation over time. The example of Timor-Leste clearly demonstrates the limitations of relying on formal state-based human rights safeguards where already substantial formal legal safeguards exist but have only muted or superficial effect because the state is new, weak, poor and has limited reach. A deeper consensus throughout the various communities of Timor-Leste needs to be secured to ensure durable human rights protection. Especially government, but also human rights advocates should not overlook the importance of engaging custodians of culture and communities in ongoing relationships rather than focusing solely on state apparatus as the primary vehicle for social change. A process of long term cultural transformation could provide new opportunities to creatively expand the field of human rights practice and is likely to produce more durable and sustained results as the change accomplished will have been achieved from within indigenous East Timorese cultures (An-Na'im 2002).

With appropriate state nurturing, a long-term process of cultural transformation could be undertaken to reform local justice systems so that they are better capable of protecting human rights and becoming a recognised partner in Timor-Leste's justice system. One factor rendering local justice systems in Timor-Leste conducive to cultural transformation is the post-conflict reconstruction phase which provides an environment supportive of change and renewal, and an opportunity to revitalise and rethink indigenous justice mechanisms. This could be done in light of the new reality, which involves not only the demise of foreign occupation of Timor-Leste, but also an overall 'shake-up' of who does what and how, making it an ideal time to make similar demands upon indigenous justice mechanisms and urge that some practices be open to question and reformulation given contemporary circumstances. The years of neglect in the development of indigenous law in Timor-Leste, caused by it operating under the harsh conditions especially of Indonesian occupation, may have sharpened the need for more rapid change or development hence providing an additional opening for creative, selective revival and reform of areas where criticism is persuasive and pertinent, such as the areas of human rights and gender equality (Sheleff 2000).

In addition, local justice systems are already undergoing their own 'velvet' revolution with the introduction of democratic elections for local leaders, including compulsory female representation. Early readings of the first local election results indicate strong community support for this process, hence providing additional evidence that the national mood is conducive to fundamental changes to the core of community life. This assertion is further supported by the election of a substantial percentage of newcomers to the positions of hamlet and village chiefs, and that the outgoing chiefs have peacefully relinquished their power and accepted the legitimacy of the newly elected leaders. This process marks a radical departure from the usual selection processes for local leadership which for the main was based on a mix of hereditary rights and selection by senior male community members.

Ready, set, stop: Waiting for the green light

Preliminary results of recent field research indicates that local justice leaders are surprisingly open to engagement in debate and training around human rights issues in the local justice domain. They crave the opportunity to talk to each other and to engage with the government on how they can best fulfil their roles. Early indications are that many view positively suggestions that local justice mechanisms could over time be reformed to mitigate human rights concerns. There was also support for an approach of identifying human rights values already entrenched in East Timorese culture as the basis for running education campaigns concerning sensitive human rights issues such as domestic violence. Some accommodation between formal state law and the 'living law' of Timor-Leste is inevitable. Protecting the rights of vulnerable groups is a key concern in the furthering of this debate. The path to reforming local justice mechanisms so that they are better capable of protecting human rights is long and difficult yet essential and would provide the best chance of creating long-term sustainable human rights protection within a legal framework which reflects the unique East Timorese cultures. The key missing element of the equation is the political will to get the ball rolling.

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