

International Women's Peace Conference Paper

Interaction between formal and traditional justice systems

“Local justice and formal justice: can the two systems work together in Timor Leste?”

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Gender based violence (GBV) in Timor-Leste remains a matter of great concern. Women in Timor experience high levels of domestic violence and sexual assault and this violence impacts in an extremely traumatic way on women's lives. Too often, violence against women is not seen as a crime but rather as a family problem to be resolved at the family or village level. The Women's Justice Unit of JSMP has observed through district training, that many communities, including members of women's organizations, view violence against women first as a family problem and only if it was very serious or if the family negotiations failed should it be taken to the police.

In Timor-Leste, victims of crime seeking justice can ideally access two different systems: traditional law, sometimes called “local justice”, and the formal legal system. However, there is very little interaction between the two systems. Rather, we have observed that the systems run parallel to each other with victims using either one or both to resolve the matter and attempt to achieve justice.

The traditional system operates at the local level, from within the family and up to the subdistrict, depending on the seriousness of the crime. It is not regulated and it varies significantly between regions, although most regions share common principles. The processes involve local elders and the families of the perpetrator and victim to promote reconciliation within the community more than punishment or deterrence. The victim is usually entitled to compensation such as animals or Tais (varies from district to district), and the perpetrator must promise that they will not commit such crimes again in future.

There are many benefits to using the traditional justice system: matters are resolved in a short time, it does not cost much to operate, the community will accept the decision, and it promotes reconciliation to avoid future conflict. However, there are also negatives to using the traditional system including that the system is unwritten and therefore unable to be monitored, decision makers may manipulate their decisions to their own advantage or impose bias, or victims are not involved in the process. There are also serious concerns that the method of resolving disputes by traditional justice means is contrary to international human rights standards, particularly the rights of women and children.

In many cases, the local justice system has taken a position on domestic violence matters which does not give equal respect to the rights of men and women. The system often does not uphold the dignity of women and children who are affected by violence. For example, in a rape case, the victim may be blamed or the victim's family may be given financial or other compensation for her loss of dignity, not as punishment for the perpetrator. Further, studies have found that women are hardly involved in the local justice system and women are not guaranteed “justice” if they bring a

complaint to a local justice hearing. For these reasons the WJU, along with most international organisations in Timor-Leste, has advocated that victims and communities should bring cases of gender-based violence to the formal system rather than rely on traditional law.

Timor-Leste's formal legal system derives from a variety of different written sources and dynamic institutions.¹ JSMP considers the formal justice system as a critical sector for promoting an end to violence against women. Not only does this system deal directly with those who suffer and perpetrate GBV, it is also public and able to significantly influence community attitudes and behaviours. The formal justice system also ensures human rights and women's rights. However, as the WJU has observed, the formal justice system is slow, often held in a different language from local languages, and rarely take note of the fact that women who send their husbands to prison are left in serious financial difficulty, or that rape ruins women's chances of marriage and financial security.²

Until now, the two systems have been viewed as separate and often in opposition. Communities view local justice systems and the formal system as operating alongside each other and see no contradiction in seeking justice through both systems at the same time. It should be noted that while the formal legal system recognises the norms and customs of local law, there has been no formalisation of traditional law in the formal legal system. However, JSMP has observed a change in the way the formal justice system approaches local justice systems.

Traditional law values and processes are slowly being incorporated into formal judicial decision-making. In the early years of WJU court monitoring, we observed courts dismissing cases that had been resolved by traditional justice means or delivering reduced sentences. However, the courts are increasingly maintaining the supremacy of the formal system by, for example, not dismissing a case if it has been resolved by traditional means.

Outcomes of traditional justice processes are sometimes admitted as evidence of fact or considered by judges when determining sentencing. For example, in a rape case a court allowed the evidence of the local chief who presided over the traditional justice matter and relied on the evidence as one factor in finding the accused guilty. In another rape case monitored by the WJU, the court took the traditional justice agreement into account, giving a custodial sentence but also ordering payment of the remainder of the accused's debt to the victim's family. That is, the formal legal system enforced the traditional justice agreement rather than using the agreement to reduce the sentence or dismiss the case. If traditional justice mechanisms are considered by courts, we recommend that they are not regarded by judges as a sentencing factor in gender based violence cases to reduce sentences. Reduced sentences based on traditional justice agreements have the potential to minimise the gravity of these crimes.

The procedural relationship between the formal justice system and local justice systems is still being worked out, but there is potential for the two systems to complement each other. The incorporation of traditional law has the potential to make the formal justice sector more

¹ For GBV, the Indonesian Penal Code is the relevant substantive law, in addition to some UNTAET Regulations and international law applicable under the Constitution. The Timor-Leste Criminal Procedure Code is the applicable procedural law. There is currently no Timor-Leste law for domestic violence; however a draft was developed in 2003 and is still under Parliamentary debate.

² See E. Harper, "Beyond Brahimi: Lessons Learned From East Timor On The Development Of A Model United Nations Legal Code", *European Journal of International Law*, Prev: 8, 2006/02/08 11:46.

approachable and receptive to the needs of court users. The WJU believes it would be a positive step if judicial policy and guidelines were developed around this issue. These should accord with the principles of justice and the rule of law and provide direction about judicial consideration of traditional justice mechanisms. Such direction would result in less confusion and more consistent practice in the courts.

But there are some issues that need to be resolved for this to work effectively. For example, to what extent does a perpetrator face double jeopardy if he or she is tried by both systems? Similarly, is it fair that a defendant pays traditional law sanctions as well as be sentenced by a court? The solution of the court, of taking the civil sanction into account in deciding the custodial sentence, may be one way of resolving this conflict. Further there are questions of confidentiality. If traditional dispute resolution processes are to be seen as similar to mediations, anything admitted within them would be confidential. Should defendants be warned in advance that their admissions before local leaders could be used against them in court?

The use of traditional law alongside the formal system is not unique to Timor-Leste; it is a challenge to many developing legal systems, particularly those emerging from an oppressive regime where the formal system is not trusted. The WJU looks forward to further research and exploration into how the traditional system in Timor-Leste can work with the formal system, and thus give people a greater sense of confidence that their legal system represents them and delivers justice.