Looking Both Ways:

Models for Justice in East Timor

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Preface

Australian Legal Resources International (ALRI) is pleased to publish these three complementary papers as an interim report on our work on Community Systems of Justice in East Timor.

This project, commenced in 2000, has continued ALRI's broad role since 1993 as an Australian not-for-profit, non-government organisation (NGO) dedicated to promoting good governance, democracy, human rights and the rule of law in developing countries. As a fully accredited agency of the Australian Agency for International Development (AusAID), we are particularly grateful for the financial support afforded by the Australian Government to this publication and the fieldwork that was its genesis.

Throughout two years of assisting the people of East Timor build their new democracy, ALRI has been encouraged by the wide interest shown in our work on Community Systems of Justice. It has been in response to that interest that this publication was commissioned. As a result, we are confident that our efforts to date will be only the first instalment of much more work in this increasingly important and highly practical area of justice.

With this in mind, readers will appreciate the many challenges inherent in our decision to publish at this time. In particular, we expect to engender more questions than answers, and look forward to working further with local and international stakeholders to find practical solutions. We are confident that our work to date, and this report on it, offer a sound foundation for East Timor to go forward as the newest member of the international community of nations.

For the publication itself, we gratefully acknowledge the outstanding commitment, enthusiasm and knowledge that Dr David Mearns brought to both his fieldwork and authorship of this paper. Dr Mearns and ALRI staff consulted widely throughout with many individuals who took time out of busy schedules to speak with us. Without Dr Mearns and all these contributions, this publication would not have been possible.

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We hope that it will make a significant contribution to the future of East Timor.

The Hon. Justice Marcus R Einfeld AO QC PhD
President
Australian Legal Resources International

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INTRODUCTION

Delivering Justice and Resolving Conflict

In an important sense, the following three papers deal with a single problem. That problem amounts to one very large and deceptively simple question: How to deliver justice and resolve conflict in a newly independent but impoverished nation. It is a problem that has become increasingly evident in the decolonised world. In new nations that aspire to become modern democratic states with a liberal form of citizenship that privileges no one because of their birth nor discriminates against them for any inherited characteristic, the problem is usually writ very large indeed.

The second and more direct question addressed in what follows is whether there are ways in which already existing social practices may be adapted and incorporated to facilitate the process of resolving conflict and delivering timely justice to the citizens of a new nation; in this case, specifically, East Timor. Does a new national government in the early 21st century have to start with a 'clean slate' approach to its constitution and code of legal practice or can it seek from the outset to incorporate the best of its own current systems? What might be the alternative to a totally new legal and justice system built from the ground up or one brought in from the outside?

It has been a common experience for many of those nations that have emerged since the middle of the twentieth century that they have failed to meet either the expectations of the international community or the aspirations of their own new citizens. This is often true particularly in the domains of justice and social equity. This failure has frequently been put down to a lack of the fundamental economic resources required to build the necessary infrastructure and provide the trained personnel for a western style legal and justice system. Sometimes, though, the failure has been attributed to the lack of sufficient understanding and education amongst the citizens themselves. This 'ignorance' has in turn sometimes been blamed on the past colonists, on subversive propaganda, or on factors such as remoteness and poverty; but it has also occasionally been blamed on 'Culture'.

The 'Culture' argument can on occasions appear defensive and at other times aggressive. It is rarely neutral. In extreme versions, it can suggest that the western style of liberal democratic individualism and the notions of social and legal justice that accompany it are essentially *alien* concepts to the imagined culture of the new

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nation. This can be deplored or celebrated by the new government, depending on its particular perspective. Rather than advocate becoming part of a shared, global culture of ‘universal human rights’, this argument sometimes equates the new national sovereignty with a very particular view of the ‘National Culture’. This view can itself be based on a narrow political ideology or a specific interpretation of a religious code.

Frequently, the argument is put by newly independent people that an ‘ancient’ and ‘unique’ culture must be given the space to reassert itself. This line of argument occasionally goes so far as to suggest that the imposition of international, UN sanctioned standards of justice upon such a new state constitutes a form of neo-colonialism or even neo-imperialism. This position can occasionally, therefore, take the form of an apparent celebration and advocacy of an ‘indigenous’ worldview. Of course, the new ruling class usually seeks to control which parts of indigenous ‘tradition’ will be promoted and incorporated into the positively sanctioned national identity they seek to promote and which parts will be excluded.

In many instances of the developing ideology of newly independent nations, another version of the culture argument occurs. It is one that often accompanies that noted above, and it asserts the vital necessity of elaborating the distinctiveness of the new nation and the urgent need to establish its difference from both its neighbours and its past rulers. This is typically also seen as a crucial part of creating the required new and cohesive ‘national identity’. Paradoxically, this position also usually demands that some ‘local’, indigenous cultural practices and differences be sacrificed in the pursuit of the cultural, linguistic and political unity deemed necessary to ensure the viability of the new nation state.

It does not stop there. Yet other paradoxes may emerge in the face of calls for national unity. Such views as those outlined above often appear elitist and centred solely on a capital city vision of the new nation when considered from the perspective of local populations living in the rural and regional hinterland. The imposition of yet another external system of values can be experienced as the replacement of one set of masters by another, just as remote. Equally, the failure of the new rulers to deliver significant benefits quickly to the ordinary people of the countryside can be seen to be indicative of the social and cultural chasm that is perceived to exist between ‘modern’, educated, urban people and ‘traditional’, under-educated, rural people.

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It is an irony then that in revolutionary movements leading to new nationhood, there is frequently also an explicit ideology that sees as necessary the radical restructuring of society for the good of the masses. This is usually promoted in terms of bringing a future of opportunity for all the people by creating a new attitude of forward looking and highly motivated individuals working within a new sense of their collective responsibility and identity.

In each of the above cases, there is an apparent systematic devaluation of the cultural and social systems of the rural masses. Rather than liberation and the empowerment to live their lives according to their own precepts, new nationhood very often requires the majority of the people to deal with yet another novel and disturbing set of values imposed from above. This can be especially disturbing to those who consider themselves to be the real indigenous population and who have come to believe that they are the 'true' nationals. For these people no real independence and self-determination exists. The response can be catastrophic. In many countries, disaffected populations rebelling against 'oppressive outsiders' have proven major problems not just for the new nations but also for the international community.

An additional problem for the new ruling classes following independence has been that it can take one or two generations for the education system and the bureaucratic machine to transform the revolutionary ideology of a political movement into the accepted new 'national ideology'. It may take even longer to create the desired new infrastructural relations - land reform, universal health facilities and mass housing etc - typically promised during the revolution. In the meantime, the governing classes must deal with a population that largely continues to operate with the systems of ideas and ways of life that have served them to date, sometimes over many generations.

Those systems of ideas generally include specific notions regarding social relations and the 'proper' distribution of power. These are seen as being dependent on supernatural factors. These 'old' ideas appear completely at odds with the new politics of the capital. In particular, the social hierarchies of the family, the village and the district may be deeply integrated with a belief system that places villagers in what are deemed to be 'ancient' traditions. Serious supernatural sanctions are often thought to reinforce the system as it is experienced in the rural backcountry and even in the poorer areas of the urban fringe. Whether it is ancestral sprits or indigenous

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deities, sorcery or a particular interpretation of a world religion, the cosmos of a villager may appear potentially dangerous to national unity and not readily susceptible to change.

In this situation, the new formal systems of justice and the legal processes that accompany them may be seen as culturally irrelevant and socially unenforceable to people whose lives are defined and dominated by such a different world view. Their own beliefs remain the most immediate and powerful drivers of a sense of the proper way to deal with a crime or dispute. Put simply, it is not only the new rulers who appear remote - it is their ideas and values.

Moreover, where new industries and supposedly modern jobs are not immediately forthcoming, (which appears to be the 'normal' situation for decolonised countries) the continued reliance on subsistence food production and petty cash cropping does not assist in the promotion of a new national cohesion and 'progressive' mind set. Even if a significant rise in levels of education can be achieved in the short term, the absence of jobs commensurate with the aspirations of the graduates can and does exacerbate the divisions between the political and bureaucratic elite and the mass of ordinary people. Disaffected youths migrating to the city from rural homes that seem to offer nothing for their future are almost inevitably seen as a threat by those in the urban centres who do have jobs and decent housing.

It is in the context of a new, uncertain polity and a very underdeveloped economy then that a strong sense of the lack of social justice is most likely to grow. Rising crime rates in the towns and cities may be matched by increased tensions in the villages and hamlets. In both areas, the new state usually lacks the resources to provide adequate police and court systems to resolve problems in good time and with consistent outcomes. At the same time, the weaknesses in the formal justice system and the inequities in access to the resources of a 'modern' existence make the economy and political system ripe for corruption. In such circumstances what likelihood is there that trust and mutual respect will be forthcoming?

It needs to be remembered always that injustice, disputes and crime are experienced as personal and highly localised phenomena, no matter how systemic or common they may appear from the outside. The lived experience of the vast majority of citizens of a new state is one where life is often unkind and rarely lives up to the

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hopes and promises of visionary leaders living far away. Where interpersonal relationships break down and conflict ensues, it is never an adequate response to talk in terms of endemic and inherent problems. People seek fast and manifestly just resolutions that can be enforced by powerful social sanctions. Without this even simple everyday interaction becomes impossible in their small scale, face-to-face communities.

So the issue for the newest of nations, the Democratic Republic of East Timor, is how to avoid creating their own disaffected population by failing to provide the justice that is expected of a new state. While transforming the social systems and the parochial ideas of its people through the creation of a new national identity, how can the government avoid alienating the very people it claims to be serving? With so few resources, the problem of relative remoteness and the limited educational background of the majority of its citizens how can the state offer the people simple justice let alone improved life chances? Above all, how can they persuade them that the new ideas and social values are worth pursuing at all? For, without such conviction, citizens will opt to ignore or even subvert the mechanisms put in place by their new rulers.

It is one specific subset of the issues of the larger problem set out above that is the focus of the three essays that follow. The papers centre on the examination of alternative processes for the delivery of rapid and visible justice both when the national system is unable to cope and when the people find it inadequate for resolving their problems. Together the papers constitute an evaluation of what I have deliberately called ‘local’ justice systems. Others prefer the term ‘Community Justice’ but I shall argue that the variety of practices and the lack of adequate research for East Timor do not allow us to gloss things this way. The notoriously difficult to define concept of ‘Community’ is issue enough, but it remains to be established whether local practices are in any and in what sense ‘Communal’. It cannot simply be assumed.

Many of the practices that fall within the domain of local justice may be legitimately considered to be ‘indigenous’ cultural practices, at least in their origins. However, in considering the options for dispute resolution and justice delivery, we should not pre-empt our conclusions by assuming some simple dichotomy exists between the ‘modern’ and the ‘traditional’. The influence of over 400 years of Portuguese

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colonisation and the Roman Catholic Church through much of the country cannot be ignored. Nor can we forget the 24 years or more of Indonesian occupation. Its (at times) brutal militaristic state system and its use of modern technology such as satellite broadcasting saw the effective penetration of state ideology and propaganda into even the remote interior, barely touched by the Portuguese.

In considering the potential for the use of local East Timorese systems of legal practice and dispute resolution in the framework of the new nation, we are examining the range of those approaches as well as their compatibility with the stated goals of the new rulers. In doing so, we must recognise the long evolution of the highly localised indigenous systems of cultural and social practice while also acknowledging that they have always been subject to external influences to a greater or lesser degree. This has never been truer than in the last quarter of a century when clandestine guerrilla forces for independence have actively sought to counter Indonesian ideas, even in the remotest regions. At the same time, individual communities have continually developed their own distinctive traditions to distinguish themselves from the people over the hill who may be considered strangers who cannot be trusted. Such an inward looking view is just as much a response to the 'external' world as one that seeks openly to embrace it.

The Research and the Papers

The research for this set of papers was commissioned and funded by Australian Resources International of Sydney, Australia. A week was devoted to library research before going into the field. That work produced the first essay. Five weeks were spent in East Timor. During that time all 13 districts were visited and a range of sources were interviewed. The second paper in the collection was completed on my return to Australia. A follow up workshop was held in June 2002 in Dili, which the author led and facilitated. An evaluation of that process is the basis of the third essay.

It should be emphasised that what follows is intended to be no more than a catalyst for further discussion and, I hope, further research. The essays are by nature preliminary statements on a large question that requires considerably more informed debate. That information is yet to be systematically gathered, though there are encouraging signs of great interest from a number of sources. Only when we have a

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better in depth understanding of the local situation and of the options available can we be confident of producing policies that are likely to succeed.

The first of the three essays discusses the place of supposedly 'alternative' processes of dispute resolution in some of the literature. It considers some of the comparative material available in order to place into relief the issues confronting a modern centralised state faced by strong alternative systems held by its remoter indigenous population. The aim of this essay, which was written prior to doing the field research that forms the basis of the second essay, was to understand what some other nations had done and ask whether their responses might be adapted as models for East Timor.

The second paper is the core of the argument, since it comprises a report on 35 days of intensive fieldwork in East Timor and an evaluation of the status quo with regard to how local justice systems were functioning. It also considers how the 'formal' system in its various manifestations dealt with the encounter.

The third essay is a summary and evaluation of the in-country workshop, which the author facilitated and led in Dili in June 2002 for Australian Legal Resources International and the Judicial System Monitoring Program. This followed the research and writing of the first drafts of the two preceding essays and was built upon that experience. The responses of the participants provide a basis for taking the argument further in relation to the implications of the current understanding of the issues and the options available to the new government. In particular, it allows reflection upon the extent to which East Timorese themselves appreciate some of the concerns and understandings of the researchers and NGOs who are seeking to assist in the development of a new nation.

At the end of the day, when more research and discussion has taken place, these essays should be seen as an initial contribution to the argument about a fundamental aspect of the future of East Timor. That is, the need for government authorities to engage with their nation's past and present diversity and decide how it might contribute to a vision that will carry all the people forward to a just and fair society.

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ALTERNATIVE DISPUTE RESOLUTION AND CUSTOMARY PRACTICE IN EAST TIMOR
A Consideration of the Issues and some of the Literature

Alternative Dispute Resolution (ADR) and 'The Other'

As the very title suggests, ADR is primarily characterised by its difference to 'formal' systems of justice and civil law as enacted by a socially recognised legislature or embodied in a national constitution. As such, ADR is often considered synonymous with 'informal' systems of justice and frequently is assumed to be equivalent to the application of 'customary' or 'traditional' law. In fact, the literature indicates that the situation is considerably more complex than this simple characterisation might suggest. This is not least because the terms 'customary' or 'traditional' are highly problematic, especially when applied to the singular noun 'law'. There is an inherent danger that a timeless and fixed notion of tradition or custom, denuded of particular social context, is implicit in the usage and that this is opposed to an evolving, universal and 'modern' system, which is of a fundamentally different order. A brief consideration of the evidence reminds us that 'informal' mechanisms exist in all societies at all times, often for dealing with issues that the parties concerned do not wish or are unable to bring before formal authorities, however defined. Moreover, many constitutional and other legal systems amount to the codification of custom and tradition over time, with suitable amendment to suit new circumstances.

In very few if any contemporary nations is there ethno-linguistic uniformity let alone an unproblematic unifying 'culture'. Yet, in characterising the culture of 'The Other' anthropologists have in the past been as guilty as anyone of creating an illusion of fixed, self contained and broadly shared systems of values, meanings and representations that they have called 'Cultures'. Too often in the past this was based on narrowly focused 'community' studies that systematically ignored history and the links to the wider social systems in which a population was situated. Contemporary anthropologists have begun to rethink their ways of representing 'The Other' and have increasingly sought to emphasise the need to recognise the importance of difference and diversity. This has called fundamentally into question any simple division between so-called 'modern' and 'traditional' systems. It has also led to

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recognition of the need to represent the range of different social and cultural responses that may co-exist within a relatively small geographic or social space. Failure do so not only distorts social reality but also misrepresents the social circumstances of a population in a manner that may cause later problems, both for that population and for the people seeking to govern them.

For the purposes of this paper, the primary focus for examining ADR comparatively will be those situations where conventional legal processes have been deemed, for a number of varied reasons, to be inadequate in dealing with a particular sub-population or set of social conditions. Often the problem emerges as one of concern with the *effectiveness* of national systems of justice for resolving situations of (ongoing) conflict at a local level. This can be true whether the conflict is internal to the population identified or between members of it and the broader community and its dominant institutions. As the main reason for this paper's deliberations is ultimately to assist in the evaluation of the potential for ADR in East Timor, the major effort will be directed towards situations where a remote 'rural' population seeks or is deemed to require different legal strategies and processes to those of the 'modern urban' population served by normal 'western' systems. In the cases of Australia and Canada, these strategies and processes have been directed to perceived problems with the administration of justice for the indigenous populations. While the context of post independence East Timor will be somewhat different, the likelihood that a 'foreign' and imposed system of justice will be able to reach, let alone adequately serve often remote, local populations equally problematic.

ADR is often contemplated by authorities then when the gap between the application of the law in the cities and towns on the one hand and the remote rural villages and hamlets on the other appears too great. Alternatively, as was argued in the introduction, the issue can sometimes be seen in terms of wealth and education versus poverty and ignorance. Here, one part of a population may be considered badly placed to avail itself of the benefits of the urban justice system because of a lack of monetary or educational resources. It is also often implied, if not openly stated, that some of the 'problems' with conventional legal and judicial practices in regard to the more marginalised members of a particular society derive from the lack of a 'culturally appropriate' approach to the administration of justice. This amounts to an admission that supposedly 'universal' values as embodied in a nation's legal code may in fact not be shared or shared equally by all the citizens of that country. The

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democratic systems of law making, such as the so-called Westminster System, allow for this, of course, but expect the minority to acquiesce to the will of the majority. It is frequently when a particular minority cannot be incorporated successfully into the democratically produced legal system that an alternative is sought. In the case of the indigenous peoples of Australia and Canada, the persistence of perceived intractable problems among those populations, despite the intense policing of their communities in many cases, led pragmatically minded authorities to look for another way of achieving the ends of security and justice.

Canada and Australia

Although it is not always apparent in the ways their governments have approached their situation, the indigenous peoples of Canada and Australia are a diverse lot indeed. In huge landscapes, many differences in language, culture and social system had evolved before the settler colonists arrived from Europe and elsewhere. Even today, the use of the terms 'Aboriginal' or 'Indigenous' amount to glosses that fail to hide the differences that exist between groups of people so labelled in both countries.

This diversity makes the issue of finding modes of dispute resolution that can be thought 'authentic' to the indigenous population as a whole a chimera from the outset. While there are undoubtedly some generalisations that cross the ethno-linguistic boundaries found within the Canadian and Australian populations, they do not permit of a single, alternative, approach to justice that would be equally valid for all concerned.

The realisation of this truth has resulted in Canadian authorities looking to adapt forms that they believe derive in some sense from the 'community', while recognising that the recently adopted processes are in fact entirely new or 'hybrid' constructions. The most famous of these is the so-called 'Circle Sentencing' (see McNamara, 2000), which approaches crime and punishment amongst Canada's indigenes through the notion of 'community justice'. However, as McNamara and others have noted, the attempt to seek a culturally appropriate and effective sentencing outcome through community ownership of the problem nonetheless depends on the willing delegation of the power and authority of a conventional judge of the state court system. That judge retains the real power and the ultimate responsibility for the end result.

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As McNamara himself also notes, the legitimacy of this process depends in part on the identification of the appropriate 'community' to be involved. However, this is not sufficient, as the community will need training and resourcing in order to operate effectively. For this reason McNamara advocates that *acceptance, compatibility* and *community ownership* be the test of adequacy and appropriateness of this method rather than 'authenticity' to some supposed tradition. Nonetheless the premise remains that the approach reflects an emphasis on collective 'peacemaking' ideas that is closer to 'traditional' methods of dispute resolution than mainstream sentencing practices, which had singularly failed to resolve the problems experienced in Canada.

McNamara also points out that the chosen innovative approaches all seek to emphasise community values and restorative justice but,

> *it is important to recognise, that not all so-called 'restorative justice' approaches are necessarily applicable to a particular Indigenous community in Canada or Australia merely because they are considered to have their origins in an Indigenous culture.(2000:6)*

This caveat applies equally to the choice of approach in contexts such as East Timor, of course. What may work for one group in one part of the country may be useless elsewhere.

The other major issue surrounding this Canadian method (and all other methods) of Alternative Dispute Resolution is "the development of the criteria for determining the types of cases in which it is appropriate to convene a sentencing circle" (McNamara, 2000:6). This again raises the issue of who actually has the power to determine such matters and the real extent to which Community Ownership is possible. However, McNamara does suggest two 'core requirements' for success:

1. the offender must be willing to take full responsibility for his/her wrong-doing: and
2. there must be a community willing and able to facilitate a process of healing and restoration for the offender (McNamara 2000:7).

While the Canadian system is a still evolving one in which issues of enforceability and limitations of application are still being determined, it is a useful example of the cooperative potential that exists when the mainstream attempts to incorporate local

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understandings into its deliberations. Nonetheless, it is not above criticism. The advantages of a local system are also potentially its limitations. Accusations of local political influence, of the benefit accruing to some families at the expense of others and the potential for leniency and inadequate recompense for victims have all been raised as problems[1].

In Australia, a major attempt to look for alternative means of addressing social problems and even criminal behaviour has seen the increasing involvement of Aboriginals as mediators between their people and the white justice system. The NT Law Reform Committee produced a discussion paper in the early nineties in which it was explicitly argued that breaches in Aboriginal Law was a matter for the 'communities' and that unless they were 'invited' in this was not a matter in which persons outside the community should become involved. The NT Law Reform Committee saw that its business in such matters only began when such a breach was also a breach of the criminal law. Moreover, it noted, "Aboriginal Law may assist in the resolution of a dispute that has arisen from a breach in criminal law" (1992:4). The Committee also said it was important for resolution that the community had itself invited the assistance of alternative methods of solving such disputes. It was concerned to argue that Aboriginal culture remained 'a real force' in the lives of the people and that it was preferable to resolve disputes wherever possible rather than rely on 'the general legal system'. However, the paper goes on to suggest that there are limits to adopting a policy of avoiding the general legal system in such matters as drinking, petrol sniffing and domestic violence where they cannot successfully be controlled by the community and overcome through recourse to Aboriginal Law. The discussion then suggests that it is only by listening to Aboriginal people and involving them in the solutions that success is likely to be achieved. The paper goes on to consider a number of strategies, approaches and mediatory mechanisms that have had some success in the NT, Queensland and Western Australia. These are cases where Aboriginal people have taken an initiative and been empowered to take control. The conclusion again suggests that success comes from the support of the communities and their direct involvement in the solution.

Classic examples of this might include the 'Night Patrols' that have sprung up in various forms across the country (see Liu and Blanchard 2001). The intractable

[1] For a more general discussion of the relationship between the Canadian Government and the indigenous populations, see, for example, Hawkes, 1991

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problem of alcohol abuse amongst some indigenous people has seen others in their communities, with varying degrees of support and assistance from government agencies and authorities, set up their own alternative to the police patrols that so often produced confrontation. Here, the intervention of people with the right cultural and linguistic skills has been demonstrated to reduce the incidence of arrest and violence in notoriously troubled areas.

The difficulty of generic solutions to so-called 'indigenous' concerns is perhaps highlighted most starkly in the debate over Torres Straits Islanders' demands for recognition of their different and specific adoption practices (see, for example, Ban 1997). This issue centres on the contradiction between national and international notions of the rights of the child and the need for a stable home situation (preferably with the 'natural parents') on the one hand, and the local conceptions of the role of the extended family and their right to adopt permanently on the other. Torres Straits Islanders see their patterns of adoption as fundamental parts of their social identity, but there is a very uneasy fit between their customary practice and state and national law. Part of the problem is the state's perception of the child or children as individuals to be 'placed' for their own good. This contrasts directly with the local notions of collective responsibility and family structure in the Torres Strait. One further issue raised by this case is the very pertinent one of how large and how identifiable does a cultural group have to be to have its particular concerns addressed by the larger system. How 'local' should relative autonomy in matters of justice and dispute resolution be permitted to go?

The occasional intrinsic incompatibility of customary law and national law has perhaps come to the fore most obviously in the problem of Australian Aboriginal practices such as the spearing or severe beating of an offender in what is often too easily glossed as 'payback'. Western systems of state governance typically appropriate to themselves the prerogative of 'legitimate violence', even where they no longer impose the ultimate sanction of the death penalty. Increasingly in jurisdictions such as the Northern Territory of Australia, judges and magistrates are taking into account the probability of 'traditional punishment' being imposed over and above any decision of their court. (see McGrath, 1997/98). In this case, it is not necessarily indicative of even tacit approval of 'customary practice' that it is taken into account, but rather the apparent recognition of its inevitability in certain circumstances. The fear is of a kind of 'double jeopardy' arising. The courts fear that

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the offender will be severely punished twice. At the same time, the legal authorities acknowledge that the community response, where it involves significant physical punishment, may in fact be illegal. The dilemma is often one in which the short term protection of an offender from anticipated traditional violence might prolong conflict between families and ultimately result in even more violence. Judges and magistrates have responded in a number of ways. Some seek advice from elders and adjust their sentencing accordingly. Others have sought to separate the offender from his or her family and community, at least for the short term. The latter situation has occurred even where the offender has been prepared to return home to face his accusers.

This situation highlights one of the perceived advantages of finding 'culturally appropriate' means of dispute resolution. The hoped for outcome is a redressive process leading to the mutual recognition of the transgression and a satisfactory final resolution of the conflict it has produced. In many cases, the success of this relies upon a collective assessment that adequate recompense has been paid, either in suffering or in suitable goods. Frequently, and especially in societies in which exchange is a major medium and marker of social interaction, the compensation is not designed to profit the family or individual who has been wronged, but rather to provide an opportunity for a feast or distribution of wealth which creates the public symbolic closure of the issue and amounts to a form of reconciliation.

Land Issues

As the recent significant changes in the Australian legal status of Aboriginal people and their relationship to their land have demonstrated, the problem of the massive disruption and at time lethal outcomes caused by colonial occupation of countries and even continents remains a salient issue as much in Australia as in East Timor (see also Bartlett, 1986 for discussion of Canadian issues). What the *Mabo* and *Wik* decisions of the Australian High Court acknowledge is that while forms of land title and land usage that have emerged since the settlement of Australia by non Aboriginal people have changed patterns of control over land, they have not completely erased the prior systems of land tenure and land use practised by the original Australians.

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Even before the Mabo decision and the development of the 1993 *Native Title Act*, the *Aboriginal Land Rights (Northern Territory) Act* passed by the Commonwealth government in 1976 created new contexts in which mechanisms had to be developed to accommodate the different claims to and use of the land. In many respects what has emerged is the formal incorporation into the legal and judicial system of means of negotiating and resolving potential or actual disputes that are closer to 'Alternative' methods than to the 'traditional' court or bureaucratic processes. In many ways the work of statutory bodies such as the Aboriginal Areas Protection Authority and the Northern and Central Land Councils, each of which has an Aboriginal dominated board and an Aboriginal chairperson, is directed to negotiating the relationship between customary attitudes to land and its use and the expectations of governments and developers. In different ways, both the Land Rights Act and the Native Title Act permit the retrospective recognition of ongoing relationships of customary 'ownership', though only the former translates this recognition into legal ownership in contemporary law. Even when a successful claim was made under the 1976 Act, the nature of the ownership was very different to the standard patterns of land ownership that applied in the wider community. The law created land that could no longer be used as a simple commodity but which had a formal title in Australian mainstream law. This new 'Aboriginal land' is nevertheless very different to that so-called 'tribal land' the colonists entered and appropriated.

The control of their own land and the increasing capacity of Aboriginal people to have a say on land occupied by others through the Native Title Act does require patterns of negotiation and consultation which have to some extent re-empowered a displaced people. Where disputes occur, mediating structures, such as the Land Councils are also empowered, even required to represent the interests of the Aboriginal people (see for example Stead, 1997). When the processes are deemed to fail, the national governmental and legal structure may intervene (see Kearney J, 1982) through the medium of a judge sitting as a Land Commissioner, but the process still appears to be one where consensus and negotiation are the order of the day, in so far as this is possible. While the adversarial legal pattern may ultimately be invoked, the recognition has come to both governments and to many business people that a negotiated settlement with regard to land is often the best solution.

At least in the Northern Territory, the capacity for Aboriginal people's interest to be represented locally, with the assistance of lawyers and anthropologists employed by

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their own organisations, has certainly reconfigured the power relations to a certain extent. This is not to say that the system always works smoothly or that it may not have produced new contexts for conflict within the Aboriginal population (see Finlayson and Smith 1997). Nevertheless, the past attitudes of both authorities and settlers, where Aboriginals were often either ignored or thought irrelevant, have been forced to change. The concepts of 'Traditional Owner' or 'Native Title Holder', which are now embedded in Australian law, require a process of culturally specific identification that ties in Aboriginal cosmology, sacred sites in the landscape and patterns of kinship in a way that has invested 'tradition' and 'custom' with a whole new salience. Moreover, this process of identification is a fundamentally collective one in which disputes may arise but where such disputes can only be resolved by the agreement of a 'community' that recognises the truth of the claims being made.

East Timor

East Timor is a country that has been produced by colonialism. There is no 'natural' border between East and West Timor. Nor is there between Timor and nearby islands. Ethno-linguistic groups, cultural groups and even kin groups straddle the border. In the eastern part of the emerging nation, there are people whose languages are part of the 'Papuan' group while the majority speak Malayo-Polynesian languages. The urban population before the Indonesian invasion in 1975 was a mixture of European Portuguese, mixed descent (mestico) people, Chinese and a relatively few indigenous Timorese in proportion to their numerical domination of the whole province. The rural populations were largely indigenous Timorese who lived in small kin based hamlets where descent from a common male ancestor usually defined membership, rights and access to resources, especially land. The urban elite was educated, literate and considered themselves modern and sophisticated. The language of these latter people was and remains Portuguese. The indigenous Timorese population of the towns were of low socio-economic status, often the servants of the elite. The rural population was poorly educated, largely illiterate, spoke regional languages and in many cases did not even share the dominant Roman Catholic religion.

The almost quarter century of Indonesian domination certainly had a significant effect on East Timor and on its population. Many of the Portuguese speaking population left and created new lives for themselves in such places as Mozambique, Portugal and

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Australia (see Farreras-Morlanes, 1991). There they nurtured a new Ethno-nationalist identity and sought new opportunities for their children. In Timor, a whole generation grew up educated in Bahasa Indonesia in a widely expanded primary education system[2] that saw many areas provided with the chance of literacy for the first time. The Indonesian state sought to subdue separatist movements and sentiments through the twin tools of military oppression and 'education' to a nationalist ideology based on the *Panca Sila*. Thus, the differences in experience of the generation that grew up in Indonesian occupied East Timor and those who grew up in exile could hardly be more different. The tensions between the committed exiles and those who 'stayed' are already emerging in the post 1999 East Timor as it seeks to negotiate its new position in the world.

The Indonesian state sought to impose a national system of government that penetrated down to the village level. However, evidence suggests that this was no more completely successful in the remoter parts of East Timor than it was in neighbouring Maluku or Nusa Tengara Timor. In those contexts, the new titles such as *kepala desa* or village head were often assumed by traditional leaders whose place in the kinship and ritual system provided them with local authority.

Authority and Governance at the Local Level

The situation in much of East Timor remained similar throughout the long period of rule by foreigners. Despite the legal fiction of the occupying power's ownership of state or crown land, local land was considered to be owned and was certainly managed via local mechanisms based on kinship and the authority of patriarchs of a particular clan or lineage (see Hicks, 1990). As with many rural and remote societies, access to land was the most basic of requirements for a sustainable existence.

However, it needs to be understood from the outset, that control of land in the eastern part of the Indonesian archipelago is never merely a matter or 'possession' in a western sense. As with Australian Aboriginal land, East Timorese land is inextricably associated with a cosmological understanding of how and when a people came to live in this place. Fox (1997) and his students have come to describe this as 'precedence' – the mythological justification for priority and seniority in matters related to land and the sacred sites it incorporates. Traube (1980 and 1986) and

[2] The expansion had begun in the years 1972-1975, but was continued by the Indonesians for their own ends.

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others have described how a sacred mountain often constitutes the *axis mundi* for a particular group. She and others describe the importance of those who know and practice the ritual associated with the sacred places. In Tetum speaking areas this involves the cooperation of two people, the 'Male Lord' and the 'Female Lord'. The mythological and ritual structures of this region are generally founded on a dyadic symbolic system in which the complementarity of such opposites as male and female, heaven and earth, is fundamental to understandings of being and living in the world.

Marriage, Land and Hierarchies

While local practices vary, many writers have noted the widespread patterns of exchange involved in the process of marriage and procreation in Timor. Hicks (1990) reminds us of the relationship between the hierarchies that emerge in marriage patterns and the broader existence of social hierarchies in East Timor. Simplified, East Timor, like other parts of the Malayo-Polynesian world, had a social structure in which a royalty and aristocracy was recognised as superior and as the natural governing class. Commoners lived as free people under this system but often stood above a slave class who were those captured in war or those whose debts had placed them in penury. Once more, the status of the different classes could often be justified by reference to ritual notions of precedence. Corvee labour could be required of commoners by aristocrats and the slaves were largely dependent on their masters for their means of sustenance.

As already indicated, access to land was primarily achieved for many people by membership of a patrilineally defined kinship group or by attachment to such a group. Sometimes, as Renard-Clamagirand (1982) would prefer, the 'kinship group' is better viewed through the prism of local understandings where the 'house' or *uma* takes priority as the symbolic heart of the family and the minimal social unit. Women retained rights so long as they remained unmarried and were considered productive members of the group. On marriage, the responsibility for the woman's welfare and access to resources – and the expectation of her labour being employed – was held by her husband and his kinship group. In one sense, the transference of her membership to another 'house' is achieved and marked by a series of payments or bridewealth. The idea of the exchange of a woman for gifts that recognise her value as the producer of the children of her husband's lineage, and acknowledge the value

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of her own lineage's nurturing and educating role, is one that is common in many societies. It often results in a symbolic acknowledgment too of the 'superiority' of the wife-giving group to the wife-taking group as anthropologists have characterised them.

The successful completion of marriage payments is critical to proper relations between kin groups or 'houses' who often form the core of a hamlet or village. This is also often a cause of conflict when payments are delayed or refused. Similarly, the issues surrounding repayments in cases of incompatibility or premature death of the woman can lead to major disputes. Divorce and compensation for mistreatment can in such societies be ongoing sources of disruption to normal social relations. Ideally, local groups are linked in 'alliances' formed by repeated patterns of marriage that link people over generations and place them in specific – hierarchical – relations to others in their social universe. Failure to act appropriately to one's kin and affines can itself be a major cause of discord and even violence (see the Report on the Manatuto case). The national state law may not be well suited to dealing with such disputes. It may fail to create satisfactory resolutions to problems that are often to do with highly localised and culturally specific modes of behaviour. What may simply be the failure to act according to particular norms, norms that may not accord too well with notions of the sovereign and unique individual who is equal to others in the eyes of the law, can nonetheless be a major source of ongoing conflict for a community.

As in Australian Aboriginal communities, it is likely that in many cases East Timorese people will see the formal legal structures of the new Nation as a means of last resort in resolving what are perceived to be essentially 'local' and often 'family' problems. Only when local leaders are unable to apply successfully the sanctions open to small communities, such as ostracism, expulsion, violence and even death, will extreme cases be brought to the attention of 'outsiders'.

Questions to be considered

Amongst the issues raised by a comparative consideration of the situation of informal or 'alternate' mechanisms for resolving disputes, perhaps the most fundamental is the question, "In a modern nation state, what room is there for autonomy in the field of justice for culturally and socially distinct sub-populations?"

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Before such a large question can be answered, however, it is necessary to examine to what extent more or less autonomous decision-making and sanction enforcing processes are already in place in East Timor.

- Are the land disputes, which arise in all societies, being handled locally according to 'custom' outside of Dili?
- Is compensation being paid between individuals or groups without the sanction of the courts?
- Are social or ritual leaders able to influence breaches of norms in such areas as marriage and divorce?
- Is crime being 'dealt with' independently of the police force?
- What are rural peoples' views on the preferable way of handling matters of security, law and justice?
- Is the urban elite prepared to contemplate ceding some of its power over such matters as land distribution, religious issues, gender questions and local development to local assemblies or councils based on 'traditional' affiliations?

In summary, in what domains, if any, is decentralised administration of justice and dispute resolution in place? And, what potential might there be in an emerging nation to permit certain categories of conflict resolution and administration of justice to be retained in the hands of people deemed appropriate only according to customary law.

Of course, other considerations that will have to be taken into account include the protection of universal human rights and the fact of the hierarchical and often anti-democratic nature of some of the traditional processes of governance and legal deliberation.

Ultimately it may be that there are basically two paths to take with regard to the incorporation of customary practice into the national system. On the one hand it could be seen as a permanent alternative to the formal system of justice for certain categories of dispute or transgression. On the other hand, it might be seen as a transitionary stage that recognises the present reality but seeks to 'regularise' it in the future. Either way, there should be much to learn from systems that have, albeit through evolution, outlasted 400-450 years of interference from outsiders.

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VARIATIONS ON A THEME: COALITIONS OF AUTHORITY IN EAST TIMOR

Introduction

This report is based upon 5 weeks of fieldwork in East Timor and several weeks' review of literature and analysis of data in Darwin, Australia. During the 35 days in the 'field', all thirteen districts of East Timor were visited and over 100 interviews were conducted with as wide a range as possible of people involved in the legal and justice systems at the national, district and sub-district level. In practice, this generally meant interviewing Civpol (Civilian or UN police) commanders and community policing officers where possible, and local East Timor Police Service (ETPS) officers, as well as UN Human Rights Officers and Legal Officers (national and international), village authorities (Chefe do Suco and Chefe d'Aldeia) and members of the East Timorese public. Interviews were largely conducted in English with international members of the UN mission and in Bahasa Indonesia with East Timorese

The brief given by Australian Legal Resources International (ALRI) was to consider the 'existing foundations' for Alternative Dispute Resolution (ADR) in East Timor and to evaluate whether these foundations could be strengthened and developed to complement the formal system of justice. The aim was to consider 'Community based dispute resolution' in the context of a capacity building program designed "to support the development of an enhanced legal system in East Timor". In practice, this meant an assessment of the current patterns of dispute resolution at the local level and its relationship to the national or 'formal' system. The 'formal' system at this time is generally recognised being unable to cope even with the level of disputes and crime currently being experienced in the towns of East Timor. Most of East Timor's people still live outside the major towns, often in relatively remote villages and hamlets. It became evident early in the research that the vast majority of the disputes and crimes that occurred in the country were not reaching the police or the courts but were being dealt with at a local level, often with the tacit or active approval of local police and administrative officials. The research, therefore, required an examination of the so-called 'traditional system' as it was understood and mobilised by people (including police) confronted with local disputes and crimes that were not considered

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'serious' enough to necessitate a court appearance. We will return to both the notion of 'traditional system' and 'serious' crimes later in the report.

A caveat: Necessarily, given the time and resources available for the study, the information obtained for this analysis is somewhat variable in both breadth and depth. No capacity existed to remain long in any one district or to get to know villagers in any close sense. Therefore, this cannot be said to be a fully comprehensive account of the operation of local systems of justice and legal authority in East Timor. It is certainly not an attempt to document the very large number of culturally specific practices that occur in the villages when crimes occur or disputes break out. Rather, this is an overview with some illustrations from specific districts. I am not able to offer even a full analysis of the data I was able to collect given the constraints of time and space. While visits were made to relatively remote villages such as Uato Lari in Viqueque District and Allas in Manufahi, when the opportunity arose, most of the information collected was gained in District Capitals. Moreover, during the fieldwork stage of research, there was unfortunately never an opportunity to see local dispute resolution processes in operation at first hand. Thus the tentative conclusions drawn on the basis of the survey undertaken must remain a preliminary assessment of the current situation. Much more in-depth research would be needed to evaluate the actual practices of village leaders and councils of elders in the area of dispute resolution if a truly authoritative account were required.

Earlier Research and Reports

Initial meetings in the first three full days of research in Dili established that a considerable amount of work has been done on 'traditional systems' in the last two years. A number of agencies have considered the role of 'community justice' or 'customary law' in the new constitution and legal structure (see attached list of reports and articles). Nevertheless, the interim authorities and NGOs alike unanimously expressed the view that more research and coordination was needed. There was also a perhaps surprising level of agreement amongst many with experience in the area of justice and legal processes on the probable usefulness if not necessity of incorporating the local systems into the national structures especially in the early days of independence.

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Interviews with several individuals located within the UN structure uncovered a considerable amount of knowledge amongst some officers in 'Political Affairs', 'National Security', The Office of the Principal Legal Adviser, and Civpol. Three important reports were immediately made available which assisted considerably in the development of the research project.

The first of these was the 'Report on the National Constitutional Consultation in East Timor' in which individual summary reports from all districts were included. In most of these the text recorded a strong expression of the desire of the people to retain a system of traditional justice at the local level to overcome the problems caused by local disputes and crimes. In one, that pertaining to the Viqueque area, the need for the law to deal with people who use 'medicines' to harm people was specifically mentioned. We shall return to the particular issue of black magic and sorcery as sources of dispute later in this report.

The second important document made available was the 'final report' evaluating the, 'Traditional Power Structures and the Community Empowerment and Local Governance Project', prepared by Sofi Ospina and Tanja Hohe in June 2001. These two anthropologists led a team that focussed on three districts, one in the East, one in the West and one in the centre of the country. Approximately three months of intensive research was undertaken in two of three districts and two months in the third. While the focus was not dispute resolution mechanisms per se, the study provides a very useful comparative base on which to build. Amongst other things, the report reinforces the view that while some general characteristics can be delineated for East Timorese traditional systems, *there is considerable variation across the country* at the local level with regard to the details of cultural beliefs and social practice. A further important conclusion from our point of view was the fact that, despite the overt attempt to engineer a new local democratic basis for social development, customary leaders and the elders of the villages still retained considerable real authority and influence. In this context it needs to be remembered that, as Opspina and Hohe remind us, the Portuguese acknowledged and made use of the indigenous hierarchical social structure that recognised three levels of social status. These were the noble or ruling class whose hereditary leaders were known as *Liurai* in many parts of the island; the commoner class of peasant farmers: and the slaves. Slaves could be debt slaves or prisoners taken in time of conflict. The Portuguese first worked through hereditary leaders and then sought to replace them

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by appointing their own men, but mostly from within the ruling class. In an important respect the colonial rulers were an additional level in the hierarchy and the UN attempts at 'democratising' the structures of society through a World Bank funded program sought to transform a truly ancient pattern of governance and political authority.

A Civpol report prepared by Mr Adrian Norwell for the Community Policing section in February 2001 incorporated a number of case studies from 10 of the 13 districts of East Timor. The report and recommendations highlighted two factors that had become very apparent in conversations with a number of sources.

1. Police are acting pragmatically at the village level by encouraging some (often most) situations to be resolved through the village chief (Chefe do Suco) and a village council. Like it or not, the local justice system is operating and appears to be the preferred system in many cases.

2. Both local people and current police authorities recognise that the formal system of law is and will remain too remote, too expensive and too slow to resolve disputes at the local level quickly and in a way that will bring about reconciliation and an end to any conflict arising from the transgression.

There was also a fairly wide appreciation amongst both local East Timorese and expatriates that there is considerable potential for contradictions to arise between traditional systems and concepts of Universal Human Rights, especially those relating to the position of women (and to a lesser extent, children) in the new nation. One expatriate officer suggested that the brideprice system (see my earlier paper for ALRI: *Alternative Dispute Resolution and Customary Practice in East Timor*) leads to the belief that a wife is a chattel that has been bought ("for a couple of buffalo") and is therefore 'property' to do with whatever the husband wishes. I was to hear variations of this notion in many parts of East Timor, usually expressed by people of European descent. In fact, this is not an accurate representation of how the system works in most contexts (See Fox, 1980) but it is true that women, once they leave the home of their fathers, become very vulnerable and may be treated in a way that is considered totally unacceptable by the standards of western legal systems and those of many educated urban East Timorese.

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An example was cited in the Norwell report by a Civpol officer who recounted the case of a woman who intervened when her husband was violently abusing his daughters. She, in turn, was soundly beaten by the husband, who used a chair to chastise her. When this was reported to Civpol, they consulted the local village head only to be told that this was 'normal' and there was no problem. The officer suggested that there was a total lack of comprehension as to why Civpol would wish to be involved in what was essentially a 'family matter'.

Conversation with now former Civpol officer, Adrian Norwell, did immediately raise one problem that he believed already existed in the application of the law. He suggested that some officers were making the judgement that a matter such as a 'minor' assault need not be dealt with by Civpol, but could be resolved by the local village council. They were sometimes doing this in order to avoid the paper work and the trouble of following up the matter. He suggested that there was a failure to distinguish between what was reasonable to leave to the locals and what must be dealt with formally. Again, he raised the issue of the extent to which this was a factor of the inadequacy of the police (UN) who were on the ground. These issues were to recur many times during the field research and a number of senior police officers suggested that there were indeed individuals who were avoiding the necessity of making proper reports and compiling case notes by invoking the village justice systems. However, as we shall see, this was not always deemed to be a result of laziness or incompetence.

'Traditional' versus 'Local' Systems'

An important point needs to be made early in this study. It is one that pertains directly to the assumptions many people evidently have concerning local justice systems in East Timor. In much of the literature and in common parlance in East Timor, one is continually confronted by references to the idea of **the** (or **a**) 'traditional' system of justice or **the** form of 'customary law' (*hukum adat*)(Bahasa Indonesia). This is a basic fallacy.

Many writers, perhaps most notably Hobsbawm and Ranger (1983), have drawn attention to inherent problems with the term 'tradition' in English usage. It has been pointed out that both the 'ancient' and static implications of such a term prove to be illusions on closer examination. What is thought of as 'traditional' often turns out to be a relatively recent invention even in literate societies and traditions prove to be

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dynamic evolving systems that demonstrate more or less continual change in both their form and content. In another place, I have myself argued that the Indonesian or Malay term *adat* carries similar illusory loadings. It seems that much that is thought of as belonging to the realm of 'custom' (*adat*) (and therefore assumed to be ancient habit) is in fact the glossing of an inherited practice that may only be a generation or two old. The often-encountered propensity of people in this part of the world to resort to the notion that contemporary ways of doing things are sanctioned by adat or ancient custom must be seen as more a plea for the recognition of the legitimacy of the current practice than a statement of reality. Equally, of course, custom (*adat*) can be used just as forcefully as a basis for challenging current practices and their legitimacy as much as for justifying them.

The most dangerous aspect of both 'tradition' and 'adat' as concepts then is their tendency to represent practices as fixed and immutable. It is a major mistake to think that because people claim that their contemporary ways of resolving disputes are handed down from the ancestors as ancient custom, this actually means that there has been little or no change over a long period of time. It is both too easy and potentially dangerous to dismiss customary practice as something of the distant or worse 'primitive' past.

In the context of East Timor and the developing world generally an important associated issue is the notion of 'a traditional system' that is opposed to the 'modern' or formal system. One thing needs to be made quite clear from the outset; earlier work and my own research confirm that there is **not one** tradition of dispute resolution in East Timor. In an important sense, there are as many 'traditions' as there are local cultural and social groups that seek to solve the disputes confronting them in their everyday lives from their own cultural and social resources. My research convinces me that we are better off talking in terms of 'local systems of justice' rather than 'traditional' or even 'community' systems.[3]

I am not suggesting, of course, that local people do not often resort to the idea of the sanctity and fixity of their customs and the concept that their specific power resides in their ancient and supernatural origins. They certainly do. However, it is critical to

[3] Community systems might be a more accurate description than 'traditional' in many contexts, as we shall see, but the current political situation in the villages means that not all authority resides with the village community, nor is the leader always obliged to consult the community as a whole. However, it is an unwise leader who seeks to administer justice without resort to the collective will of his constituency, for reasons that should become apparent.

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acknowledge that these community practices, 'traditions' or local systems, as I prefer, are not and never have been totally isolated, hermetically sealed, bounded arrangements that are unaffected by neighbouring systems and national and colonial history; quite the contrary. The local differences between villages and subdistricts that we can observe today are in part the outcome of processes of differentiating 'us' from 'them' in the next village or down the mountain. 'Our' ancestral inheritance and our contemporary cultural practices are what make us who we are (see Fox and Sather, 1996).

However, fortunately for those of us observing the villagers' approach to crime and dispute resolution, it is possible to identify some underlying principles of justice and social interaction that seem to pervade many of the local systems despite their relative autonomy and apparent differences in detail. These will be important considerations in determining the future relationship between the national, formal system of the administration of justice and pervasive local practices. Much more research remains to be done.

Part 1: CONTEXTS OF HISTORY AND AUTHORITY

Stable systems and the social transformations of the last 27 years

It is self-evident that the period between the decision of the new left wing Portuguese government in 1974 to divest itself of its colonies and the election of the members of the constituent assembly in East Timor in 2001 was a time of momentous change for the people of the former colony. However, this somewhat conceals the fact that the long period of Portuguese rule was also a time of change, albeit at a slower pace. Perhaps the most important aspect of the change over the more than 400 years of Portuguese political domination was the creation of an urban Portuguese speaking elite located mainly in Dili and Baucau. This approximately 10% of the East Timor population, comprised primarily, but not exclusively, of European and mixed-descent families, was the focus of the political processes that occurred in the civil war of 1974-75. These people were prominent also in the reaction to the Indonesian invasion that followed. It is perhaps true to say that it is to a large degree this urban elite population and their descendants that dominate the contemporary political process. A significant number of the current (2001) leaders were overseas for the greater part of the 24 years of Indonesian rule, often living in other Portuguese

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former colonies or in Portugal or Australia. In many ways, they form an identifiably distinct group compared to the leaders who remained in East Timor and, in many cases, fought for independence from within, from the jungle or as part of the clandestine organisation of leadership. Many of the latter did so while appearing to acquiesce to Indonesian rule, learning the language and even serving in the bureaucracy.

Needless to say the Portuguese educated and speaking elite differ greatly in life experience and in socio-economic status from the at least 70% of the population who remain rural and use vernacular languages as their normal means of communication. Prior to the expansion of the Indonesian primary school system, probably 90% of the rural population was illiterate. Today, those who are literate are mostly so in Bahasa Indonesia, though their preferred spoken language is likely to remain a regional one. Most urban people of adult age today and all of the children who received education in the period before 1999 speak some Bahasa Indonesia and are able to read it to some extent.

The clandestine leadership system of the years between 1975 and 1999 that was organised by the resistance and ultimately by the Council for National Resistance in Timor (CNRT) provided a direct alternative to the Indonesian sanctioned system of leadership. The latter was predicated on laws that tried to create a common system of village governance across the archipelago. The Indonesians had also tried actively to subvert the older patterns of village leadership as they saw the potential for the focus of resistance to lie with the customary holders of authority[4]. Most of the senior government officials were recruited from Java and other islands. They also tended to ensure the 'election' to the posts of head of village (*kepala desa [BI]*) and head of hamlet (*kepala kampung)* of the local people they believed to be sympathetic or at least compliant. These community heads were supported in turn by a committee and by formally recognised lower order officials. The evidence suggests that despite the best efforts of the Indonesian rulers, many of those chosen for formal positions in the village were secretly sympathetic to the resistance movement. Indeed, some leaders at the local level were still drawn from the customary leadership families because the people overwhelmingly chose them. Some of these same people have been able to retain leadership roles in some cases to this day by virtue of their association with the clandestine resistance movement. However, most of the current village and hamlet

[4] In this they replicated the position of the Portuguese who also sought to subvert the local leaders.

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leaders are neither *adat* leaders nor former Indonesian officials. Instead, they are those individuals who were approved by the CNRT to take over after the departure of the Indonesians. These people usually have no legal status under the prevailing legal system. Nevertheless, the UN and local administrators have accepted the de facto leaders and treat them as though they were sanctioned by law. A real problem is perceived to exist however in this situation. The current village leaders are not paid as they were under the Indonesians and they mostly have considerable demands placed upon their time and energy in the very busy period of reconstruction that characterises the present in East Timor. Furthermore, since the success of the Fretilin candidates in the election for the Constitutional Assembly, several villages have been reported to be in the throws of further political struggle as the ex CNRT but non-Fretilin leaders see their power challenged by Fretilin members who argue that the recent election shows that they should hold the authority at the local level too.

The patterns outlined above demonstrate two important things that are highly relevant to the issue of alternative dispute resolution and to the application of 'traditional' law within villages. The first of these is the fact that local customary justice systems have long had a formal (foreign) system that they had to accommodate and against which they could be measured, particularly since the Indonesians took over. The second is that formal and informal political processes have directly challenged the power of customary leaders within the villages since soon after colonisation, but especially since 1975. Current challenges to customary authority by ex CNRT and Fretilin cadres are in part indicative of a problem in understanding the democratic process at the local level. Both non-elected political appointees and those whose authority derives from ancestral claims to precedence (see Fox & Sather 1996) are nonetheless still able to exert considerable influence at the local level in the current circumstances and the implications of this will be explored further below, as they are crucial to the issue of dispute resolution.

The Church

Along with the Portuguese language and the legal culture, the colonisers brought a new religion. Roman Catholicism was a very early aspect of the transformation of East Timorese society. However, like the language, it was much stronger in the urban district capitals than in much of the hinterland. In the more remote areas, in many cases, it was not until post 1975 that a truly successful expansion of the

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Church across the country occurred. This was in part because of the Indonesian insistence on propagating the *Panca Sila* national ideology that prescribes belief in one god and associates atheism with communism and anything else with 'primitive' and 'backward' people. The expansion of the church allowed the figure of the priest to exert a much greater influence beyond the centres of Portuguese civilisation, which had been their stronghold in earlier times.

In many ways, the Church today offers another layer in the structure of local governance and dispute resolution. The powerful moral influence some priests are able to exert was aptly demonstrated in the figure of Bishop Belo and his brother bishops in the period leading up to the departure of the Indonesians. As an international organisation, the Roman Catholic Church also provided a major conduit for information flows into and out of the country over a very difficult period. Local priests are also able to exert moral influence and can be used as an alternative source of appeal if families are not satisfied with the treatment they are receiving from others in their community. An obvious area in which priests may be mobilised is in the problem of illicit sexual relations or family violence. However, the Church seems to be held in reserve in many cases of intra-village dispute. Sometimes they are used in inter-village conflict resolution and often they are appealed to before the police are brought into the issue.

National and Local Legal Systems

The current situation in East Timor is that, subject to a few changes passed as UNTAET regulations, the Indonesian legal code remains the law of the land. This will continue until the new government of the country is able to enact its own laws, once the constitution has been fully written and approved. However, as has always been the case, the application of the law in the towns and villages of East Timor is highly variable in the extent to which it exists at all, let alone in how much it conforms strictly to the written codes.

UNTAET has implemented recruitment and training programs to create an East Timorese Police Service. Training is for a mere 3 months because of the pressure to have police on the ground as soon as possible and to be in a position to replace the UN or Civpol force when the mission ends in May 2002. In many areas, local police are present and are beginning to exercise authority, though still largely under the

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supervision of international UN police. There have been many concerns raised during my research about the brevity and inconsistency of the training the local officers have received. The haste and the broad range of international instructors involved in the training program have seen a confusing array of approaches offered to recruits and a worrying inconsistency in the supervisory control exercised in the field. Many East Timorese police are seen by the international policemen as lacking in confidence and experience to the point of being unready to stand alone. The pay the police receive is also perceived to be a potential problem as it is so little that officers may be forced to 'supplement' their income in order to support a family. Given the reputation of Indonesian police and the example they set, there is a real fear that this could lead to corruption emerging sooner rather than later.

Another potential problem lies in the intention, already fulfilled in many cases, to send recruits back to their home villages to serve as local police. The logic of using people familiar with the social and cultural ways of the population seems at first glance quite sensible. It is also probable that people from an area will know the people and their reputations in a way that could assist intelligence gathering and crime detection. However, a real risk is inherent in this practice. The mainly young men and women, often unmarried and therefore still 'children' culturally, will be returning to a very hierarchical system of authority in which they will be very junior in many cases. Moreover, given the strength of family ties and collective sentiment in this context, the ability to remain and be seen to remain neutral may be extremely difficult. There will be real conflict between one's obligations to one's kin and one's obligations to the law. Reliance on food and shelter from family resources will also add to these tensions.

As suggested earlier, the national system of justice based on district courts that are yet to function consistently (or at all in some cases) is not able to cope at present with the backlog of reported crimes. There is also no effective civil court at present and redress in civil matters is very difficult to achieve at any level above the purely local. International police observed that local people do not distinguish between a criminal matter with which the police can deal and that which is a matter for the civil courts or for private settlement. However, as we shall see, it could be argued that the police, international and local, are equally guilty of confusing matters as they seek to intervene and even mediate in issues which would be way beyond their jurisdiction in those countries with developed court systems. The notion of 'community policing' has

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been extended to arbitration and mediation of such cases as disputes over land use on the basis that pre-emptive intervention may avoid the seemingly inevitable violence that is assumed to be the result of unsuccessful resolution of the matter at hand. The rhetoric is in terms of avoiding crimes in the future by facilitating local resolution processes.

The cases that do reach the court are also not being dealt with consistently or always in accord with the prevailing legal code. Prosecutors and Investigating Judges are reported to have referred some cases back to the 'traditional' or village system on the basis that the matter was too trivial to be dealt with in the court or too politically sensitive to allow the officials to feel safe in making a judgement. Since my research records cases of severe domestic violence and serious arson being among those to have been passed back to the community, it is not surprising that a distrust of the court system was expressed both by police, administrators and local people.

It needs to be understood that villagers generally report to police only those matters that they consider to be too hard to resolve at the local level. Police believe that they are hearing about murders and some serious rape cases almost as a matter of course, but they accept that they learn about a very small fraction of the disputes and other crimes that occur in the villages. Neither most of the police I spoke to nor the local leaders and community members could see much point in reporting many crimes and disputes to the court if it was going to take a very long time for anything to happen or if they were simply going to be referred back to the village level. Thus the present state of the national court system and the early decisions emanating from some of the Prosecutors and Investigating Judges have provided a disincentive for both police and citizens to report cases and invoke the formal processes of the law.

It also needs to be remembered that the western notion of clearly separated powers did not apply under Indonesian rule in East Timor. Local lines of authority placed village heads, the police and the military all within the political domain of the executive, and the courts and legislature were both equally dominated by the interests of the Suharto regime. As a result, local leaders tended to act with the assumed authority of the national government and were able to wield considerable real power within their area of control. In addition, there was a strong element of corruption in the exercise of power and the administration of the law. From the perspective of the East Timorese, the military and the militarily organised police were

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often the feared and seemingly arbitrary enforcers of a government based in Java. They were not trusted and were not seen as the protectors of the people or the preservers of a fair and just system. Rather, they were an unpredictable source of often violent oppression and were largely to be avoided wherever possible. Generally, one relied on the local clan and family leaders and on the hamlet and village heads to resolve most conflict and to punish offenders against the community. The village authorities might bring in the police, but the ordinary citizen seems to have avoided interaction with them if they could.

Part 2: IN THE FIELD

General Observations: Authority in the here and now

From the beginning of fieldwork, most of the impressions and attitudes mentioned in the various sources cited above began to be confirmed by the comments of the Civpol Officers, East Timorese Police Officers, Legal Officers and Human Rights Officers I was able to interview. The early discussions I was able to develop with local East Timorese people concerning these matters also rarely contradicted the understanding of most of those located within the 'formal' system. This was especially so on the issue of the extent to which there was an acknowledged heavy reliance upon village processes for the administration of justice. There was also confirmation of the view that there existed little understanding or trust of the formal system amongst many rural villagers. Local leaders expressed (an often repeated) hope that the confusion they felt at the moment regarding the lack of an 'East Timorese' Law would be settled once the new independent government came into being in May 2002. Some local village heads told me explicitly that there was no law at present and they felt that their own authority was even a little uncertain. Technically, they were wrong about the absence of a legal code but right about the fragility of their own positions. However, for many villagers I met in my travels, the only regular authority in their lives remained these village heads, the chefe do suco (*kepala desa*) and chefe d'aldeia (*kepala kampung*). It was understood that military power was in the hands of the UN and that a new police force was being created by the Civpol officers whom they saw on patrol, but there was little confidence or certainty in interacting with people who were outside the local system of social relationships.

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In fact, throughout East Timor in the course of my research, I continually met the notion of a hierarchy of authority that was mobilised to seek resolution of the problems encountered in everyday life. Whether these problems were an assault or theft, or the encroachment of another on one's land, most people saw the approach to resolution to be the same. Disputes between members of different families, whether over marriage issues or any other matter, were first dealt with by the elders of the two families through a meeting. If this was not sufficient, they resorted to the chefe d'aldeia or *kepala kampung* and sought his mediation. If the *kepala kampung* could not achieve a successful outcome, he referred it to the chefe do suco or *kepala desa*. Either of these leaders might, if it was deemed appropriate, convene a meeting of the knowledgeable elders of the village, including the *adat* or customary leaders. They were particularly likely to do so if the issues concerned matters of customary usage or practice, such as land or marriage customs, but it was generally recognised that any decision had greater weight if it was seen to be collectively generated and supported. At this point, the local priest, if he was present and trusted, might also be consulted. As indicated earlier, people often expressed the view that it was better to avoid taking things outside the village if possible and the police were only resorted to when no resolution could be achieved at the local level. In the Indonesian period, they said, the district head the *camat* would be the next level of authority above the village head and, only when he required it, would a report be made to the police under normal circumstances.

The international police officers employed by the UN quickly learned that they were more likely to maintain peace and good order if they worked through local leaders and mobilized local dispute resolution mechanisms. In one case, an Australian officer I visited, who had been in the remote station for only 3 weeks, had already facilitated and mediated a meeting between the heads of two villages concerning the theft of a horse. The large sum of compensation sought by and paid to the victim (by the prominent brother of the perpetrator) was seen as a very satisfactory outcome by all concerned. It was, of course, an entirely extra-judicial process that went beyond the duties of the police under normal circumstances. However that was the point. International police came rapidly to understand what the local police already knew. It was deemed important to all concerned that a **quick** and **visibly just** resolution to such situations be achieved in order to allow normal social life to resume. The state's judicial process could not provide a quick outcome and neither the police nor the local people trusted that it would produce a just one in *their* terms. The priority

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generally given by the police was the avoidance of any potential escalation of a dispute into a serious violent confrontation. The volatility of the population and their propensity for violent responses was a constant theme of the assessments made by local people, East Timorese police and international visitors concerning conflict at the village level. The ready availability of machetes and large knives in the farming communities meant that such violence could easily become deadly.

Overall then, the major benefits of local systems of justice are perceived to be their accessibility and the speed of their operation, along with their sensitivity to local social contexts. The ability to work in the local vernacular is also very relevant here. District Courts may require the use of a poorly understood language and the victim and perpetrator can be significantly disadvantaged in such circumstances. The old adage that justice delayed is justice denied also has a particular ring of truth in the context of newly emerging East Timor. People are keenly aware that the government cannot yet solve most of their problems but they also know that a distant government of Dili based politicians is unlikely ever to understand the importance of their local concerns or be able to resolve them in a timely manner. There was a general feeling among the local people outside the capital that the village system of justice remained and would remain the most immediate, relevant and effective form of resolving disputes and punishing petty crimes. This view was not, of course, always shared by the international advisors in the areas of law and human rights.

A dominant concern of UN Legal Officers and Human Rights Officers across the country was the inconsistency of outcome in local decisions. Several of these international officers pointed out that in cases of sexual assault or domestic violence, the decision on the compensation payments to be made was a matter for the men of the village. Often a payment was made to the father of the victim and she did not even have to be present, let alone receive any personal compensation. The village leaders treated each case subjectively and there was no sense that there should be equal treatment for all. The UN officers were aware that police were often acquiescing to such practices even where these contravened both Indonesian law and international standards. In most cases, there was not even active monitoring of these standards by police. Thus there was no consistency within districts, let alone between districts, as to the ‘punishment’ meted out to perpetrators or the processes applied to their crimes. Nor is there any consistency in the results from the point of view of the victim.

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While senior police and UN legal and human rights personnel agreed that most reported rapes were being treated seriously and processed through case notes and reports to the prosecutor and court, everyone was equally aware that many rapes went unreported, especially where these took place within families. Even when rapes were initially reported, a pervasive pattern was being observed in many districts where the complaint would be withdrawn shortly afterwards. The police officers noted that family shame and the influence of senior males were often cited as the reason for seeking to resolve the issue by 'traditional' means. They often reported that compensation was quickly paid following a village meeting and the withdrawal of the complaint tended to follow immediately, thereby preventing further pursuit of the case. While they recognised that great pressure was often put upon the victim, they felt that they had no leeway to move when she refused to give evidence. Moreover, the inadequacies of the court system and the lack of support services added to the likelihood that a victim would receive little effective justice from the formal system. Officers cited cases where victims and witnesses were carried to a distant court in the same vehicle. In at least one case, the alleged perpetrator was also carried in the same vehicle. There were often no facilities or funds for accommodating or feeding victims or witnesses and there was no guarantee that a case would be heard when it was scheduled to be. The lack of a public defender or legal aid added to the complications. In such circumstances, several police suggested or implied that the victim was being punished a second time if she reported and pursued a crime of sexual assault.

Common assault, especially in the form of domestic violence, was just as bad since a lack of women's refuges or shelters in most areas and the absence of any national social welfare system meant that women who did not return to their families generally lacked any alternative support system. To return to one's natal family was to create a situation where a negotiated settlement between the offending husband and the men of the woman's family was likely to see her returned to the context of her assault after a ceremony of 'reconciliation' often involving animal sacrifice and the sharing of a feast.

Thus, there *are* significant dilemmas for the police and the people who are concerned with human rights. Social conditions do not currently allow the full implementation of international standards in the protection of women and children. A further, particular example of the issues raised appears in the context of what are often glossed as

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'abandoned women'. These are women who have become pregnant to a man who is not their legally sanctioned husband and then find that the man refuses to support them and the baby. In many cases these are young women who have formed a relationship with an unmarried man. In other cases, the man concerned may already be married to another woman. In Indonesian law the act of adultery is still considered a crime. However, UNTAET passed an early regulation decriminalising adultery. Many local people do not know this or do not understand why it is no longer a crime. It is especially galling for a woman impregnated by a married man but also affects the original wife and her family who have been dishonoured. There is no obvious legal recourse for a woman who feels herself to be wronged in such circumstances as, in addition to no crime having been committed, no effective possibility of obtaining paternity decisions and maintenance orders exists. Several officers from different districts stated that they suspected some women were reporting that they had originally been forced to have sex – even if the first occasion was several years before they became pregnant – and were seeking to punish or pressure the man who abandoned them through the accusation of rape. Sometimes the strategy was said to have worked and the complaint was withdrawn once agreement had been settled on the terms for compensation and future support, through so called 'traditional' processes.

In one such case reported to me, the police were called as a result of the tensions caused between disputing families but could not find a legal way of acting to force the man concerned to acknowledge his responsibilities. In desperation, the matter was reported to the Prosecutor and taken to the district court. The Prosecutor asked the man again if he was going to marry the woman or at least support the child. When he refused the Prosecutor asked the Investigating Judge to issue a warrant for arrest. The Investigating Judge did so, interviewed the man and when he again refused to marry or support the woman, jailed him for 30 days on a charge of 'swindle'. This was considered a rather creative interpretation of the law and is perhaps a suitable indication of social disapproval. However, it also highlights significant problems with the formal system and its outcomes, regardless of how they are achieved.

Other Particular Cases

Oecussi - Justice and 'Victim' Compensation

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In most of East Timor and in much of the East Indonesian archipelago, justice is never simply a matter of punishment but rather of compensation for the victim and the victim's family whose honour had been damaged by the crime or offence. Moreover, the acts of individuals as perpetrators have consequences not just for them alone, but also for their families whose shame and dishonour result from any member's crime or misbehaviour. Thus the simple removal of a perpetrator from the scene and his imprisonment, for however long, do not satisfy the tenets of local justice in this part of the world. Whenever harm has been done to another, a debt is created that must be settled if the matter is to be finalised and reconciliation (or at least the resumption of normal social relations) is to take place.

As one knowledgeable man in Oecussi pointed out, the debt incurred by an offender does not fall upon the individual alone. The family and, at times, the larger community may be deemed responsible for its discharge and the payment is made in the name of the family as a whole. A current dispute between the villages of Passabe and Tumin in Oecussi district is a case in point. The Passabe people now complain that their cattle pool is being severely depleted by the massive level of compensation payments being demanded of them following the notorious massacre of Tumin villagers allegedly by Passabe based militia in 1999. The Passabe villagers are now baulking at further payments and point out that they will become as poor as Tumin was before the troubles if things continue this way. Various attempts have been made to find a resolution, including the notion of a pool of cattle donated by all sub-districts to provide compensation, but these have not worked. The basic notion that debts must be paid personally or by your family ensures that an ongoing issue (that has already resulted in blockades and stoning) will remain between the two communities for some time to come.

In another Oecussi case that came to the attention of the Human Rights officers of the UN, the local people in the same subdistrict of Passabe were proposing to conduct an adat trial of an alleged murderer, partly because they could get no satisfactory response from the serious crimes unit of the UN police or from local police. In the end, the trial did not take place, but the issue of collective responsibility for the murder by the family and community of the perpetrator was raised as a central matter.

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Oecussi as a district highlights a number of the issues of the differences and similarities between areas. As an enclave within the western part of Timor Island, since 1769 when Dili became the capital of Portuguese Timor, the place has remained a relatively quiet and isolated backwater. This has not been a bad thing from the point of view of the continuity of local cultural practices. The nearest neighbours to many of the mountain villages in the hinterland of Oecussi were culturally and linguistically closely related people in what was Dutch East Indies before it became Indonesia. In many ways the rugged country of the highlands meant that borders were not and are not very meaningful. Interaction between local villages was much greater than that between the villages and their relevant administrative capitals of Dili and Kupang. Even now, local people cross the border into West Timor on a regular basis. Shared ceremonies such as planting and harvesting festivals link people in a ritual community that recognises no national boundaries.

Ritual and other customary cultural systems remain relatively strong in the area and difficulties in communication mean villages are much less susceptible to the exercise of central authority than many other areas[5].

Oecussi has had many problems in setting up and maintaining a district court and being integrated into the national system. As a result, police, UN officials and local leaders have all acknowledged that the only recourse that many citizens have is to invoke local processes of resolution and settlement. The very long delays inherent in the formal system and the fact that much has had to be resolved through Dili, which is effectively unreachable for a significant proportion of the population, means that there is little point in walking for several hours from one's hamlet to report something for which there are local mechanisms available. In addition, as one major informant in Oecussi pointed out, in some matters, such as the use of land and conformity to local family and marriage customs, people would be loathe not to involve the ritual leaders and pay respect to local customary practice for the very good reason that they feared mystical retribution from offended ancestor spirits. Oecussi was, in my experience, the district in which there appeared to be the strongest commitment to continued adherence to adat even amongst relatively educated and urbanised people. This was partly explained by one local man who said that people would be afraid not to follow

[5] This obviously needs to be qualified by recognition that the military and militia presence late in the period of Indonesian rule was devastating. However, in many respects the heavy-handed approach was indicative of the degree of 'independence' many villages had maintained up to that point.

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their customs, as it could prove very dangerous to them and their families not to do so. The idea that mystical sanctions are likely to be imposed by the ancestors or the spirits remains a very strong force for conservatism in many parts of the island of Timor and, it should be acknowledged, in the region more generally.

Moreover, there are major logistical problems everywhere except on the main roads for police seeking to make their presence visible through patrolling. Even these main roads can become problematic in the wet season and, without the ongoing presence of UN helicopters, there will be some basic impediments to the centralisation and coordination of the justice system. In this area at least, it seems unlikely that local understandings and practices are going to be significantly threatened in the near future by experience of an alternative and more 'modern' system that is perceived to fulfil the needs of the people.

Lautem and Los Palos – Sorcery and Leadership

While the terrain is much less a problem at the very eastern end of the island, the strength of local cultural and social forms still remains an issue for any process of transformation in legal practice. Whether we are talking of the most easterly village of Tutualu or the district capital of Los Palos, the evidence is that local leadership remains strong. There is considerable negotiation going on between the UN, the Dili politicians and local leaders, but certainly the police and senior administration officers were forced to acknowledge the power and influence of those recognised by the ordinary people as their leaders.

Indeed, as with other areas in the country, this was a necessary response to at least one area of dispute within local villages. Throughout this part of the world sorcery or 'black magic' *(ilmu hitam)* is a continuing and current problem. From Oecussi in the west to Tutuala in the east, police and leaders meet the problem on a regular basis. Village people often seek to explain sudden misfortune or illness through the notion that someone has used magical means to harm them or members of their family. A long recognised anthropological phenomenon in much of the world, sorcery offers a way of locating otherwise inexplicable misfortunes within the realm of manageable social relations. However very few formal legal systems in the world recognise sorcery or witchcraft accusations or allow for legitimate punishment. Police and international police in particular do not have a procedure for dealing with complaints;

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even complaints concerning the unjust accusation by one villager of another who feels aggrieved and reports to the police. Other than for the purpose of maintaining peace and good order, there is no basis in law for intervening.

One case was reported to me as a true instance where the dilemma of police confronted by witchcraft and sorcery produced a tragic outcome. A man was said to have reported to the police station in an agitated state saying that the police had better come quickly to his village. When asked what the problem was the man reported that another man in the village was harassing his daughter. Persuaded to elaborate, he went on to say that the man was accusing his daughter of being a witch and practising magic against the man and his family. The international policeman stopped the man immediately and said that there was no law dealing with this and the police could not become involved in such matters. He advised the man to return to the village and try to sort the problem out by 'traditional' means. A couple of days later, the man returned to the police and told them that he had taken their advice and resolved the issue by traditional means – he had killed the accuser. Needless to say, he was arrested for murder.

The more usual local justice solution for this problem is to convene a meeting of the village council of elders (conselho do Katuas), including the local chief of adat, and hear the evidence. It is said in most districts that these days the realisation that there is no good evidence to support such crimes, as invariably there are no direct witnesses, means that it is usually the accuser who is fined and made to apologise. Unfortunately, this is not always the outcome. One officer reported a case in which a suspected witch was tried and punished by villagers who placed hot coals on the witch's back. The witch died. Clearly such an outcome is not acceptable by any standards of international law. Nevertheless, these two cases mark the seriousness of such accusations for the Timorese legal and justice systems. In any case, without some local resolution and in the absence of a formal system response, the conflict that arises from accusations of witchcraft and sorcery remains a potentially lethal sore in the side of society. Whether or not the aim is eventually to 'educate' people away from such beliefs, the fact remains that conflict, including serious violence, will remain an issue in many villages for some time to come. The local justice system at least offers some sort of a mechanism for defusing the tension and restoring some level of normalcy to social interaction. It should be borne in mind that more than one senior East Timorese policeman confessed that many police believed in the

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presence of black magic, even if they do not know how to deal with it or want to advertise the fact.

It was also in Los Palos that the recognition of local leadership and the continuity of local authority first became very evident. One chefe do suco in the area who was generally recognised as both a knowledgeable and respected leader related to me how he had survived in a leadership role through the Indonesian period and had now emerged as perhaps the senior local person in relation to UN governance. The man's status as a *liu rai* or customary chief was still a significant part of his personal profile and of his capacity to act with authority in the community.

This man described how he would give judgment in cases of theft in the communities over which he exercised authority. He had a rule of thumb, he said, whereby if a person was found guilty of stealing a chicken, he would be fined five chickens, one pig would result in a five pig fine and so on. The elegant simplicity of this system had the virtue he thought of letting everyone know what to expect in such situations. Now, he was not claiming that this was an invariable practice, but he was offering a degree of consistency that may be lacking in many local contexts.

Not all the village and hamlet chiefs had this level of self-assurance. Nor did many have the length of leadership experience that this particular gentleman possessed. Nevertheless, many did enjoy a considerable degree of respect and influence. On more than one occasion I was told that the local people would choose a person from the aristocratic class because they would fear the consequences of not doing so, but that person must have the capacity to lead.

Centres and Peripheries

It is tempting to imagine that the fact of the geographical distance from Dili of the districts of Oecussi and Lautem would in itself explain the degree to which the so-called 'traditional' system retains its influence. The two districts most distant from the capital might be expected to be less influenced by the 'modern' alternative the argument would go. There is certainly some truth in the idea that communications are more difficult for these two extremes than for some districts closer to Dili. However, some of those geographically closer districts are equally endowed with remote and mountainous regions that require arduous journeys in order to be reached.

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Moreover, my research established that even in the capital's home district, traditional leaders and ritual experts remained influential and were consulted on a range of problems, including the presence of sorcery. Like many capital cities in Southeast Asia, Dili is populated to a great extent by recent migrants from impoverished rural areas. Even the long-term local residents in the town and in the villages outside the town area proper retain beliefs and practices with regard to the misfortunes that beset them that require local specialist intervention.

Certainly it is true that the proximity of the only full functioning district court and the presence of a larger number of police provide the theoretical opportunity for people living in the capital to avail themselves of the modern justice system, or be inadvertently caught by it, to a much greater extent than the people living in the mountains. However, the great delays in processing and the suspicion that their treatment may not be fair remain inhibitors to the active pursuit of such assistance on the part of most ordinary people. Most people, indeed, would see the police and the courts as a source of great potential trouble for them and seek to avoid them at all costs. Most people in the capital still lack the knowledge and education to confidently view the legal system as something that they have a right to mobilise to protect them and punish those who have harmed them.

In many ways, then, the unemployed youth and poverty stricken older people of the town are as marginalized from the national formal justice system as are the remote farmers in the mountains. Indeed, they often lack the security of family and community support systems and the capacity to seek redress and protection that these afford.

The most accessible districts from Dili are those lying along the coastal roads to the east and west of the capital. Manatuto and Liquica are reachable by local mini-bus for a fare that while expensive can be managed by many locals. As a consequence, both districts reported making a greater use of the formal processes of law than most others. Equally, in both areas, both police and UN officers indicated that a considerable amount of disputes and petty crimes were resolved by the village processes of restitution so long as all parties agreed. As everywhere else, these areas reported that the agreement of all parties to the process and to the outcomes

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was a vital part of the success of local justice systems. Consensus and restoration of normal social relations were the guiding principles.

Liquica also raised a central concern surrounding the relationship between the formal system and the local systems. In a memo dated 18 December 2000, the then District Commander sought to define in a directive those crimes that could be considered *minor* and those which must be considered *serious*. The former could be “dealt with via traditional resolution”, the serious crimes should be processed fully within the police system. Described as a “diversion process” in other memoranda, this was a de facto recognition that the formal system (police and courts) lacked the personnel and resources to investigate all that was reported to them, let alone that of which they heard only secondhand.

Concerns that the resolution of conflict and the restoration of social relations did not always amount to justice for a victim were raised by a number of international officers in both districts. This raised the problem that proved to be widespread in evaluating the relative merits of the current local and national justice systems. The abstract notion of justice and the concept of equality before the law are principles that do not easily fit with the experience of a people who have never lived in a democratic society. Both the division of indigenous society into three largely endogamous (in-marrying) classes (one informant actually used the Portuguese term *casta*), and the long experience of political domination by outsiders, do not encourage the expectation that all will receive equal treatment in the courts.

Manatuto provided me with a particular case study in which the successful resolution of violent confrontation within a family was ultimately resolved through the use of the village chief and the committee of elders. The case highlighted the extent to which rules of behaviour at the village level remain based on respect for elders and consideration of the members of one’s family. Most importantly, it demonstrated the degree to which **public** acknowledgement of fault and acceptance of reconciliation form vital parts of the process. Of course, admission of wrong doing in this context can be seen by legal practitioners to prejudice an accused case under formal law.
In another case, the impotence of the formal legal system was put into relief by the inability of an educated young woman to be extracted from her family home when she was being forced into a marriage she did not want and refused permission for one she did. The refusal of the woman to shame her father by accusing him of holding her against her will and the lack of a basis to support her on the part of her

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boyfriend were both cited by a UN policeman as reasons that they were unable to intervene. The case drew attention to the problem of women who would lack any other effective support system if removed from that of their families.

Baucau served as the location of one of the district courts that was supposed to function as the court for surrounding districts as well as its own. Research here indicated the extent to which the court had been intimidated and overwhelmed by its caseload. Judges had been known to flee, support structures were inadequate and local people were directly threatening judicial authorities and witnesses, it was reported. It was Baucau that illustrated another problem with the move to a formal justice system too. It was said that one old man berated the judge for daring to stand there and tell him what to do. His reasoning was that in the traditional system the judge's father had been subordinate to the old man and now his son should also accept his authority. It was said that the young judge was shamed into stunned silence.

Baucau was also the district court for the Viqueque district and its inability to function was cited by many in Viqueque as a reason for the extent to which the police preferred to deal with most issues through the local system. It was said that a major arson case had been documented and sent for prosecution to Baucau, only to be returned to the 'traditional system' sometime later. International police said that this was because the perpetrators were members of a dominant political grouping and the prosecutor and judge were afraid to take the case on. In other cases, the lack of certainty about whether the long journey to the court would be rewarded with a hearing and the lack of money to support victims and witnesses meant that police were reluctant to use the court if a local alternative could be achieved.

It was in Viqueque district that the complexity of the transition to an international standard of law also became most apparent. In the context of a workshop on Domestic Violence and Sexual Harrassment, which I was able to attend, it became apparent that both men and women disputed the fundamental values being propagated by the two European UN women and their local assistants. Some men virtually described their ideas as a new form of colonialism saying that the Timorese were now free and laws should reflect their values not those of the UN. Women told me, in the absence of any other men, that a reasonable level of violence towards a wife was acceptable if she misbehaved. Some of the women involved were well

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educated and very articulate but they remained committed to a worldview that the western women found incomprehensible. This extended to the desire to keep a brideprice system “because this shows how our parents value us”. However they were prepared to concede that current rates (around 30 buffalo and other payments) were probably too high. Clearly, the value systems inherent in village people’s understandings and their systems of justice remain significantly at odds with those of the western educated social transformers employed by the UN.

The district of Ermera was one where the local police commander was determined that everything should be done by the book and every incident properly recorded and processed according to police procedure. Though only a couple of hours away from Dili by car, the beautiful valleys and mountains of the district remain a logistical nightmare for policing in the western way. A lack of vehicles, poor or non-existent roads, and a heavy wet season made patrols extremely difficult. The district commander had instituted a Law and Order Committee that required the (unpaid) village and subdistrict heads to descend to the capital to hear the latest directives and report their problems. It was in the context of one of these meetings that I encountered the confusion of role that is probably in part a hangover from Indonesian rule. In addition to concerns about the lack of a response to reports of a house burning, local leaders raised the issue of assistance for rebuilding. The commander indicated that he had spoken to the District Administrator, whose domain this was, but he had declined on the basis that if he gave money those who wanted new houses might start burning their old ones down! Another leader raised the issue of sports equipment for the youth in his village. The commander explained that the Police budget did not cover such matters and he should talk to the appropriate person in the district administration.

At the same meeting, leaders complained that people did not come to the villages to explain what was happening and what they could and could not do. In turn, the Commander suggested that perhaps local people were not telling the police who had burned down the house spoken of earlier. Whatever the rights and wrongs, what clearly emerged was confusion and an inadequate level of communication and trust. Later in the meeting, the local leaders reported community concern about the inability of junior high school graduates to be recruited to the police. It was explained that it was policy that only senior high school graduates could enter but there was an evident dissatisfaction with the answer. I was to be told in other districts that many

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recruits were admitting that they were looking for a secure government job with the regular (if small) cash income. It was also reported that some had said that they did not intend to remain in the job when the UN pulled out completely. It should be remembered that in Timor as in other parts of Asia, the lure of government service, with its promise of regular income and even the possibility of a pension, remains very high. Local economies rarely create opportunities for secure careers in the private sector and often a family will seek to ensure that at least one of its members is strategically placed to provide income continuity.

Maliana and the town of Bobonaro that gives its name to the district highlighted a wider problem that relates to the antagonism of different cultural practices that can cause conflict when two ethno-linguistic groups come under the one administration. In this case, the Bunaq and the Kemaq groups have different languages and distinctive belief systems. They are reported as mutually antagonistic and there is said to be frequent conflict between them. Clearly, it is difficult for such conflict to be resolved without outside assistance given the social chasm that divides the two groups.

Maliana also brought up an issue of justice and political interference in the case of a woman who was beaten and then fined by the village head for tearing down a poster belonging to the locally dominant political party when it had been placed on her front door without her knowledge or permission. The concept of private property and the notion of political freedom were both absent from the local leader's response. It is very evident that local democracy will only thrive if a considerable training program is implemented to ensure that community justice does not become community coercion. The perversion of the local system to make individuals express support for a particular political party can only lead to a mistrust of the process as a whole. Civic education and monitoring of leaders and their actions must take place as a matter of urgency if local elections and deliberations are to be free and fair.

In Suai, similar problems were found to exist for the Covalima district and the absence of the district court that was meant to be there only compounded them. Here there were rumours that a returnee from West Timor had been killed and a variation of the local compensation system had placed a value on human life when another interloper from West Timor had been killed. Negotiations across the border had seen 4 buffalo paid to the family of the dead man as compensation. It was here that the force of personality was said to be critical to governance in the absence of developed

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structures. In one sub-district, a priest was noted to be of very great influence, while in town particular political figures were said to be critical brokers.

In Aileu, my attention was drawn to the clash between local understandings about land and the issue of titles given by the Portuguese and the Indonesians in the past. It became apparent there are going to be many cases of dispute in the future when the use of land and its ownership are both challenged. This issue is further compounded by the fact that some people have occupied the land of those who fled to West Timor after the 1999 conflict. The potential for the problems to grow to dangerous proportions will continue until a clear new basis for ownership and regulation is established. The local justice system is unlikely to be able to cope with this particular problem.

In Ainaro district, the mobilisation of the traditional system of Maubisse was reported to be focussed as elsewhere on land and domestic violence. Sorcery was an ongoing problem that could only be dealt with through the traditional system it was said. One UN officer raised the very important consideration of the village head adjudicating in a case that involved his daughter. Such practices call into question the neutrality and fairness of local justice decisions.

In Same, the continued role of traditional leaders in carrying out rituals and maintaining order was well recognised. The Manufahi area was said to be strong on Adat in some areas but in others it was reported that the church and the new political and elected leaders had effectively replaced the adat system. One senior local administrator pointed out the 'traditional' system represented the only stability in the lives of the local people. The formal system has been consistently unstable in the experience of most people living today.

Conclusion

There is no doubt that there are major inconsistencies and a high level of geographical variation in the administration of local justice that stands outside the formal system of East Timor. It is not possible to give a characterisation of the local system of dispute resolution that can safely be generalised across the country as a whole. Indeed, much more intensive research needs to be done observing the actual

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practices at the local level before we can be certain that some of the broad principles I have identified are indeed present in all districts.

Nevertheless, the evidence supports the view that the variety of local practices in the area of justice and dispute resolution are all built upon a fundamental principle of reciprocity and fair compensation. Social or physical harm to another produces a substantial debt for the perpetrator and his family. Therefore, removal of a perpetrator from the scene through imprisonment, or the imposition of a fine payable to the state will not obviate the necessity to pay one's debt to the parties harmed by one's action. No resolution will occur at a local level without such payment. The prospect of ongoing conflict between villages, even villages on the other side of a national border, acts as a strong incentive to achieve such resolution.

The research I have undertaken definitely confirms the fears of many working in the Human Rights area that local patterns of dispute resolution certainly do not always accord with ideas of equality, democracy and international human rights. In many districts the arbitrariness of the judgments and the potential for bias and the exercise of vested interest were seen as real problems with the local system. Since most local systems relied on strong political leaders who were often not descended from customary leaders and were not 'traditional' anyway, this was considered a particularly difficult problem.

Political interference and fears of political interference are already also bringing the formal system into disrepute at the local level as matters are returned to the villages and not dealt with in the district courts as they should be.

There was a general recognition of the power of local systems and their likely continuing presence in the lives of villagers. It was put to me in several different contexts that the local systems of resolving disputes and punishing crimes will go underground and act as a clandestine and preferred alternative to the formal system unless they are given recognition and regulated. This is because they fulfil functions at the local level that the formal system may never be able to replicate or replace. They also operate speedily and with the force of social conformity backed by the threat of ostracism or even expulsion.

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Four hundred years of Roman Catholicism has not eliminated the belief in numerous mystical forces that can significantly affect a person's life. These understandings impinge directly on the delivery of justice and the resolution of disputes between individuals and families in the extent to which they underpin the authority of customary leaders and raise the prospect of supernatural sanctions for those who do not conform. The Church, its priests and catechists do nevertheless provide an alternative source of moral authority within villages and do sometimes assist in resolving disputes, especially in family matters.

Change in attitudes will require the education of citizens in the values of democracy and equality. Education is a long-term tool for social transformation, however, and while it should be pursued as rapidly as possible, short-term considerations necessitate more immediate solutions to overcoming the weaknesses and developing the strengths of local justice systems. Two processes are at work here: The evolution of the system and the evolution of the citizen.

The cultural attitudes of men towards women and even the beliefs of some women themselves, for example, often create the context for a level of abuse and disregard of women's rights that are unacceptable by modern international standards. However, this is not something that is going to be eliminated quickly and it became evident in the course of my research that it was not only poorly educated rural people who believed that it was acceptable for physical violence to be meted out by men upon women who they felt had offended them in some way. Education will obviously play an important part in the mid to long-term in the elimination of such practices.

In the short term, the formal justice system is probably incapable in its present form of making a significant impact upon the issue of violence against women. There has to be a more direct way of making an impact upon local practices. The only way this seems likely to occur is to build upon the vibrant and generally respected local systems of dispute resolution rather than seeking to eliminate them in the name of progress. The basis certainly exists in the districts and subdistricts to adapt local systems through a process of incorporation and monitoring so that they become improved sources of stability and better means of maintaining the peace. The future lies in a coalition rather than a confrontation between existing village based systems and the new law of an independent Timor Loro Sa'e.

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Recommendations

1. The government should neither ignore nor try simply to suppress the local systems of dispute resolution.
2. The new laws should acknowledge and incorporate aspects of the customary practices of villagers while maintaining the values of a modern democratic society.
3. A legitimate role for the council of village elders must be delineated by the government in respect of dispute resolution and punishment of petty crime. Decisions of the council should be considered recommendations to be sanctioned by a magistrate.
4. The development of a fair and equitable justice system for all citizens of the new nation of Timor Loro Sa'e will require a flexible and mobile response which sees the courts go to the people rather than expects the people always to travel to a central point.
5. A circuit court – at the magisterial level in the first instance – that appears regularly in the sub-districts will have some chance of monitoring, regulating and eventually replacing village heads as the preferred judicial authority.
6. The formal system should embrace the principles of victim compensation (restorative justice), transparent and public deliberation, **and consultation with village elders and the families of victim and perpetrator** in the determination of punishment. This will produce culturally appropriate and socially acceptable outcomes that are likely to be adhered to.
7. Magistrates and judges must act as **independent** monitors and courts of appeal for the decisions of local leaders regarding disputes arising in their area. They must over-rule decisions that are against natural justice, corrupt, politically motivated, or breech the international standards of human rights. They should be trained to understand the social and cultural values of the people they judge.
8. While local cultural understandings and practices should be taken into account, local political and administrative authority must be separated from judicial powers. The confidence of all citizens in the legal and justice systems of the new state will depend upon this.
9. Training in cultural sensitivity to local differences in belief systems and social practices must be built in to the establishment of a magisterial and monitoring system alongside the training in human rights and international law.

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FIRST RESPONSES
Workshopping the issues in Dili

Introduction

The research funded by Australian Legal Resources International (ALRI) for this project was always intended to lead to rapid practical outcomes. It was hoped from the outset that once the current situation of local justice practices in East Timor was better understood, the possibility of thinking creatively about how they might be employed to assist in the delivery of justice would become a reality.

In conjunction with another NGO, the Judicial System Monitoring Program (JSMP), Mr Nathan Laws of ALRI arranged for me to return to Dili in June 2002 to be part of the first attempt to make practical use of the reports already presented in this publication. My brief was to present my research findings and initial recommendations to a diverse audience of interested East Timorese citizens and to seek from them their views on which were the important issues and how they should be handled.

In order to facilitate discussion and provide a basis for forming opinions about the problem of the new justice system, my report 'Variations on a Theme' (see above) was translated into Bahasa Indonesia and it or the first English version were distributed to all participants. The workshop was originally scheduled for a two-day period but circumstances changed and it was completed on the one day, June 10th 2002.

The workshop was entitled "East Timor Community Systems of Justice Consultative Workshop", which was slightly at odds with the tenor of my reports, but which was designed to emphasise the need for the East Timorese people themselves to be involved in and take control of the debate from the earliest possible opportunity. Participants included judges, public defenders, and chiefs of villages, members of the East Timorese Police force, NGO workers and academics. 12 of the 13 districts of the newly independent nation were represented.

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After a long day of vigorous debate and hard work by all concerned, a list of recommendations was created. I have since been informed that this list was sent to the government of East Timor and to other NGOs that work in the area.

The Structure of the Day

I began the day by outlining the objectives of the workshop as agreed by ALRI and JSMP. These were:

- to consider the best way local and formal justice systems might work together to provide legal services in East Timor
- to analyse the participation of women and children in the local justice system in East Timor
- to identify the problems and difficulties which impede the processes of formal and local justice delivery
- to develop the local justice system as a system which can be accessed by everyone and which respects the universality of human rights.

(The assumption here was that most people broadly understood at first hand how the local system operated and that they accepted my report that it was still functioning.)

The day was divided into 2 major sessions with a lunch break. Each session had a short refreshment break in the middle.

The first session I called 'New Nation, Ancient Culture: Do we have to choose?' The idea behind this was to call attention to the research and to the concepts it highlighted. I also wished immediately to challenge people to consider whether, in fact, the country was faced with a simple choice between 'tradition' and 'modernity' – a common rhetorical dichotomy in this part of the world. The first stage involved a brief summary of the research program and its results. I emphasised the pervasive use of 'local systems' and the current incapacity of the formal system to produce satisfactory outcomes from the point of view of all concerned. The recommendations of the report 'Variations on a Theme' (see above) were mentioned but not covered in detail nor offered as a recipe for the future.

The first participatory part of the day for the workshop delegates was that which I called 'Problem Identification' where the perceived benefits and potential problems

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were elicited for both the local and the formal systems of justice currently being practised in East Timor. The large number of participants was broken down into a number of smaller groups. An initial attempt was made to mix people in the groups in order to avoid participants feeling constrained to 'follow the line' of colleagues from the same institution or organisation. This was not entirely successful, but some of the groups did produce significant discussion between people approaching the issues from very different perspectives. Not surprisingly, participants with allegiance to a particular NGO wanted to highlight the concerns of that NGO's focus.

During the first part of the morning, it had been the intention to rely on a translator to ensure that my words were well understood. I opened proceedings in Bahasa Indonesia, with an apology for not being able to speak Tetum, the indigenous *lingua franca*. The original translator did not arrive until much later and proved too embarrassed to stand at the front to translate for me. I relied for much of the day upon my Bahasa Indonesia and a great deal of help from one of the local JSMP members whose assistance proved invaluable, both when I got stuck in Indonesian and when Tetum seemed to be required.

After about an hour, each group reported back to the whole workshop. The lists of perceived benefits and problems each group had prepared on butcher paper were left displayed at the front of the hall. This was to allow everyone to compare and digest them. Not surprisingly, there was a high degree of overlap with the identified areas of concern. However, there were interesting differences in emphasis and some notable absences. These are discussed below.

After a morning coffee break, discussion on the desirability of the two systems working together began once new groups had been formed and the specific topic from among the issues identified earlier had been established that each group was to address. These proved to be lively discussions for the most part, though participants varied in their willingness to speak up on difficult topics. As I had in the first set of group discussion session, I moved around the groups listening and occasionally answering a question or offering an observation.

Before lunch was taken, the larger workshop came together again to present their findings on the possible ways of accommodating the two systems, if they believed

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that they should or must be accommodated. The emerging issues are discussed in a later section of the paper.

The afternoon session I entitled ‘Looking to the Future: Who makes the decisions and about what?’ Here, the obvious aim was to raise the whole process of democratic decision making and to consider the parameters within which a set of interested parties such as those assembled might contribute to that process. The focus remained the issue of legal equality and justice in the wider sense, but participants homed in on specific concerns within this area that they considered to be of particular interest.

The group discussion in the first part of the afternoon suffered initially from the usual post-lunch torpor but rapidly became lively and engaged. The participants became quite exercised in their efforts to persuade each other of their points of view. Throughout the day, the individuals and organisations concerned with women’s issues remained committed to ensuring that their perspectives were adequately considered and this is reflected in the summary of issues raised and recommendations made. However, many other important considerations were also given space to be heard and it was encouraging to see the level of determination to grapple with the potential problems and advantages of the various approaches. Some people could see that there were major national and political implications in the matters we were discussing and, in the course of the day, one or two individuals did attempt to lead us into a much broader and highly polemical argument about these. I persuaded participants that these were problems that would take much longer to resolve than our sessions for that day would allow and we would still be confronted by the immediate practical issues. Accordingly, we returned to the agreed objectives and topics after slight diversions.

After an afternoon tea break, I brought the meeting back to the objective of summarising the major issues and considering recommendations that they believed arose out of their day’s deliberations. I shall discuss the range of issues considered and examine the recommendations in the penultimate section of the paper. Before we move to that point though, set out below is the summary of the day’s proceedings as noted by the recorders supplied by the NGOs and transcribed by JSMP. The following is a direct quotation (with minor corrections) from the document ***Findings***

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and Recommendations: Workshop on Formal and Local Justice Systems in East Timor prepared by JSMP.

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"4. SUMMARY OF RECOMMENDATIONS

4.1 Session 1: Benefits and problems of local and formal justice

4.1.1 Positive and negative aspects of traditional justice

A. Advantages of traditional justice:

Economics advantages

- The traditional justice system does not cost much to operate
- The system doesn't cost the parties anything to participate.

Effective and efficient in making decisions

- All groups believed that the traditional justice system quickly resolves cases
- One group mentioned the system has no bureaucracy.

Acceptance of decisions by traditional authorities

Four groups said in the traditional system, the whole community will accept decisions and act on them immediately.

Promotes reconciliation

- Two groups said that the whole community accepts decisions made in this system and the parties to the dispute forgive each other
- This builds strong family relationships for the future.

Mutual respect

- Four groups believed that because the whole community accepts decisions, parties would respect each other and continue take part in the life of the community
- One group stated that the traditional system is still very strong because the community still believes in it
- Another group also said that the traditional system is built on traditions of the people themselves.

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Decision-makers

- Two groups noted that the traditional decision makers have a difficult job to do making decisions on the cases
- Another group also advised that the whole community respects the traditional chief.

Benefits

- For people staying in village, it is easy to have a decision made on a case
- Flexibility
- Decisions are tailored to the circumstances of each case.

B. Disadvantages of traditional justice:

Decisions makers

Three groups raised the possibility that decisions-makers will manipulate their decisions to their own advantage.

Traditional law

Two groups stated that the traditional law is not written and so is less certain than written statutes.

Women's rights

Three groups noted that women's dignity can be treated as commodity in this system, for example in a rape case where the victim's family is given financial or other compensation for her loss of dignity.

No appeal rights

One group stated that once a decision has been made, it cannot be appealed.

International law

Four groups said that in many cases the process and decisions of the traditional system are violating international human rights standards.

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The decision of traditional justice

Two groups mentioned that sometimes people did not accept the decision made in the traditional system.

Effectiveness

Two groups said that, the traditional system does not investigate matters so cannot effectively solve criminal cases.

Victims and suspects in traditional prosecutions

Five groups said that sometimes victims and accused persons were not happy with decisions made by traditional authorities. Sometimes the authorities do not involve the victims in the process, so the victim does not understand the outcome. Sometimes suspects are also not sufficiently involved.

Economic

One group said that the traditional system uses money from both victims and suspects to resolve the dispute, so it costs a lot of money.

Children and women's rights

One group said the system does not give protection to domestic sexual violence cases against women and children.

4.1.2 Positive and negative aspects of the formal justice system

A. Advantages of the formal justice system:

The law

Six groups said that the law used in the formal system is written, is widely accepted by all communities and countries and can be used to resolve disputes.

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Decisions

Five groups proposed that in the formal system, all decisions were taken following regulations and international standards so decisions were more readily accepted.

Economic

One group noted that the parties need money to take cases to court.

Time

One group said that the formal system takes a long time to resolve cases.

Victims and suspects

Three groups mentioned that the formal system protects victims' and suspects' rights which makes them more likely to accept the court's decision.

Rehabilitation

One group said that in the formal system anyone can be rehabilitated if found not guilty.

More specialised

One group said that the formal system has good specialist practitioners for many cases.

B. Disadvantages of the formal justice system

Process

Eight groups said that the process of the formal system takes a long time and might lead to more problems between the victims and suspects before the case is resolved.

Decisions

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Five groups said that length of the process in the formal system would influence both victims and suspects to spend more money in that process.

Relationship between the formal system and traditional systems

Two groups said that the formal justice system does not recognise the validity or the advantages of the traditional system.

Language

Two groups noted that the formal system in East Timor uses many languages.

Future family relations

One group said that the relationship between families is still healthy when the case is resolved by the formal justice system.

Human resources

Three groups noted that human resources in the formal system are still limited.

Access

Two groups said that people have no access to the formal system, so they do not know about the role of that system or how the courts operate.

Experience

Two groups said that the inexperience of East Timor's judges, prosecutors and public defenders means that the decisions made by the formal justice system will not always be legally correct.

The influence of government in the formal system

Two groups said that the formal system is only important to the government, and that the system does not pay any attention to the people.

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4.2 Session 2: The systems: problems and recommendations

4.2.1 Problems of the traditional justice system

Domestic Violence

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 domestic violence and it may not even give them the opportunity to participate in the process. This means that women and children are frequently sidelined when decisions affecting their lives are taken. This practice continues to occur in villages where the formal justice system is difficult to access and local resolution has been the only way for disputes to be resolved.

The local justice system tries to reconcile both the victim and the alleged perpetrator in order to promote reconciliation within the community. As a result of the process, the victim is entitled to compensation such as animals or Tais [traditional woven cloths DM] (or other forms of compensation, which vary from district to district), and the perpetrator must promise that they will not commit such crimes again in future. In the local justice system, the victim must accept the compensation and no prosecution will take place afterwards. There are serious concerns that this method of resolving disputes undermines human rights principles, particularly the rights of women and children, as many cases involve domestic violence and/or sexual abuse.

Lack of legal acknowledgment of the traditional justice system

During the seminar, participants emphasised that the existence of the traditional justice system should be formally acknowledged by the government of East Timor. They also stressed that the traditional justice system should be structured nationally and recognised as part of the formal justice system. The challenge for the people of East Timor is now to contribute ideas in order to find the most appropriate mechanism for the local justice system, so that it respects human dignity and the equal rights of all members of the community.

A number of questions were posed at the seminar about who is eligible to practice in the local justice system, what mechanisms will be used to identify those practitioners, and the kind of knowledge and ability practitioners should have in order to be able to

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competently practice in the local justice system. Presently, individuals practicing within the system include the chiefs of villages and sub villages, chiefs of Sub districts, and members of Falintil. Participants believed it was very important to review the current local justice system in East Timor and to review local justice mechanisms, as many of these appear to contravene human rights principles. The local justice system also needs to be reliable and easily accessed by those who seek remedies from the system.

Recommendations

Participants recommended that:

- the formal education system educate the public about preventing domestic violence and protecting families from its effects
- the government establish a formal mechanism for resolving domestic violence cases
- religious groups provide moral support for these initiatives
- a mutual and sustainable relationship be created between the formal and local justice systems to handle cases efficiently, and respect the universality and equality of rights
- the Government and NGOs work together in socialising the issues on the universality and equality of the rights between men and women
- violent behaviour in the family be eradicated
- the local justice mechanism, which does not currently respect the dignity of women and children, be reformed
- the local justice system be legally recognised by the state, and be accessible to the public without any discrimination on the basis of sex, religion, ethnic origin, political opinion, or nationality.

4.2.2 Problems of the formal justice system

Language

Language has become a considerable problem in the Formal Justice System, where intensive language training for the court staff is urgently needed. Many of the court staff are not able to speak the national languages of East Timor, which has a negative impact on the ongoing process of trials in the court. This situation is

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exacerbated by the lack of legal experience of the court translators. Court translators should have legal experience and/or a legal background prior to their employment. In addition, the fact that many international judges are not able to speak Tetum or Portuguese has encouraged some justice seekers to choose the local justice system as a more efficient and reliable system, rather than bringing cases to the formal justice system.

Language is one of the problems that are seriously impeding the progress of the formal justice system, and difficulties with language have weakened public confidence in the system, as the public cannot follow the legal process. The local justice system has been the most practicable, understandable and easily accessed system, especially for villagers who are not able to travel to Dili or to regional centres.

Lack of effectiveness

Many participants at the seminar expressed their frustration that the formal justice system does not follow proper procedures, because of the scarce human and financial resources available to the courts in East Timor. There were concerns that excessive bureaucracy in the formal justice system has caused delays and weakened public confidence in the system. The best way to build an efficient, impartial and independent justice system is a significant question for the people of East Timor.

Land and property cases

In the past, East Timorese owned land left to them by their ancestors. However, during the Portuguese and Indonesian occupations, many houses and blocks of land were forcibly taken from their owners and occupied by the colonising powers. During the Indonesian occupation, many people were forced to sell their land to soldiers and their families. This has caused serious confusion within the community and participants believed the government should establish a proper mechanism to deal with land and property issues.

Recommendation

Participants recommended that:

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- it is important to identify which mechanisms of the local justice system could be incorporated into the formal justice system, and will be legally and nationally recognised
- it is essential to provide a legal translator to translate documents into the language that is most commonly used by the community in order to encourage them to participate in the formal justice system
- it is important to recruit court translators who have a legal background or who have experience in the legal field
- it is particularly important to recommend to East Timor's government that it supports the local justice system based on international human rights principles.

In order that a tribunal can be truly independent, impartial and just, it is vitally important that any political interventions into the formal legal process are strictly prohibited."

Analysis of the workshop and its findings

1. It is reasonable to conclude that the day's workshop was a success in terms of the objectives agreed between JSMP, ALRI and myself as the consultant.

2. Local people in East Timor were provided with the appropriate context and opportunity to come to grips with some fundamental issues confronting them and their future as a new nation.
3. Most of the concerns raised by East Timorese in the course of my research emerged again at the workshop to be central matters for future resolution in the view of the participants.

4. A wide representation of people was present at the workshop and there was a lively exchange of views.

5. While there was not unanimity in identifying the most important issues relating to justice and its delivery, there was a considerable degree of commonality of opinion as to the major areas that need addressing.

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6. The informed debate that took place during the day provided senior people in the legal system with an opportunity to hear and reflect upon the concerns of others.

7. There was a strong feeling amongst many participants that the local systems had significant advantages over the as yet inadequate formal system.

8. Participants, nonetheless, recognised that there were serious limitations with the current practice of local justice in the rural areas.

9. In particular, the unequal treatment of women remains a major issue for women and women's groups, as does the rights of children.

10. Impartiality – in both the local and the formal systems - is seen to be an unachieved necessity if people are to have true trust in either approach.

11. The speed and immediacy of the local system were seen as major advantages over the slow and distant formal system.

12. Alack of knowledge of formal procedures can be intimidating compared to the familiar local processes and the personnel who control them.

13. Language was recognised to be a real factor that could inhibit people's access to, understanding of, and trust in the formal system.

14. The expense of travel, accommodation and other fees was a problem with the formal system.

15. Political interference remains a significant concern.

16. The complexity and extent of issues of landownership needs a great deal of work
17. Many participants considered it appropriate and necessary to incorporate a modified and sanctioned form of the local justice systems into the new national system.

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18. There was recognition of the diversity of local systems and the need to have more research to understand that diversity and how the systems operate in practice.

Conclusion

Those motivated to attend this first workshop demonstrated considerable knowledge of and a great deal of commitment to the principles of justice. They displayed a very healthy awareness of the current limitations of both the available systems for punishing wrongdoers and resolving conflict. However, the attitudes of some of the people responsible for maintaining peace and justice also showed that there is a great need for further education and debate about some of the problems, which others see in the current situation.

Before the current situation can be altered, it has to be understood. The actual, 'on the ground', practices in villages in districts remote from Dili and other major centres still needs further research. This is necessary to allow the informed targeting of those practices that need to be changed as well as the identification of those practices that could add to the delivery of justice in the national system.

The emphasis on reconciliation and resolution through compensation inherent in the local systems was recognised and valued by many participants. Restorative Justice principles and family responsibility for the action of members are issues that many western systems are struggling with. The workshop appeared to wish these principles to remain part of the new national system.

However, other practices are less universally supported. In particular, the areas of domestic violence and the true equality of all citizens remain contentious areas for both men and women. There is a long way to go before international standards will be fully accepted, let alone practised in East Timor. Some old cultural perspectives will have to change. Both some police and some local leaders showed a failure to appreciate fully the values their positions will now require them to incorporate into their roles. On the other hand, there is a strong and growing women's movement that is unlikely to allow past attitudes to prevail uncontested.

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The workshop necessarily remained largely at the level of general principle and broad concerns. There remains a real need to address the practical problems of any attempt to incorporate local practices into the national system. There also remains a major problem with training of personnel to run the national system. Specific mechanisms to improve access such as circuit magistrates and judges need to be considered. Some form of legal aid service would appear an urgent necessity. An adaptation of the Canadian approach to sentencing (see the first paper in this collection) ought also to be discussed as it might provide a way of including local and culturally strong views into a properly monitored and sanctioned system.

It is essential that the legal code and legal proceedings be allowed to be presented in vernacular languages with which the ordinary people are comfortable. Some consideration needs to be given as to how this might occur. There may be space for NGOs to assist in this area. At the very least, the careful use of translators will be a pre-requisite for justice to be realised. The training of such translators, those with at least a basic understanding of legal practice, is another area in which NGOs might assist.

It is clear that justice in East Timor in the future will be intimately related to the success of what might loosely be called 'Civic Education'. The rights and responsibilities of citizens in a truly democratic state must be understood before they can be fully exercised. This may prove to be a very uncomfortable process for some of the formally powerful leaders of rural communities and may even have adverse implications for the local leaders of religious institutions, indigenous and introduced. Again, it might be possible for NGOs to assist in the production of culturally and religiously sensitive educational material to assist in the process of creating an informed citizenry.

Recommendations

- Further workshops be developed to pursue these issues with other people involved in the system
- Consideration be given to assisting in the preparation of vernacular language materials to educate rural and urban people in the new legal and court system

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- Specific workshops be developed to deal with particular aspects of the concerns raised in this first attempt at addressing relations between national and local systems
- Further research be undertaken into the variation in the actual practice of local justice – this should involve intensive fieldwork in at least three sites for at least three months each to observe first hand what takes place and the attitudes of the people involved.
- When the research basis is available, a major conference to canvass possible variations on formal western approaches be arranged.
- Consideration be given to assisting in the supply and training of translators to ensure all citizens understand and are able to participate in the proceedings affecting them.

Dr David Mearns
September 2002

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These Appendices were prepared by JSMP.

ANNEX I: LIST OF PARTICIPANTS

DISTRICT OF AILEU

No	Name	Organisation
1	Humberto Tilman	Hak Asasi Manusia (HAM)

DISTRICT OF AINARO

No	Name	Organisation
1	Rosa Rodrigues	
2	Orlando Xavier	

DISTRICT OF BAUCAU

No	Name	Organisation
1	Aleixo Ximenes	CAVR
2	Gregorio D.O.X	Commissao Justisa
3	Andre Dos S.F	Commissao Justisa
4	Carolina Do Rosario	CAVR
5	Domingos B.	Kejaksaan

DISTRICT OF ERMERA

No	Name	Organisation
1	Bernardo S. Babo	Chefe de Suko
2	Manuel S.	Chefe de Aldeia
3	Martinho N. Ximenes	Chefe de Suko
4	Agosto Ataidi	Conselheiro

DISTRICT OF LIQUICA

No	Name	Organisation
1	Maria Fernanda M.	CAVR
2	Ana Maria	CAVR
3	Elisa Dos Santos	Grupo Rate Laek
4	Amelia Dos Santos	Grupo Rate Laek
5	Aurelia De Jesus	Grupo Rate Laek
6	Angelina	Grupo Rate Laek
7	Clara Dos Santos	Grupo Rate Laek

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ANNEX I: LIST OF PARTICIPANTS (cont.)

DISTRICT OF LOSPALOS

No	Name	Organisation
1	Luis Monteiro	
2	Valentin D.S Trindade	
3	Faustino Dias Sarmento	
4	Justino Valentin	CAVR
5	Albino Da Silva	CAVR

DISTRICT OF MANATUTO

No	Name	Organisation
1	Ildefonso Pereira	CAVR
2	Geraldo Gomes	CAVR

DISTRICT OF MALIANA

No	Name	Organisation
1	Bento Oliveira	Forum Hak Asasi Manusia (HAM)

DISTRICT OF OE-CUSSE

No	Name	Organisation
1	Arnold Sunny	CAVR
2	Antonio H. Da Costa	CAVR

DISTRICT OF SUAI

No	Name	Organisation
1	Armando Dos Reis	
2	Atanasio Tavares	

DISTRICT OF VIQUEQUE

No	Name	Organisation
1	Daniel Sarmento	CAVR
2	Helena H.X. Gomes	CAVR
3	Teodoro O. Pinto	Yayasan Direitus Hanesan

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ANNEX I: LIST OF PARTICIPANTS (cont.)

DISTRICT OF DILI

No	Name	Organisation
1	Salvador sarmento	ICR
2	Januario Freitas	ICR
3	Mariano C. da Cruz	Universidade Timor Leste
4	Joana Cunha	ETWAVE
5	Thomas Freitas	Lao Hamutuk
6	Manuela Pereira	FOKUPERS
7	Julino Ximenes	Y. HAK
8	Benevides C.B	LIBERTA/Advocacy
9	Teresa Barros	APSC
10	Beba Siquera	APSC
11	Maria Natercia	Judge at the Court of Appeal
12	Antonio Da Costa	Timor Post
13	Silveirio Pinto	Y. HAK
14	Cancio Xavier	Defensor publiku
15	Eusebio Aparicio	Juiz iha Tribunal Distritu

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ANNEX II: LIST OF RECOMMENDATIONS

Recommendations to the traditional systems included that:

- the formal education system educate the public about preventing domestic violence and protecting families from its effects
- the government establish a formal mechanism for resolving domestic violence cases
- religious groups provide moral support for these initiatives
- a mutual and sustainable relationship be created between the formal and local justice systems to handle cases efficiently, and respect the universality and equality of rights
- the Government and NGOs work together in socialising the issues on the universality and equality of the rights between men and women
- violent behaviour in the family be eradicated
- the local justice mechanism, which does not currently respect the dignity of women and children, be reformed
- the local justice system be legally recognised by the state, and be accessible to the public without any discrimination on the basis of sex, religion, ethnic origin, political opinion, or nationality.

Recommendations to the local system included that:

- it is important to identify which mechanisms of the local justice system could be incorporated into the formal justice system, and will be legally and nationally recognised
- it is essential to provide a legal translator to translate documents into the language that is most commonly used by the community in order to encourage them to participate in the formal justice system
- it is important to recruit court translators who have a legal background or who have experience in the legal field
- it is particularly important to recommend to East Timor's government that it supports the local justice system based on international human rights principles
- in order that a tribunal can be truly independent, impartial and just, it is vitally important that any political interventions into the formal legal process are strictly prohibited.

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ANNEX III: GROUP DISCUSSIONS

GROUP I	*Positive*	*Negative*
Local Justice	• economically, it will save money • relation between families of victim and accused will be harmonious in the future.	• the decision-maker (usually the village chief) can use their power to manipulate cases, and make decisions according to their wishes rather than the law.
Formal Justice	• fair trial • it has regulations that can protect suspects' and victims' rights.	• procedurally, it takes a long time • system is very expensive.
GROUP II	***Positive***	***Negative***
Local Justice	• people understand their rights • decisions are effective immediately and at a local level • flexible • people have some control over the sanction imposed • people don't need money to access this system • effective and efficient • local Sanction • appropriate to local customs.	• unwritten law because made by custom or village chief • law differs between villages, districts and regions • cases usually involve gender issues • no appeal from decision of chief • Sometimes decisions contradict International Human Rights standards • system discriminates against people from outside village, region or nation.
Formal Justice	• written law is more certain • law has more formal authority because made by government • controlled by Government • judges and prosecutors are state employees • people don't need money or livestock to pay for remedies • effective and efficient • formal sanction.	• formality • special law needed for each offence • inefficient • centralised • government interest may influence • top-down systems • contradiction between formal and local systems.
GROUP III	***Positive***	***Negative***
Local Justice	• provides a basis for people to respect each other and respect the law • it doesn't take long time • it is easy for people in village to resolve every case • economically, it will not be difficult for people to participate.	• it can create nepotism • unwritten Law and there is no written statute • sometimes victim and accused are left unsatisfied • sometimes people don't respect local justice.
Formal Justice	• written law, legal and passed by government • due process of the law is followed • people will agree with the decision because it is based in law.	• the process is very long • it can create a new problem • different in reality than it is in theory.

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GROUP IV	*Positive*	*Negative*
Local Justice	• still used by people to judge every case until now and people consider it a good system to judge their case • the process is easy • people can respect each other • easy to understand because they use local language • parties can give redemption money between them.	• people make decision by themselves • give priority to material gain rather than resolving the dispute • sometimes they just give compensation in criminal act • sometimes the victims do not attend the case in local justice • people don't give their respect to women's issues • there is no attention to children's issues, for example about sexual abuse.
Formal Justice	• procedurally, it is possible to judge every case according to international standards • protect human rights • it is possible to get rehabilitation.	• the process is too long • human resources are very limited • no more experience • no reconciliation • many languages were used in formal justice • people still not understand about trial procedure • process is too long so it is possible to create a new problem.
GROUP V	*Positive*	*Negative*
Local Justice	• people still respect traditional justice • have a respect to chief of villages • effective and efficient • easy to resolve every case.	• contradiction with human rights standard • nepotism • it is possible to judge criminal case • make a decision by themselves • it is impossible to judge every case about criminal act at the court.
Formal Justice	• respect human rights • judicial decisions are fair • written law • people have access to know about the case and the procedure • fair trial.	• need much money • there is many intervention from out side • the human resources are very limited.
GROUP VI	*Positive*	*Negative*
Local Justice	• the process is quick • all people will submit the decision • the decision is absolute • applicable law.	• sometimes impartial • the traditional justice needs much money to resolve every case • contradiction with international standard of human right.
Formal Justice	• systematically it is a general law • the decision is absolute • the decision is according to the regulation.	• it takes time to judge the case • it can create a new problem in the community • sometimes the decision contradicts traditional justice.

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GROUP VII	*Positive*	*Negative*
Local Justice	• it can resolve the case quickly • people will still respect each other • chief of village makes many sacrifice to resolve every case.	• it can resolve the case quickly but still not absolute • obligation • no investigation • it will not effective to resolve every case.
Formal Justice	• fair trial • it has guarantee when the trial finished that judgement will be handed down.	• different court • formal process takes time to resolve case • it needs money • the legal staff is very limited. • different investigations.
GROUP VIII	• **Positive**	• **Negative**
Local Justice	• it can resolve cases quickly • the administration is very simple • it doesn't need much money.	• it is only recognized by people who live in the village • some people don't admit the decision.
Formal Justice	• it takes time to judge every case • people need much money to resolve their case at the court • legal subsistence • the decision is absolute.	• it takes time to resolve via formal system • the administration isn't easy • some people need much money to resolve every case at the court.

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