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Legal Pluralism and the Rule of Law in Timor Leste

LAURA GRENFELL*

Abstract

Many transitional countries face the problem of establishing the rule of law in a weak justice sector where a gulf separates local legal norms from national, constitutional norms that are drawn largely from the international sphere. As a case study of East Timor this article challenges simplistic positivist notions about the normative hierarchy of laws within a constitutionally bounded polity. It argues that in transitional countries such as East Timor legal pluralism is important but must be properly tuned to serve the rule of law. Legal pluralism poses certain dangers when it operates without any of the checks or balances that ensure accountability and the promotion of constitutional values such as equality. The rule of law is not served by an informal system where there are no formal avenues of appeal and thus minimal accountability and transparency. A more promising version of legal pluralism that comports with the rule of law is one that empowers the state to monitor local decisions to ensure that they observe the norms set out in East Timor's Constitution.

Key words

constitution; East Timor; legal pluralism; reconciling local and international norms; rule of law

I. INTRODUCTION

When the United Nations Transitional Administration of East Timor (UNTAET) began operating in East Timor on 16 November 1999, the devastation in that country was similar to that experienced by post-war Germany. A quarter of the population had abandoned their homes, and the entire administrative and executive infrastructure had disappeared. Most of the security, police, and administrative personnel had fled with the withdrawal of Indonesian forces, and courthouses, prisons, and police stations were largely destroyed.¹ East Timor had experienced 24 years of conflict following the invasion by Indonesia in December 1975; prior to that event it had been colonized by the Portuguese for over 400 years. Approximately 1,400 people were killed in the months of violence that followed the popular consultation ballot of 30 August 1999, when almost 80 per cent of East Timorese had voted for independence.

Six years later, after almost three years of UN administration and three years of independence, the UN's 'Progress Report' asserts that the 'justice sector remains

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1. See H. Strohmeier, 'Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor', (2002) 25 *Fletcher Forum of World Affairs* 107, at 109.

particularly weak' in East Timor.² Specific problems are lack of capacity³ as well as 'access to legal services and advice'.⁴ This weakness is illustrated by the fact that in early 2005 it was announced that all East Timor's local judges and public prosecutors and defenders failed an evaluation set by the state, thus causing them to be suspended from working in the courts. The UN responded in May 2005 by assigning almost half the civilian advisers authorized by the Security Council for the UN's Office in Timor Leste (UNOTIL) to the justice sector, demonstrating that overall it is considered to be one of East Timor's frailest sectors in its development since 1999. These problems in the justice sector indicate that the road to establishing the rule of law in East Timor is a difficult one, needing much care and consideration.

The rule of law has become a catchphrase in the recent deliberations of the UN. In the context of post-conflict societies, the UN Secretary-General recently defined the concept as meaning accountability at all levels to laws 'that are publicly promulgated, equally enforced and independently adjudicated', but the laws must also be 'consistent with international human rights norms and standards'.⁵ In addition, there should be 'adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'.⁶ This is a useful working definition for this paper, but by no means an uncontroversial one.

It must be pointed out that the UN's 'Progress Report' on East Timor refers to problems facing the *formal* legal system in East Timor. It does not mention the role played by local legal systems. Any deliberations on the rule of law in East Timor should, however, take into account the fact that for centuries local legal systems, using what is sometimes labelled 'customary' or 'traditional' law,⁷ have operated to resolve community disputes in East Timor. Since the Portuguese occupation it has unofficially coexisted with the formal legal system, in a state known as 'legal pluralism'.⁸ Locals have come to depend more and more on local law as the formal legal system negotiates a maze of difficulties. However, as this paper outlines, local legal systems also suffer a myriad of problems, which further complicates the road to establishing the rule of law.

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2. Security Council, Progress Report of the Secretary-General on the United Nations Mission of Support in East Timor (for the period from 10 November 2004 to 16 February 2005), S/2005/99 (2005), para. 5. Note that East Timor's official long names are now Republika Demokratika Timor Lorosa'e (Tetum); Republica Democratica de Timor-Leste (Timor Leste is its official short name).
 3. Security Council, End of Mandate Report of the Secretary-General on the United Nations Mission of Support in East Timor (for the period from 17 February to 11 May 2005), S/2005/310 (2005), para. 13.
 4. See *supra* note 2, para. 18.
 5. Security Council, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616 (2004), at para. 6.
 6. *Ibid.*
 7. The use of these labels implies that they are not varied or subject to change: D. Mearns, 'Looking Both Ways: Models for Justice in East Timor', report prepared for Australian Legal Resources International, 2002, at 30–2. Hence the term 'local law' is used in this paper.
 8. According to S. E. Merry, legal pluralism 'is generally defined as a situation in which two or more legal systems coexist in the same social field': 'Legal Pluralism: Review Essay', (1988) 22 *Law and Society Review* 869, at 870.

The question posed by this paper is whether the current state of legal pluralism assists or detracts from the process of establishing the rule of law. One view is that one form of legal pluralism, where the state does not recognize the local legal system for example, is detrimental to the rule of law because it subjects a person to conflicting duties.⁹ This form of legal pluralism describes the current operation of the two legal systems in East Timor, where the two systems coexist in an uneasy relationship due to the different values underlying their respective norms. This form of legal pluralism can be distinguished from classic legal pluralism,¹⁰ where state law formally recognizes and incorporates local law.

After outlining the basic tenets, including the benefits and drawbacks, of both formal law and local law, this paper considers in particular how the present state of legal pluralism affects the lives of local women, considered to have the least means of access to justice in East Timor.¹¹ It argues that the current state of legal pluralism in East Timor does not serve the rule of law because it operates without any of the checks or balances that ensure accountability and the promotion of constitutional values such as equality. The rule of law is not served by an informal system where there are no formal avenues of appeal and thus minimal accountability and transparency. Classic legal pluralism offers a more promising vehicle for the observance of the rule of law as it empowers the state to monitor local decisions so as to ensure that they observe the norms set out in East Timor's Constitution.

In sum, through a case study of East Timor, this paper considers the problem, faced by a number of transitional countries, of establishing the rule of law in a weak justice sector where a gulf separates local legal norms from national constitutional norms.¹² In focusing on the role of local law in the process of establishing the rule of law, it responds to the urging by the UN Secretary-General, in his report on the rule of law in post-conflict societies, that due regard be 'given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so *in conformity with* both international standards and local tradition'.¹³ But, as the Secretary-General's report acknowledges, in these post-conflict situations, international institutions have had limited success in imposing norms from 'above' on local justice sectors so as to ensure 'conformity' with international standards.¹⁴ Thus the process of attempting to reconcile local

9. See G. R. Woodman, 'Legal Pluralism and the Search for Justice', (1996) 40 *Journal of African Law* 152, at 160.

10. Sometimes referred to as 'weak' or 'juristic' legal pluralism. Woodman, *supra* note 9, at 157–8, refers to it as 'state legal pluralism', where, in the context of the imposition of colonial laws in Africa, the state legal system recognizes and incorporates parts of the bodies of customary law existing within that state's claimed field of jurisdiction. He distinguishes it from what he refers to as 'deep legal pluralism', where state law coexists with customary law.

11. According to the Judicial Systems Monitoring Programme (JSMP), women's access to justice in East Timor is 'almost completely neglected': see JSMP, 'Access to Justice for Women Victims', July 2004, at 7.

12. This problem exists in Afghanistan. For example, its 2004 Constitution embodies norms such as equality for men and women (Art. 22) which do not underlie the practices widely used by local decision-making bodies (*jirgas* or *shuras*) in most parts of Afghanistan. See L. Grenfell, 'Paths to Transitional Justice for Afghan Women', (2004) 73 *Nordic Journal of International Law* 505, at 522, 529; M. H. Sadat, 'The Implementation of Constitutional Human Rights in Afghanistan', (2004) 11(3) *Human Rights Brief* 48.

13. See *supra* note 5, at para. 36 (emphasis added).

14. *Ibid.*, at para. 17. For example, the report states that 'Countless pre-designed or imported projects, however meticulously well reasoned and elegantly packaged, have failed the test of justice sector reform . . . we must

and constitutional norms needs East Timor's lawmakers to be the drivers of national consultation, education, and open debate.

2. FORMAL LAW

2.1. Structure

On 25 October 1999 UNTAET's mandate was drawn up, with the aim of rebuilding all state institutions from the ground up, in particular the state legal system and judiciary. UN Security Council Resolution 1272 states that UNTAET 'will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice'.¹⁵ This mandate was clearly based on the Security Council's assessment that East Timor did not have the capacity to administer itself.

The process of rebuilding East Timor's legal system began with UNTAET's first regulation in late November 1999, which set out that the applicable law was the Indonesian law which operated prior to 25 October 1999 (the date of UNTAET's establishment) in so far as it did not conflict with standards set out in the Universal Declaration on Human Rights and the six core UN human rights treaties.¹⁶ No mention was made in this regulation of the applicability or inapplicability of local laws. This was followed a few days later by UNTAET Regulation 1999/3,¹⁷ which established the Transitional Judicial Service Commission and set out the powers of the Transitional Administrator to appoint judges. In March 2000 the Transitional Administrator issued Regulation 2000/11 for the organization of courts in East Timor, stating in section 1 that 'judicial authority in East Timor shall be *exclusively* vested in courts that are established by law and composed of judges who are appointed to these courts in accordance with UNTAET Regulation No 1999/3'.¹⁸ Subsequently

learn better how to respect and support local ownership, local leadership and a local constituency for reform, while at the same time remaining faithful to United Nations norms and standards.' This quotation captures the tension inherent in the field of transitional justice between the desire to make the process local while requiring consistency and conformity with international norms.

15. UN Doc. S/RES/1272 (1999), para. 1. Prior to UNTAET, UN Security Council Resolution 1246 (UN Doc. S/RES/1246 (1999)) set up the United Nations Mission in East Timor (UNAMET) on 11 June 1999 to organize and conduct the popular consultation. On 15 Sept. 1999, UN Security Council Resolution 1264 (UN Doc. S/RES/1264 (1999)) established a multinational force (INTERFET) under Chapter VII of the UN Charter to restore peace and security in East Timor, to facilitate humanitarian assistance and support UNAMET. INTERFET arrived on 20 Sept. 1999.
16. See Ss. 2 and 3 of UNTAET Regulation No 1999/1, On the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1 (1999). The six core treaties are the 1966 International Covenant for Civil and Political Rights, 999 UNTS 171, and its Protocols; 1966 International Covenant for Economic, Social and Cultural Rights, 999 UNTS 3; 1965 International Convention for the Elimination of All Forms of Racial Discrimination, 660 UNTS 195; 1979 Convention on the Elimination of Discrimination Against Women, (1980) 19 ILM 33; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, (1984) 23 ILM 1027; 1989 Convention on the Rights of the Child, (1989) 28 ILM 1448. In addition, six Indonesian statutes were declared inapplicable and capital punishment was abolished.
17. On the Establishment of a Transitional Judicial Service Commission, UNTAET/REG/1999/3 (1999). For an analysis of the establishment of East Timor's formal criminal legal system see S. Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25 *Melbourne University Law Review* 122.
18. Emphasis added. UNTAET subsequently established District Administrations in the 13 districts established by Indonesia and created 60 sub-district offices, each of which contain about eight villages. In June 2000 the Special Panels for Serious Crimes were established pursuant to s. 1 of UNTAET Regulation 2000/15, On the

four district courts were established, in Dili, Bacau, Suai, and Oecussi.¹⁹ Together with the Court of Appeal, these courts currently constitute the formal state legal system in East Timor.²⁰

Since independence on 20 May 2002, Indonesian law has continued to be applicable as far as it is consistent with the Constitution, international law, UNTAET Regulations, and East Timorese law.²¹ This last category comprises about 80 acts passed either by East Timor's National Parliament or by the government using its limited power to pass laws by decree, provided in Article 96 of the Constitution. While the official languages are set out in the Constitution as Tetum and Portuguese,²² East Timorese law so far has been published in its entirety only in one of the official languages, Portuguese, used by only 5 per cent of the population. Few laws, perhaps three, have been published in Tetum,²³ used by 60–80 per cent of the population.²⁴

The Court of Appeal and the National Parliament are being scrutinized by various actors in the judicial sector to ensure that they are upholding and enforcing constitutional values and principles. A recent test case for the rule of law has been the draft Law on Freedom of Assembly and Demonstration, which was approved by the parliament in late December 2004. Pursuant to his powers under Article 149(1) of the Constitution, President Xanana Gusmão referred this bill to the Court of Appeal in March 2005 for anticipatory constitutional review as a result of concerns that it violated Article 42 of the Constitution, protecting the right to demonstrate and assemble, and Article 24, which limits restrictions being placed on constitutionally protected rights. In May 2005 the Court of Appeal held only two of the eight challenged provisions to be constitutionally defective,²⁵ but one prominent actor in the

Establishment of Special Panels for Special Crimes, UNTAET/REG/2000/15 (2000), to exercise jurisdiction over the 'serious crimes' of murder and sexual offences committed between 1 Jan. 1999 and 25 Oct. 1999. This limit on temporal jurisdiction does not apply to genocide, war crimes, crimes against humanity, and torture, which are also within the subject matter jurisdiction of the Special Panels. In 2001, the Commission on Reception, Truth and Reconciliation was established pursuant to UNTAET Regulation 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10 (2001).

19. UNTAET/REG/2000/11 (2000), On the Organization of Courts in East Timor, initially stipulated the establishment of eight district courts (s. 7), but this was later amended to four courts by UNTAET/REG/2000/14 (2000) Amending Regulation No 2000/11 (s. 2).
20. East Timor's highest court is the Supreme Court of Justice, but under s. 164 of the 2002 Constitution the Court of Appeal can exercise its functions until such time as it is established. The JSMP reports that the Court of Appeal did not function from November 2001 to June 2003 due to the lack of judges. This meant that no appeals could be heard during this 18-month period: JSMP, 'Overview of the Justice Sector: March 2005', March 2005, at 20.
21. This is set out in RDTL Law No 10/2003, Interpretation of Section 1 of Law No 2/2002, of 7 August, and Sources of Law, s. 2, which clears up some confusion following Law No 2/2002. The applicable Indonesian law must have been in force prior to 25 Oct. 1999, and UNTAET Regulations apply as long as they have not been repealed. The application of international law is explained in section 5 of this paper. See also Art. 165 of the 2002 Constitution, which provides that 'Laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution of the principles contained herein.'
22. See Art. 13 of the Constitution.
23. JSMP, *supra* note 20, at 19. This has prompted the JSMP to assert that 'laws are often not widely disseminated and misunderstanding and lack of uniform application occur', at 6.
24. See JSMP, 'Impact of the Language Directive on the Courts in East Timor', August 2004, at 7.
25. Unpublished decision, File No 1/2005, 9 May 2005. The decision can be found at www.unmiset.org. Parliament passed the law on 18 July 2005.

justice sector, the Judicial Systems Monitoring Programme (JSMP), still believes that the law unduly restricts the right to assemble and demonstrate.²⁶

2.2. Problems faced by the formal legal system

The formal legal system suffers a maze of difficulties: first, there are problems relating to the implementation of the formal law and, second, there are problems that are more normative in nature.

One of the most obvious obstacles to the implementation of formal law has been the lack of legal expertise. Since 2000, 22 local judges have been appointed for up to four years on a probationary basis.²⁷ In 2004 these judges were required by Law No 8/2002, as amended by Law No 11/2004, to undergo and pass an evaluation, both written and practical. It was announced on 25 January 2005 that all the local judges had failed the written evaluation, with the result that they were suspended from hearing cases.²⁸ These problems were exacerbated by the announcement on 25 May 2005 that all the local public prosecutors and defenders had also failed their evaluations.²⁹

The weakness of East Timor's formal legal system can be traced not only to its relative infancy, seen in the failure of capacity building, but also to its Portuguese colonial heritage and the continuing influence thereof over East Timor's government. Language is a serious problem that impedes real access to state courts, a right which is guaranteed in East Timor's Constitution.³⁰ Apart from the official languages of Tetum and Portuguese, 19 different languages are spoken in East Timor.³¹ For a number of years after UNTAET's arrival, the formal legal system used the official languages, as well as allowing the use of English and Bahasa Indonesia on occasions.

On 27 February 2004, however, the Superior Council of the Judiciary ordered that from the end of 2004 all court documents had to be written in the official languages.³² This directive effectively prohibits the use in court of documents in Bahasa Indonesia, which is used by 20–40 per cent of the population, mainly younger East Timorese, unlike Portuguese, which is used mainly by the older generation and

26. E-mail correspondence with the JSMP, 8 Aug. 2005.

27. JSMP, *Justice Update, Period 24 January–1 February 2005 Issue No 3/2005*, at 2.

28. Note that 19 of the judges have appealed against their results. The President of the Superior Court of the Judiciary must make a determination of the validity of the appeal and appoint three judges to hear it: JSMP, *supra* note 20, at 12. Despite this, the President of the Court of Appeal announced that four of the judges would continue to work as judges but that they would be required to attend a two-year training course at the Judicial Training Centre. The four international judges, who were previously assigned 80 per cent of the caseload, presumably now have total responsibility for handling the backlog, which one source reports as having reached 3,000 cases, and will continue to shoulder the bulk of the cases until the judicial training is complete: JSMP, *supra* note 20, at 13.

29. This leaves one international prosecutor and one international public defender in each district court, as well as a handful of local prosecutors who are yet to sit the evaluation, until such time as more lawyers are trained to become probationary prosecutors and defenders: Security Council, *supra* note 3, at para 13. These failed evaluations, which have produced some national disappointment, make it clear that 'capacity building' has not succeeded in East Timor's formal justice sector and that the sector is very weak. For a view as to why capacity building has failed in East Timor see S. Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', (2003) 16 *Harvard Human Rights Journal* 245, at 265 et seq.

30. Art. 26 of the Constitution provides: 'Access to the courts is guaranteed to all for the defence of their legally protected rights and interests. Justice shall not be denied for insufficient economic means.'

31. See G. Hull, 'The Languages of East Timor: Some Basic Facts' (Instituto Nacional de Linguística, Universidade Nacional Timor Lorosa'e), available at <http://www.shlrc.mq.edu.au/~leccles/langs.html>.

32. Presumably in order to reduce the huge cost of translation and its associated delays. See JSMP, *supra* note 24.

those in exile during the Indonesian occupation.³³ While Tetum is the most widely spoken language, its usefulness as a court language is undermined by the fact that its lexicon includes few technical legal words. According to one source, the written examination set for the local judges, public prosecutors, and defenders was not written in Bahasa Indonesia, the language in which the majority of their work has so far been conducted, but in Portuguese.³⁴ Overall it is not surprising that language difficulties have ‘weakened public confidence’ in the formal legal system.³⁵ While local court staff are struggling to follow the process, the public has little hope of doing so, boding ill for the rule of law.

Chronic delay has been another associated problem. The maxim ‘justice delayed is justice denied’ is the commonly held perception among locals of the formal legal system. The view is that the formal legal process takes too long to resolve issues.³⁶ This perhaps arises from the bureaucracy involved in the formal legal system and the fact that even before the suspension of the local judges, only one of East Timor’s four district courts, the Dili court, was functioning properly.³⁷

The pressure on district courts has meant that priority has been given to hearing criminal cases,³⁸ few civil cases have been dealt with by the courts, most civil matters

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33. Of the two official languages, the lusophone international judges favour Portuguese, and there are accounts that some international judges have even refused to allow translations into Tetum to enable the public prosecutor and defender to follow the court process. See JSMP, *supra* note 20, at 16–18. The Portuguese government currently offers free Portuguese language tuition for those locals working in government and NGO spheres, but it will obviously take a number of years for locals to use Portuguese with skill and confidence.
 34. Translations into Tetum were available but were reportedly confusing and unreliable. Anecdotal evidence suggests that a question written in Portuguese which read ‘Which are the 10 Articles of the Constitution that contain Human Rights?’ was translated into Tetum to read ‘Which Human Right is contained in Article 10 of the Constitution?’. S. Marshall, ‘The East Timorese Judiciary: At the Threshold of Self Sufficiency? Update’, conference paper, June 2005, available at www.jsmp.minihub.org, at 3. In addition, answers given in Portuguese were rewarded more highly than those written in Tetum: interview with the JSMP, Dili, 15 June 2005. Note that the criteria for the judges’ evaluations, set out in ss. 57 and 58 of Law No 8/2002, do not explicitly stipulate Portuguese language skills. In contrast, these skills are stipulated in the case of public defenders and prosecutors: see Government Decrees No 8/2004 and 9/2004, ss. 4 and 3 respectively. According to the US State Department, most trial judges and prosecutors were trained in the Bahasa Indonesia language, while most appellate judges speak little or no Bahasa Indonesia: see *supra* note 29, s. 1(e).
 35. See JSMP, ‘Findings and Recommendations: Workshop on Formal and Local Justice Systems in East Timor’, July 2002, at 11.
 36. The Asia Foundation’s survey found that 37 per cent of East Timorese participants believe this: ‘Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor’, February 2004, at 73. See also JSMP, ‘Findings and Recommendations: Workshop on Formal and Local Justice Systems in East Timor’, July 2002, Ann. III.
 37. See Asia Foundation, *supra* note 36, at 10. According to the JSMP, ‘extremely limited proceedings occurred in the district courts outside of Dili’ until the end of 2004 because of a lack of staff and funding; JSMP, ‘Overview of the Courts in East Timor in 2004’, 17 Dec. 2004. A report of the JSMP found that in 2003 in the Dili District Court it took an average of over 24 weeks for an indictment to be laid after the commission of a crime, and that it took an average time of a further 23 weeks and 6 days for the indictment to be decided. An appeal takes on average another four months. See JSMP, ‘Case Flow Management: A Statistical Analysis, 2003–mid 2004’, August 2004, Ann. I, at 26. The length of the process can be explained partly by poor organization, in particular case management. According to the JSMP, once the police gather statements from victims and witnesses, they then send the matter to the prosecutor who in turn asks the investigating judge to issue an arrest warrant. The police perform no follow-up when a matter is handed on to the prosecutor, leaving it to the victim or an NGO to ensure that each office deals with the matter and passes it on to the next: interview with the JSMP, Dili, 15 June 2005.
 38. According to the JSMP, three of the four district courts heard no civil cases in 2004; JSMP, ‘Overview of the Courts in East Timor in 2004’, *supra* note 37, at 6. The JSMP was unable to access details for the Dili District Court.

thus presumably being dealt with at the local level. While in the circumstances this setting of priorities seems reasonable, it may have the effect of discouraging foreign investment.

With regard to cases dealing with offences against women heard in the Dili District Court in 2003, the JSMP found that ‘postponements and delays marred the vast majority of these serious proceedings’.³⁹ In fact, of 148 domestic violence cases reported, 104 of the complaints were withdrawn, partly because of the lengthy delays.⁴⁰ Besides delay, there are normative obstacles: cultural beliefs commonly force women to withdraw domestic violence complaints from the formal legal system. This is because perpetrators view the instigation of such complaints in the formal sphere as a cause for divorce, which carries a serious social stigma in East Timor’s religious society. Generally speaking, these cultural issues make women reluctant to report domestic violence to the formal sphere and they generally opt to use the local sphere.⁴¹

The government is in the process of attempting to address some of these problems. It is currently drafting four new legal codes; this bundle includes a penal code to replace the Indonesian Penal Code, which contains three specific provisions dealing with domestic violence.⁴² The government proposes to pass these codes by decree, thus bypassing the opportunity for real debate in the parliament and in the community as to the appropriate offences to be defined and procedures to be applied under civil and criminal law. At the same time the government is drafting another law on domestic violence, separate from the decree law, to be debated in and approved by parliament. An earlier draft of this law, which focused strongly on educating the public to the effect that domestic violence is a crime, was the subject of much community consultation.⁴³ However, it has since been superseded by a draft heavily influenced by Portuguese law rather than local needs.⁴⁴ The current draft of the proposed ‘law against domestic violence’ reads more like a policy document than legislation addressing a serious practical problem. The need for two different formal laws on domestic violence is not clear, and it is arguable that normative confusion is obscuring a proper response to this problem.

39. On average such cases take 274 days to be processed through the formal legal system: JSMP, ‘Women in the Formal Justice Sector: Report on the Dili District Court’, 7 April 2004, at 24.

40. *Ibid.*, at 16; JSMP, *supra* note 11, at 21.

41. This was confirmed in interviews with Manuela Leong Pereira, the Director of Fokupers, East Timor’s leading women’s rights NGO, and with Maria Agnes Bere, Co-ordinator of the Women’s Justice Unit, JSMP, in Dili on 17 and 14 June 2005 respectively.

42. Arts. 148–50 of the draft penal code. According to the JSMP, these provisions are limited in the range of relationships that are included. For example, for harsher penalties to apply under Art. 149, the maltreatment must occur between a married couple or a couple that has cohabited for than three years. See JSMP, ‘The Draft Penal Code’, March 2004, at 14.

43. For a copy of the previous draft law, see <http://www.jsmp.minihub.org/new/legislation.htm>.

44. The law urges family unity but it does not spell out that domestic violence is a crime, nor does it appear to be designed to assist victims. In its current draft form, it is vague and confusing, placing most responsibility for combating domestic violence on the Office for the Promotion of Equality as well as various NGOs. It is accompanied by a proposed law ‘regarding provision of maintenance’ and a decree law ‘regarding support centres for victims of domestic violence’.

3. LOCAL LAW

There is no evidence that when UNTAET began to operate there was any regulation or policy regarding the role of local law. Possibly this was due to the limited detailed knowledge of the local justice systems and how they function.⁴⁵ The result of this initial UN policy vacuum with regard to the role of local law was that a range of approaches was used in relation to local law by various UN staff. For example, some CivPol (International Civilian Police) officers used local law, while others refused to do so,⁴⁶ leading predictably to ‘a certain degree of confusion, particularly among the East Timorese’.⁴⁷ It was not until September 2001 that a workshop was held to discuss the manner in which local law could be used to complement the formal justice system.⁴⁸ According to Hohe and Nixon, this interest in local law was largely due to pressure relating to land disputes, and in the following month UNTAET prepared a report on establishing a co-ordinated approach to the issue of local law.⁴⁹ At this time it became apparent that local processes could be utilized to advantage.

3.1. History of local law

Many experts assert that during the periods of occupation and colonization the formal legal systems never held great sway in East Timor, explaining the relative weakness of the formal legal system today and the continued operation of local law.⁵⁰

Portuguese colonial rule began in 1556,⁵¹ but it is argued that it did not have a significant impact on local power structures and systems of law⁵² because the Portuguese were primarily interested in trade, the prevention of large-scale conflict,

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45. The first detailed report on local law came out in 2001. See D. Mearns, ‘Variations on a Theme: Coalitions of Authority in East Timor’, report prepared for Australian Legal Resources International, 2001. See also Mearns, *supra* note 7; T. Hohe and R. Nixon, ‘Reconciling Justice: “Traditional” Law and State Justice in East Timor, Final Report’, report prepared for the United States Institute of Peace, 2003, at 40. Presumably this initial policy vacuum resulted from a combination of a lack of resources and poor communication channels between the local community and the UN administration.
46. See Hohe and Nixon, *supra* note 45, at 40. Note that from early 2000 onwards, UNTAET showed interest in traditional mechanisms of conflict resolution in its approach to policing: see Security Council, Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the period 27 January–26 July 2000), UN Doc S/2000/738, (26 July 2000), at para. 46.
47. See Hohe and Nixon, *supra* note 45.
48. Security Council, Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the period from 25 July to 15 October 2001), S/2001/983 (2001), at para. 18.
49. Hohe and Nixon relate that the report was prepared by the Office of the National Security Advisor: *supra* note 45, at 41. The question of resolving land disputes using both local law and state law is beyond the scope of this paper, but see E. Urresta and R. Nixon, Timor Leste Land Law Program, ‘Report on Research Findings and Policy Recommendations for a Legal Framework for Land Dispute Mediation’, February 2004; D. Fitzpatrick, *Land Claims in East Timor* (2002).
50. See Hohe and Nixon, *supra* note 45, at 27, and J. A. Berlie, ‘A Concise Legal History of East Timor’, in *Studies in Languages and Cultures of East Timor* (2000), vol. 3, 138 et seq.
51. This is the date of the first Portuguese settlement at Lifau (in present-day Oecussi). It was not until the beginning of the eighteenth century that a Portuguese governor was appointed in East Timor. For a history of East Timor see J. G. Taylor, *Indonesia’s Forgotten War: The Hidden History of East Timor* (1991); J. Dunn, *Timor: A People Betrayed* (1996), ch. 2.
52. See Hohe and Nixon, *supra* note 45, at 27. More generally, Taylor states that ‘the salient features of East Timorese society remained in the mid-twentieth century much as they had been at the time of the Portuguese arrival’: Taylor, *supra* note 51, at 15.

and the collection of taxes.⁵³ The Portuguese ruled through a system of 'indirect colonial rule', which involved the bestowal of military power on local chiefs who were expected to provide strong loyalty to Portugal and maintain law and order.⁵⁴ Very few laws were promulgated for East Timor.⁵⁵ Indirect rule allowed local legal systems to continue operating with little outside interference.⁵⁶

At the turn of the twentieth century, Portuguese rule became more direct. Berlie states that up until this time 'the local native authorities had considerable judicial power'.⁵⁷ The beginning of direct rule, alongside the demise of the Portuguese monarchy with the founding of the Republic of Portugal in 1910, sparked some rebellion among the local chiefs whose loyalty was tied, conceptually at least, to the king of Portugal. After the Second World War, East Timor formally became an 'overseas province' of Portugal rather than a colony.⁵⁸ It had nine administrative districts⁵⁹ and 'four courts of justice existed in Dili, Bacau, Suai and Oecussi'.⁶⁰ What is not clear is whether Portugal set up separate 'native' courts for chiefs to administer 'native' law to the local population, as occurred in colonies ruled by the British and French in parts of colonial Africa.⁶¹

The subsequent imposition of the Indonesian legal system during the occupation (1976–99) had a greater impact on East Timorese society.⁶² East Timor was subject to laws adopted by Indonesia's national legislative council, and only civil matters were left to be dealt with at local level.⁶³ According to one report, during the occupation Indonesia passed a law that 'permitted no local traditional institution to exist apart from those adopted by the national legislative body'.⁶⁴ The local population viewed the Indonesian legal system with deep distrust, due to widespread perception of its

53. Hohe and Nixon, *supra* note 45, at 27.

54. See Berlie, *supra* note 50, at 145. Geoffrey Hull states that 'Portuguese rule was accepted because, before the mid-nineteenth century at least, there was minimal interference in indigenous affairs, and this allowed the local kings to maintain the social status quo.' G. Hull, 'East Timor and Indonesia: The Cultural Factors of Incompatibility', in *Studies in Languages and Cultures of East Timor* (2000), vol. 4, 60. Taylor comments that indirect rule was partly attributable to the fact that the Portuguese were unable to administer successfully the interior: see *supra* note 51, at 10.

55. Berlie, *supra* note 50, at 149.

56. Hohe and Nixon, *supra* note 45, at 27. Taylor states that conflict in the region between the Dutch, the Portuguese, and the Topasses (a mestizo group from the Portuguese settlement of Palau Solor and Larantuka (Flores)) in the eighteenth century left 'Timorese society relatively free from incursion and disruption': *supra* note 51, at 5. He comments that East Timorese communities were successful in restricting 'Topasse and European influence and control to the political sphere of princely kinship alliances': *ibid.*, at 9.

57. See Berlie, *supra* note 50, at 147.

58. *Ibid.*, at 148, where Berlie says that a 'politico-administrative statute for Timor was published in the Organic Law of the Portuguese Overseas (no. 2066)' in June 1953. This was during the dictatorship of António de Oliveira Salazar (1932–68). It is possible that this issue was formalized earlier by the Portuguese Constitution in 1951. However, see J. Dunn, *East Timor: Rough Passage to Independence* (2003), 32, where Dunn says that this status was declared in 1963.

59. The nine districts were Dili, Lautem, Viqueque, Bacau, Manatuto, Suro, Ermera, Bobonaro, and Oecussi.

60. See Berlie, *supra* note 50, at 150. Some of the records of the Dili court show punishments being meted out in the nineteenth century to soldiers, but these soldiers were possibly Portuguese and not local East Timorese: *ibid.*

61. On native courts and indirect rule see M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996).

62. East Timor became annexed as the 27th province of Indonesia in 1976.

63. See Hohe and Nixon, *supra* note 45, at 27.

64. S. R. Quast, International Legal Assistance Consortium, 'Report on East Timor', March 2002, at 22.

corruption.⁶⁵ The notion of the separation of powers did not apply under Indonesian rule, according to which police were perceived as both lawmakers and law enforcers. More broadly, the concept of the rule of law, as defined above by the UN Secretary-General, was not understood or respected by the government of Suharto, in power in Indonesia for most of the period of its occupation of East Timor.⁶⁶

For these reasons, locals had no experience or understanding of the rule of law and would rarely access the formal legal system, in particular during Portuguese rule, except when it came to reporting serious cases such as murder.⁶⁷ The formal legal system was seen as a last resort. Overall, Berlie sums up that ‘The continual influence of traditional law, *adat*, shows that colonial and indigenous legal and political systems existed in parallel.’⁶⁸ Thus the post-colonial legacy was one of two separate legal systems operating in parallel without recognizing each other.⁶⁹

The period between the popular consultation ballot and the arrival of UNTAET was one of approximately two and a half months, longer in some less accessible rural areas. During this time the local population relied on local law.⁷⁰ In addition, they relied on the National Council of Timorese Resistance (CNRT), whose influence continued after UNTAET arrived.⁷¹ This is expressed by the words of one government official: ‘In 1999–2000 the legal way was via the CNRT . . . only seldom people went to UNTAET and PKF. If we go to UNTAET, there is a difference in culture . . . there is international laws and not normal local ways’.⁷² Even after the CNRT was dissolved in mid-2001, locals and CivPol officers would still approach its former members for assistance with matters of local law.⁷³ Mearns reports that as late as 2002 some local village heads spoke to the effect that they believed there was ‘no law at present’, demonstrating that they had little trust or understanding

65. See Hohe and Nixon, *supra* note 45, at 7; see also 26–7.

66. See T. Lindsey, ‘Indonesia: Devaluing Asian Values, Rewriting Rule of Law’, in R. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (2000), 286–323. See also International Commission of Jurists, ‘Ruler’s Law: The Report of the International Commission of Jurists Mission to Indonesia’, October 1999.

67. Hohe and Nixon, *supra* note 45, at 19, 26.

68. *Ibid.*, at 149. This is confirmed by Taylor, who states that the ‘two political systems, the colonial and the indigenous coexisted’ but in a ‘rather uneasy truce’, *supra* note 51, at 12. *Adat* is the Indonesian word for the sacred laws or belief systems on which local law is based.

69. While the local system continued informally to serve locals who lived in village structures, particularly in rural areas, the Portuguese legal system predominantly seems to have served the non-East Timorese as well as some urban East Timorese. What is apparent is that local systems of law remained strong and operational, although they could not escape outside influence entirely.

70. According to a priest from the Oecussi district, ‘In the villages after September 1999, it was customary law that asserted itself quickly. This was natural and not surprising because – though everything had been destroyed – through tradition and culture the local law lived on in strength inside people’s heads’ (November 2002), quoted in Hohe and Nixon, *supra* note 45, at 32.

71. In early 1999 different nationalistic political parties gathered under the umbrella of the CNRT in order to assist East Timor in its transition to a democratically elected government. In August 1999 the largest resistance party, Fretelin, split from the CNRT and the remaining CNRT dissolved in June 2001, some weeks before the first general election on 30 Aug. 2001.

72. Bobonaro District, November 2002: quoted in Hohe and Nixon, *supra* note 45, at 36. According to Hohe and Nixon, the CNRT was the only obvious power at this time, as it possessed an organizational structure that stretched from the hamlet to the national level; it ‘was rooted in principles of local administration and law’, 30, 38.

73. *Ibid.*, at 36.

of the formal legal system.⁷⁴ This comment needs to be considered in the context of the entry into force on 20 May 2002 of East Timor's Constitution, a month after Xanana Gusmão won the presidential elections. It illustrates the amount of time that it takes to communicate to locals the existence and relevance of the new formal legal system, as well as the degree of community consultation that took place in the drafting and enactment of East Timor's Constitution.⁷⁵

3.2. The main tenets of local law

Some of the salient features of local law in East Timor, sometimes referred to as *adat*,⁷⁶ need to be briefly outlined so as to give a sense of how local law differs from the formal legal system. One of the challenges here is that it is generally agreed that there is no single local system of law that applies across all regions of East Timor. Instead there are numerous local systems, and while they share some underlying principles, commonalities should not be assumed.⁷⁷

Anthropologists and other experts have identified a number of common features, some of which are as follows. First, law is part of a broader social order based on the values of kinship, marriage relations, and the exchange of certain goods. The marriage relationship, for example, is pivotal in local communities as producing a bond between two families, understood as 'houses'. The initial marriage relationship is established through an exchange of values between the two families, symbolized in exchange goods, commonly translated as 'bride price'.⁷⁸ This exchange is a central aspect of the local systems of 'value circulation'.

Second, 'wrongdoing' in local East Timorese communities is understood as being a disturbance of the system of 'value circulation'.⁷⁹ If an individual commits a crime, it causes an interruption in the flow of value and an imbalance in the socio-cosmic system. The threat of someone breaking the social rules is perceived as very serious. For example, if a family member refuses to marry a designated person, this is considered a greater offence to the social value system than an act of domestic violence.⁸⁰

74. Mearns, *supra* note 7, at 38.

75. See A. J. Regan, 'Constitution Making in East Timor: Missed Opportunities?'; D. d. C. B. Soares, 'The Challenges of Drafting a Constitution', in D. d. C. B. Soares et al. (eds.), *Elections and Constitution Making in East Timor* (2003); and A. Baltazar, 'An Overview of the Constitution Drafting Process in East Timor', (2004) *East Timor Law Journal*, available at <http://www.eastimorlawjournal.org/Articles/alipioonetconstitution.html>.

76. See *supra* note 68.

77. While some of the practices of these local systems of law may have been used for generations, it is in my view best not to use the term 'customary law' or 'traditional law' because not all practices of local law are necessarily customary or traditional. Prior to the UN's arrival, few studies had been undertaken of East Timor's local systems of law; this situation has now changed, allowing for some detailed analysis and understanding for those from outside. A number of workshops and studies have been conducted in the past few years on the subject of the benefits and drawbacks of using these local systems of law. See JSMP, 'Findings and Recommendations: Workshop on Formal and Local Justice Systems in East Timor', July 2002; Asia Foundation, *supra* note 36.

78. One of the families acts as 'Wife Giver' and one as 'Wife Taker': Hohe and Nixon, *supra* note 45, at 13. They state that 'Although a bride price contains the idea of payment for a received good, most Timorese strongly deny that this is what happens in the context of marriage, as both parties exchange goods to the other'. See also Berlie, *supra* note 50, at 141–2; Fitzpatrick, *supra* note 49, at 31–2.

79. Hohe and Nixon, *supra* note 45, at 17.

80. *Ibid.*

Third, local dispute resolution processes generally operate in such a way that matters to be resolved between two individuals of different families are first taken to the elders of the two families. This process may involve the *lian nain* or *dato* (different words for 'holder of words') ruling over the proceedings. If this does not succeed, the families may refer the matter to the *chefe d'aldeia* (the hamlet chief). If this process is not successful then the matter is referred to the *chefe do suco* (the village chief). Either of these leaders may decide to convene a meeting of a 'council of elders' in the village, which will include the customary leaders. Sometimes the matter may also be referred to a trusted local priest, while the police are generally considered to be the last resort.⁸¹

Local legal systems follow a path of restorative rather than punitive justice. Anthropologist David Mearns explains the difference thus:

[J]ustice 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.⁸²

Justice and punishment are understood in a collective sense. The debt payment owed by the perpetrator for a crime committed is made in the name of the family as a whole and can be paid by the perpetrator's family. For example, the crime of arson may involve reimbursing the victims' family to the extent that the victim's family is offered the perpetrator's family belongings.⁸³ Committing a crime is seen as being more than an individual act of transgression; it is seen as a community problem.⁸⁴ The debt created by the act must be settled before any form of reconciliation can be found within the community.⁸⁵

Reconciliation is seen as 'One of the most important stages following the consensus on a compensation for a crime and the payment or execution of the punishment'.⁸⁶

A reconciliation ceremony involves the local ritual authorities, as their involvement ensures ancestral participation in a peace agreement, which is considered to be important. The perpetrator, and sometimes also the victim's family, then provides goods for a reconciliation ceremony.

In many local systems the punishment emphasizes the shaming of the perpetrator in order to 'cover the victim's shame'.⁸⁷ While detention is an act of shaming in Western legal systems, this form of shaming is not understood as such by the East Timorese. Locals see detention as a period when the perpetrator 'becomes fat', in that they are provided with food and shelter while others must work for these things.

81. See Mearns, *supra* note 7, at 39; A. Swaine, International Rescue Society, 'Traditional Justice and Gender Based Violence', August 2003, at 20–1.

82. Mearns, *supra* note 7, at 43.

83. Swaine, *supra* note 81, at 21.

84. Hohe and Nixon, *supra* note 45, at 22.

85. Mearns, *supra* note 7, at 43.

86. Hohe and Nixon, *supra* note 45, at 22.

87. Swaine, *supra* note 81, at 21.

This means that the Western path of removing the perpetrator from the scene for the purposes of imprisonment does not produce a resolution at the local level.⁸⁸

In sum, local systems of law in East Timor are based on value systems very different from Western legal systems. Violent assault may not be considered to be serious, while, in contrast, theft, for example, is considered to be a serious crime.⁸⁹ A local form of arbitration is used to deal with disputes, when a *chefe* listens to the parties before informing them of the required means of reconciliation.

In order to understand the operation of local law and legal pluralism in East Timor in greater depth, it is necessary to consider both the benefits and the drawbacks of local systems of law.

4. THE BENEFITS AND DRAWBACKS OF LOCAL SYSTEMS OF LAW

4.1. The benefits

The main benefits of using the local systems of law are outlined as follows.

4.1.1. *Speed and accessibility of local dispute resolution*

Without doubt, local dispute mechanisms are more accessible than formal state mechanisms, since each hamlet and village has its own, saving locals in remote areas from having to walk for hours simply to make a complaint.⁹⁰ Accessibility to the formal legal system is also hindered by cost: the relatively high cost involved in lodging a civil case⁹¹ means that locals are reluctant, or simply unable to afford, to bring disputes to the formal courts.⁹² Formal legal enforcement is an option in theory only for most people and in particular those living in rural and isolated regions.⁹³ In contrast, local systems of law are relatively cost-free⁹⁴ and use the language that is locally spoken.

4.1.2. *Sensitivity to local context*

Unlike the formal legal system, local legal systems reflect the system of circulation of values, discussed above, that exist in local East Timorese societies. For this reason they can be more sensitive to the local context in which the conflict arises and more comprehensible to local people. Swaine says that women opt to use local justice 'because of its basis in their culture and the fact that it is a familiar and known concept'.⁹⁵

88. Hohe and Nixon, *supra* note 45, at 64.

89. Its punishment may involve the replacement of the stolen goods in addition to compensation. Swaine, *supra* note 81, at 21.

90. There are many remote areas of East Timor where roads are difficult, and transport and communication by telephone are minimal. The formal legal system is even more inaccessible for the inhabitants of Oecussi, East Timor's enclave that lies in West Timor, which is particularly isolated. It appears that neither criminal trials nor civil matters were heard at the Oecussi District Court in 2004 – see JSMP, 'Case Flow and Management', *supra* note 37, at 12–13.

91. Court costs are set out in Decree Law No 15/2003. For example, a matter involving a sum of \$500 incurs costs of \$26. The average wage for an East Timorese worker is currently US\$2–5 per day.

92. Asia Foundation, *supra* note 36, at 10.

93. Swaine, *supra* note 81, at 60. On women's access to formal law, see JSMP, *supra* note 11.

94. But note that the parties are often expected to supply the holders of local law with food while their matter is being resolved: see Swaine, *supra* note 81, at 60.

95. Swaine, *supra* note 81, at 4.

4.1.3. *The acceptance of local resolutions and appeasement of customary leaders*

Local resolutions are locally accepted, whereas decisions made by formal district courts are not always accepted and understood at the local level. This derives from the fact that ‘the “wrong” person might have made the judgment, and that the [formal] process is alien and that the punishment does not deliver the desired result’.⁹⁶ Mearns reports that in the Bacau district locals were threatening court staff and witnesses:

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.⁹⁷

Another reason why formal decisions are not automatically accepted is that locals are being put on trial by the formal legal system ‘for acts they never realised were criminal, and before the basic concepts of the new legal system have even begun to permeate the social fabric’.⁹⁸ The act of removing a case from the local to the formal level may insult the holders of local law.⁹⁹ Given the close-knit nature of East Timorese village society, it is important to involve local ritual leaders in the decision-making process, otherwise they may invoke the supernatural to support their position.¹⁰⁰

4.1.4. *The promotion of badame*

Local legal systems aim to promote *badame* (literally, ‘forgiveness’ or ‘reconciliation’) between the parties so that the tension is alleviated and the conflict is less likely to continue in the future. Once the decision is made, the sentence is put to the offender, who then enters a dialogue with the victim as to whether it is appropriate. Agreement must be reached between both parties and during this process the means of each party is considered.¹⁰¹

4.2. **The drawbacks of using the local systems of law**

As well as the many benefits of the local legal systems there are also a number of drawbacks.

4.2.1. *Inconsistency of outcomes, openness to abuse, and enforcement problems*

The outcomes are inconsistent because the laws applied are unwritten, they vary between regions and are ‘subject to the different personalities involved and their own

96. Hohe and Nixon, *supra* note 45, at 64.

97. Mearns, *supra* note 7, at 50.

98. Hohe and Nixon, *supra* note 45, at 65.

99. Swaine, *supra* note 81, at 2. Swaine states that the right to appeal does exist in some form but that women are reluctant to use it for fear of retribution by local law-holders (at 2). Furthermore, she questions the transparency of these appeal systems (at 33).

100. Mearns, *supra* note 7, at 44.

101. See the transcript of the address by President Xanana Gusmão to the ‘International Conference on Traditional Conflict Resolution and Traditional Justice’ in Timor Leste, Dili, 27 June 2003, available at http://www.asiafoundation.org/Locations/easttimor_gusmao.html.

interpretations of how justice should be administered'.¹⁰² This presents a problem for establishing the rule of law which requires a degree of consistency and certainty.

The unwritten and arbitrary nature of local laws lacks transparency and allows wide scope for the potential for bias, bribery,¹⁰³ and other abuses.¹⁰⁴ Given the lack of regulation and supervision of such bodies, there are no safeguards protecting against such abuses.

In addition, local legal systems have few tools to enforce decisions. This is demonstrated most clearly in cases of domestic violence where an agreement is reached between the parties that the perpetrator will compensate the victim's family but the perpetrator fails to do so.¹⁰⁵

4.2.2. *Practices falling below international human rights standards*

The main opposition to the use of local legal systems derives from the concern that some of its practices are below international human rights standards, in particular with regard to their impact on women's rights. This issue is elaborated on below.

The counter-argument is to the effect that these standards are not culturally relevant or applicable to East Timorese people. Resistance to the imposition of these standards has dismissed them as a 'new form of colonialism' imposed by the UN. Some UN values are perceived as alien and remote to the East Timorese value system. For example, one local lawyer stated of UNTAET,

The UN have a mandate to provide stability, but they should not just impose these human rights laws from New York and Geneva. People felt strange having these laws imposed. The UN should have consulted with the communities to ask the leaders what ideas they had about implementing UN laws.¹⁰⁶

This stereotypical understanding of the UN's intervention underlines the importance of ensuring that communication channels with the local population are effectively set up to highlight the significant commonalities shared by international human rights law and local law.

4.2.3. *Disadvantages for women*

The main disadvantages arising from the local legal system for women are as follows.

Participation. As users, women's level of participation in local legal systems is 'minimal and often superficial'.¹⁰⁷ Many local belief systems hold that women do

102. Swaine, *supra* note 81, at 19.

103. Xanana Gusmão states that 'bonuses are a reality and the balance of justice may weigh in favour of those who pay more . . . Once the problem is resolved, it is also common for the winning party to give a monetary reward to the agents of justice'. *Supra* note 101.

104. The system may also be open to abuse by some participants. According to Swaine, *barlaque* (bride price) is sometimes argued by husbands in family disputes as a justification for their actions and as a reason why the wife's family should not be involved in the hearing. *Supra* note 81, at 60.

105. Aisling Swaine comments that 'Local justice has little power to enforce its ruling, whether that is in regard to the compensation payment or the prevention of further violence. Men are not forced to take responsibility for their violent acts.' *Supra* note 81, at 2. Swaine quotes the comments of a local Ainaro woman: 'I don't like *Adat* because up until this time he [her husband] was beating me and it didn't stop until the police got involved': at 62.

106. Quoted by Hohe and Nixon, *supra* note 45, at 57. See also Mearns, *supra* note 7, at 50.

107. Swaine, *supra* note 81, at 2.

not possess, and never have possessed, power in the local sphere to be decision makers.¹⁰⁸ These common local beliefs curtail the possibility of women's equal participation in local legal systems as both participants and holders of the law.

Compensation and other problems relating to gender-based crimes. The approach of East Timorese local law to sexual crimes and gender-based crimes does not meet international standards in a number of ways. First, the crime of rape is not fully conceptualized. There is little distinction between rape and adultery. Moreover, local legal systems often require the perpetrator to marry the victim or to pay compensation. The case of a man reneging on his promise to marry a woman after consensual sexual intercourse is considered by local authorities to be more serious than that of a violent rape.¹⁰⁹ Local belief systems hold that such offences are a disturbance to the flow of values which thus need to be restored through the act of compensation. For example, when victims of rape and domestic violence take their case to their local legal systems, a form of compensation might be agreed on. The problem is that this compensation is made to the family of the woman and not to the victim herself. As Hohe and Nixon comment, 'the compensation negotiations associated with the resolution of rape (and adultery) cases make the crime itself appear like a property offence and women appear as cattle'.¹¹⁰ With regard to domestic violence, compensation paid by a husband is also problematic, since it effectively penalizes the woman, whose economic means, based on her husband's, are thereby decreased.

Bias against women. Women face bias in engaging with local law. Swaine states that a woman 'who presents a complaint of violence to a local justice hearing cannot be guaranteed that "justice" in the true sense of the word will be delivered'.¹¹¹ Local biases and cultural beliefs regarding women's status in society often inform rulings at the local level. For example, the local legal systems are seen 'to often blame women for the cases of [domestic] violence presented'.¹¹² Generally women victims and offenders feel that their needs and input into the process are ignored.¹¹³

These drawbacks of local law are serious in that they imperil the establishment of the rule of law in East Timor. The next question relates to the status given to local law by East Timor's Constitution¹¹⁴ and the position it confers on the rule of law.

108. *Ibid.* At 25–6 Swaine relates a discussion on this question with a council of elders in Cora Lima. This fascinating discussion reveals that the justifications used to exclude women from the realm of legal decision making include the views that the ancestors have decreed that only men can 'know' and 'speak' the 'words of law', that it is a cultural matter, and further, that women are not educated and are therefore unreliable.

109. Hohe and Nixon, *supra* note 45, at 60. See also Swaine, *supra* note 81, at 47.

110. Hohe and Nixon, *supra* note 45, at 61.

111. Swaine, *supra* note 81, at 2.

112. *Ibid.*, at 4. For examples, see *ibid.*, at 27–33. Swaine states: 'The systems are inherently biased towards women's status, decision-making capabilities and their roles within their communities.' *Ibid.*, at 3.

113. Interview with Manuela Leong Pereira, the Director of Fokupers, Dili, 17 June 2005. The potential for bias also lies in the fact that most disputes are dealt with initially in the family sphere. Of such a forum for dispute resolution, Nyamu-Musembi explains that 'embedded ideas about authority and gender roles seem to constrain open deliberation on the facts, and to dictate a resort to idealised statements of custom that necessitate a particular outcome'. See C. Nyamu-Musembi, 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights', in A. An-Na'im (ed.) *Cultural Transformation and Human Rights in Africa* (2002), at 139.

114. The path of constitutional recognition of local 'customary' law has been chosen not only by many African countries, including South Africa, but also by most Pacific Island states. While some have chosen to assign

5. THE CONSTITUTIONAL STATUS OF LOCAL LAW

Article 2(4) of East Timor's Constitution¹¹⁵ provides some recognition of local norms and customs:¹¹⁶

4. The State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.

This subsection gives recognition to local norms and customs; arguably it intends to direct the courts (presumably 'the State' includes state courts) to have regard to local 'customary' law. But the subsection is ambiguous in that it does not appear to go so far as to specify that courts are to apply them as being part of the body of East Timor's formal law. In the absence of a less ambiguous constitutional provision, such as that in South Africa's Constitution,¹¹⁷ East Timor's government needs to enact legislation clarifying the relationship between the two systems of law and setting out some judicial guidelines so as to remedy the present confusion in East Timor's courts as to whether and when local law can be used. For example, the courts have been grappling in an ad hoc fashion with the questions as to whether local law can be legitimately used as a criminal law defence, as a ground for dismissing a case, to mitigate a sentence, or in sentencing generally.¹¹⁸

customary law a rank in the hierarchy of laws, others have left this question somewhat vague. The Tongan Constitution of 1875 makes no express mention of custom, but in all other Pacific states the written law expressly provides for customary law to be used in relation to land disputes. In the Solomon Islands, Samoa, Tuvalu, Kiribati, Nauru, and Vanuatu, written law provides for the broader application of customary law. See, e.g., the Constitution of the Solomon Islands, S. 76 and sched. 3, para. 3(1), which states that 'subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands'. Para. 3(2) states that para. 3(1) 'shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with the Constitution or an Act of Parliament'. Art. III(1) of the Constitution of Samoa 1962 provides: 'Law . . . includes any custom or usage which has acquired the force of law in Samoa . . . under the provisions of any Act or under a judgment of a court of competent jurisdiction.' See J. C. Care et al., *Introduction to South Pacific Law* (1999), ch. 3.

115. This Constitution came into force on 20 May 2002.

116. There is another provision which points to the possibility of a formal engagement between local legal systems and the formal legal system:

Article 123 Categories of courts

1. There shall be the following categories of courts in the Democratic Republic of East Timor:

- a) The Supreme Court of Justice and other courts of law;
- b) The High Administrative, Tax and Audit Court and other administrative courts of first instance;
- c) Military Courts.

...

5. The law may institutionalise means and ways for the non-judicial resolution of disputes.

Para. 5 sits strangely in this section; one interpretation is that it is an opening to allow a formal engagement with local systems of dispute resolution which are clearly beyond the present jurisdiction of the formal court system.

117. S. 211(3) of South Africa's 1996 Constitution provides: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' This recognition is reiterated in S. 39 of the constitution which deals with the interpretation of the Bill of Rights. Subsection 3 provides: 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

118. These cases have been reported by the JSMP – see the following reports: 'The Role, Practice and Procedure of the Court of Appeal', 28 June 2005, at 15; 'Judge Applies Customary Law in a Criminal Case', press release, 19 May 2005; *supra* note 20, at 14–15.

According to Article 2(4) of East Timor's Constitution, local norms and customs must 'not [be] contrary to the Constitution'. This means that they are subject to the extensive bill of rights entrenched in East Timor's Constitution,¹¹⁹ as well as to international conventions, such as core human rights treaties, which are given special status by Article 9(3) of the Constitution:

3. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.

East Timor has acceded to a number of international conventions. For example, in 2003, a year after independence, it acceded to almost all the core UN human rights conventions: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination against Women, the Convention against Torture, and the Convention on the Rights of the Child.¹²⁰ Article 9(2) provides that the act of accession to an international treaty transforms it into state law:

2. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.

This means that local law would need to be consistent with the above international human rights conventions. More generally, the 'objectives of the state' are outlined in Article 6. One of these objectives is:

(b) To guarantee and promote the fundamental rights and freedoms of the citizens and the respect for the principles of the democratic state based on *the rule of law*. (emphasis added)

The rule of law is not defined in the Constitution, although some of the elements of the Secretary-General's definition can be made out. For example, Articles 119–22 guarantee the independence of the judiciary and the courts' duty to uphold the Constitution and its principles, while Article 69 guarantees the separation of powers. Furthermore, the Constitution explicitly protects fundamental values such as equality and gives the judiciary guardianship over these values.

To sum up, East Timor's Constitution has not given local law a formal position in the state legal system. Some form of explicit legislative recognition is necessary

119. East Timor's Constitution has special sections regarding the rights of women, children, youth, the elderly, disabled citizens and the diaspora (Arts. 17–22). It guarantees an extensive list of civil and political rights (Arts. 29–49) and social, economic, and cultural rights and duties (Arts. 50–61). Note, however, that the enforcement provisions for these rights are not particularly strong. Under Art. 27, the independent office of the Ombudsman only has the power 'to examine and seek to settle citizens' complaints against public bodies, certify the conformity of the acts with the law, prevent and initiate the process to remedy injustices'.

120. Except for the ICCPR, *supra* note 16, accession to these international treaties took place on 16 April 2003. The ICCPR was acceded to on 18 Sept. 2003. East Timor has not acceded to the UN Convention on the Elimination of Racial Discrimination, *supra* note 16. However, it has acceded to the 1991 International Convention on the Protection of the Rights of All Migrant Workers, *supra* note 16, to the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights, (1990) 29 ILM 1464 (18 Sept. 2003), to the two Optional Protocols to the Convention on the Rights of the Child, UN Doc. A/RES/54/263 (2000) (25 May 2000 and 16 April 2003 respectively) and to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. A/54/4 (1999) (16 April 2003).

in order to give the courts clearer guidelines as to the legitimate use of local law. However, if local law were to be given recognition, it would need to be compatible with East Timor's constitutionally entrenched bill of rights, the international human rights treaties that have been acceded to and East Timor's constitutional objectives based on the rule of law.

6. THE FUTURE ROLE OF LOCAL LEGAL SYSTEMS

The current unrecognized position of local law is clearly the source of many of the drawbacks of local law, such as the degree of potential bias, because this law operates without a sufficiently strong system of checks. Arguably, however, the advantages of engaging with local legal systems outweigh the problems in using local law, because without this engagement state law risks losing relevance and legitimacy in the eyes of the local population. The question is whether official recognition of local law – classic legal pluralism – can remedy local law's drawbacks. In this section I map out the views of some local experts and government figures, followed by various views from some 'outside' experts who have conducted studies into this question.

6.1. Some local views

6.1.1. *Public opinions*

Generally, local law in some form appears to garner popular support in East Timor. Interviews with locals conducted by Swaine in three districts in East Timor on the question of the status of local law produced heated discussion, with all participants asserting that 'if local justice was abolished as a method for resolving community disputes, they would lose a way of life and culture – and would have nothing to pass on to future generations'.¹²¹ The female participants shared this view, but also expressed strong support for a combination of the two systems.¹²² Local impetus clearly exists for local law to be harnessed by state law in some form so as to give the local population some feeling of ownership over, and connection with, the applicable law and its values. This is seen in the following comment made by an East Timorese lawyer:

If people are to own the law, even in a transitional context, then they must feel that it recognizes their own customs. It makes sense to put customary law together with state law . . . UNTAET adopted Indonesian laws and this did not come from the people. It was top down.¹²³

The question of how practically to 'put customary law together with state law' is the real issue.

Some local activists and women's groups have been involved in organizing local education campaigns in the villages on issues such as rape, domestic violence, and marriage.¹²⁴ Their efforts lie in calling for specific changes and modifications to local

121. Swaine, *supra* note 81, at 63–4.

122. *Ibid.*

123. Hohe and Nixon, *supra* note 45, at 57.

124. *Ibid.*, at 61, where they are describing the work of Centro Feto (Centre for Women).

law to reflect changing values concerning gender roles in society. For example, some groups advocate 'compensation paid in relation to sexual crimes, domestic violence or other offences to be paid directly to the victims instead of to the families'.¹²⁵ These actions make it clear that some women's groups do not regard formal law as a panacea; instead they consider a modified form of local law as an ongoing and viable means of community dispute resolution.

Another important local initiative to modify local law, spearheaded by the Peace and Democracy Foundation, has been the establishing of a mediation model, 'based on the existing culture' of East Timor, for civil cases, a sphere neglected by the formal system.¹²⁶ Given that East Timor has many models of dispute resolution, the idea is that the mediation model could become the 'one common model to be used in all communities'.¹²⁷ The aim of the proposed model is to improve local dispute resolution and 'correct the problems with the customary practice' by implementing an alternative mechanism that is 'more transparent' and 'can reduce discrimination' suffered by women and young people in the local legal sphere.¹²⁸ The model prefers mediation to the system of arbitration most commonly used at the local level because it allows the parties to the conflict to find a solution to their problem with the assistance of a mediation team made up of customary leaders, as well as representatives of women, youth, and religion.

This model, currently at its pilot stage, has the potential to complement formal law in civil matters, thereby reducing the pressure on district courts.¹²⁹ The merit of the model is that it seeks to integrate mediation principles with the positive aspects of local customary dispute resolution, so that local leaders will continue to be involved in the process of resolving local disputes but will no longer have the power to decide the matter. The ever evolving nature of local law suggests that these principles of mediation and broader representation could be accommodated into the local system as long as there is sufficient local will. If this will were found, the next step would be for the government to recognize the system formally through legislation.¹³⁰

6.1.2. *The government's views*

Some elements in the government appear to be uninterested in the potential of using local law.¹³¹ This view does not appear to be shared by East Timorese President

125. *Ibid.*

126. Peace and Democracy Foundation, 'Report about Research on Customary Dispute Resolution and Proposed Mediation Model for the Democratic Republic of Timor Leste', November 2004, at 69 (document on file with author).

127. *Ibid.*, at 9.

128. *Ibid.*, at 5.

129. Interview with Peace and Democracy Foundation, Dili, 14 June, 2005. The mediation process has also been favoured to resolve disputes concerning land issues and for less serious crimes by East Timor's Truth, Reception and Reconciliation Commission. For a discussion of some 'grassroots strategies' which use local mechanisms to achieve reconciliation, see D. Babo-Soares, 'Nahe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor', (2004) 5 *Asia Pacific Journal of Anthropology* 15.

130. This would be necessary in order to promote legitimacy of the process and to ensure standards of transparency and accountability: Peace and Democracy Foundation, *supra* note 126, at 7.

131. Hohe and Nixon state somewhat vaguely that due to some social and historical factors, 'some factions of the governmental party are condemning all efforts to integrate local concepts of justice', *supra* note 45, at 67.

Xanana Gusmão, who, speaking at a conference on traditional justice in Dili in June 2003, outlined in a neutral fashion both the positive and negative aspects of local systems of justice. His speech underlined the need to reform the current system of legal pluralism by bringing in greater transparency. He argued that

For traditional justice to gain greater credibility it is necessary to reorganize its components; this will enable these ‘courts’ to truly serve the communities and continue to be open and accessible to the general public at a greater level.¹³²

In his view there is a ‘crying need to establish the judicial system based on the *sucos* (villages) so that local government bodies, including the police, may intervene and avoid disputes within the community’.¹³³ However, he seems uncertain as to how state legislation can bring about an engagement between the two systems, as he sees an ‘enormous gap, which is often difficult to bridge, between drafting the law and the still traditional perception of the majority of the population’.¹³⁴

6.2. Some outsider views

Mearns advocates that East Timor build on its vibrant local legal systems rather than eliminate them in the name of progress.¹³⁵ He believes that a process of formally incorporating local systems will allow monitoring so that these systems become better sources of stability and means of maintaining the peace.¹³⁶ He asserts, ‘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 [the Tetum version of Timor-Leste]’.¹³⁷ The word ‘coalition’ may mean that the local system could remain a separate entity within this formal system, operating complementarily in parallel with the national system.

Two other experts, Tanje Hohe, a political scientist, and Rod Nixon, an anthropologist, argue that a parallel system will not be beneficial to East Timor. They assert that it will not work, as having ‘two different ways of doing things is unlikely to promote social stability’ and stability is essential for a post-conflict society such as East Timor. Instead, they recommend that ‘some features of customary law should be *integrated* into written law’, and they make some specific suggestions.¹³⁸

Possibly they are referring to those government ministers who were part of the diaspora of East Timorese in exile in countries such as Portugal, Australia, and Mozambique and who are perceived by some as being removed from, and hence uninterested in, the local order and its positive aspects. One of those ostensibly not in this group is the Foreign Affairs Minister, Jose Ramos Horta, who has thrown his support behind the Peace and Democracy Foundation’s mediation model.

132. Gusmão, *supra* note 101.

133. *Ibid.*

134. *Ibid.*

135. Mearns, *supra* note 7, at 55.

136. *Ibid.*

137. *Ibid.* (emphasis added).

138. Hohe and Nixon, *supra* note 45, at 68 (emphasis added). They appear to be advocating a ‘*selective interference* principle’ which focuses on a limited range of modifications to local practices. For example, they argue that the formal justice system should be used only for serious crimes. In their view, only this ‘integrated’ approach can realistically meet with success given East Timor’s currently limited resources and capacity. They state that ‘only those features of the local system that contradict international standards of human rights should be abolished’, as above.

Swaine's report for the International Rescue Committee examines the current parallel relationship between the two systems and notes that it is presently 'quite strained', because both systems are failing adequately to deal with certain issues such as gender-based violence.¹³⁹ In her view, the parallel system 'has caused much confusion for women users who are caught in the interface between the two systems and for the administrators of local justice and police themselves who are not sure where the line between the two processes is'.¹⁴⁰ Where complainants have the choice of two different systems and they take a matter to one system, the problem is that that system refers the matter to the other system, thus confusing complainants and failing to meet their needs. However, Swaine acknowledges that at times the two systems can operate usefully side by side. For example, she observes, 'A combination of the two systems were seen [by domestic violence victims] to be most forceful'; while 'Police were seen to have more force and capacity to scare husbands into stopping their actions', the local system has the 'advantage of cultural and accepted methods of dealing with problems'.¹⁴¹ This ensures that 'processes were fair and delivered what they wanted – justice for the act of violence and for that violence to stop'.¹⁴² Thus a parallel system can assist women in accessing justice in some circumstances.

Swaine advocates a 'formal engagement' between the two systems. She believes that the local legal authorities are 'open to and desire a formalization of the relationship between the two systems so that local justice can become more forceful and respected by community members'.¹⁴³ The advantage of a formal engagement is that it would enable 'the debilitating cultural practices within local justice to be addressed and changes which need to take place facilitated in a way that is inclusive and supportive of all stakeholders'.¹⁴⁴ But she warns, like Gusmão, that these changes may be complex and take a long time.

There is some opposition to the use of local law by some outside human rights workers who argue for its abolition, citing the drawbacks identified above. Opponents argue that official state entities such as the police should not be involved with local legal systems in any manner, as this will legitimate these systems and condone their practices which conflict with international human rights standards.¹⁴⁵

7. FUTURE PATHS

The general consensus is that the current state of legal pluralism is not working as it is placing strain on both systems and causing confusion for locals. There is agreement on the need to 'put customary law together with state law', as well as on the view

139. Swaine, *supra* note 81, at 4.

140. *Ibid.*

141. *Ibid.*

142. *Ibid.* See also Hohe and Nixon, *supra* note 45, at 50.

143. Swaine, *supra* note 81, at 4.

144. *Ibid.*

145. These arguments are raised in other parts of the world where there is discussion of engaging with 'traditional' or 'customary' law. For example, the South African Rural Women's Movement and South African National Civics Organisation (Sanco) both oppose such engagement with local law.

that local law requires some modifications. Exactly how these processes should be carried out is controversial. The reports of the outside experts appear to align themselves with two different paths for state law pluralism. One is an integrated system whereby substantive local law and state law are unified into a single legal code.¹⁴⁶ The alternative path is for parallel systems to continue to operate but on a formal basis, linked at the apex through a single integrated appeal court.¹⁴⁷ Both paths pose various challenges.

7.1. Path 1: an integrated system

Hohe and Nixon's argument for a partly integrated system is at first impression a persuasive one, since it seems to promise a neat solution of a predominantly single, unified law and centres on the need for stability in an unstable transitional state. It advocates the integration of some local law into written law, which would presumably involve a degree of codification. The benefits of codification lie in the fact that it ensures greater certainty and consistency, important elements of the rule of law.

However, the experience of other states that have attempted such integration points to this being a challenging and also potentially dangerous path. First, it would be an expensive and time-consuming anthropological task to collate the diverse local laws, to translate them into written form and to identify and distil sufficient common strands and principles among them. Second, potential danger lies in the fact that the act of writing down customary law may lead to distortion. This is illustrated by a recent case in the South African Constitutional Court, *Bhe and Others v. The Magistrate, Khayelitsha and Others*,¹⁴⁸ where the court held that customary law in South Africa has been 'distorted' by its codification in legislation. The case concerned the constitutionality of the customary rule of male primogeniture written into the Black Administration Act 38 of 1927. Writing for the majority, Langa DCJ articulated some of the problems produced by codification:

The rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values. One reason for this is the fact that they were captured in legislation, in textbooks, in the writings of experts and in court decisions without allowing for the dynamism of customary law in the face of changing circumstances. Instead, they have over time become increasingly out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas.¹⁴⁹

Of particular concern has been the fact that this distortion in the South African context has emphasized the patriarchal features of African customary laws and minimized their communitarian features.¹⁵⁰

146. This path has been followed in African states such as Ghana and Senegal.

147. This took place in Chad, the Central African Republic, and Zaire (now Democratic Republic of the Congo).

148. CCT 49/03 (15 Oct. 2004).

149. *Ibid.*, para. 83. The judgment goes on to assert that there is a distinction between 'living customary law' and 'official customary law' and that 'official customary law as it exists in the textbooks and in the Act is generally a poor reflection, if not a distortion, of the true customary law': paras. 86–7.

150. *Ibid.*, para. 89.

If such a codification project were undertaken in East Timor, it is important that in the pre-codification stages such law be scrutinized so as to ensure that only customary law that is consistent with human rights standards is recognized. Otherwise gender inequalities extant in local law will become deepened and ingrained. While statute law is obviously anything but exempt from amendment, the written articulation of local legal practices will have the effect of placing the initial code as the original reflection of local norms, thus freezing and ossifying them in the minds of the local population. This would rob customary law of its most positive attribute: its dynamic ability to evolve and to recognize changes taking place.

7.2. Path 2: a dual system

It is possible that Mearns's suggestion of a dual system is the more sound option for a number of reasons.¹⁵¹ First, this option would preserve the dynamic nature of local law. Second, it could complement state district courts by relieving congestion in state courts and easing the burden on defendants, complainants, and witnesses of travelling long distances to the nearest district court. There is the danger, of course, that it can lead to the perception that one system is inferior to the other. One commentator, Brown, states generally that 'customary law is not equipped to compete with the monolithic strength of introduced law systems and will be the inevitable loser in any circumstances where there is a choice between the systems'.¹⁵² This analysis does not appear to fit transitional countries such as East Timor, where the state legal system collapsed after the ballot and is hence relatively weak in contrast to local 'customary' law. In these transitional situations the relationship between the systems has greater potential to be complementary and symbiotic.

On the structural issues involved in a dual system, South Africa's contemporary experience is a useful starting point. South Africa's parliament is currently in the process of debating a bill on customary courts which would formally recognize and establish a hierarchy of customary courts, from a 'headman's court' to a 'chief's court'. As in East Timor, dispute resolution in rural South Africa generally starts at the family level and if a resolution is not found, the dispute will be taken to a 'headman's court' to be resolved. Through recognition of the headman's court, the bill proposes to recognize local dispute resolution. The bill also proposes the appointment of a registrar to supervise and guide the customary court system as well as a right to appeal either to a higher customary court or to the state court system. Litigants are permitted to opt out of the jurisdiction of customary courts, even after proceedings have begun. A monetary cap has been recommended for all matters in customary courts.

151. For an argument against dual systems see K. Brown, 'Customary Law in the Pacific: An Endangered Species?', (1999) 3 *Journal of South Pacific Law*. Brown argues that those who advocate dual systems have a conservative agenda, and he asserts that the consequence of such a system can be a form of legal apartheid. It is undeniable that in the past dual systems were set up by colonial administrators with conservative agendas so as to impose control through indirect rule. Possibly this consequence is more likely in a state with separate racial or ethnic groups as in South Africa. In East Timor the worst outcome would be a division between the rural and urban populations. Note that Brown's article is useful in giving an insight into some of the problems encountered by customary law when two systems are integrated into a unified system.

152. *Ibid.*

7.2.1. *Supervision and conformity with constitutional principles*

The effect of formally bringing local 'courts' into state supervision is that they must operate in conformity with state law, both constitutional law and legislation. In this sense the extensive bill of rights entrenched in East Timor's Constitution is relevant.¹⁵³ For example, Article 16 protects against discrimination and guarantees equality before the law, while Article 17 provides that men and women have equal rights and duties. Furthermore, democracy and the rule of law are emphasized in the Constitution as two of its 'fundamental principles'.¹⁵⁴ Local 'courts' would need to promote these values. The courts' role would also be to balance the competing claims of constitutionally entrenched international human rights norms and the preservation of local norms and customs that are connected with local cultural identity and also protected in the Constitution.¹⁵⁵

It would be the duty of an official, akin to the South African model's registrar, to ensure the promotion of constitutional values by local 'courts' as well as, more generally, the consistency of court outcomes from region to region. The Peace and Democracy Foundation's proposed local mediation model includes an element of supervision, as it requires that all agreements be signed by the parties and can be registered with the district court. In addition, the *suco* chief must prepare a monthly report of all matters mediated. Parties have the option of taking their matter from the course of mediation to the courts. Of course, where particular customs are clearly inconsistent with constitutional values, the legislature should take the responsibility for modifying or abolishing these customs through legislation after local consultation, rather than leave them to be appealed through the court systems. The Office of the Ombudsman for Human Rights and Justice ('Provedor')¹⁵⁶ could assist the parliament in this function by setting out which local laws are plainly inconsistent with East Timor's human rights obligations.

7.2.2. *Composition*

The composition of local 'courts' in a dual legal system is an important issue. This process must be driven by the constitutional values of democracy, non-discrimination, and equality. The definition of the rule of law offered by the UN Secretary-General includes consideration of 'participation in decision making', which can be read to encompass legal decision-making. The composition of 'courts' needs to be

153. See *supra* note 119.

154. For example, Art. 1 states that the Democratic Republic of East Timor is a 'democratic . . . State based on the rule of law . . . and the respect for the dignity of the human person'.

155. S. 59 (5) of the Constitution provides: 'Everyone has the right to cultural enjoyment and creativity, and the duty to preserve, protect and value cultural heritage.' Note that s. 23 states that 'Fundamental rights enshrined in the constitution . . . shall be interpreted in accordance with the Universal Declaration of Human Rights.' For an example of how the South African Constitutional Court has balanced such rights, see *Bhe and Others v. The Magistrate, Khayelitsha and Others*, *supra* note 148, which held to be unconstitutional the rule of male primogeniture as it applies in African customary law as well as s. 23 of the Black Administration Act 1927. The rule violated ss. 9(3) (right to equality) and 10 (dignity) of the Constitution. Note, however, that some countries have constitutions which allow customary law to override anti-discrimination provisions. See, e.g., the Constitution of Fiji Islands, s. 38(8)–(10); the Constitution of Tuvalu, s. 27(3)(d); and the Constitution of Solomon Islands, s. 15(c).

156. Art. 27 of the Constitution sets out the role of the Ombudsman. Law No 7/2004, Art. 28, sets out the scope of the Ombudsman's powers.

representative of the community as a whole, and thus women need to be included in the process. East Timor's 2004 Law on Election of Suco Chiefs and Suco Councils reserves a minimum of three seats for women on each *suco* council,¹⁵⁷ a body which is expected to 'solve' 'specific problems' in the community.¹⁵⁸ The possible precursor to this was the Community Empowerment and Local Governance Project (CEP), an UNTAET programme set up in 2000, which went further by establishing village councils composed of an equal number of men and women democratically elected for the purpose of disbursing funds for local development.¹⁵⁹ Unlike CEP, however, it is unlikely that women will make up half of the membership of a *suco* council because apart from the *suco* chief, a male youth, and an 'elder', the remaining seats on the council are to be taken up by the chiefs of all villages making up the *suco*, who are generally male and on average number about six per *suco*.¹⁶⁰

The challenge here is ensuring that law propels cultural change and making women's membership count. There are a number of hurdles. First, local chiefs may oppose women's participation in local 'courts', as many local belief systems in East Timor hold that women do not possess decision-making power in the local sphere.¹⁶¹ Ospina and Hohe state, "Traditionally, in East Timorese societies the decision-making process is the domain of the senior male of the existing social groups within the hamlets. Rural women are not supposed to be outspoken and to take the floor in public meetings."¹⁶² They relate the experiences of the CEP, where women's participation and contribution was limited despite their making up half the membership. In their analysis, women were prevented from taking a more active role due to structural constraints – 'the demands of their traditional role in society' as well as 'the lack of transportation and training'.¹⁶³ They observed that female members of the council 'seemed to be sidelined . . . in interviews with male council members they would not make any comments, unless directly asked'.¹⁶⁴

Despite this hurdle, a representative council that assists the chief in local decision making is preferable to the path chosen by some Pacific Islands states such as Western Samoa, where statute law has confirmed the traditional authority of village chiefs

157. S. 3. See also Reg. No. 182/STAE/2004 passed under Art. 12.6 of Law 2/2004. This is similar to some of the options proposed in South Africa's Customary Courts Bill (s. 4), but it appears that a policy decision on this thorny issue has not yet been taken: see South African Law Commission, 'Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders', 21 Jan. 2003, ch. 2.

158. See the preamble to Law No. 2/2004. Note that the Law does not specify the nature and scope of these 'problems'.

159. The aim of this programme was to build the foundations of democracy at the local level. See S. Ospina and T. Hohe, 'Traditional Power Structures and Local Governance in East Timor: A Case Study of the Community Empowerment Project', Graduate Institute of Development Studies, Geneva, December 2002.

160. On average, each *suco* is made up of about six villages. However, one *suco* in Dili has 32 villages. According to the Peace and Democracy Foundation, fewer than 2 per cent of traditional leaders are women: *supra* note 126, at 9.

161. Ospina and Hohe, *supra* note 159, at 112.

162. *Ibid.*

163. *Ibid.*

164. *Ibid.*, at 110. See also the experience of the female commissioners and panel members involved in the Commission for Reception, Truth and Reconciliation: JSMP, 'Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process', August 2004. The report states that community members raised few concerns regarding women's participation as panel members and commissioners. While local leaders were initially sceptical about women's role in conflict resolution, the report states that acceptance of this role grew over time. *Ibid.*, at 37–8.

and *matais* (chiefly heads of families) to exercise local 'customary' law without incorporating any element of representativeness.¹⁶⁵ The path taken by Western Samoa operates to engrain patriarchal values by reinforcing the status quo. The problem is articulated by a group of Fijian women thus: 'tradition, culture and custom in the main is defined by men, not women – therefore there is a conflict about whose custom is being applied, especially given that custom is largely unwritten'.¹⁶⁶ A representative council may avoid this particular problem as long as decisions are taken collectively by consensus or majority vote. Women's participation, however minimal, will allow for some contestation of patriarchal norms in local law, while in the long term it may make women's authority more acceptable and legitimate and give women more skills and confidence for the future.¹⁶⁷

Second, local belief systems variously hold that appointment to primary positions of lawmaking is only by descent.¹⁶⁸ The hierarchically ordered nature of East Timorese society means that democracy is not a familiar norm. It will take many years and manifold programmes for such international norms to become adapted into the local cosmic order by the East Timorese, particularly those living in rural areas.¹⁶⁹

7.2.3. Jurisdiction

The dual option presents the question of jurisdiction. Jurisdiction should be based on criteria such as residence and proximity as well as the nature of the offence. Generally the criminal jurisdiction of local decision-making bodies in East Timor should be limited to deal with minor offences.¹⁷⁰ The question of jurisdiction is fraught when it comes to domestic violence,¹⁷¹ the most prevalent crime in East Timor, accounting

165. Village Fono Act 1990.

166. Submission by the Fiji Women's Rights Movement and Crisis Centre: Report of the Commission of Inquiry on the Courts (Fiji 1994) (Beattie Commission), at 172, as quoted in J. C. Care, 'Conflict between Customary Law and Human Rights in the South Pacific', (1999) 1 *Commonwealth Law Conference Papers, Kuala Lumpur* 251.

167. See Nyamu-Musembi, *supra* note 113, at 141–3.

168. East Timorese society is based on a hierarchy of 'houses' in which every house has a position depending on when a family settled in the territory. 'Through a House's specific position in the cosmos, specific tasks are given to it. These include all important ritual and political activities'. Ospina and Hohe, *supra* note 159, at 23, 36, and generally. On the belief regarding the appointment of village chiefs, for example, Ospina and Hohe state (at 36):

Only the ritual authorities have the knowledge about the descent line and oaths that were taken in the past, hence they have the capacity to choose a political ruler that is also sanctioned by the ancestors. People are often scared if a ruler does not conform to this system, as this can mean misfortune for the whole community caused by angry ancestral powers.

169. According to Ospina and Hohe, 'The majority of the population at the local level perceive that power holders have to descend from the family sanctioned by the supernatural power of the ancestors. Therefore, the idea of a local democratically elected "development agency" [such as CEP] with decision-making authority has not yet fully taken root.' *Supra* note 159, at 116.

170. Note that not all customary courts in countries with dual legal systems have criminal jurisdiction. For example, customary courts in Zimbabwe have no criminal jurisdiction and South African customary courts have limited criminal jurisdiction, while in Botswana and Swaziland they have broad criminal jurisdiction.

171. It appears that this matter has also not been considered in South Africa until recently. Its bill leaves rape within the exclusive jurisdiction of non-customary courts alongside 25 other serious crimes, and proposes as additions to this list of serious crimes to be heard by non-customary courts those offences connected with domestic violence in terms of South Africa's Domestic Violence Act 116 of 1998. Sched. 1 of the bill lists offences which cannot be heard by customary courts. This schedule largely replicates Sched. 3 of the Black Administration Act 1927.

for approximately 30 per cent of all reported offences.¹⁷² It is through the contested issue of domestic violence that legal pluralism most concretely affects women, as demonstrated by Swaine's findings above that victims are currently having to choose between the two systems and are having difficulties accessing either, due largely to poor police training.¹⁷³ Much of the difficulty in this area relates to the general cultural confusion regarding the nature of the offence of domestic violence. Domestic violence has marked East Timorese society for centuries, but it was not considered a criminal offence in East Timor until recently, in the form of an oblique articulation in the Indonesian Penal Code which has not been widely understood and was rarely, if ever, prosecuted during the Indonesian occupation.¹⁷⁴ Local legal systems have addressed domestic violence more as part of the fabric of social relations than as an offence. A recent survey of citizen awareness regarding law and justice in East Timor found that while over 70 per cent of East Timorese participants favoured the formal court system to hear rape charges, the view on cases of domestic violence was more equivocal, with 56 per cent favouring the local system over the formal system, even if the woman is seriously injured.¹⁷⁵

Local non-governmental organizations (NGOs) generally appear to be against using local law or alternative dispute resolution for domestic violence because it undermines public awareness of the wrongdoing as a criminal offence and also because the man is invariably favoured by local law.¹⁷⁶ Nevertheless, some women's organizations such as Fokupers offer the option of mediation to women victims with the view that it should be left to the victim to choose which mechanism she prefers, given the high risk of divorce and social stigma threatened by taking the matter to the formal legal system.¹⁷⁷

The current practice of being able to access either system, as pointed out by Swaine above, means that local women in East Timor can get some leverage out of having a choice between the two systems. Is it necessary for the decision to be an 'either-or' one? Where the injury is not serious, it may be best in my view to give women in East Timor the option to use either as long they are fully informed of the implications

172. In 2001 the UN estimated that 40 per cent of all reported crimes were offences against women: UNTAET Fact Sheet 11, April 2002. The JSMP has gathered statistics on cases of violence against women in 2003–4. More than three-quarters of the total number of offences against women in this period were domestic violence offences: see JSMP, 'Statistics on Cases of Violence Against Women in Timor Leste', February 2005, at 6.

173. On the problems involved in the police investigation of domestic violence cases, see JSMP, 'Police Treatment of Women in Timor Leste', January 2005, at 15–16.

174. See Arts. 351–6 of the Code on maltreatment. Art. 356 stipulates that the penalty will be increased by a third if the crime is perpetrated against a spouse. World Bank, 'International Development Association Country Assistance Strategy for the Democratic Republic of Timor Leste for the Period FY06-FY08', 22 June 2005, at 20.

175. Asia Foundation, *supra* note 36, at 80–1. This belief that local law is an appropriate or useful mechanism for dealing with domestic violence is borne out by a survey conducted by Swaine of 23 female victims of domestic violence which shows that more than half went initially to the police but two-thirds of the matters were ultimately resolved by 'local justice'. She comments that 'women themselves fear the full power of the formal system and want sensitive issues such as domestic violence to be dealt with within the realm of the family': *supra* note 81, at 14.

176. This debate also exists more broadly. On the one hand, for example, Renate Alexander argues that 'mediation should never be pursued in family law matters' because it perpetuates power inequalities, while Hilary Astor argues that 'if the target of violence makes a free and informed consent to use mediation she should be able to do so': see H. Astor and C. Chinkin, *Dispute Resolution in Australia* (2002), 353, and more generally at 349–55.

177. Interview with Manuela Leong Pereira, the Director of Fokupers, Dili, 17 June 2005.

of their choice. It is vital that it is the victims who make this choice rather than the police, and that their decision is respected by the chosen system.¹⁷⁸ This option will ensure that victims can choose between a system that garners considerable local respect and a system that offers greater enforcement powers, depending on the circumstances. Importantly, parties to local dispute resolution should be given the ability to opt out of the local jurisdiction and into the courts, even if proceedings have begun.

8. CONCLUSION

While attempts to balance international and local norms have met with varied success in Africa and the Pacific region, it is apparent that systematic educational programmes are required to assist communities and customary law in the process of adapting to ideas of constitutionalism, democracy, and equality.¹⁷⁹ Without such programmes, international norms may be close to meaningless at the local level.¹⁸⁰ This is made clear by Bennett, who, speaking in relation to the African context, states,

It is necessary to remember that for many people the Constitution is an alien transplant, and without advance publicity, careful education and a serious attempt to make legal forums more accessible, people at whom the fundamental rights were aimed will be in no position to act on them.¹⁸¹

This statement is apposite for a country such as East Timor where, according to the Asia Foundation's survey, a third of the population have no idea what the Constitution means.¹⁸² The government of East Timor has an opportunity to remedy

178. Note that the previous draft law on Domestic Violence explicitly removed police discretion to refer domestic violence cases to traditional leaders: see *supra* note 42, Section 9(9).

179. On the success of the balancing of such norms, see generally K. Brown and J. C. Care, 'Conflict in Melanesia: Customary Law and the Rights of Women', (1998) 24 *Commonwealth Law Bulletin* 1334. See also their conclusion regarding systematic programmes, at 1351. On the short-term success of educational programmes in East Timor, Swaine comments: 'inherent cultural practices, beliefs and norms are so powerful that even with education in the era since Independence, standards of human rights and other modern concepts are both misunderstood and completely lost due to the massive gap between these concepts and the realities on the ground'. *Supra* note 81, at 14.

180. This is outlined by Xanana Gusmão in his 2001 New Year's speech to the nation:

What seems to be absurd is that we absorb standards [such as democracy and equality] just to pretend we look like a democratic society and please our masters of independence. What concerns me is the non-critical absorption of (universal) standards. . . [and] that the East Timorese may become detached from their reality and, above all, try to copy something which is not yet clearly understood by them. (See H. Charlesworth and M. Wood, 'Women and Human Rights in the Rebuilding of East Timor', (2002) 71 *Nordic Journal of International Law* 325, at 335)

181. T. W. Bennett, *Human Rights and African Customary Law* (1995), at 47.

182. This group is largely made up of the uneducated, small-town residents, as well as older women in both urban and rural areas. The Asia Foundation survey found that of the remaining two-thirds of the population, 28 per cent see the Constitution as the source of law, 8 per cent believe that it means law and order, 7 per cent see it as the rules for an independent country, while 15 per cent understand it vaguely as 'a way of life or guidance for citizens'. See *supra* note 36, at 33. Perhaps this is linked to the level of participation in the process of drafting of the constitution; 41 per cent of the population believe that there was not genuine public participation in this process. See *supra* note 36, at 34. Note that the Constitution was drafted by an elected 88-member Constituent Assembly which was dominated by Fretelin members. The process took six months, during which 13 constitutional commissions took place to conduct popular consultation. See H. Charlesworth, 'The Constitution of East Timor, May 20, 2002', (2003) 1 *International Journal of Constitutional Law* 325.

this situation of low community awareness and understanding of constitutional values and principles through the implementation of educational programmes when the Constitution is reviewed by the National Parliament in 2008.¹⁸³ The role of East Timor's highest court is to set the standard of the rule of law appropriately so as to ensure that all lawmakers and those who work in the justice sector respect the Constitution and its values. Moreover, East Timor's lawmakers must ensure that the public can readily access and understand the formal legal process and the applicable law.

This paper has used East Timor as a case study in order to point out the manifold dangers in the operation of some forms of legal pluralism in post-conflict countries with weak state legal systems. It may be useful in assisting countries such as Afghanistan, where local law councils (known as *jirgas* or *shuras*) are strong but the state system and its constitutional norms are frail.¹⁸⁴ In these situations, the power of local leaders must be monitored to protect against bias and discrimination and to ensure restraint. The rule of law is deficient when there is confusion within communities as to the applicable law due to inconsistencies between local law and the formal legal system. Nevertheless, legal pluralism itself is important because without local legal systems, the weak state legal system in these countries will be overwhelmed and hence undermined. Classic legal pluralism is more capable of serving the rule of law because it provides for the monitoring of local courts and local law, a process that should ensure that women get better access to, and treatment by, the justice system as a whole. However, this process of harnessing local law in some form should not be allowed to rob it of its dynamic and accessible nature.

It is clear, however, that classic legal pluralism will only succeed in serving the rule of law if some modifications are made to both the *procedures* and the *substantive content* of local law. Procedurally, local law in East Timor needs to be properly enforced, less arbitrary, and administered more impartially; substantively, local law, under the ultimate supervision of East Timor's highest court, must be reconciled with fundamental norms such as human dignity and equality which permeate East Timor's Constitution. At the same time, attention must also be given to formal law to ensure that it is not detrimental to the rule of law: it must become easier to access, and more clear and comprehensible so that all persons can understand it. Perhaps East Timor's current state legal system could be 'localized' by embracing some aspects that are central to local law, such as the process of consulting with the families of the victim and perpetrator as well as the village council in the determination of punishment.¹⁸⁵

183. This review is required by s. 154 of the Constitution, which provides: '1. It is incumbent upon members of Parliament and the Parliamentary Groups to initiate constitutional revision. 2. The National Parliament may revise the constitution after six years . . . 3. The period of six years for the first constitutional review shall commence on the day the present constitution comes into force.' S. 155 provides that a majority of two-thirds of Parliament is required for amendment. S. 156 insulates from revision certain matters including 'the rights, freedoms and guarantees of citizens' and 'the independence of the courts'.

184. See A. Wardak, 'Building a Post-war Justice System in Afghanistan', (2004) 41 *Crime, Law and Social Change* 319.

185. Mearns, *supra* note 7, at 55.

In effect this paper advocates a view of the rule of law such as that offered by the UN Secretary-General. This definition is arguably a maximalist view¹⁸⁶ because it goes beyond procedural requirements such as public promulgation of laws and the avoidance of arbitrariness, the mainstays of a minimalist position,¹⁸⁷ to assert that the rule of law also requires that laws be ‘consistent’ with international human rights norms and standards.¹⁸⁸ This position requires an element of scrutiny of the substantive content of the laws being applied and enforced. In East Timor, both the procedures and content of local law must be carefully scrutinized in order to observe the rule of law.

The maximalist position is, however, an ambitious one that carries the risk of failure, which explains why the international community often rejects this path in its assistance to transitional countries. In her study of low-income post-conflict transitional countries, *Beyond Retribution*, Rama Mani points out that a minimalist position is undoubtedly easier for the international community, as it requires little sensitivity to local cultural norms, and leaves such substantive issues for the national government to determine.¹⁸⁹ She advocates the ‘maximalist’ position because in her view the minimalist position is a form of lowering of standards which fails to safeguard fundamental values. She asserts that international programmes need to assist transitional governments to strive for the maximalist position, and, indeed, doubts whether the international community can repudiate its responsibility in this area.¹⁹⁰ This is true in the case of East Timor, where the international community, under the banner of the United Nations, assumed significant responsibility for enabling the independence process and initiating rule-of-law programmes. Indeed, UNTAET’s administration required that East Timor comply with the core human rights treaties during its administration, thus showing an intention to monitor the substantive content of East Timor’s laws. For this reason, the international community has the responsibility to assist East Timor in striving for a maximalist view of the rule of law.

One of the problems often suffered by transitional states, according to Mani, is the lack of local pressure and resources to focus sufficiently on important questions such as that of legal pluralism so as to take all factors into account.¹⁹¹ Without

186. See R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002), at 25–31.

187. A minimalist view broadly regards it to be about the establishment and maintenance of law and order: rules and procedures are applied and enforced regularly and consistently by an independent and impartial judiciary. It focuses on the need to guarantee predictability in legal relationships and hence it rejects retroactive and arbitrary laws. It emphasizes that the law should be clear, easily accessible, comprehensible and relatively stable. See J. Raz, ‘The Rule of Law and its Virtue’, in J. Raz, *The Authority of Law: Essays on Law and Morality* (1979), at 210–11. See more generally D. Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999).

188. The maximalist position requires that laws comply with fundamental concepts of human dignity and other international human rights standards. The content of the law is prioritized over the procedural nature of the law. See generally R. Dworkin, *Law’s Empire* (1986) and *A Matter of Principle* (1985).

189. Mani, *supra* note 186, at 77. Speaking generally, Mani warns that the international community should not follow this route as ‘A host of dangers might flow from this relinquishing of responsibility for the substantive content of the rule of law.’ For example, she questions whether governments, left to their own devices, ‘have the necessary political will to put in place a “maximalist” rule of law that is appropriate to the needs and aspirations of its society, and cognizant of its cultural realities and traditions’: *ibid.*, at 78.

190. *Ibid.*, at 80.

191. *Ibid.*

international pressure, there is a risk that government efforts will ‘unwittingly reforc[e] iniquitous practices or undesirable power authorities, out of deference to local customs, culture and leaders’.¹⁹² The challenge, then, is for the international community to assist post-conflict states such as East Timor in terms of offering resources and providing expertise with regard to comparative studies, so that East Timor can find a path to engaging with local law that preserves stability while addressing procedural and substantive problems with local law. Exactly how this engagement between the two legal systems shapes is a matter for local consultation and decision-making. The government must not attempt to bypass real community debate on these important questions.

To conclude, any engagement between local law and state law in East Timor will necessarily involve the process of reconciling constitutional and local norms. This challenging but essential process can be labelled ‘legal vernacularization’, because adaptation and transformation is a two-way process.¹⁹³ While pragmatism requires that the post-conflict countries harness local law into their legal framework, at the same time the local sphere must be encouraged to promote, absorb, and adapt constitutional norms such as equality so as to make these norms local and meaningful.

192. *Ibid.*, at 84.

193. See S. E. Merry, ‘Legal Pluralism and Transnational Culture: The Ka Ho’Okolokolonui Kanaka Maoli Tribunal, Hawai’I, 1993’, in R. A. Wilson (ed.) *Human Rights, Culture and Context: Anthropological Perspectives* (1997).