



JUSTICE UPDATE

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The Interaction of Traditional Dispute Resolution with the Formal Justice Sector in Timor-Leste

On 15 November JSMP monitored a 72-hour detention review hearing conducted at the Suai District Court, in Suai. The four suspects were arrested for alleged maltreatment of three victims arising from a fight which took place in the Suai township on 7 November between two groups of youths. What is particularly interesting about the case, however, is the way in which the presiding judge addressed the issue of out-of-court agreements reached between victim and offender, and the extent to which these ought to be recognised by the courts in criminal cases. During the hearing both the suspects and the victims addressed the court. They indicated that a mutual agreement had been reached between them and the victims were satisfied with the manner in which the dispute was resolved. Accordingly, they did not want the prosecution to proceed against the suspects.

This was followed by a decision of the Oecusse District Court on 22 November.¹ That case concerned a charge of sexual assault perpetrated by an adult on his 12 year-old niece. Under this agreement the defendant was required to pay compensation to the family of the victim in exchange for the disposal of the case. The lawyer for the defendant submitted that the court ought to recognise the agreement and that the defendant ought to be released and all further proceedings against him dismissed.

It must be stressed that there have been numerous other District Court decisions in recent months in which the judge has either: acknowledged customary out-of-court agreements to resolve the dispute and dismissed proceedings on that basis;² or refused to dismiss proceedings, usually on account of the seriousness of the offence, but has nevertheless upheld the portion of the agreement pertaining to payment of traditional compensation (for example, buffalo). This Justice Update will focus on the Suai and Oecusse cases as notable examples of this wider trend.³

Addressing Criminal Conduct: State Prosecution or Civil Resolution through Traditional Mechanisms?

¹ See also *JSMP Press Release*, 'Out of Court Agreement Taken into Account in Criminal Case', 5 December 2005, for a more complete discussion of the case.

² Case # 37/05 and 40/05, Hearing, Oecusse District Court, 23 November 2005.

³ For references to other cases involving traditional dispute resolution see *JSMP Justice Update # 19*, 'Court Monitoring for October 2005'.

Criminal laws prohibit, and make punishable, conduct which is deemed so serious as to require the intervention of the State. The State has a duty to protect its citizens by prosecuting perpetrators for actions of such a serious nature that they ought not be resolved between citizens. Nevertheless, there are compelling reasons to consider appropriate alternative or parallel means of dealing with crimes, other than prosecution by the State.

In many jurisdictions around the world, including in Timor-Leste, other means of dispute resolution are used regularly to resolve acts that the State considers “crimes”. This is particularly apposite for pre-colonial indigenous societies that continue to practice traditional customs of dispute resolution in parallel with, but invariably subject to, more formal, Western-influenced legal systems.⁴ In Mexico, for example:

“...in the case of minor infractions committed by members of indigenous communities, the government authorities try to refrain from intervening in the resolution of the conflict. When faced with crimes of a more serious nature, however, the government authorities step in, notwithstanding efforts by the indigenous communities to resolve the conflict in accordance with customary mechanisms of resolution”.⁵

More relevantly to Timor-Leste, the Indonesian legal system formally recognises ‘adat’⁶ but regards it as ultimately subservient to that system.⁷ The Philippines meanwhile has adopted the ‘Barangay’ system of traditional justice that requires at least an attempt at village-based resolution of minor disputes – which in the words of the former Chief Justice “waste talent and squander finances” and constitute a “misuse of the courts” – by way of mediation or arbitration, as a condition of prosecution before state courts.⁸

Secondly, the right of indigenous peoples “to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices...” is recognised in the *Draft United Nations Declaration on the Rights of Indigenous Peoples*.⁹ Although this is not binding, and the existence of ‘indigenous’ peoples in Timor-Leste is uncertain (according to accepted legal definitions), it does

⁴ For example, in the U.S. there is a well-established, formally recognised system of ‘Tribal Courts’: see generally BJ Jones, ‘Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations’, 24 *William Mitchell Law Review* 457; In the context of the Pacific see generally Kenneth Brown, ‘Customary Law in the Pacific’, 3 [1999] *Journal of South Pacific Law* 8.

⁵ Jeffrey Gesell, ‘Customary Indigenous Law in the Mexican Juridical System’, 26 *Georgia Journal of International & Comparative Law* 643, at 663.

⁶ The Indonesian word ‘adat’ is often used to refer to traditional dispute resolution and the body of traditional laws which encompasses it, however, this does not represent a uniform body of practice and there are inevitably regional variations within Timor-Leste. Precisely what is encompassed by ‘adat’ in Timor-Leste remains unclear. According to MB Hooker, for example, ‘adat’ can refer to any one of the following: “...law, rule, precept, morality, usage, custom, agreements, conventions, principles, the act of conforming to the usages of society, decent behaviour, ceremonial, the practice of magic: M.B. Hooker, *Adat Law in Modern Indonesia* (Oxford University Press, Kuala Lumpur, 1978) at 50.

⁷ Simon Butt, Natalie David, Nathan Laws, ‘Looking Forward: Local Dispute Resolution Mechanisms in Timor-Leste’, Australian Legal Resources International, 2004, at 34 (“ALRI Report”).

⁸ ALRI Report at 55

⁹ E/CN.4/1995/2;E/CN.4/Sub.2/1994/56, 28 October 1994; Article 4

illustrate that *in exceptional circumstances disputes can be legitimately resolved outside the ambit of the formal, state-controlled process.*

Finally, it should be noted that Article 2.4 of the Constitution acknowledges the importance of traditional “norms and customs”, although the precise form that this recognition ought to take and whether it extends to juridical matters is far from clear:

“The State shall recognise 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 provision confers recognition of East Timorese customs rather than incorporating it as a source of law in a formal sense. The precise form that this recognition ought to take and whether it extends to juridical matters is far from clear.

Recourse to ‘Adat’ in Timor-Leste

In Timor-Leste forms of mediation and agreement between victim and perpetrator in accordance with traditional customs are a common means of resolving disputes that would in other countries be resolved only through the formal criminal justice process. The dependency on adat can in part be explained by the weakness of the formal justice sector itself, its inability to handle the volume of cases and try suspects within a reasonable time and the historical reliance on traditional dispute resolution mechanisms.

As Julio Faundez puts it:

“The assumption that legal reform requires new rules is especially absurd in cases where the formal legal system does not reach the whole territory of the state. This is indeed the case in many developing countries where the state either does not have the resources or the legitimacy effectively to rule over its whole territory. In most of these cases local communities are governed partly by their own customary practices and partly by the rules of the formal legal system”.¹⁰

Although JSMP has in recent months observed significant improvements in the speed and efficiency of case flow in the courts, it will be some time before the system is operating effectively.¹¹ Further, the legitimacy of the formal justice process must be reinforced and made more relevant to villagers in remote communities, where the reach of the State is limited.

One way of helping to resolve both of these issues may be by taking into account traditional dispute resolution processes. Customary norms of dispute resolution therefore ought to be given official recognition in the courts and integrated into the formal criminal justice process. Indeed, this was acknowledged by a widely respected Indonesian lawyer in relation to the penetration of Indonesia’s formal legal system in

¹⁰ Julio Faundez, ‘Legal Reform in Developing and Transition Countries – Making Haste Slowly’, delivered at a World Bank Conference entitled *Comprehensive Legal and Judicial Development – Towards an Agenda for a Just and Equitable Society in the 21st Century*, Washington 5-7 June, 2000.

¹¹ See also ALRI Report at 9

communal East Timor.¹² The critical, and exceedingly complex, question, however, is to determine clearly the circumstances in which recourse to traditional process is acceptable and justified, to the exclusion of formal criminal proceedings, particularly where the victim and the perpetrator have reached an amicable resolution.

The decisions of the Suai and Oecussi District Courts took some small but important steps towards answering that question.

The Courts' Decisions

The judge presiding in the Suai case expressly acknowledged the existence of adat law as something to which the court was entitled to have regard, however, she refused to accept the defendants' written statement that the victims had forgiven their actions and that the dispute had been resolved outside of court. She also distinguished the case from previous cases in which the courts have accepted traditional resolution and dismissed the case on that basis.

The judge's decision was based on two key criteria. Firstly, the suspects were involved in a large fight between two competing martial arts gangs which clearly had important implications for public security. She added that fights between these types of gangs were a significant source of public unrest in Timor-Leste at the present time. Secondly, the judge indicated that any cases involving the death of the victim, whether through murder or negligent driving, were not appropriate for resolution by traditional, out-of-court means.

In the Oecusse case the court convicted the defendant and sentenced him to a term of imprisonment despite the fact that he had resolved the dispute by way of an agreement reached with the victim's family in accordance with traditional processes. The court deemed the offence to be too serious to allow it to be disposed of by an out-of-court settlement. Nevertheless, the court did recognise the agreement as a factor which could be taken into account in mitigation of sentence. Furthermore, it upheld that part of the agreement which required payment of compensation and ordered the defendant to pay the remaining debt of three buffalo, in addition to the livestock he had already provided to the family.

Conclusion

The decisions of both the Suai and Oecusse District Courts constitute an important, positive development in the continued progression of Timor-Leste's judicial system. They also highlight what is, in JSMP's view, a complex issue with broad socio-political implications which must be addressed at some time in the future if Timor-Leste's democratic development is to continue: namely, should traditional dispute resolution mechanisms play a role in the country's formal justice process and, if so, how and to what extent should it be recognised. These are complicated issues which need to be addressed by society as a whole. JSMP therefore urges commencement of a dialogue between government and civil society for that purpose.

¹² ALRI report at 36