Leaders, Lawyers & *Lian Nains*: Sources of Legal Authority in Timor-Leste

Andrew Marriot

Timor-Leste is faced with the difficult task of producing a coherent national identity from an overlapping history of foreign influences and a legacy of linguistic divisions. To further complicate this picture, the key to its ongoing law and order problems may lie in reconciling the interests of a number of very different stakeholders, each of whom are empowered to resolve disputes according to distinct, and sometimes contradictory, methods. These multiple sources of legal authority contain the potential for conflict, but also possibilities for a more adaptable and locally meaningful approach to justice.

Leaders

Early accounts, and subsequent anthropological studies, indicate the former organisation of what is now Timor-Leste in a series of small kingdoms or dominions, ruled in a familiar monarchic fashion (Nixon 2008, 53). Although history has overtaken this construction of the state, vestiges of this apportionment of power remain in community memory and in the prestige accorded certain individuals and families. *Liurai* families, hereditary representatives of the first settlers of their respective areas, traditionally derived their authority from a material, physical sense of connection to place (Exposto et al 2003, 6).

This continuing precedence within the community has often been reflected in a governance role, formalised by successive colonial and occupying regimes and now recognised as a legal feature of the modern Timorese state (Nixon 2008, 62). Of course, there is not necessarily so direct and majestic a lineage behind every community leader in Timor-Leste, especially given the aftermath of conflict, but the nature of the role has nonetheless been shaped by this tradition. Incorporation of this role into a (largely absent) state bureaucracy requires a sometimes uncomfortable acknowledgement of or alliance with a source of power and influence that originates outside the community.

In many cases, the secular, worldly influence of these figures has been translated into a broader political framework – owing, in large part, to the experience of occupation and resistance. In this way, nation-building endeavours have capitalised on the self-ordering of diffuse and often insular communities to advance peace and security objectives.

Nation-wide surveys (TAF 2004, 39), and the findings of community-level networks (Belun 2009, 5), suggest that village, and sub-village, chiefs are, across the country, among the officials most commonly engaged to settle conflict. Notwithstanding the ubiquity and accessibility of such figures, much of the same research also indicates a degree of unease around this approach to dispute resolution. David Mearns, for example, in his 'Models for Justice' work, pointed to an erosion in the repute of local leaders due to arbitrary decision-making, and in some cases, outright partisanship and bias (Mearns 2002, 52).

This underscores the personal and contextual mode of operation common to local leaders in Timor-Leste. Though it may result in outcomes that preserve relationships within the community, its lack of reference to consistent and predictable measures puts it at odds with the rule of law, as theoretically understood.

This distinction is not seen only at a local level, however. There appears to be a belief pervasive within Timor's civil service, and perhaps more widely, that an expression of will from a senior political figure automatically countervails written statute. Acts on the national stage, however personal, however diverging from established practice, are sometimes afforded an exception arising from political capital. Acts are, dependent on the actor, given the de facto status of law. The alleged issuing of a 'free passage' letter to then wanted criminal Alfredo Reinado (Greenlees 2008, 2), and the presumptive suggestion of a pardon for his associate Gast**ão** Salsinha – prior even to his trial (ABC News 2009, 1) – demonstrate the disjuncture from rule of law institutions.

The political domain, however, is not the only source of influence, nor the only source of dispute resolution authority. In fact, within the context of the Timorese community, it may be contrasted with, or even subject to, appeals of a supernatural character. The custodians and interpreters of indigenous Timorese animistic cosmology seek to negotiate the relationship between communities and the environment (seen and unseen) that is key to their survival. These *lian nains* – the masters of the word (Grenfell 2006, 317) – have authority of a different, but no less pertinent, kind.

Typically presiding over a range of moral prescriptions surrounding dress, intermarriage, and common resource use, *lian nains* (and their analog in non-Tetum speaking Timorese communities) may call on a localised, spiritual authority in enforcing social norms (Hohe and Nixon 2003, 24). With use and understanding of the formal justice system still very low across Timor-Leste's many rural and remote communities (UNMIT 2008, 22), recourse to traditional justice, as administered by the lian nain, remains a very regular approach to solving disagreements.

Lian nains and their like employ a moral order in determining disputes – something that runs counter to the technocratic, Western rule of law tradition. In Timor-Leste, however, there has been a long history of conflating belief systems and justice institutions. For *lian nains* to dispense justice according to spiritually derived behavioural norms is, after all, not so different to courts administering statutes that – in the Indonesian mode – prescribe private conduct as often as they regulate public action on the basis of a culturally-entrenched idea of social order (Wright 2009, 1-2).

The moral stance often employed in Timor-Leste under Indonesian law, and which has evidently carried over into the new domestic statute book, is seen clearly in the approach to abortion. Procurement, and provision, of an abortion was illegal under the previously operating Indonesian Penal Code, which contains many prescriptions of behaviour on the grounds of public morality. The proposed decriminalisation of abortion under the newly-passed Timorese Penal Code raised such furore that even minor exceptions on the grounds of medical emergency were limited to the point of practical impossibility (JSMP 2009, 2).

Moral systems, by their nature, resist change, whereas laws must reflect the emerging needs of a community. Accordingly, where the integrity of the spiritual precepts upon which traditional justice is based is open to challenge, the credibility of decisions reached by this method are likewise less durable. This has led, following the example of Indonesian law, to moral systems seeking the credibility, however dubious, of law.

Challenges to this form of quasi-legal authority are arriving from two sources. Firstly, conflict and other turmoil has often severed the link between generations of traditional justice practitioners. In some cases, what is perceived to be custom of ancestral provenance may be a far more recent invention. Secondly, with unprecedented rates of migration and exposure to external social influences, the connection to place that buttresses traditional law, and also its cultural pre-eminence, are being eroded (Mearns 2002, 53).

Access to different value systems and corresponding legal avenues has unsurprisingly produced a degree of forum-shopping (Nixon 2008, 329). Whilst courtroom proceedings are often long delayed, their decisions are more likely to be made outside the power structures of the community to which the parties belong. Whilst formal justice does have the capacity to render a more objective outcome, a more cynical view suggests that recourse to the courts in Timor-Leste may allow a dissatisfied party to circumvent or postpone restitution according to custom and to seek a less burdensome penalty.

Not all challenges to the integrity of customary law, and by extension its guardians, are inherently negative. This body of tradition is rightly criticised as failing to advance the interests and equality of women (JSMP 2008b, 1). Responses to gender-based violence in this forum are, by Western standards, very lenient, and prosecution for witchcraft remains a feature of local justice in some areas (Swaine 2003, 50).

Development processes emphasising human rights have become a test of the adaptability of traditional justice. Some customary law practitioners have been receptive to incorporating new ideas and concepts into their reasoning – such as the *lian nains* engaged as mediators by Oecusse civil society group FFSO (JSMP 2008a, 2). Such a proactive approach is, however, far from typical.

Historically, proponents of customary law have gotten short shrift in the nation-building exercise, with token mention in the Timorese Constitution (RDTL 2002, Part 1 Section 2), which indicates an

intent to 'recognise and value' traditional norms and customs where they do not conflict with the formal justice system. Moreover, commentators from the era of Timor-Leste's post-independence United Nations Transitional Administration (UNTAET) have noted a sense seeming to prevail among the shapers of the modern state's formal justice institutions that alternative approaches to dispute resolution were unwelcome, and indeed comprised an evolutionary 'dead step' in Timor-Leste's development (Harrington 2006, 8).

The fact remains, though, that given Timor-Leste's diffuse and largely rural population, the few outposts of formal justice that exist – principally the four under-staffed and under-performing district courts (Grenfell 2006, 309), are simply unable to exclusively shoulder the burden of dispute resolution. Awareness and understanding of the state-sponsored legal system is low, and customary law remains, for most, the only practicable method of settling local conflicts.

Another, emerging dispute resolution force in some parts of Timor-Leste is the church. Whilst priests may not fit the alliterative structure of this paper, they nonetheless fill much the same role as *lian nains*, whom they appear to be displacing, at least in part, in various communities across the country (TAF 2004, 64).

Lawyers

This is not to say, however, that there is no precedent for inter-relation between formal and informal justice systems in Timor-Leste. Quite the contrary – a complex system of appeals to officialdom (constituted in various forms over the years) is entrenched in traditional practice. For some time, certainly since the colonial Portuguese era, there has been a recognition at a local level that some crimes are not appropriate to be dealt with by traditional justice. There is a long history in some parts of Timor-Leste, for example, of murders and other serious crimes being referred to authorities external to the respective communities (Hohe 2003, 344).

Additional to these interactions between formal and informal justice systems, there are features in Timorese customary law that find analogs in Western legal tradition. The tradition of *nahe biti*, or unrolling the mat, appears consistent with mediation and conciliation approaches to dispute resolution (Babo-Soares 2004, 15). Similarly, the *tara bandu* method of enforcing local norms of community interaction and common resource incorporates elements of what a Western audience may recognise as contract (Trindade and Castro 2007, 12).

Perhaps the most salient comparison, however, is in the fact that in both systems there are individuals whose principal task is to communicate and interpret the law, however it might be understood, and to negotiate the settlement of disputes.

Whilst the place of *lian nains*, as keepers of traditional knowledge, is long established in Timorese society, the role of lawyers as envoys and embodiments of the formal justice system is relatively new and unfixed.

With state-sponsored justice often a remote and largely unknown concept (TAF 2004, 2), and recourse to quasi-legal resources following a model of spiritual appeal, it is perhaps unsurprising that the legal realm and the spiritual realm are being conflated or confused by many, especially in rural Timor-Leste. Both, evidently, are so alien and ineffable as to be interchangeable, or to enable use of one against the other.

In fact, instances are emerging where the two are confused. When spiritual leaders enticed supporters of the deceased guerrilla leader Vicente Reis to Dili with news of his imminent resurrection, their response, on his failure to arrive, was to enquire about the prospect of litigation against those who made the initial, remarkable claims (Wright 2008, 1).

A saving grace in this patchwork of legal authorities is the rise of a Timorese legal profession. As members of their communities familiar with the tropes and practices of customary law, and also trained in formal justice methods, there is an opportunity for such individuals to play a crucial bridging role. As more formal justice practitioners move to district locations, often in a legal aid function (TAF 2004, 2) their local identity may be leveraged in raising awareness of, and increasing appropriate recourse to, the court system.

In this way, lawyers may be the only accessible conduits of information about the state and its institutions. Called upon to communicate a message about policy and service provision, the legal profession has the potential to become a powerful force in the Timorese nation-building process.

The experience of other post-conflict nations suggests that with the increasing influence of the legal profession come risks – practitioners, gaining privilege through specialist knowledge and arbitrative capacity, may become subject to partisan capture, or alternatively fall victim to political pressure and constraint (IBA 2002; Berthaulme and Yun 2006, 1). In the short term, though, the obstacles to positive development of the legal profession in Timor-Leste are principally procedural. Lawyers must grapple with a patchwork of legal influences from Indonesia, Portugal and elsewhere, and must often navigate the system in a language unfamiliar to most (UNMIT 2008, 22).

An uneven approach to legal education and accreditation, recently codified, will also limit the ability of the profession to contribute to security and development (JSMP 2008c, 2). While the current training bottleneck persists, paralegals trained by various civil society operators are laudably extending the reach of the formal justice system, acting as intermediaries between the local and national (ASF 2005, 4).

The awareness-raising efforts of these legal focal points are, however, effective only to the degree they can be acted upon. Whilst promising initiatives such as the creation of a circuit court in Suai and Maliana (UNMIT 2008, 23) go some way toward promoting access to justice, the sluggish pace and irregular operation of district courts is a disappointment that goes some way to explaining the persistence of more familiar, customary methods of dispute resolution.

Conclusion

Some countries, among them post-conflict and emerging democracies, have dealt effectively with this question of legal pluralism, whether by incorporation or integration (Wojkowska 2006, 25). In Timor-Leste, however, the situation remains unclear, with lian nains competing with local leaders and increasingly with lawyers and other court actors for their place in the dispute resolution hierarchy.

In light of the various challenges posed by multiple forms of legal or quasi-legal authority in Timor-Leste, critiques of its rigid framework for formal justice are many. Justice sector commentators have globally argued the need for a more contextualised approach to law and its administration, rather than a doctrinal version to be reproduced without alteration across the developing world (Golub 2007, 48).

Currently, there are policy efforts underway to bring customary law under the umbrella of the formal system, and to regulate the activities of its practitioners (UNDP 2009, 2). With United Nations support, legislation has been drafted that would, if passed by the Parliament, recognise certain elements of traditional dispute resolution, conditional on their application in line with human rights standards.

Replacing the locally-derived credibility of local leaders and *lian nains* with a state-sanctioned license, though, risks undermining the validity of their decisions. Targeted programs of education, while slower, may achieve a more accepted synthesis. As with any contact between cultures, harmonious co-existence is brought about more often by persuasion than by coercion.

Bibliography

ABC News 2009, 'Ramos-Horta Welcomes Assassination Attempt Trials, Mulls Pardon', 5 March.

Advocats Sans Frontières (ASF) 2005, *Annual Program Review*, ASF, Dili.

Babo-Soares, Dionisio 2004, 'Nahe biti: The philosophy and process of grassroots reconciliation (and justice) in East Timor', *Asia Pacific Journal of Anthropology*, 5(1):15-33.

Belun 2009, Early Warning and Early Response System: Trimester Report February – May 2009, Belun, Dili.

Berthaulme, Lee and Yun Samean 2006, 'Yeng Virak is released from prison on bail', *The Cambodia Daily*, January 12.

Democratic Republic of Timor-Leste (RDTL) 2002, *Constitution of the Democratic Republic of Timor-Leste*, RDTL, Dili.

Exposto, Manuel et al 2003, *Community Rights to Customary Land*, University of San Francisco School of Law, San Francisco.

Greenlees, Donald 2008, 'East Timor's Road Ahead is Clouded by Uncertainty', *The New York Times*, 13 February.

Grenfell, Laura 2006, 'Legal Pluralism and the Rule of Law in Timor-Leste', *Leiden Journal of International Law*, 19: 305-337.

Golub, Stephen 2007, 'Rule of Law and the UN Peacebuilding Commission: A Social Development Approach', *Cambridge Review of International Affairs* 20(1):47-67.

Harrington, Andrew 2006, 'Institutions and the East Timorese Experience', *East Timor Law Journal* 7: 2-37.
Hohe, Tanja 2003, 'Justice without Judiciary in East Timor', *Conflict Security and Development* 3(3):335-357.
Hohe, Tanja and Rod Nixon 2003, *Reconciling Justice: 'Traditional' Law and State Judiciary in East Timor*, United States Institute of Peace, Dili.
International Bar Association (IBA) 2002, Outrage at the Arrest of President and Executive Secretary of the Law Society of Zimbabwe, Press release June 6, IBA, London.
Judicial System Monitoring Programme 2008a, *Legal Proceedings in Oecusse – February 2008*, JSMP, Dili.
—— 2008b, Call for Further Action on Domestic Violence Law, Press Release 23 May, JSMP, Dili.
—— 2008c, The Private Lawyers Statute: Overview and Analysis, JSMP, Dili.
—— 2009, Abortion Reform Still Needed: Article 141 of the East Timor Penal Code Must Comply with Constitution and International Law, JSMP, Dili.
Mearns, David 2002, *Looking Both Ways: Models for Justice in East Timor*, Australian Legal Resources International, Sydney.
Nixon, Rodney 2008, Integrating Indigenous Approaches into a 'New Subsistence State': The Case of Justice and Conflict Resolution in East Timor, Charles Darwin University, Darwin.
Swaine, Aisling 2003, *Traditional Justice and Gender-based Violence*, International Rescue Committee, Dili.
The Asia Foundation (TAF) 2004, A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor, TAF, Dili.
Trindade, José and Bryant Castro 2007. *Rethinking Timorese Identity as a Peacebuilding Strategy: The Lorosa'e – Loromonu Conflict from a Traditional Perspective*. The European Union's Rapid Reaction Mechanism Programme, Technical Assistance to the National Dialogue in Timor-Leste, Dili.
United Nations Development Program (UNDP) 2009, *Report of the Consultation Workshop on Customary Law*, UNDP, Dili.
United Nations Integrated Mission in Timor-Leste (UNMIT) 2008, Report on Human Rights Developments in Timor-Leste: The Security Sector and Access to Justice, UNMIT, Dili.
Wojkowska, Ewa 2006, Doing Justice: How Informal Justice Systems Can Contribute, Oslo Governance Centre, Oslo.
Wright, Jesse 2008, 'Hoping, Waiting, Suing', *The Dili Weekly*, January 31.
Wright, Warren 2009, 'Criminal Defamation in East Timor – A Miscarriage of Justice', East Timor Law Journal 5:1-2