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Introduction to the Laws of Timor-Leste

**Legal History and the
Rule of Law in
Timor-Leste**

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Preface to the Series: *Introduction to the Laws of Timor-Leste*

Timor-Leste has enjoyed a decade of formal independence. The country's democratic institutions have grown during this period. But, as thoughtful Timorese are quick to point out, much remains to be done. Building viable and professional state institutions takes time. And growing the human resource capacity within those institutions is always a major challenge to new states.

The capacity building imperative in Timor-Leste is both striking and compelling. Establishing state agencies in the first instance is relatively much easier than filling those agencies with effective professionals that uphold their duties and responsibilities. Building the capacity of a pool of Timorese who hold, or may hold, positions within legal and other state institutions is crucial. Likewise, building an educated understanding and awareness of the obligations and responsibilities of key actors within legal institutions, and government institutions more broadly, contributes to setting demands and expectations for performance among the polity. Encouraging professionalized capacity within state institutions, on the one hand, and thoughtful and calibrated demands for performance by citizens, on the other hand, are essential dynamics for the development of the rule of law and a democratic state in Timor-Leste. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Timor-Leste* series of papers produced by the Timor-Leste Legal Education Project (TLLEP). This series seeks to critically engage the reader in thinking about the laws and legal institutions of Timor-Leste, and is based on a model of educational writing first introduced in TLLEP's *Introduction to Professional Responsibility in Timor-Leste* textbook, published in 2011. Founded in March of 2010, TLLEP is a partnership between The Asia Foundation and Stanford Law School. Working with local actors in the Timor legal sector, the project's goal is to positively contribute to the development of domestic legal education and training in Timor-Leste. USAID provided funding for this series through its Timor-Leste Access to Justice Program.

The authors of the legal working papers focused on writing in clear, concise prose, and on using hypothetical legal situations, discussion questions, and current events. Through this style of writing and pedagogy, the aim is to make these texts accessible to the largest possible audience. The texts are designed to be broadly accessible to experienced Timorese lawyers and judges, government officials, members of civil society, Timorese students in law, and the international community. They cover topics ranging from constitutional law to inheritance law to the Petroleum Fund Law.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for this series were Peter Broderick, Daniel Cassman, Margaret Hagan, Brian Hoffman, Lexi Shechtel, and Anne Johnson Veldhuis, all Class of 2013, Jessica Fox, Hamida Owusu, and Samuel Saunders (all Class of 2014) edited the series under the guidance of Stanford Rule of Law Fellow Megan Karsh ('09). The students benefitted from the substantial and extensive guidance provided by Brazilian lawyer Dennys Antonialli (LLM '11) and Geoffrey Swenson ('09), TLLEP's former in-country director and legal advisor to the Asia Foundation's Dili office.

The program has also received extensive support from Kerry Brogan, previous Country Representative Silas Everett, current Country Representative Susan Marx, Juliao de Deus Fatima, and a host of other Asia Foundation staff. USAID Timor-Leste provided vital financial and programmatic support to the program. We especially thank USAID Director Rick Scott and USAID staff Ana Guterres and Peter Cloutier. The US Embassy in Dili, especially Ambassador Hans Klemm and Ambassador Judith Fergin, have been incredibly supportive. I would be remiss if I did not thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their unwavering support of this project.

Finally, this series of papers simply would not have been possible without the many thoughtful and critical insights from Timorese judges, educators and lawyers, and those who work within Timorese institutions. Prosecutor General Ana Pessoa, Public Defender General Sergio de Jesus Hornai, and President of Court of Appeals Cláudio Ximenes were extremely gracious in clarifying issues related to their respective organizations and offering constructive suggestions. The textbooks received vital input from National University of Timor-Leste (UNTL) faculty and staff throughout the drafting and review process including comments from Rector Aurelio Guterres, Law Deans Tome Xavier Geronimo and Maria Angela Carrascalão, Professor Benjamin Corte Real, and Vasco da Cruz of the Portuguese Corporation. Feedback from UNTL students themselves on draft text was immensely helpful for the final text. The Judicial Training Center (CFJ) has also been a source of wisdom throughout the drafting process, particularly CFJ Director Marcelina Tilman, Erika Macedo, and Bernardo Fernandes. The text benefited as well from the contributions of Charlie Scheiner and La'o Hamutuk, the staff of the Ministry of Justice Legislation Unit, AALT Executive Director Maria Veronika, Judge Maria Netercia, Judge Jacinta Coreia, JSMP Executive Director, Luis de Oliveira, JSMP Legal Research Unit Coordinator, Roberto da Costa, ECM director Lino Lopes, and Sahe Da Siliva. We are also grateful to Gualdinho da Silva, President of the National Petroleum Authority, for two wonderfully engaging meetings.

In addition to this series and the already-published texts on professional responsibility, constitutional rights, and contracts, TLLEP has plans to complete the first edition of a new textbook in 2013 entitled *An Introduction to Criminal Law in Timor-Leste*. All texts are updated as the legal landscape changes. The most recent versions of all published texts are always available for download online free of charge on TLLEP's website: www.tllep.law.stanford.edu.

To the students, educators, legal and government professionals that use this book, we sincerely hope that it sparks study and debate about the future of Timor-Leste and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in ensuring the country's future is bright.

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LEGAL HISTORY AND THE RULE OF LAW IN TIMOR-LESTE

CHAPTER OBJECTIVES

- To explore what is meant by “the rule of law.”
- To trace the history of Timor-Leste’s legal system from the pre-colonial era and understand the influence of that history on Timor-Leste’s current legal system.
- To examine challenges Timor-Leste faces in establishing the rule of law.

CHAPTER OVERVIEW

- There are many different definitions for the term “rule of law.”
- Conceptions of the rule of law can be placed on a spectrum from thin to thick.
- Thin definitions focus on procedural aspects of the law, while thick definitions emphasize substantive elements, or the elements relating to rights and duties, as well.
- The Constitution of Timor-Leste states that Timor-Leste should be a country based on the rule of law.
- Several provisions of the Constitution promote the rule of law in Timor-Leste.
- Timor-Leste’s legal history has had a lasting impact on Timorese legal systems.
- Portuguese colonization of Timor-Leste did little to dislodge traditional Timorese ideas of justice, but Portuguese legal fixtures remain influential.
- Indonesian abuses of the justice system bred deep mistrust for the formal justice system.
- Upon Timor-Leste’s independence from Indonesia, Timor-Leste was governed by the United Nations, which built the groundwork for much of Timor-Leste’s legal system.
- Timor-Leste’s formal legal system suffers from a severe lack of lawyers and judges, which limits the functionality of the country’s judiciary.
- The reach of Timor-Leste’s formal legal system is limited outside the capital, and women, children, and people who do not speak or read Portuguese often lack access to it.
- The limited reach of the formal legal system and a general preference for traditional justice create tension between the formal and informal legal systems.

I. THE RULE OF LAW

SECTION OBJECTIVES

- To understand what lawyers and development experts mean by “the rule of law.”
- To explore the importance of the rule of law in the Constitution of Timor-Leste.

What if the government could arrest you and put you in jail for any reason—even if you had done nothing against the law? What if public officials were not subject to the same laws that govern everyone else? What if the government could seize your property without following any procedures, and didn’t have to pay you for it? What if the government prosecuted crimes when they were committed by women, but ignored them when they were committed by men? Chances are that you would not wish to live in a society where any of those things were true. The ideas that protect us from those abuses are collectively known as “the rule of law.” The notions that governmental decisions must be made by applying law; that the government and government officials are subject to the law; and that the law should apply equally to everyone are some of the most basic principles of the rule of law.

This chapter begins by exploring what lawyers and scholars mean by “the rule of law.” It starts with a discussion of what the term means, both in theory and in practice. Then it traces Timor-Leste’s legal history from the pre-colonial period to the modern day. It examines the influence of that history on the nation’s modern legal system. Finally, this chapter explores the challenges Timor-Leste currently faces in establishing the rule of law across the country. Two major themes guide this chapter. The first is the effect of Timor-Leste’s history on the current legal system. The second is the interplay between Timor-Leste’s formal and informal legal systems.

1. What is the rule of law?

Lawyers and development experts are quick to label the “rule of law” as a remedy for a variety of political and social problems. But there is a remarkable lack of agreement and understanding as to what the term actually means. The ideas discussed in the introduction—that government decisions must be made by applying the law, that the government and public

officials are not above the law, and that the law should be applied equally to everyone—are some of the most fundamental elements of the rule of law. However, many lawyers and scholars believe that the rule of law requires much more.

The different definitions of the rule of law are complex and overlapping. Perhaps in some ways it is easier to recognize the rule of law by its absence. Lawyers and scholars may not agree on what exactly the rule of law means, but there is often greater consensus on when it is lacking, or not adequate. Most would probably agree that judicial or bureaucratic inefficiency, unequal application of the law, corruption, and a failure to protect individual rights are evidence that the rule of law is lacking. These issues can appear in different combinations and to different degrees, which illustrates another important point: the rule of law is more accurately described as a spectrum, or a range, than as something that either does or does not exist.

One way of thinking about this is to consider a range of definitions of the rule of law from “thin” to “thick.” In this sense, “thin” definitions of the rule of law have the fewest requirements and the fewest substantive elements, or elements that relate to rights and duties. Thin definitions are mostly *procedural*. That is, thin definitions of the rule of law focus on *how* laws are made and applied without making judgments as to what the *substance* of those laws should be. “Thick” definitions have more substantive elements, and they refer to *which types* of laws are necessary. Thicker definitions of the rule of law might advocate certain individual rights, goals for governance, and even the system of government a country should have.

Among the thinnest definitions is the concept of “rule by law.” Rule by law requires only that government actions be authorized by law. Since the government can also make the law, this definition does little in practice to limit the government’s power. A rather thicker definition is “formal legality,” which demands that laws be clear, applicable to everyone, and applied regularly. An advantage of a system of formal legality is that it is predictable—people can plan for the future because they can safely assume that the law will be applied as it is written. Finally, a third and even thicker notion of the rule of law is “democratic rule of law.” The most important idea behind the democratic rule of law is that the government should have the consent of the people it governs to pass laws.

Reading Focus

As you read the next section, consider why the rule of law is important to Timor-Leste. Which parts of the definition of the rule of law are most important? What do the references to the rule of law in the Constitution indicate about which definitions the Constitution's drafters had in mind? Which sections of the Constitution help to ensure that Timor-Leste has the rule of law?

2. The Rule of Law and the Constitution

References to the rule of law

The Constitution of Timor-Leste mentions the rule of law three times. The first reference appears in the preamble; the others appear in Sections 1 and 6. The inclusion of this phrase was not accidental. Its repetition in some of the sections of the Constitution that define the state and the state's goals indicates that the rule of law was important to the Constitution's drafters. But why? Why does the Constitution mention the rule of law repeatedly? What do the references to the rule of law in the Constitution tell us about how Timor-Leste should be governed?

References to the Rule of Law in the Constitution of Timor-Leste

Preamble

Fully conscious of the need to build a democratic and institutional culture proper appropriate to a State based on the **rule of law** where respect for the Constitution, for the laws and for democratically elected institutions constitute its unquestionable foundation;

Section 1: The Republic

1. The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary State based on the **rule of law**, the will of the people and the respect for the dignity of the human person.

Section 6: Objectives of the State

The fundamental objectives of the State shall be: . . .

(b) To guarantee and promote fundamental rights and freedoms of the citizens and the respect for the principles of the democratic State based on the **rule of law**;

The preamble and Section 1 of the Constitution say that Timor-Leste should be a democratic state “based on the rule of law.” This statement alone does not tell us very much about what the drafters meant by rule of law. However, it is important to realize that every time the Constitution mentions the rule of law, it appears near a reference to a “democratic State.” The idea that democracy and the rule of law go together is a feature of the thicker definitions of the rule of law we discussed earlier. One of those thicker definitions was the idea of democratic rule of law, which emphasized the importance of the consent of the people to the laws that the government makes.

Why might democracy be important to the rule of law? Remember that the thinner definitions of the rule of law told us very little about what the laws should actually say—the thinner definitions just focused on how the laws should be made and how they should be applied. Democracy emphasizes consent of the people. Maybe if everyone gets to vote for the representatives who decide which laws are passed, the result will be a country with fairer laws that more people want. That will also help with some of the procedural aspects of the rule of law. If people think the laws are fair, they are more likely to want those laws enforced more broadly. As a result, laws will apply more uniformly and completely. Additionally, if everyone is represented in a democratic government, it seems more likely that the laws will be applied equally to everyone.

Section 6 of the Constitution says that one of the “fundamental objectives” of the state is to “guarantee and promote individual rights and freedoms.” Remember that even our most basic definition of the rule of law included the idea that everything the government does must be authorized by law. So even this simplest definition suggests that everyone should be free from arbitrary arrest, and that everyone should have the right not to have their property taken unless the government follows the procedures that the law requires. Perhaps these are some of the fundamental rights and freedoms that the drafters had in mind when they wrote this section. The three references to the rule of law throughout the Constitution recall aspects of each of the definitions of the rule of law that we discussed. Next we turn to a brief discussion of the sections of the Constitution that help to ensure that Timor-Leste has the rule of law.

Establishing the rule of law

There are several sections of the Constitution that speak directly to establishing the rule of law in Timor-Leste. For example, Section 16 states that “All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties.” This provision of the Constitution guarantees equal application of the law, which is one of the fundamental principles of the rule of law.

Equal Rights and Duties

Section 16

All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties.

Section 31 deals with the application of criminal law. One provision of Section 31 states that “No one shall be subjected to trial, except in accordance with the law.” This principle recalls one of the fundamental principles of the rule of law: that all government actions (in this case criminal prosecutions) must be justified by law. Similarly, Section 31 prevents the government from trying or convicting someone for anything that was not a criminal offense at the time it was committed. Section 31 also prohibits any penalties “not clearly provided for by law at the moment the criminal offense was committed.” Each of these provisions helps to make sure that the government cannot impose arbitrary criminal rules on anyone. Instead, all criminal convictions and penalties must be based on existing laws.

Criminal Law and the Rule of Law in the Constitution

Section 31

1. No one shall be subjected to trial, except in accordance with the law.
2. No one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed, nor endure security measures the provisions of which are not clearly established in previous law.

3. Penalties or security measures not clearly provided for by law at the moment the criminal offence was committed shall not be enforced.

...

5. Criminal law shall not be enforced retroactively, except if the new law is in favour of the accused.

Nor can the government seize someone's property without following proper procedures. Section 54 guarantees that "Requisitioning and expropriation of property for public purposes shall only take place following fair compensation in accordance with the law." If the government needs to take someone's property for public purposes, it still must follow proper procedures and pay a fair price to the property owner.

Property and the Rule of Law in the Constitution

Section 54

1. Every individual has the right to private property and can transfer it during his or her lifetime or on death, in accordance with the law.

...

3. Requisitioning and expropriation of property for public purposes shall only take place following fair compensation in accordance with the law.

These sections, and other ones throughout the Constitution, help to establish the rule of law in Timor-Leste. But simply writing these things down is not enough to establish the rule of law. Like any law, these provisions of the Constitution might not always be followed. It is possible that the government might violate them intentionally. It is also possible that the government might lack the resources to uphold the Constitution. If there are not enough judges, lawyers, police officers, and courthouses, it might be impossible for the government to make sure that everyone has the same rights and freedoms throughout the country, even if the government wants to. The next section of this chapter examines Timor-Leste's legal history, with

a particular emphasis on how the rule of law has changed over time. The last section of the chapter explores current challenges to the rule of law in Timor-Leste.

Questions

1. This is the secretary-general of the United Nation's definition of the rule of law: "*a principle of governance in which all persons, institutions and entities . . . including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure 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.*" How would you describe this definition?
2. Which provisions of the Constitution help to establish the rule of law in Timor-Leste?
3. What sorts of things might Timor-Leste need, apart from provisions in the Constitution, to guarantee the rule of law?

Answers

1. This definition contains both thin and thick aspects. It contains *procedural* elements, such as universal and equal application and enforcement of the law. However, it also contains some *substantive* elements, such as the separation of powers. It also requires that laws be "consistent with international human rights norms and standards," a description of the types of laws that should exist.
2. We have already discussed Sections 16, 31, and 54. Section 17 guarantees that women and men will have equal rights and duties. Section 63 states that participation by the people in political life is critical for the democratic system. Section 72 helps promote another definition of the rule of law: limitation of the central government through sharing power with local governments. Those are just a few examples. Many other sections of the Constitution help to guarantee the rule of law. Indeed, most of the rights and freedoms guaranteed by the Constitution could be considered to help establish the rule of law under the thickest definitions.
3. As we discussed, writing down provisions of the Constitution that uphold the rule of law is only a start. If the rule of law is actually to exist, Timor-Leste needs police officers to enforce the law. It needs judges to decide on the law, and lawyers to argue the law. It needs courthouses where cases can be heard. It needs law professors to analyze the law. It needs honest, dedicated politicians who will pass laws to address the country's problems. This is

not an exhaustive list, but these things will go a long way towards establishing the rule of law in Timor-Leste.

3. Summary

There is no single agreed-upon definition of the rule of law. One useful way to think about definitions of the term involves a spectrum of definitions from thin to thick. Thin definitions focus on procedural elements of the rule law—rules for *how* justice is administered that ensure the law is applied equally and consistently. Thick definitions of the rule of law include *substantive* elements—ideas about what sorts of laws a country should have.

The Constitution of Timor-Leste includes three direct references to the rule of law. Clearly, some notion of the rule of law was important to its drafters. Several provisions of the Constitution help to establish the rule of law. Among these are rules requiring that people charged with crimes be tried in accordance with the law, requiring the government to compensate people when it takes their property, and guaranteeing the equality of men and women before the law. Other provisions of the Constitution also establish procedural and substantive rules that promote the rule of law.

II. THE LEGAL HISTORY OF TIMOR-LESTE

SECTION OBJECTIVES

- To explore defining aspects of traditional justice and the interplay of Portuguese and traditional justice systems during the colonial era.
- To identify reasons for the survival of traditional systems of justice despite colonization and foreign occupation.
- To identify rule of law issues during each period of Timorese history.

This section examines the history of justice systems in Timor-Leste. It begins with a discussion of the forms of justice that existed before the colonial era. Then it examines the Portuguese colonial period, emphasizing the interaction between Portuguese rule and traditional legal systems. Finally, it explores the justice institutions of the United Nations-administered transitional government. As you read this section, try to identify the strengths and weaknesses, in terms of promoting the rule of law, of the legal changes in each era.

1. The Pre-Colonial and Portuguese Colonial Eras

Prior to the arrival of the Portuguese, Timor-Leste was controlled by several small kingdoms ruled by local kings, or *liurais*. The island's economy was dominated by subsistence agriculture, and it produced little beyond what its people needed to survive. As a result, the *liurais* battled constantly to secure the island's small surplus. Though the *liurais* were the authorities on matters of justice, such matters were often resolved by the families of the people involved. The *liurais* had no obligation to encourage negotiations or reconciliation. In fact, the dominant feature of the justice system was retribution—crimes were often punished by fines of money or goods, or by death.

Another important aspect of traditional Timorese justice times was the notion of collective responsibility. Rather than disputes between individual perpetrators and victims, crimes often became controversies between the families of those involved. Criminals' families would make payments to the families of the victims. At the same time, reconciliation also played an important role, especially at the group level. Disputes between kingdoms were often forgiven

after sealing relations through feasting and the swearing of friendship oaths. Certain elements of both retribution and reconciliation infuse Timorese systems of justice to this day.

One significant traditional justice mechanism was the rites of *nahe bitu* (literally “stretching the mat”). *Nahe bitu* involves the perpetrator and victim sitting on a mat together. Traditional leaders, especially the *lian nain* (storyteller) mediate to promote a settlement. Precedent plays an important role in the negotiations, as agreements made in the past have a bearing on the process. Traditionally, *nahe bitu* fulfilled the dual goals of restoring peace to the community and repairing the relationship between the spiritual and secular worlds, which was disturbed by the community’s strife.

Reading Focus: Formal and Informal Legal Systems

These customary mechanisms—justice as administered by the *suco* or *liurai*, and traditional rites such as *nahe bitu*—still exist in various forms at the community levels. These modern implementations of community justice are known collectively as the **informal legal system**. Calling these varied practices a legal system is something of a misnomer, as there is no single system. Rather, we use this term to distinguish community and traditional justice from the **formal legal system**. The formal legal system consists of the written laws of Timor-Leste and the court system established by the national government.

For centuries before the arrival of Europeans, Timor-Leste had been known as far away as China as a source for high-quality sandalwood. In 1511, the Portuguese arrived in the region. The presence of Portuguese traders created a power imbalance that favored coastal *liurais*, who could trade sandalwood for European cloth, guns, and iron tools. These initial changes did little to displace indigenous economic, social, and cultural systems, even on the coast where the Portuguese presence was much stronger. The Portuguese did even less to promote development of the interior.

The Portuguese established the first permanent European settlement on Timor at Lifau in 1702. Throughout the colonial period, the Portuguese colonial government lacked funds and resources. Consequently, the Portuguese relied on *liurais* to maintain security. Day-to-day administration was left to the heads of *sucos* (integrated clusters of hamlets). Rule by *suco* heads meant that justice and administration continued according to traditional principles.

Among the legal changes instituted by the Portuguese was a revision of the tax system. In 1908, the Portuguese imposed a head tax—requiring payment in the form of either labor or surplus crop—on all East Timorese males between the ages of 18 and 60. Portuguese opposition to capital punishment also resulted in more crimes being punished by fines rather than death. The Colonial Act of 1930 centralized control of Portugal’s colonial possessions in Lisbon. It also created legislative councils to represent the Portuguese government and people. Additionally, the law officially distinguished between *indigenes* (indigenous Timorese) and *não indigenes* (which included part-Portuguese—*mestiços*—and “assimilated” natives—*assimilados*). One could gain *Assimilado* status by learning Portuguese, being able to support one’s family, and having good character. Despite the new law, the Portuguese for the most part allowed traditional justice—usually implemented at the *suco* level—to continue unchanged.

Over the centuries, Portuguese authority gradually accreted into a monarchical system. A 1910 rebellion ushered in a brief period of republican government. But in 1926 a military coup brought to power a government that was, in practice, a dictatorship. The colonial government existed in essentially that form until independence in 1974.

Questions

1. In what forms have the reconciliatory and retributive aspects of traditional Timorese justice systems survived to the present day?
2. What were the effects of Portuguese colonialism on the legal system of East Timor? What effects have lasted to this day?

Answers

1. The reconciliatory and retributive aspects of the traditional Timorese justice systems have survived through both the formal and informal justice systems. For example, certain crimes may only be prosecuted if the victim files a complaint. Sometimes, consultation between the victim and perpetrator, even in the formal justice system, can lead to resolution of the dispute without filing criminal charges. In August 2011, a charge of light maltreatment was dropped after the victim forgave the defendant and requested that he never repeat such acts against others. Community justice systems also embrace both aspects of traditional justice. Customary justice mechanisms (like *nahe bitu*) often have the goal of restoring peace to the

community and of fostering forgiveness. At the same, crimes are often punished through payment by the perpetrator to the defendant. For example, theft is often punished by requiring the thief to return the stolen goods, and sometimes to pay further compensation. Even more serious crimes, like rape or murder, may be punished by requiring payments to the victim.

2. Portuguese colonialism was focused on trade, and hence many significant Portuguese legal changes dealt with the economy. The institution of a head tax is one example. With respect to criminal law, the Portuguese reduced the frequency of capital punishment. Many relics of the Portuguese legal system continue to influence Timorese law. Laws are written in Portuguese, and the Timor-Leste, like Portugal, has a **civil law system** where laws are codified in written collections (rather than a **common law system**, like those that exist in the United Kingdom and the United States, where law is developed through decisions by judges). Despite these changes, Portuguese colonialism did little to alter the traditional legal mechanisms in Timor-Leste, especially in the interior of the country.

2. The Indonesian Annexation

Two major developments in Portugal and Timor-Leste during the mid-1970s led to Timor-Leste's independence. First, the "Carnation Revolution" in Portugal brought to power a government that favored democracy and decolonization. Second, a coup in Timor-Leste led to a brief but bloody civil war. On November 28, 1975 the Revolutionary Front for an Independent East Timor (*Frente Revolucionária de Timor-Leste Independente*, Fretilin) declared the Democratic Republic of East Timor to be an independent nation. But independence did not last long. Indonesia invaded Timor-Leste on December 7, 1975, beginning a twenty-four year occupation.

Both the Indonesian and Portuguese occupations of Timor-Leste failed to do much to dislodge traditional Timorese customs. In the Portuguese case it was due mostly to neglect; in the Indonesian to local resistance and friction with the Indonesian government. Though Timor-Leste officially became a province of Indonesia, the Indonesian government severely limited opportunities for Timorese to participate in the island's administration. This exclusion also contributed to the lack of change in the Timorese economy and society.

The Timorese people had good reason not to place confidence in the Indonesian justice system. Continuing armed resistance against the occupation prompted Indonesian crackdowns that undermined the justice in two ways. First, people associated with pro-independence views or activities were often the victims of extra-judicial violence at the hands of the Indonesian security

forces. Such acts went unpunished. Second, the justice system itself was corrupt. The post-independence Commission for Reception, Truth, and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliação*, CAVR) documented hundreds of cases in which Indonesian, judges, security officials, and lawyers conspired to convict pro-independence activists in sham trials.

The friction between the pro-independence movement and the Indonesian government continued unabated. In 1991, the Santa Cruz massacre drew international attention to the struggle for independence. The trouble began when Indonesian intelligence agents found and killed a pro-independence protest organizer. A demonstration was planned at the Santa Cruz Cemetery for his funeral. About 2,000 unarmed people gathered at the cemetery. At the demonstration, some protestors beat a uniformed Indonesian army officer as they passed him. Shortly afterwards, Indonesian soldiers blocked the entrance to the cemetery and opened fire on the crowd. The soldiers continued firing into the protestors' backs as they fled. Over the next week, wounded protestors were murdered in a military hospital, and protestors that had been arrested were murdered. In total, 271 people were killed. Though Santa Cruz was not the worst massacre during Timor-Leste's quarter century under Indonesian rule, the circumstances of the event shocked the international community and highlighted the absence of the rule of law. The massacre had a powerful impact in Portugal, galvanizing support there for the Timorese independence movement.

In late 1998, the Timorese and Indonesians opened negotiations on the future of Timor-Leste. The next year, Indonesian President B.J. Habibie announced that Indonesia would grant independence to Timor-Leste if the province rejected autonomous status within Indonesia. A referendum was held on August 30, 1999. Over 78% of the country voted in favor of independence.¹

Questions

1. What effects did the Indonesian occupation have on the rule of law in Timor-Leste?

¹ "Timor Chooses Independence." *BBC News*. September 4, 1999, <http://news.bbc.co.uk/2/hi/asia-pacific/438145.stm>.

Answers

1. Though the Indonesian government established a formal legal system that probably had greater reach than the Portuguese, misuse of the justice sector bred deep mistrust for the formal legal system. The Indonesian government frequently used the legal system as a tool to suppress the independence movement. To do so, legal professionals often violated the tenets of the rule of law. The string of human rights abuses during this period culminated in the Santa Cruz massacre and, eventually, Timor-Leste's independence.

3. The UN Transitional Authority

After Timor-Leste voted to become independent from Indonesia in August of 1999, Indonesian-sponsored militias and the Indonesian military caused chaos throughout the province. United Nations (UN) peacekeepers were deployed to restore order. Timor-Leste was governed by the United Nations Transitional Authority for East Timor (UNTAET) from October 1999 until the country's independence on May 20, 2002. UNTAET had a remarkably broad mandate that included the power to exercise all legislative and executive authority, including enacting new laws.

One of UNTAET's most significant legal tasks was trying serious crimes committed during Timor-Leste's internal conflicts. Two institutions that worked in tandem pursued those charges: the Special Panels for Serious Crimes (SPSC) and the Serious Crimes Unit (SCU). The SCU was responsible for investigating war crimes, crimes against humanity, murders, and rape, committed during the violence of 1999. Those crimes were tried before the SPSC. The SPSC suffered from a number of institutional problems. It was located in Dili, which limited access for those located outside the capital. Proceedings were conducted in English, often by international lawyers, which limited their accessibility and Timorese participation. Additionally, the SPSC was designed like a Western legal system, ignoring local traditional justice, which further reduced buy-in from Timorese. Finally, the SPSC's ability to try cases was severely restricted by a lack of accountability in Indonesia, which refused to turn defendants over to the court.

The UNTAET administration also managed day-to-day legal and governmental affairs in Timor-Leste. It established taxation and customs systems and bureaucracies to enforce them. It created a staff of public prosecutors to bring cases and developed professional guidelines to govern them, as well as rules for criminal procedure. UNTAET also developed specific

procedures for managing parts of the country's government, including the budget, financial management, and appropriations. The transitional administration even established rules and regulations for managing protected places.

UNTAET worked to build governments at both the local and national levels. It established a system of local governance by creating District Administrations and sub-district offices in Timor-Leste's thirteen districts. To support these local administrations, UNTAET built judicial and political institutions. At a national level, UNTAET called for general elections for a Constituent Assembly that drafted Timor-Leste's Constitution. The Assembly became Timor-Leste's first parliament. Finally, UNTAET administered Timor-Leste's first presidential elections.

Despite some successes, UNTAET had its problems. Many of the UN staff had little experience with reconstruction and development. Few spoke Tetum, Portuguese, or Bahasan, which significantly reduced their ability to obtain input and feedback from the Timorese people. The **Special Representative of the Secretary-General** (SRSG) held complete legislative, judicial, and administrative power. This concentration of power alone was controversial, and it limited Timorese participation in national government. While these critiques of UNTAET are valid, UNTAET did face the enormous task of rebuilding a country whose infrastructure was mostly destroyed. The dispersion of the population across isolated rural areas made reaching out to the entire population even more difficult. Though UNTAET's administration ended in 2002 when Timor-Leste officially became independent, its regulations are still in effect where the National Parliament has not passed laws to supersede them.

4. The Legacy of Timor-Leste's Legal History

One of the most obvious enduring effects of Timor-Leste's unique legal history is the wide variety of the sources of law in the country. Each of the Portuguese, Indonesian, and United Nations legal systems continue to influence modern Timorese law. Timor-Leste's Constitution was modeled on Portugal's. Many of Timor-Leste's statutes have been imported, often with little modification, from Portuguese law. UNTAET regulations and Indonesian laws that have not been repealed may supplement the Constitution and statutes passed by the National Parliament. Multiple sources of law that supersede one another in certain circumstances can complicate the legal system and make it difficult to understand or analyze the country's laws.

Another important legacy of Timor-Leste's legal history is skepticism towards formal legal systems. During the colonial period, Portuguese law mostly failed to replace traditional methods of justice. This was true throughout the country, but especially in the inland areas that were of less interest to the colonial administration. Centuries of neglect were followed by years of mistrust of the formal legal system under Indonesian occupation. As a result, traditional legal systems have continued to flourish.

These two themes will be important in our discussion of the state of the rule of law in Timor-Leste today. The interaction of Timor-Leste's formal and informal legal systems is a critical element of the rule of law in Timor-Leste. Similarly, the multiple sources of Timorese law have varying effects on the complexity and organization of Timor-Leste's legal system. Keep these issues in mind as you read the next section.

5. Summary

Pre-colonial justice in Timor-Leste was often administered by *suco* heads and *liurais*. Traditional justice emphasized both retribution and reconciliation. Most crimes were punished by requiring the perpetrator to pay compensation to the victim. More serious crimes were sometimes punished by execution. Rites such as *nahe biti* acted to resolve disputes at the community level, with the goal of promoting reconciliation.

When the Portuguese colonized Timor-Leste, they brought with them certain European notions of justice. Some of these ideas, such as the civil law system, have survived in the Timorese justice system to this day (and much of the Timorese legal codes has been imported from Portugal). However, the Portuguese were focused primarily on using their colonies for trade. Thus they mostly neglected to impart, or pass on, their legal system to the Timorese. Portuguese colonization was focused in coastal areas, so the reach of Portuguese colonization was especially limited in inland regions.

Indonesia invaded and annexed Timor-Leste shortly after Timor-Leste gained independence from Portugal. The Indonesian justice system often functioned as a tool to attack the independence movement. Judges, lawyers, and police officers conspired to convict independence advocates of crimes. The result was a powerful mistrust the formal legal system among the Timorese, which has lasted, to some degree, to this day.

After Timor-Leste voted to become independent from Indonesia, the UN took over administration of the country. The UN attempted to build a formal legal system in Timor-Leste, and it succeeded in some areas. But lack of outreach limited Timorese participation in the UN administration and reduced opportunities to receive feedback from the population. Additionally, the decision to staff the legal system with international lawyers and judges prevented Timorese legal professionals from gaining practical experience. From a rule of law perspective, UNTAET was only a qualified success.

III. RULE OF LAW CHALLENGES IN TIMOR-LESTE

SECTION OBJECTIVES

- To understand why the small number of lawyers and judges in Timor-Leste is a problem for the formal legal system.
- To examine problems that limit the reach of the formal legal system.
- To explore reasons for tension between the formal and informal legal systems and potential resolutions for that tension.

Timor-Leste has made remarkable strides since its independence from Indonesia in 1999, and since the end of UN administration in 2002. It has adopted a Constitution, formed a democratic government, and developed laws to manage its natural resources. It held elections in 2006 that international observers considered free and fair. Nonetheless, as of 2012 Timor-Leste still faces enormous challenges to establishing the rule of law throughout the country. One challenge up until 2012 has simply been passing sufficient laws to govern the country. Until the legislature passes those laws, UNTAET regulations and Indonesian laws can remain in force to regulate areas that are not controlled by Timorese law. This section examines three of the most significant rule of law issues in Timor-Leste: the lack of human capital, the limited reach of judicial services, and the interaction of the formal and informal justice systems.

1. Lack of Human Capital

As of 2012, one of the most critical gaps in the Timorese justice system is the lack of well-trained lawyers and judges. There are simply not enough legal professionals to handle the number of cases that arise. Hopefully this will change as the first students trained in Timorese law schools begin to graduate. In the meantime, the lack of human capital presents a serious problem to the Timorese justice system.

This problem was felt acutely when UNTAET began administering the country in 1999. Though an initial effort was made to staff the country's courts with Timorese lawyers and judges, only a few of the sixty people who applied to be judges had any practical legal experience (and none had previously been judges). As a result, international lawyers and judges

filled the positions in courts to prosecute serious crimes in early 2000. Though this process was probably necessary to administer the courts in the short run, it drastically reduced the opportunity for Timorese to gain practical legal experience. When UNTAET's mission ended in the middle of 2002, Timor-Leste had twenty-two trainee judges, nine trainee prosecutors, nine public defenders, and thirty-five support staff to serve the entire country. All local judges failed their professional examinations in January 2005. They were disqualified and given full-time training for up to three years. Even in 2005, six years after the UN took control of the country, Timor-Leste's courts were staffed by international judges and prosecutors.

The lack of well-trained professionals in the justice system has created huge problems, both real and perceived, for the formal legal system. As of 2012, there are not enough lawyers to try the cases that arise. In early 2007, the Prosecutor-General's office had a backlog of 1,658 pending cases. This was actually an improvement from the 2,700 cases that were pending in 2005.² Unfortunately, the backlog persisted in 2008, owing largely to the understaffing of the prosecutor's office. The large backlog had a very real effect on the rule of law—courts began to “disregard due process” to clear cases more quickly.³ As we discussed, procedural aspects of the rule of law tend to be the most basic. Thicker, substantive, elements of the rule of law are built on top of well-functioning procedures. If the courts are too busy to observe proper procedure, it will be impossible to ensure that the law is applied fairly, equally, and consistently.

In addition to the lack of human capital, the courts and lawyers lack the resources they need to investigate and try cases, such as phones and housing for some prosecutors. As a result, the prosecutor's office fails to investigate many cases, and it is easy for people to lose faith in the justice system. A 2006 survey found that most people do not consider the formal legal system a legitimate method to resolve their disputes.⁴

2. Limited Reach of Judicial Services

Related to the lack of human capital is the problem of the limited reach of judicial services. The limited capabilities of the formal justice system make it especially difficult for it to function outside the capital. This, too, is a problem of human capital to some extent. Most judges

² “Rule of Law in Timor Leste” (2007), 26.

³ Laura Grenfell, “Promoting the Rule of Law in Timor-Leste,” in *Security, Development and Nation-Building in Timor-Leste: A Cross-Sectoral Assessment*, ed. Vandra Harris and Andrew Goldsmith (Oxon: Routledge, 2011), 235.

⁴ Zaum (2009), 194.

and prosecutors live in Dili. Courts outside Dili must either find local lawyers and judges, which can be a challenge, or rely on professionals in Dili to travel. As a result, district courts outside Dili only function some of the time. Enforcing a contract according to state law is more difficult in Timor-Leste than most other countries. This is a consequence of courts that do not function consistently and the large backlog of civil cases. Recall that enforceability of property rights is considered by many to be an important part of the rule of law.

The reach of Timor-Leste's judicial system is not limited only by location. Certain people—women especially—have difficulty accessing the justice system. Section 17 of the Constitution guarantees equal rights and status for men and women. But that promise has not been wholly fulfilled. Though gender-based violence is one of the most frequently reported crimes in Timor-Leste, fewer than a quarter of the cases reported to the police are investigated. Often, insufficient evidence is presented in such cases, due in large part to lack of training for police and prosecutors. These problems were reflected in a 2005 survey. Almost fifty percent of district administrators and *sucos* considered traditional justice mechanisms to be the fairest conflict resolution system available to them. About 40% believed the court system was the fairest. By contrast, about 60% of representatives of women's organizations believed the traditional justice systems were fairest. Only 15% believed the court system was fairest, and about 25% said that neither system was good enough. Because of these problems, a 2007 examination of the rule of law in Timor-Leste concluded that “[w]omen lack of access to the courts for redress of wrongs against them.”⁵

Children are another group that commonly lack access to the justice system. Many of the problems children face can be traced to a lack of procedural safeguards. For example, there are not special investigation and examination procedures for children that reflect their special vulnerabilities. There are also few support and protection services for child victims of crimes. Nor is there an expedited process for hearing cases or testimony that involve children. This issue is compounded by the general difficulty of finding adequate legal representation across the legal system. Children are particularly vulnerable to the stress and hardships of the judicial process, and the delays in obtaining representation and resolution affect them to a greater extent.

Another crucial hurdle, or challenge, to accessing the justice system is language. Laws are generally written in, and courts operate in, Portuguese. All too often, translations into Tetum

⁵ “Rule of Law in Timor-Leste” (2007), 31.

and local dialects are difficult or impossible to obtain. This is problematic for two reasons. First, it creates challenges for people who do not speak or read Portuguese to accessing the justice system. This just compounds the other challenges that Timorese face when accessing the justice system. Second, it deepens mistrust for the formal justice system. If people cannot read the laws that govern their country, it is hard for them to participate in making or improving those laws. That participation is critically important for a functioning democratic society.

3. Interaction of Formal and Informal Justice Systems

One of the most complex rule of law issues in Timor-Leste is the interaction of the formal and informal justice systems. When development scholars began actively promoting the rule of law, they tended to disparage, or criticize, traditional methods of justice. Because it is administered at the community level, traditional justice can sometimes be applied inconsistently throughout a country. As an example, recall that the Constitution demands that every criminal charge be based on existing (written) law. The informal legal system does not have this requirement, and ideas of what sort of behavior constitutes a crime might differ from community to community. So it is possible that some criminal prosecutions through the informal system might not be consistent with the idea of criminal justice that the Constitution advocates.

There are also legitimate concerns that that traditional methods of justice lack procedural safeguards and can fail to protect human rights. Additionally, the formal justice system is an official part of the government, while the informal system is not. This means that only the formal justice system can legitimately rely on coercive force to implement its decisions. Nonetheless, the informal system has its own ways to enforce its decisions. For example, people who fail to follow the decisions of their community leaders might be excluded by the rest of the community. These methods of communal enforcement can be more effective than the state's coercive power, especially in areas where the government's presence is limited.

However, in their zeal, or eagerness, to promote formal justice systems, development experts overlooked two major problems. First, nascent, or new and undeveloped, justice systems often lack the capability to provide justice services throughout a country and to all persons. Second, mistrust for the formal system—due to the capacity issues or the transition from customary justice—can discourage people from seeking solutions through the formal justice system. These issues reinforce one another, as lack of a functioning judicial system breeds

mistrust, mistrust discourages people from seeking solutions through the formal system, reducing the legitimacy of the formal system—and thus its ability to function. Essentially, the international community tended to assume that societies would unquestioningly accept new justice systems, even if those systems did not conform with local concepts of justice.

Lack of access to the justice system is a major problem in Timor-Leste. As a result, people seek solutions through customary justice mechanisms. Surveys have confirmed this preference for customary justice. A 2004 study found that Timorese overwhelmingly believe that senior *katuas* (elders) should resolve land disputes. This was true in cities as well as in rural areas, though the preference for traditional justice was much stronger in rural areas.⁶ Similarly, a 2005 survey found that most people believe that “tradition” is the most important reason for solving problems in the community. However, all respondents to that survey, including traditional leaders, said that traditional justice mechanisms were insufficient to handle serious crimes. Those crimes, it was agreed, should be solved in the formal legal system.⁷

Why the preference for traditional justice? A survey of district administrators, *suco* heads, and land and property officials revealed that a large majority believe traditional justice is a superior forum. These officials—many of them state actors—saw the informal justice system as cheaper, faster and more efficient, more accessible (in terms of travel), less corrupt, and easier to understand than the court system. They also believe traditional justice is fairer, though the difference in opinion was much smaller.⁸ As more lawyers and judges are trained in Timor-Leste, some of these problems with the court system should become less severe. But many of the deficiencies with the formal legal system will take a significant investment of time and resources to improve.

CAVR was a start towards the goal of establishing a formal justice system mindful of traditional conceptions of justice. CAVR sought to facilitate reconciliation for victims and perpetrators of less serious crimes committed between 1974 and 1999. Unlike many internationally sponsored justice programs in Timor-Leste, CAVR involved Timorese in the mediation process. During the UN administration, Timorese courts were staffed almost exclusively by international lawyers and judges. By contrast, over eighty percent of CAVR’s

⁶ Nixon (2009), 55-57.

⁷ Sandra Scheeringa, “Enhancing the Local Legitimacy of Transnational Justice Institutions: Local Embeddedness and Customary Law in CAVR,” in *East Timor: Beyond Independence*, ed. Damien Kingsbury and Michael Leach (Victoria: Monash University Press., 2007), 134-35.

⁸ Nixon (2009), 62.

employees were local Timorese. Reconciliation was facilitated by local mediation panels. This participation by community leaders significantly improved CAVR's perceived legitimacy.

In addition to relying on local leaders, CAVR integrated traditional justice mechanisms. It used *nahe bitu* in the reconciliation process. Sometimes this was impossible—for example, some traditional leaders stated that *nahe bitu boot* (stretching the big mat) requires the inclusion of all perpetrators. Since most CAVR proceedings dealt with two or three offenders at a time, this was impossible. However, traditional rites were still followed, even if all the perpetrators could not be called together. At the end of the *nahe bitu* process, the victim and offender swear an oath not to bring up the problem again in the community. This oath is crucially important to the traditional conception of justice, and its inclusion in CAVR's procedures further improved the program's legitimacy. At the same time, CAVR made an effort to uphold international human rights standards—for example, women were encouraged to participate in CAVR meetings. One analysis of CAVR concluded that, while interweaving customary notions of justice, CAVR “did not compromise on human rights.”⁹

Though CAVR succeeded in many ways in combining customary notions of justice with international norms, it was only a limited success from the victims' perspectives. People in communities where CAVR resolved disputes generally said that the process gave them a sense of closure. Enthusiasm for CAVR was powerful enough that many people thought CAVR should be extended (the program ended in 2005) so that refugees who had yet to return to Timor-Leste could participate. On the other hand, victims of crimes, especially those who had lost close family members, often felt that CAVR helped to relieve their trauma but did not provide a definite future course of action, such as a promise of prosecution.

Formal and informal legal systems often compete to provide justice services. This competition creates a tension that can be challenging to resolve. CAVR is an example of resolving tensions between formal and informal justice systems by integrating the two systems. Other options to encourage integration of the two systems exist as well. Courts might refer cases to the informal justice system with the consent of both parties. Though such disputes would be resolved in the informal system, courts might review and record settlements through the informal process. Such a compromise would reduce the load of cases the courts have to resolve. Presumably, distrust for the courts is greatest where they do not function well. In such places,

⁹ Scheeringa (2007), 136-37.

parties to a dispute would probably be more likely to agree to resolve their disagreements through the informal system. So this solution might help insure access to *some* system for everyone, while allowing people who strongly desire resolution through the formal system to have it. At the same time, the reviewing and recording function the courts would play might help to improve the courts' legitimacy. These proposals are not perfect or complete, and ultimately countries like Timor-Leste might instead choose to encourage proliferation of the formal justice system throughout the country. But thinking about these questions, and how to resolve the tensions between the formal and informal justice systems, is critical to the stability and effectiveness of Timor-Leste's legal system.

Questions

1. Why do many Timorese prefer customary justice to the court system?
2. What are the advantages and disadvantages of the formal and informal systems?
3. What might help to resolve tension between the formal and informal justice systems in Timor-Leste?

Answers

1. Many Timorese believe the courts are corrupt, inefficient, expensive, and hard to understand. The fact that the courts function only intermittently, or irregularly, outside the capital does not improve perceptions of the formal justice system. Finally, the formal justice system represents a significant change to the way many people use to resolve disputes in their communities. The misuse of the justice system during the Indonesian annexation further reinforces mistrust for the formal justice system.
2. The formal justice system, at least in theory, should ensure respect for human rights and all of the legal protections guaranteed by the Constitution. It should be applied consistently to everyone throughout the country. It can also legitimately rely on the use of coercive force to make sure that its decisions are followed. However, the formal justice system in Timor-Leste currently operates irregularly in much of the country, and certain vulnerable groups (particularly women and children) often lack access. The major advantages of the informal system are that it reflects traditionally accepted notions of justice, functions in areas where the formal system does not, and operates in local dialects. Unfortunately, traditional justice mechanisms do not always adequately protect human rights or maintain procedural

safeguards. Additionally, there is no guarantee that the informal system will operate similarly in different areas. Nor can the informal system rely on the state's coercive power to enforce its decisions.

3. These questions have no easy answers. But you will play an important role in helping to find those answers as you enter the legal profession. One crucial part of resolving these tensions is improving the capacity of the formal justice system. Once courts are operating more effectively and more consistently, increased trust in those institutions will help more people accept the formal justice system as a legitimate method of dispute resolution.

4. Summary

Despite its progress in establishing the rule of law, Timor-Leste still faces serious challenges in building its formal justice system. A major problem—one you, as a legal professional, will help to solve—is a lack of human capital. Timor-Leste does not have enough trained lawyers and judges for its courts to function regularly and to ensure that everyone's legal rights are protected.

Partly due to the lack of human capital, Timor-Leste's formal justice system has a limited reach. Outside of Dili, courts function only sporadically. Certain groups, especially women and children, are disproportionately excluded from the formal justice system. The formal legal system also lacks safeguards that would help encourage participation in the system by women and children.

Where the formal justice system functions poorly, people turn to the informal justice system. The result is a tension and competition between the formal and informal systems. Customary justice can sometimes fail to protect human rights, and is usually applied less consistently than justice administered through the formal justice system. However, most Timorese see the informal justice system as cheaper, more efficient, easier to understand, and less corrupt than the formal justice system. As a result, most people seek out solutions in the informal justice system. CAVR was a good example of fusion of the formal and informal, as it effectively incorporated traditional notions of justice. But some of its failures highlighted problems that can exist in reliance on the formal justice system.

We discussed potential resolutions to the tension between the formal and informal legal systems. One option is to allow people to make informed decisions about which system to use to resolve their disputes. Courts might transfer cases to the informal justice system if both parties

consent. Traditional justice ministers might inform people who seek relief through the informal system of their legal rights under the formal system. Courts might also review and record decisions made in the informal system. The formal and informal justice systems in Timor-Leste will have to coexist for the foreseeable future, and the current generation of legal professionals will play a critical role in shaping the relationship between customary justice and the formal legal system.

IV. REVIEW

SECTION OBJECTIVES

- To review definitions of “rule of law” and the provisions of the Constitution that help to uphold the rule of law.
- To review Timor-Leste’s legal history.
- To review the challenges Timor-Leste faces in establishing the rule of law.

We began this chapter by discussing definitions of the rule of law. Though there is no generally accepted definition of the term, most scholars agree that, at the very least, the rule of law requires that government decisions must be made by applying the law, that the government and public officials are not above the law, and that the law should be applied equally to everyone. We explored thin definitions of the rule of law, which are limited to procedural aspects. We also examined thick definitions, which include substantive elements as well.

Next, we looked at references to the rule of law in the Constitution. The Constitution mentions repeatedly that Timor-Leste should be a state based on the rule of law. It includes several provisions that promote the rule of law. Among these are provisions governing criminal trials and government seizure of property, and establishing equality under the law.

After exploring notions of the rule of law, we turned to Timor-Leste’s legal history. Pre-colonial notions of justice in Timor-Leste emphasized a mix of retribution and reconciliation. Most crimes were punished by requiring the perpetrator to pay compensation to the victim. Rites like *nahe bitu* encouraged reconciliation to resolve communal strife.

When the Portuguese arrived in Timor-Leste, they established a colonial administration focused on trade. For the most part, the Portuguese colonial government allowed traditional justice to survive unless it impacted Portuguese (mostly economic) objectives. As a result, the Portuguese did not establish an extensive formal legal system in Timor-Leste. Especially in inland areas, justice continued to be administered at the community level.

Shortly after its independence from Portugal, Timor-Leste was invaded and occupied by Indonesia. Though Indonesia made Timor-Leste one of its provinces, the Indonesian legal system was frequently leveraged to harass the independence movement. The government used sham

trials to convict independence advocates of crimes. It perpetrated a series of human rights abuses that eventually encouraged international support for Timor-Leste's independence, but also ingrained, or embedded, mistrust for the formal legal system.

For three years after Timor-Leste gained independence from Indonesia, the country was governed by the UN. The UN mission established courts and district administrations throughout the country, but many of these failed to function effectively. The UN administration made significant progress in building Timor-Leste's formal legal system, but initially Timorese participation in the UN administration was limited. The lack of local involvement did not help to produce badly needed legal professionals with practical experience.

In the last section of this chapter, we discussed three major challenges Timor-Leste faces in establishing the rule of law. The first was the relatively small number of trained legal professionals in the country. The second was the limited reach of the formal legal system. The limited reach of the formal system limits access to justice for people outside the capital, especially women, children, and people who do not speak Portuguese. Finally, we examined the interaction of the formal and informal legal systems. The limitations of the formal justice system and the general mistrust for it mean that the informal justice system will continue to be a commonly used forum for dispute resolution. We examined strategies that might ease tensions between the formal and informal systems, such as referrals from one system to the other, or a role for the courts in reviewing and recording decisions made through the informal system.

To learn more about the various definitions of the rule of law, with a particular application to Timor-Leste, see Ema Denby's article, "The Rule of Law: Theoretical, Cultural and Legal Challenges for Timor-Leste" (East Timor Law Journal, December 2010). For an excellent discussion of the rule of law in nascent legal systems, see Brian Tamanaha's article, "The Primacy of Society and the Failures of Law and Development" (44 Cornell International Law Journal 209, 2011). If you want to read more about the legal history of Timor-Leste, a great choice is Rod Nixon's essay, "Non-State Actors as Agents of Order: *Suco* Justice and Dispute Resolution Systems in East Timor," in *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past*, edited by William Binchy (2009). Other sources cited in this chapter may be helpful as well.

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GLOSSARY OF SELECTED TERMS

Civil law legal system: A legal system in which laws are codified in written collections, and the legal codes are the primary authorities to guide legal decisions. Timor-Leste, Portugal, and Indonesia all use civil law systems.

Common law legal system: A legal system in which common law has great precedential value. Common law is law developed through decisions made by judges, rather than by acts of the legislature. Judges in common law countries are bound by the text of statutes, but also by earlier court decisions. Australia, the United Kingdom, and the United States are among the countries that use common law systems.

Comissão de Acolhimento, Verdade e Reconciliação (CAVR): English: Commission for Reception, Truth, and Reconciliation. A commission established during the UNTAET administration to investigate and encourage reconciliation of less serious crimes that occurred in Timor-Leste between 1974 and 1999.

Formal legal system: The system of written laws and courts emanating from the national government.

Informal legal system: The combination of traditions, customs, and rites that are used to dispense community justice without the explicit endorsement of the national government. We also refer to the informal legal system as “traditional justice” and “customary justice.”

Liurai: A local Timorese king. *Liurais* were the ultimate judicial authorities in pre-colonial Timor and through much of the colonial era.

Serious Crimes Unit (SCU): The SCU was responsible for investigating war crimes, crimes against humanity, murders, and rape, committed during the violence of 1999.

Special Panels for Serious Crimes (SPSC): The SPSC was a criminal tribunal created to try the crimes investigated by the SCU.

SRSG: The Special Representative of the Secretary-General of the United Nations. The SRSG was in charge of UNTAET, and held total legislative, judicial, and administrative authority.

Suco: An integrated cluster of hamlet governed a traditional leader—a *suco* head. Throughout much of Timor-Leste’s history, justice was frequently administered by the *suco* head.

UNTAET: United Nations Transitional Administration in East Timor. The United Nations administration that governed Timor-Leste from 1999 to 2002.