

10. Transitional Justice and Reconciliation

In its preamble, the *Constitution of the Democratic Republic of Timor-Leste* recognises the rule of law and the separation of powers, which are themes of this book. It also recognises indigenous justice in Part I, Section 2, which says '4. The State shall recognize and value the norms and customs of Timor-Leste that are not contrary to the Constitution and to any legislation dealing specifically with customary law'. So indigenous justice is not an alternative to the rule of law in Timor-Leste; it is part of the rule of law.

In this chapter, we consider how the United Nations and the first governments of Timor-Leste set about constructing institutions of justice. The first part of this story is a mundane tale of flawed international assistance to re-institutionalise courts, prosecutors, public defenders and a legal profession. We tell this tale briefly. In Chapter 9, we have described the flawed institutionalisation of the police (PNTL). Land law is used in this chapter as a case study of the dilemmas of post-conflict law in a developing economy. Then we describe transitional justice mechanisms, especially the Commission for Reception, Truth and Reconciliation (CAVR), which struggled to comprehend the crimes of Timor-Leste's long war. After considering the contribution of indigenous justice to post-conflict reconciliation, the chapter concludes with a discussion of options for integrating state and non-state justice.

The complexity of the different forms justice has taken makes this our longest chapter. It is important because we see Timor-Leste as being at risk of future violence because justice systems have not provided a satisfactory alternative to violence for resolving festering conflicts. The courts mostly do not work at all in this regard. When traditional reconciliation is used as an alternative, too often there has been a reconciliation that has avoided working through the root causes of the conflict and removing them as threats to future peace. Too often a feel-good ritual of reconciliation has substituted for restorative justice that confronts and resolves the specificities and structural sources of injustice. Too often the courts have been used ritualistically as well, creating the appearance of justice while being captured by a politics of impunity. Many anguished families still wait to be told where their loved ones' bones can be found.

From UN Justice to State Justice

The legal profession in East Timor before 1999 was largely Indonesian, mostly part of a ruling-class apparatus of tyranny, as opposed to a profession that practised a rule of law. Consequently, most of East Timor's lawyers fled to Indonesia after the ballot. The state legal system had to be built from scratch. The first legal problem INTERFET faced was to disarm and arrest marauding militia members encountered by peacekeepers. Under what law should the militias be arrested? Indonesian law was the law the people had just voted out in the referendum. No copies of Portuguese colonial law were on hand and none of the initial peacekeepers and few of the locals could have read them in any case. Some Australian military lawyers suggested Australian law since at least INTERFET would understand how to administer it fairly. Arrests were made in the event under Indonesian law. UNTAET's first regulation in November 1999 affirmed Indonesian law as applicable so long as it did not contradict the Universal Declaration of Human Rights and the six core UN human rights treaties. UNTAET then set about appointing judges to administer this modified Indonesian transitional law. An interesting moment of resistance was an Appeals Court decision in 2003 in which the judges chose to apply Portuguese, rather than Indonesian, law in defiance of UNTAET Regulation 2000/15 (Pascoe 2006:Fn. 185). Timor's transitional experience showed the need for a basic international criminal law that UN-authorised missions could opt to use in appropriate transitional situations. The rule of law got off to a low-legitimacy start.

After most wars, nations survive with some sort of supply of lawyers in-country supplemented with returning exiles and retired lawyers who are prevailed upon to return to practice in the nation's hour of rebuilding. It proved difficult to persuade the children of Timorese refugees in Australia and Portugal to come back in the early years; few had studied law in any case. In 1999, the United Nations estimated there were 70 East Timorese nationals in the country who had legal training, few of whom had practised law and none of whom had worked as a judge or prosecutor (Harris Rimmer 2008:144). The difficulties were palpable five years on when all 22 of the newly trained Timor-Leste judges failed their written examinations on the law in May and September 2004. As a result, they were suspended from hearing cases. In the same year, all the local public defenders and prosecutors (including the Prosecutor-General) likewise failed their examinations.

Up to 2004, internationals had done most of this work. When Timorese failed their exams, internationals took over again, until mid-2007. Since foreign lawyers were so few and so expensive compared with locals, the realities of the justice budget meant that a huge backlog of cases accumulated. The backlog

persists at the time of writing,¹ with cases from 2000 still not tried. In 2007 the backlog was still rising at a substantial rate. Nevertheless, in 2007 and 2008, the courts of Dili and Baucau increased threefold the rate at which they completed cases in comparison with the years up to 2005, so at least urban courts were seriously improving their caseload performance (Asia Foundation 2008:10). As with its policies of police development, the United Nations had failed at climbing the mountain of legal capacity development, though things look more promising now. The peacebuilding pathology was the same. Too many of the foreign lawyers found it easier to do the job themselves. They did not consider that legal work done tolerably well by locals was better for the development of justice than work done very well by internationals.²

Timor-Leste's legal vacuum attracted idealistic human rights lawyers, particularly from Australia and Portugal, who were touched by the nation's suffering. They tended to regard human rights principles as absolute standards, and saw themselves as duty-bound to remedy all cases of individual rights violations they encountered. Lawyers who are capacity-builders sometimes do better to see rights-development practice as a process: success can be measured by continuous improvement of indigenous capacity to implement rights, as opposed to how completely rights are honoured in the present. This reduces the risk of international domination and a collapse of rights infrastructure once internationals pull out. A practical obstacle beyond the fact that Timor-Leste judges were still struggling with the new legal system was that they were still learning the new language of the law: Portuguese (Marshall with McKenna 2005). The challenges of an early flood of foreign lawyers on short postings (which reduced to a trickle as the backlog they left behind grew) are captured in the following account of a single important case:

[A] proceeding was heard in Dili where members of the national police service stood accused of rape. At the original 72-hour hearing, there had been a total of five prosecutors and seven private legal aid lawyers, following which a number of the accused were held in pre-trial detention for ten months until the commencement of the trial. At the trial there was only one prosecutor (who had not been present at the 72 hour hearing) and two private legal aid defence lawyers, only one of whom had been present at the 72 hour hearing. The judge only questioned one of the accused before adjourning the trial. When the court recommenced over a week later, two different defence lawyers and a different prosecutor

1 A judge in a September 2009 interview told us that the backlog of criminal prosecutions was more than 3000 cases.

2 'In late 2002 the UN administration decided to end the "experiment" with a defense function that relied on inexperienced Timorese public defenders working in uneven mentoring relationships with international counsel. An internationally staffed Defense Lawyers Unit was created...[bringing] about a marked improvement in the defense function' (Cohen 2006b:5).

were present. Unable to contact the defence lawyers who had previously acted for their clients, the new defence lawyers requested the judge to adjourn the remainder of the trial until the other lawyers were available. They then left the court. The judge then appointed an apparently random Portuguese person sitting in the body of the court to represent the accused, before releasing them because of the lack of evidence and because they had been in long term pre-trial detention. (Marshall with McKenna 2005:44)

As with police development, so with development of the courts, the ratio of professional practice competence to expertise in the development and management of institutions was too high. There was insufficient case-management training, staff management and supervision, financial management, computer networking, management of physical files, language translation services, and victim support logistics (JSMP 2005a:18–19, 2005b).

Most Western justice systems fast-track commercially important cases while defendants in prison and victims in rights-sensitive cases are kept waiting. The rights consciousness of post-conflict Timor-Leste created a reverse pathology. Between 1999 and March 2005 in Timor-Leste, the Court of Appeal heard no civil matters, and no international judge had heard a civil matter in the District Court, undermining investor confidence that there was a court system they could turn to if their investment were imperilled (Marshall with McKenna 2005:45). According to our UN police informants, this was a live development issue as there were frequent arbitrary exercises of power by the political leadership against businesspeople. These included shutting people out of businesses and seizing property (see also Federer 2005:111–15).

In the criminal cases that were taken up, a culture of political interference in the decision making of prosecutors and judges quickly set in. UN police and justice officials repeatedly complained of specific instances of this in our interviews. This was particularly demoralising for prosecutors and police who developed cases against alleged offenders with links to the political elite. Consequently, there was corrosion of morale among officers of the legal system—morale that was needed to come to terms with the unmanageable backlog. The leadership failed to see that political activism towards securing the independence of prosecutors and judges was a vital step to consolidating a separation of powers and to giving the aggrieved a genuine alternative to received traditions of dispute resolution through violence (which became politicised). Not only did the political leadership fail to give priority to this aspect of institution building, through their personal political interference they tore down such good work as legal technocrats managed to put in place. Both Prime Ministers Alkatiri and Gusmão in their time responded to pleas for them to interfere in legal decision making, thereby educating citizens to the view that they lived under political

party rule, even one-man rule. These leaders thus undermined the ethos that their electors lived under the rule of law of a republic. The frequency of victims of crime taking their case to a Member of Parliament is also a challenge.

Land law was particularly politicised, especially with respect to urban land. In Chapter 8, we have already questioned whether in a new nation where some members of the political elite hailed from the largest landowning families in the country there was actually any political will to settle land law. It is common in developing economies for political elites to decide to keep land law chaotic, maximising their options for land predation for personal/familial use and for political favour (Fitzpatrick 2006). As one Timorese political leader put it: 'Unsettled land law...allows the rule of party to prevail over rule of law' (Interview, December 2006). In a sense, whether one's claim to land were based on customary title, colonial Portuguese title, title granted during Fretilin's brief land-reforming rule of 1975, title recognised by the UN transitional administration, post-conflict Timor-Leste title, or even title claimed as purchased under Japanese administration in the 1940s, it was a claim vulnerable to someone else asserting title under a head of authority dating from a different period.

This uncertainty was a cloak during the 2000s for many evictions from land occupied by people politically out of favour, or by thugs acting in ways that were tacitly accepted by political leaders. We interviewed many people who claimed that they were evicted from their land because of their political affiliations. Police told us stories of having to mop up after what they believed were evictions they could do little about because they were supported by political elites. An Asia Foundation (2004:3) national survey of 1114 citizens found that '[l]and disputes are the most common legal issue faced by citizens and most believe the *adat*³ process (including the village head) is the best venue to seek remedy if family-to-family discussions fail', though respondents from the capital city were an exception, of whom 52 per cent said they would prefer government courts to rule on land disputes (pp. 46, 62).

Nixon (2008:337–41) found that almost half of legal disputes in Timor-Leste are land disputes. He reports a survey of 717 randomly selected rural and urban Timorese asked 'who should make a compulsory decision (arbitrate) concerning a land dispute or claim, in the event that such a decision must be made?'. A substantial majority of respondents chose *katuas* (elders) in preference to any other authority. Only 10 per cent nominated the courts.

3 *Adat* is the Indonesian term for customary village law still widely used in Timor-Leste. It is for Timorese a synonym of the Tetum word for customary village justice: *lisan*.

Separated Powers over Land

Land law in post-conflict economies is a challenge that opens up the possibility of a more hybrid and differentiated vision of the separation of powers than Montesquieu's (1777) classic formulation in *The Spirit of the Laws* (executive, legislature, judiciary). Not only is it richer to see the *Provedor*, the prosecutor and the police as having powers separated from those of the judiciary and elected leaders of the executive branch, it is also richer, perhaps even vital, with land law to be open to an asymmetric constitutional vision. Symmetric constitutionalism implies separations of powers that operate in the same way in all corners of a country: one law, one separation of powers, for all citizens. Canadian constitutional jurisprudence concerning the Francophone legal enclave of Quebec, which enjoys provincial responsibility over various matters that are national responsibilities elsewhere in Canada, has influenced Western thinking on why asymmetric constitutionalism might be characterised more as a responsive virtue than as a rule of law vice (Kymlicka 1998; Webber 1994).⁴

Here we deploy a separation-of-powers analysis to read the rich veins of policy analysis in Daniel Fitzpatrick's research on land law reform in Timor-Leste and beyond (Fitzpatrick 1997, 2000, 2005, 2006; Fitzpatrick and Barnes 2010; Fitzpatrick and McWilliam 2005; Fitzpatrick et al. 2008). That work does not prescribe a model for post-conflict land law so much as define a typology of policy options that a nation like Timor-Leste can mix and match to its evolving land policy dilemmas. Land law reform is not something that UNTAET alone decided to duck, deferring to the interests of Timor's political elites on the topic. The successive governments of Prime Ministers Alkatiri, Ramos-Horta and Gusmão still have not at the time of writing finalised a private land law of 'who owns what land, where, and under what title' (Fitzpatrick and Barnes 2010).⁵ Law No. 1/2003, however, did settle the succession of Portuguese and Indonesian state title to the Timor-Leste state, and Law No. 12/2005 provided for leases over state and private land.

Few root causes of violent conflict are more frequently deferred than land law on reform menus across the globe. Land disputes are root causes of civil war that are already potentially recurrent in Peacebuilding Compared. Examples include

4 Another interesting Western debate has been around the economic-efficiency virtues of asymmetric constitutionalism in the post-fascist Spanish Republic, particularly in consideration of conflict potential in the Basque country (also Catalonia and Galicia) where tastes for governance and welfare have such a differentiated history (García-Milà and McGuire 2002). Moreover, this literature reveals that constitutional asymmetry is also common in unitary non-federal states, even to the extent of consociationalism being supported for particular regions, but not for most regions (Italy; Northern Ireland in the United Kingdom, with also non-consociational asymmetry for Wales and Scotland) (Conversi 2007).

5 A USAID-funded project in November 2008 tabled a draft framework for a land law that informed a June 2009 draft transitional land law still being debated in Parliament.

conflict over ‘transmigration’ (Braithwaite et al. 2010a), immigration of refugees from other conflict zones (as in the Great Lakes region of Africa), swallowing of villages by huge mining projects and logging (Bougainville, Solomon Islands, Indonesia [Braithwaite et al. 2010a, 2010b, 2010c]); overpopulation and intense competition for scarce land, including environmental change that floods lands (Rwanda again; Bengali encroachment on indigenous land in the Chittagong Hill Tracts); displacement of people by dam projects for flood mitigation and hydroelectric power (Bangladesh again); land invasions by people fleeing volcanoes (North Maluku again [Braithwaite et al. 2010a]); immigration from rural to urban land vacated after a previous conflict (Timor-Leste); immigration to rural areas for plantation labour (Solomon Islands and Bougainville again). In the second Asia Foundation crime victimisation survey of 1040 Timorese (Chinn and Everett 2009:8), ‘land grabbing’ was the most commonly reported form of victimisation, with the second most common being domestic violence—both more frequent than all other forms of physical attack that result in injury combined and all other forms of theft combined.

Fitzpatrick’s work suggests that it can make sense for large swathes of rural land to be exempted from state land law that otherwise applies outside those rural exceptions. At least this is the case where customary custody shows accepted competence in environmental management, in sharing land for grazing or communal purposes, allocation for family farming, quarantining sacred land, and other land as available for outsiders’ commercial use in ways attuned to local resource demands. In some circumstances, it can also make sense, as post-conflict Timor-Leste has done, to accept prior colonial state land appropriations as facts on the ground (in the Timor-Leste case, land acquired by both the Portuguese and the Indonesian states) and formalise these as state land sufficient for future state needs. In other circumstances, prior colonial occupations are contested, and states must tread carefully to avoid conflict. One reason massive carve-outs can enhance welfare is that when they have a status-quo quality, this might render them unlikely to open large conflicts. Moreover, in circumstances where departing Indonesian forces systematically destroyed all land registration records in order to make it hard for the successor government to ‘see like a state’ (Scott 1998), sacred houses (*uma lulik*) (Fitzpatrick and McWilliam 2005:59) and the state could be allowed to continue existing occupation and land administration without imposing registration and documentation costs on such usage. For the most part, customary systems in Timor-Leste can allow long-term leases for major projects without conflict and provide ‘tenure security at relatively low cost’ (Fitzpatrick et al. 2008:7). Moreover:

There is no pressing need to define the boundaries of customary land, at least in relation to the rights of different origin groups. These boundaries may be difficult to determine. Attempts at demarcation may produce inter-

group conflict. In Mozambique, customary authority over rural land has been recognized without the need for demarcation of group boundaries. Uncertainty of group boundaries is not currently a constraint on agricultural productivity [see Tanner 2002:23–4; Toulmin and Quan 2000:223]. Group boundaries may only require demarcation when a land conflict is such that state intervention takes place. (Fitzpatrick et al. 2008:8)

Template agreements might be mandated when customary groups or the state opt to alienate some of their land through long-term leases for mining, tourism or other commerce (Fitzpatrick 2000:159). When a customary group wishes to engage as a group in land dealings with foreign investors, group incorporation is an option for giving both sides the certainty they want with a large investment (Fitzpatrick 2005:472). In the interests of reconciliation with a powerful neighbour, Xanana Gusmão's promise to honour bona fide Indonesian title can also be respected (Fitzpatrick 2000). Where customary group claims were overridden by Indonesian (or Portuguese) titles, there might be a right to compensation (Fitzpatrick 2000:155). Given that state title is considerable and that famine and war vacated formidable tracts of land, Fitzpatrick (2000:155) suggested a state-administered land bank for land reform to assist the mediated movement of the dispossessed as an option. In comments on our draft, he warned that he would be cautious about that today where state land tenure is contested, as it often is post conflict. A land claims commission to hear and mediate disputes that fall between the cracks of such evolving patchworks of tenure was an option for Timor-Leste (Fitzpatrick 2000:155). Where customary authority to settle claims collapses and when mediation fails, Fitzpatrick (2000:158) suggests the District Court could sit as a land court. In other words, asymmetric governance of land could work through customary institutions where they continue to be accepted as legitimate, through executive branch mediation where custom does not apply, and through the judiciary where that fails. This land governance can be nested to minimise uncertainty driven by forum shopping.

Fitzpatrick and his colleagues describe a confusing patchwork of separated powers over land. Here a *uma lulik* allocates; there the *chefe de suco* governs land because traditional land management by the *uma lulik* was forced to retreat long ago by Portuguese or Indonesian colonial governance of land through a *chefe de suco*;⁶ there the executive government owns; somewhere else there is alienation to long-term foreign leaseholders where that might be done by the *uma lulik*, the Prime Minister alienating state land, a land claims commission

6 Fitzpatrick commented on our draft that in such circumstances, 'either the notion of management of customary land under the authority of the *uma lisan/rai nain* is contested or authority has receded into a generalised notion of spiritual stewardship and day-to-day issues fall more within the purview of the *chefe de suco*. This is not to say that the *uma lisan/rai nain* and *chefe de suco* are necessarily two separate systems that are in conflict. But it is to acknowledge the diversity, plurality and potential difficulties of a peacebuilding approach that emphasises the *lisan* system.'

or a district court. Of these only the District Court would hold sway over all Timor-Leste and really it would have no authority over most of the landmass in the normal circumstances of the jurisdiction of the *uma lulik* being uncontested from within.

Does it matter that all this seems so confusing in its carve-outs? It matters for tidy minds that wish to 'see all the land like a state', and see it symmetrically. But does it seem untidy to Quebecois that they have a different criminal law than Alberta, that their province has control over its criminal law in a way that Alberta does not? Does it matter to villagers in a rural corner of Timor-Leste that authority over land law is separated into totally different hands and according to utterly different principles to urban law in Dili? They do not need to 'see like a state'; they will be less confused when they are allowed to 'see like a village', in continuity with the way their parents saw their village lands and the possibilities for alienating it. They probably do not want some grand synoptic scheme to unsettle the security of their land tenure, bringing them into conflict with neighbours. The following principle, while asymmetric, is clear and could be put into simple language: 'The starting point for legal regulation of rural land could be a default or presumptive position that custom governs land outside city boundaries' (Fitzpatrick et al. 2008:8).

A much more complex principle for village people is the following symmetric principle: 'Any legal space for custom will be subject to the human rights provisions of the Constitution. These provisions will act as a safeguard against potential abuses in the name of "custom", including the denial of women's rights to land' (Fitzpatrick et al. 2008:8).

While a more complex task of education and comprehension is required to grasp the implications of this principle, it is an important one, of much more general import than simply in reform of land law. It can come to ground what we will describe as a set of 'engaged universals' (Tsing 2005).

The work of Fitzpatrick and his colleagues suggests that no unified symmetric legal ordering of land is attractive in a context like Timor-Leste. There is little charm in a synoptic anthropological project of codifying all local land-tenure systems, abstracting general principles from them, putting the principles into national law then allowing those general principles to be implemented locally in the local ways that gave birth to the overarching principles. There would be too much error in the anthropological inference; the flux of disparate local systems would be a deviously moving target; judges might misunderstand custom as settled rather than as fluid and hybrid; codification might do violence to regimes that do not work primarily through code; judge-made law based on the general principles could come to conflict with the specificities that gave birth to

the principles. The entire grand project of anthropological codification would be unsettling for a post-conflict situation that needs more settling in the cause of future conflict prevention.

This would be even truer of the other major symmetric option of imposing a nationally uniform land registration system like the Torrens system, used in Australia. It would conflict with the land order of every *uma lulik*. It would impose paperwork costs that a poor nation would strain to administer without creating new forms of corruption. The court backlogs described above would get even longer. The poor would be disadvantaged because of Max Weber's (1954) insight in *Law in Economy and Society* that the more law enshrines formal rationality, the more it favours formally rational organisations—organisations like Indonesian firms that understand the new law and wish to speculate in land. Weber might have added that the more the law enshrines customary rationality, the more it favours those who inhabit the world of custom. Land law that is messy from the perspective of formally rational organisations like state bureaucracies, urban law firms and big business can be harder for them to manipulate to redistribute wealth in their favour. At the same time, the transaction costs of negotiating long-term leases under asymmetric land law need not be high. And big business and big government benefit as much as anyone from a land law that is sufficiently messy to prevent future armed conflict.⁷

Geographically segregated powers over land administration can act as a check on the abuse of power. This is the most general virtue of all separations of powers. A developer wanting to build a tourist lodge or a collaborative coastal fishing venture might be at risk of customary owners demanding a bribe. Still, they have the option of refusing to pay it and moving onto another *uma lulik* with their development proposal. The separated powers over land administration

7 Fitzpatrick (2005:453) cites the following comparative literature: 'while systematic land titling programmes may be useful in urban and peri-urban areas, there is substantial evidence that in places subject to customary tenure they commonly fail to achieve their objectives of increased certainty and reduced conflict (Bruce, 1993:50–1; Knetsch and Trebilcock, 1981:32–3). In many cases, for example, titling programmes have allowed wealthier and more powerful groups to acquire rights at the expense of the poor, displaced and/or female occupiers (Binswanger et al., 1993; Lastaria-Cornhiel, 1997:1317–34; Platteau, 1996:40–4; Platteau, 2000:62, 66, 68; Toulmin and Quan, 2000:218–9). In other cases they have increased conflict by applying simplistic legal categories of "owner" and "user" to complex and fluctuating interrelationships (Fitzpatrick, 1997:184; Knetsch and Trebilcock, 1981:40; Lavigne-Delville, 2000:108; Simpson 1976:236; Toulmin and Quan, 2000:219). In yet other cases they have increased uncertainty by overlaying formal institutions on informal arrangements, with the results that (1) disputants are given the opportunity to manipulate overlapping normative orders through "legal institution shopping" (Bruce, 1998; Platteau, 1996:41–6; Toulmin et al., 2002:13), and (2) the register loses value over time as an accurate record of local land relations (McAuslan, 1998:540; Okoth-Ogendo, 2000:125–8). In other words, the fact that individualized State-enforced property rights may be both an ideal source of security for economic investment, and an evolutionary product of increased land scarcity and resource value, does not necessarily mean that regulatory interventions to introduce these rights will be either effective or appropriate (Platteau, 1992:102–3). In some circumstances, customary systems will be providing sufficient tenure security at low cost to encourage available forms of investment.' A more recent literature review with a more econometric perspective, by Easterly (2009:431–3), also finds a failure to establish an association between land-titling interventions and improved development outcomes.

mean that they will not be blocked everywhere from realising the proposal absent a bribe to the Prime Minister, the Tourism Minister or the Fisheries Minister. They will be less likely to confront a reality that only a business crony of the Prime Minister would get such a land permit. Legal pluralism in land governance actually creates incentives for local villagers to cooperate to make consensus building over their *uma lulik* land policy work.

Fitzpatrick's default to customary governance empowers ancestral origin houses to seize a big piece of governance back from a state that appropriated this in Indonesian times. That state corrupted land law in favour of regime cronies. In rural economies where wars can be fought over land reform, where power over land is a more strategic form of power than in industrial or post-industrial societies, a commanding path to power is to be able to see land like a state, to systematise land administration like a state, and then to corrupt it from the top down. Quilted land regimes can frustrate unchecked central state power and the shadowy power of shadow states of business cronies (Reno 1995). This is akin to the messy reality that it is harder to corrupt a jury than to corrupt a single judge. Separated powers corrupt small time, and leave open the option of contracting on a patch where the corruption is less. Absolute power corrupts big time, leaving subjects little choice but to submit to centralised tyranny.

Some patchwork of separated powers over land of the kind opened up by Fitzpatrick and his colleagues might allow dual-economy dynamism. This is the dual-economy idea of gradual opening to investment based on private property rights combined with collaborative sharing of land that traditionally has worked for village economies in appropriate contexts. A patchwork might allow both kinds of economic development to grow together thanks to flexible hybridity in institutions for land. Institutions that simultaneously strengthen village subsistence economies and market economies, as opposed to forcing a choice between traditional production and modernity, is a theme we return to in the next chapter. We do not argue for any particular direction for the evolution of the hybridity of Timor-Leste land law; there is no simple recipe. We argue here only that rejecting the imperatives of any law and economics recipe—any rule-of-law recipe that demands one law for all—is an option. Abandoning standard recipes and opting for democratic experimentalism in a patchwork land law might allow some patches of the law to succeed while the failure of others might foster adaptation (Dorf and Sabel 1998).

Institutionalising Further Checks and Balances in the Justice System

The United Nations established the Judicial Training Centre with an eye to resolving some of the capacity challenges at root in the long run. A Timorese NGO, the Judicial

System Monitoring Programme (JSMP), received international funding from 2001. It was an innovative check for an emerging justice system as an advocate for justice development. JSMP produced critical analyses on the courts and the justice system more widely, including traditional justice and the Commission for Reception, Truth and Reconciliation (CAVR). Its Women's Justice Unit was a leader in evaluating systemic effects of the Timorese justice system on women.

In 2005, the Office of the Provedor for Human Rights and Justice was established. This is a check and balance in the Portuguese tradition of governance (which has many elements in common with the office of the Ombudsman in the Northern European tradition). The Provedor is mandated to investigate complaints of human rights abuses, maladministration and corruption and to advance human rights and justice promotional activities and advocacy. Like other justice institutions, it has tended to be Dili centric, with 70 per cent of 2006 complaints coming from Dili residents (UNMIT 2007:8).

The Anti-Corruption Commission (CAC) opened its doors in 2010, with one of the authors as the first Commissioner. The Asia Foundation (2004:25) found that nine out of 10 Timorese are worried about corruption; 76 per cent are very concerned. In 2010, Transparency International ranked Timor-Leste at 127 out of 186 countries—much better than the ranking of 146 the previous year. There are, however, no hard data on corruption in Timor-Leste. Rumours about corruption and public perceptions of it suggest that something serious might be taking place. The CAC has robust powers in its founding law; however, in order to carry out its mission of preventive action and criminal investigations, it needs people with good skills in an institutional terrain that is new for Timor-Leste.

While Timorese tend to be critical of alleged corruption by high-level government people, they are less critical of petty corruption. Some say: 'We have suffered for many years. It is time for us to enjoy life. Why shouldn't we take some money from the public purse, even if it is corruption?' Others have the attitude that if the boss (*katuas* or *ferik* in Tetum) can dip into the public purse, why can't they? Another justification is that: 'Our salary is too low, we need a bit extra.' These excuses are coupled with other day-to-day expressions from those involved in both petty and grand corruption. These expressions include: 'Don't forget our beer money' (*Keta haluha ami nia serveza*), which a public officer might say to a businessperson bidding for a project. While the specific reference is to beer money, this can mean a cash bribe, giving building materials or a plane ticket to Bali. A businessperson bidding for a project might promise to public servants who have helped him that 'your efforts will not be forgotten' (*Hau la haluha o nian kolen*). More recently, there has been a trend to ask for 'phone money' (*osan pulsa*)—Tetum code ostensibly for money needed to buy the ubiquitous pre-paid mobile phone cards. While discussing the responsibility of public servants to tackle corruption, there can be a tendency in Timor-Leste to justify

any misconduct by saying that ‘we are still in the process of learning’ (*Ita sei iha prosesu aprendizagem*), so mistakes, including corruption, are to be expected. While Timor-Leste is a very new country with an abundance of problems facing it, it is regrettable that some public figures tend to abrogate their responsibilities with such justifications (Soares 2011).

Soares (2011) also notes that there are strong public expectations about the magic of criminal investigations, which are expected to send corruptors to prison. There is little understanding of the preventive side and of the possibilities for responsive regulation of corruption. There is some progress in the work of public prosecutors in trying corruption cases, with an appeal pending from Ruben Braz, the former Dili District Administrator, for a three-year corruption sentence, as we go to press. In general, few corruption cases have been brought to the court. The pros and cons surrounding the case against Vice-Prime Minister, Luis Guterres, remind us, however, that much effort has to be made in order to continue to improve the notion of the separation of powers. In May 2011, there was a huge political debate regarding corruption allegations against Vice-Prime Minister Guterres. Guterres was accused of abuse of power and illicit enrichment by employing his Mozambican wife to work as a political adviser at Timor-Leste’s mission in New York. The court decided to dismiss the case because the evidence presented by the public prosecutor was found to be insufficient. Prior to and during the trial, the Parliamentary Alliance Majority (AMP) party, the coalition led by Prime Minister Gusmão, attacked the Prosecutor-General, Ana Pessoa, a former MP and member of the opposition Fretilin party, alleging that the case against Guterres was political revenge. Guterres was a former Fretilin member who challenged Mari Alkatiri’s leadership at the 2006 Fretilin congress and formed and led a splinter Fretilin Reform (Fretilin Mudansa) faction. Once the court dismissed the case, Fretilin’s Parliamentary leader, Aniceto Guterres, alleged that the court’s ruling had been made under political pressure from the government (*Diario Nacional*, 10 May 2011).

It is interesting to note that AMP’s attack on the Prosecutor-General was based on the argument that the Prosecutor-General had politicised the institution. In attacking the Prosecutor-General, however, they were to some extent trespassing on the principle of separation of powers for which they were advocating. Allegations that the Office of the Prosecutor-General has been politicised might have been handled through proper channels, such as the Magistrate’s Council, and not through attacks by AMP MPs. The republican view is that efforts to combat corruption require robust institutionalisation of separations of powers and public engagement with that imperative.

In a village society, the most important checks and balances against abuse of power are institutionalised not within remote state institutions in the capital, but within the village. It is important to understand that state and non-state justice systems compete for legitimacy, and people who work within

each system care about that legitimacy. So we hypothesise that one reason Western legal systems prioritise fast-tracking of commercially significant cases over matters that involve human rights is that the efficiency, legitimacy and responsiveness to commerce of the courts are under growing competitive challenge from commercial arbitration and private mediation specialists, domestic and international. Timor-Leste is not a sufficiently important market for private arbitration and mediation for this pressure from non-state dispute resolution to be felt. We argue below, however, that Timor-Leste state criminal justice and land justice experience intense competition from non-state justice. Opinion survey research shows it has little legitimacy in the hearts and minds of the overwhelming majority of the population. An Asia Foundation survey of 1114 Timorese found:

Community leaders, rather than the police, are identified as being primarily responsible for maintaining law and order⁸...Although the formal courts are generally well regarded, they are not rated as positively as the *adat* process.⁹ The formal courts are perceived to be less accessible, less fair, less protective of rights, and less reflective of community values.¹⁰ Only a narrow majority (52 percent) would want a judge or official from the formal court system to come to their area to help settle cases. (Asia Foundation 2004:3, 6)¹¹

Ninety-four per cent of respondents were comfortable bringing a dispute to the *chefe d'aldeia* or the *chefe de suco*, and 93 per cent to the traditional *adat* process (in many cases, overlapping conflict-resolution options) (Asia Foundation

8 In answer to the question 'Who is responsible for law and order in your community?', 81 per cent gave as their first choice 'Community leaders/elders/*chefe de suco*', 14 per cent gave Timor-Leste Police, and no other category of response attracted more than 1 per cent (Asia Foundation 2004:39). A more recent non-national survey in Dili, Liquica and Lautem found that for 'serious crimes, such as robbery and kidnap', 93–98 per cent nominated the police as the actors to take the problem to, with only 60–80 per cent nominating 'community leaders' (multiple responses allowed) (Grenfell et al. 2009:22). There is variation between areas on this. In Nanu, 90 per cent of respondents agreed that the means exist within the community to resolve local conflicts (only 5 per cent disagreeing). Citizens there defined different roles for the *chefe d'aldeias*, *chefe de sucos*, *liurai*, *adat* leaders and *suco* council members, while '[f]igures such as police and administrators were discussed in a very secondary sense and only in instances where a conflict of some kind was beyond the means of the community to deal with it, especially for serious crimes such as murder' (Grenfell et al. 2009:109). In many other areas of Timor-Leste, people see a much more prominent role for the police than this Nanu leader: 'Rape is also like that, if the community traditional leaders, if the parties feel okay about resolving it through traditional leaders, okay, that's it. If not, one says this can't be done like this, then it has to be resolved through the police' (Grenfell et al. 2009:110).

9 For additional data to this effect, see Laakso (2007:219).

10 Another interesting reason ordinary Timorese give for preferring to take conflicts to *adat/lisan* rather than to the police is that 30 per cent said *adat* 'saves face and allows people to avoid embarrassment' (Asia Foundation 2004:66).

11 By the next Asia Foundation (2008) survey, however, confidence in the formal courts had increased significantly. Even so, the rule of local law remained more important in 2008 than the rule of national law: 'When asked the question, "Who is responsible for making the rules that govern people's lives?" respondents say the *aldeia* (21%) and *suco* chiefs (21%) are most responsible for making the rules that govern people's lives, followed by parliament (14%) and government (13%)' (Asia Foundation 2008:14). In 2004, when asked 'who is responsible for law and order in your community?', 81 per cent of respondents' first choice was 'Community leader, elders and *suco* chiefs', compared with 89 per cent who gave the same response in the 2008 survey (Asia Foundation 2008:16).

2004:49).¹² Another survey of administrative officials across the nation in 2003 found 86 per cent of officials considered local systems cheaper and more accessible than the courts, 84 per cent saw them as easier to understand than the courts, three-quarters saw local systems as faster, more efficient and placing greater emphasis on reconciliation between conflicting parties than the courts, and a majority saw local systems as fairer and less corrupt than the courts (Nixon 2006:93).

This can be a puzzle for UN justice workers and for the class of local urban professionals they train and pay. State and UN legal elites tend to believe they offer a more advanced and rights-respecting form of justice. Robert Ellickson (1991) has shown why this should not be a puzzle at all. He concludes that tightly integrated communities (of which many Timor-Leste villages are instances) mostly prefer their own norms to rules and procedures handed down by state law because their traditions have evolved to be collectively cost minimising and welfare maximising in their local context, while state law is invariant to context. Even in Western urban contexts, the criminal law industry fails to grapple with why it is that victims, offenders and communities all report that they feel their rights are more respected in cases randomly assigned to restorative justice conferences compared with court (Braithwaite 2002:Ch. 3). Restorative justice gives people a voice, compared with criminal courts where their grievances are appropriated by lawyers who are expert in state norms that are invariant to context. Because the criminal law so fervently believes its own propaganda, the institution mostly fails to apply the lessons of that evidence to make its own procedures more participatory, restorative and responsive to the rights concerns citizens actually have in specific contexts.

We argue in this chapter that conditions of transitional justice offer superior opportunities for such learning to ossified Western justice systems. Our interviews suggest that rural Timor-Leste men and women want more effective access to a responsive justice of the courts for certain purposes and prefer access to *nahe biti* (traditional justice) on the mat in their village for other purposes. So the challenge in our analysis becomes one of seeking responsively nuanced separations of powers between non-state and state justice—separations where state justice is a check on and balance to the abuse of rights in non-state justice, and vice versa.

For women in Timor-Leste recovering from a long history of widespread sexual violence in war, balanced potency of access to the justice of the police and courts and to indigenous justice is particularly important. On the one hand, women

12 These results are not very different from Indonesian surveys by the Asia Foundation, the World Bank and the UNDP, finding 86 per cent or more of respondents believing it is better to resolve disputes by *musyawarah* (deliberation and consensus building) than by going to any formal legal institution (Asia Foundation 2005:38; UNDP 2007; World Bank 2004:37).

want to be able to take serious crimes to the police because male traditional elders sometimes protect their relatives and political colleagues against rape accusations. On the other hand, for spiritual reasons that have real bite over the consciousness of men, women feel custom offers them the strongest sense of safety and freedom:

Here, well it's our *adat*, we have used *lulik*¹³ for everything so women can go anywhere, even young unmarried women are brave enough to walk on their own because our ancestors and fathers have put *lulik* on the people who we meet in the street. So if there is anyone who wants to do something bad to a woman then they won't because they are scared of the *lulik*. Even if we meet someone in the forest we won't be scared because our ancestors have used *lulik*. Even people going to Luro by themselves. (Prominent female leader Teresa de Jesus Fernandes, quoted in Grenfell et al. 2009:74)

There is complexity in the relationship between state and non-state law that can be managed only by the sensitivity of non-state justice actors to state justice imperatives and vice versa. In our interviews, we were told many stories of individuals being punished in village justice institutions for seeking and winning a justice outcome from the police or courts that village elders judged unjust. Grenfell et al. (2009:114) observed this in their research: 'if they report it to the police they're afraid because that doesn't use *adat* rules, but government rules. So then if you come back here the people won't accept the outcome.' Most village-level police and elders have the wisdom to consult with one another and with the parties on whether a particular case is best resolved in the first instance by state or by non-state justice. In this negotiation, leaders are sensitive to the way the backlogs in the state system can cause re-victimisation:

[G]oing to the courts disadvantages the victim. He has to look for a lawyer, and then every day he has to check on the case, and [is] waiting forever for the police to come and call him. But if it's a case like this then he's already a victim, [he has] already sustained a loss, so rather than burden him further, it's better to burden the perpetrator. (Golgota elder Elisia Araujo, quoted in Grenfell et al. 2009:117)

One reason it is best that this brokering is done at the local level rather than according to centralised rules under state bureaucracies is that while the latter are seen as captive of political forces in the capital, across different communities a maximum of one-third and as few as 10 per cent of citizens either disagree or strongly disagree with the statement that 'I feel that I can influence figures of authority who are relevant to my community' (Grenfell et al. 2009:Appendix

13 'Lulik is all that is sacred...*lisan* wisdoms and practices...not only sacred objects' (Father Jovito de Jesus Araujo, quoted in CAVR 2006:Part 9, p. 7).

1, question 10). In the practical separation of powers operational in Timor-Leste, the power of village elders enjoys most institutionalised accountability. Even where that power is hereditary, it is required to listen in ways that state bureaucratic power is still learning.

War Crimes

They [human rights activists] say we don't care about the victims? We care, [Xanana Gusmão] and I have lost relatives, friends and comrades over the years. We know the cost of war, the value of peace and necessity of reconciliation.

— President José Ramos-Horta, 2007 (quoted in Harrington 2007b:23)

UN Secretary-General, Kofi Annan, called a press conference on 10 September 1999 to announce that 'crimes against humanity' in East Timor would be punished. Twelve years on, very few of these crimes have been or are likely to be punished. The grand assurances of international leaders against impunity are rarely met. Since World War II, Rwanda and the former Yugoslavia have been the outlier cases of maximum international investment and commitment to war crimes trials, yet only tiny proportions of the suspected war criminals were tried. Even the prospect of a partial international tribunal modelled on Rwanda and Yugoslavia faded quickly in Timor 'as Western states rushed to normalize ties with Indonesia' (Power 2008:327). In this sense, realism kicked in to quell the momentum towards an international tribunal.

Still there was a need for symbolic measures so that something vaguely approaching the Secretary-General's initial announcement could appear to happen. The compromise was funding the hybrid Serious Crimes Panel of one Timorese and two international judges to focus only on the crimes of 1999. Ultimately, the Serious Crimes Unit of UNMISSET was funded with 47 international staff and a five-year time line for investigations until May 2005 before it was de-funded. This was enough staff (though hardly enough time) to support only a few complex murder investigations in the nations from which these investigators came.

War crimes trials are always complex because perpetrators have fled the jurisdiction, witnesses are killed or terrorised and also politically compromised in their testimony if they have been collaborators themselves (which is sometimes true of survivor witnesses)¹⁴ and people speaking different languages

¹⁴ 'We do not have witnesses. We wish we did' (Defence counsel, Los Palos Special Panel case, charging 10 with crimes against humanity [Combs 2007:39]).

are involved on all sides. Only 55 trials were conducted. In the circumstances of such limited time and funding, plea bargains allowed 84 convictions of mostly low-level Timorese militia members and the imposition of mostly lenient sentences. Some of the plea bargains and the trials produced procedurally unjust convictions (Cohen 2006a, 2006b; Combs 2007:114–26). Some had the view that those convicted were young men who were naive enough to return to East Timor—scapegoats used to allow the United Nations to say it had a record of convictions for crimes against humanity. More sophisticated criminals did not return.

Lenient sentences must be balanced against the usual situation with war crimes trials of long periods of detention without trial (up to three years) contemplating an uncertain future. Four-fifths of all suspects indicted under the serious crimes process never went to trial, including almost all the prominent indicted suspects for the most egregious crimes, such as Indonesian Defence Commander General Wiranto (Pascoe 2006). They were safe in an Indonesia that refused to extradite suspects who fled there. More than that, Sergio Vieira de Mello, Gusmão and Ramos-Horta agreed that many potential militia spoilers of the peace across the border in West Timor should be granted *de facto* immunity to return to their villages in East Timor. These deals were done by Gusmão (against opposition from Serious Crime Unit prosecutors) both in order to defuse them as spoilers and to normalise relationships with Indonesia (Gunn and Huang 2006:148).¹⁵ Kirsty Sword Gusmão, Xanana's wife, was also involved in sensitive negotiations to obtain the release of women and girls as young as fifteen believed to be held against their will by militia leaders in West Timor as 'war trophies' (Harris Rimmer 2007:327). Quite apart from cases of sexual slavery, there were militia members in West Timor who continued to rape refugee women—continuing the war for these women. The practical way to end it in some cases was to bring these young men back under the discipline of their elders and their church in East Timor, or by allowing women to return voluntarily to their homes by enticing back the militia leaders who were forcing them to stay in the West Timor refugee camps.

The geopolitical might of Indonesia loomed over all these realist decisions. Prime Minister Alkatiri supported war crimes trials, but Gusmão and Ramos-Horta

15 There was an informal agreement between the Prosecutor-General and the UNTAET Chief of Staff that arrest warrants for key militia leaders who cooperated with reconciliation would not be executed (King's College Report 2003:280). 'Let us not lose sight of the idea of reconciliation in all of this! When I asked the First Transitional Government to initiate the meetings along the border, one of the conditions I demanded was that those persons accused or suspected of having committed crimes in Timor could cross the border without being arrested, so that they could talk and could reconcile with the victims. This was the type of agreement we had with the First Transitional Government and we managed to obtain real results because of it' (Gusmão 2005b:114). Gusmão then went on to explain how this approach was reversed just before the end of the UNTAET mandate with an announcement that war crime suspects thenceforth crossing the border would be arrested.

did not want to rock the boat with Indonesia, prioritising reconciliation with their powerful neighbour. This was in line with some diplomatic advice from Australia and the United States, urging pro-Indonesian gestures upon Timorese political leaders to fast-track normalisation. Ironically, then, within the same year that the pro-Indonesia network sustained a great policy defeat in 1999, it was able to influence the direction of regional diplomacy, supported by Gusmão and Ramos-Horta.

Let us reverse the realist lens, however, in fairness to these two men. In 1999, they had great reason to fear a repeat of their Fretilin civil war victory of 1975, which was undone by armed infiltration across the West Timor border. This was not hypothetical. The armed spoilers were angry, trained and experienced fighters, and already operating minor hit-and-run missions across the border. These militia leaders had no future other than through listening to those Indonesian generals who assured them that the military would succeed in destabilising the new government in Jakarta. Militia leaders in West Timor refugee camps in 1999 were being told that the military would eventually restore order—including in Timor. In those refugee camps they had tens of thousands of fearful East Timorese from whom they could recruit, as well as West Timorese relatives and patriots, and they had weapons suppliers and a cross-border haven.

Everyone in 1999, not just the pro-Indonesia network, feared disintegration and the collapse of democracy in Indonesia. Habibie had mortally wounded himself with his East Timor policy, especially after the Americans humiliated him (and Wiranto), forcing him to accept what the Indonesian right saw as an invasion of Australian troops. Gusmão and Ramos-Horta cared about preserving Indonesia's fragile democracy;¹⁶ for a decade they had seen the clandestine network and the Indonesian democracy movement as fundamentally the same and they felt loyalty towards those struggling against an angry military to preserve Indonesia as a democracy. Moreover, they were concerned that a military coup in Indonesia would lead to a regime that would destabilise their own fragile state. Gusmão specifically feared Timor's nemesis, Suharto's son-in-law Prabowo, becoming a future president (Interview with Gusmão personal staff, September 2009). The most likely successor leadership in Jakarta was that of President Wahid who was a genuine peacemaker and who quickly visited Dili in a spirit of reconciliation and affection for the people of Timor-Leste. Remarkably, the people on the streets of Dili warmly reciprocated. For Gusmão and Ramos-Horta, reconciliation

16 Gusmão said: 'We must respect the courage of the Indonesians in accepting our independence and not disrupt their progress towards democratization by demanding formal [criminal] justice' (Pascoe 2006:Fn. 307). Ramos-Horta said: 'Why didn't the UN establish a tribunal here back in 1999...There is not much we can do to bring Indonesians to trial by ourselves. This isn't only pragmatism. I sincerely believe that Indonesia is making progress on democratic reforms and strengthening the rule of law...SBY [Susilo Bambang Yudhoyono]...can't challenge them [the military] in this way without risking that his opponents would gang up on him. It is important that we do not destabilize the slow process of democratization in Indonesia because it is our best guarantee' (quoted in Kingston 2006:283).

was in the air with the democratic forces in Indonesia, and they went with it, because they saw the alternative as militaristic and unfriendly to their long-term survival. Then there was the diplomatic pressure from their new powerful friends whom they were counting on to pour in most of the vast aid their razed nation needed. Diplomats from the United States and Australia, and from the European Union and Japan as well, urged realism upon their relationship with Indonesia, and were telling Jakarta that they were so urging Dili as part of their own projects of normalisation with a democratic Indonesia that they wished to preserve. Sergio Vieira de Mello offered the same counsel. This realist diplomatic pressure would have been hard for such a dependent polity to resist.

Then there were many Falintil comrades who had perpetrated war crimes and signalled to their leaders that they expected them to stand by them. It would not be easy to hold together veterans, who felt aggrieved enough by their oppressive cantonment, as a political faction that would support Gusmão and Ramos-Horta in future elections. Gusmão and his inner military circle were not innocent of killing their own. Ramos-Horta, too, was involved in the deadly factional politics of the long insurgency. As a leader who, like Alkatiri, was safe overseas from direct involvement in spilling Timorese blood, Ramos-Horta acknowledged that 'we all had blood on our hands'. It is unlikely that Gusmão and Ramos-Horta were concerned for themselves, although protecting some in their inner circle might have had some influence on their calculations.

Most fundamentally, Gusmão and Ramos-Horta were genuine in wanting to embrace the people of Indonesia in forgiveness. They brought their people with them in this regard; survey research indicates a high level of inter-group forgiveness in Timor-Leste compared with other post-conflict societies, with more than 80 per cent of people agreeing with forgiving enemies (Neto et al. 2007a, 2007b).¹⁷ From the time of Nelson Mandela's visit to Gusmão in prison during which the advice he gave was 'dialogue...dialogue...let's find a peaceful solution' (Gusmão interview, June 2011), Gusmão embraced Mandela's reconciliatory approach. Mandela's fear in South Africa was that a long line of prosecutions of whites would destabilise internal reunification and prosecutions of African National Congress (ANC) leaders could fracture his own base, and he

17 In a 2006 interview with one of Timor-Leste's top civil servants, he did not agree that Timorese forgive after killing. 'They forgive Indonesia and Australia. They are pragmatic in their dealings with Timorese who have killed their own but hold revenge in their hearts waiting for the right opportunity. Unless there is a deeply ritualized commitment to reconciliation [a traditional blood oath]. We deal with it as we move on. Don't forgive but take it easy. But when the time comes you can get revenge.' John B: 'And that time is now [2006]?' Civil servant: 'Yes' (Interview, August 2006). Another UN official said: 'Once lawlessness broke out [in 2006] they were settling all sorts of scores. When the adrenalin is out and there is impunity and no police on the street you take your chance to settle those old scores of which there are many and for which there is much latent revenge. That is why there was so much chaos and so many crosscutting issues on the streets. Maybe you attack someone or burn their house down because they had sex with your wife' (Interview, September 2009). But the official said it was mostly not about killing or defeating militarily another group. This was because it was more about revenge that did not need to go as far as killing. So the death toll was not high.

wanted to concentrate scarce development dollars on fighting black poverty,¹⁸ putting limits on how many of those dollars went to potentially thousands of long criminal trials.

Were Gusmão and Ramos-Horta Realists?

So, there was a mix of considerations, only some of them realist and international, that led Gusmão and Ramos-Horta to a reconciliatory approach to transitional justice. The desire to embrace and stabilise the forces of democratic transition in Indonesia was idealist—part of their anti-realist struggle over 24 years. The realist thinks that the strong prevail over the weak in international affairs, whereas the strong are characterised by military and economic might. With Indonesia in 1999–2001, realist strength still rested with the military and they were using it to destabilise the Habibie and Wahid governments. These two presidents were not strongmen; they were scholars who were passed the parcel of an economy that was suffering one of the worst recessions any nation has suffered in the past century (Krugman 2008). Neither president survived long, due largely to the chaos the military helped foment across their tottering regimes. Fortunately, Indonesian democracy did survive and grow. The Clinton Administration, the Australian Government, their pro-Indonesia network of realist diplomats, Gusmão and Ramos-Horta were arguably among the network of friends of democracy in Indonesia who offered significant support to helping it thrive.

It could be argued, then, that support for Indonesian democracy was a long-run project of a republican politics to support separations of powers within Indonesia and is distinguishable from realist international relations thinking. Our critique is of those who renounce republican ideals of government for the people by the people, of those who renounce struggle to support politics with separations of powers because the weight of mighty nations with mighty armies and mighty economies wants a renunciation of liberation—in other words,

18 So did Gusmão: ‘But in these meetings, people also talk about reconciliation and justice. And I used to ask about the militias and about what to do with them: “Justice should be done and they should go to prison because they deserve it” would always be the immediate response. But when they learn that, in prison, the state has to feed the prisoners three times a day [post conflict, Timorese were lucky to get two meals a day] and take care of their health, that the prisoners have time allotted for sports and to study, that they have clean water, electricity, mattresses, blankets and clothes and that, for this reason, the state has to cut spending for schools, for medications, for roads, and so forth, the population immediately reacts by saying: “Oh! No! This is unfair!” And they add: “Send them here. They can stay in their houses, but they will have to work for the community for so many days a week. We will not hurt them, but they will have to rebuild what they have destroyed”’ (Gusmão 2005b:122). ‘All the sacrifices will only be honoured when we reach an equitable level of development, based on a steadfast determination to eradicate poverty in our country. It will be meaningless if we have all the perpetrators in jail, but the people continue to face high infant mortality, endemic and epidemic diseases, without decent housing, without clean water and food. Without a change in the current poor standard of living, the grief of the past will not be healed’ (Gusmão 2005b:136).

renouncing republican values for the sake of a realist politics of the national interest, kowtowing to the forces of the mighty in international affairs. Instead, we suggest continuous struggle against the odds for republican values until the right moment when the weak can prevail against the strong. There is a paradox of the weak being able to harness the power of the strong to their republican project at that right moment—such as the US military and US diplomacy finally switching sides to support Ramos-Horta in 1999. Republican politics is about separating powers; it is also about the weak dividing the strong against itself.¹⁹ It is not about renouncing power politics. Republican politics harnesses powers in institutional architectures that check the abuse of power. It plays power politics in the pursuit of a balance of powers that secures freedom as non-domination. That means playing hard at the two-level game of domestic and international politics (Putnam 1988). On a republican analysis, Gusmão, Ramos-Horta and Alkatiri were astute contributors to seizing the moment of economic crisis in Indonesia by supporting rather effectively the democratic forces of domestic Indonesian politics against Suharto and the military. This helped divide the Indonesian polity against itself in the cause of democratic transformation in Indonesia.

They also struggled successfully over 24 long years to divide the Australian people against their political leadership. In 1999 Prime Minister Howard and the Labor Opposition made the smart decisions at their table of domestic politics to switch sides and act in support of domestic public opinion. That decisively divided the Western alliance as other middling powers and Kofi Annan began to sympathise with Howard. Then Bill Clinton, heeding also the counsel of leaders such as Edward Kennedy and Nancy Pelosi at his own domestic table, finally rejected the realist advice of his National Security Advisor. American military power was then made available for the protection of General Cosgrove's imperilled INTERFET troops.

Hence, our narrative is all about the weak pursuing a politics of divide and rule over the strong. It is not about idealist aloofness from power politics. So we cannot at this point in our analysis say that Ramos-Horta and Gusmão were suddenly wrong to consider Indonesian power in prioritising reconciliation over punishment of war criminals. They were harnessing and dividing and balancing Indonesian power all along in pursuit of republican objectives for both Indonesia and Timor-Leste. On this account, we would not view them as freedom fighters of early 1999 who were turncoat realists by late 1999.

19 The discussion of anti-monopoly enforcement rejoins this theme in Chapter 11. Divide-and-conquer tactics that allow the weak to enrol the strong to their projects in global politics are theorised more fully in Braithwaite and Drahos (2000).

In weighing the place of criminal trials in a democratic project of transition from war, it is always necessary for freedom fighters to weigh the considerations confronting Mandela in South Africa and Gusmão and Ramos-Horta in Timor. If Mandela insists on prosecuting the incumbent South African leadership, will they refuse to hand over the South African military to his control? If Gusmão insists on prosecuting this militia leader in West Timor, will he succumb to Gusmão's appeals to lead his men back to a peaceful life in their villages in East Timor, and to surrender their arms? What is the balance between spending money on criminal trials that might be divisive if they drag on for too long and on directing money to rebuilding and development work that will help construct peace and unity? In saying these are the right questions to ask, in concluding that Gusmão and Ramos-Horta pondered them in an ethically responsible way, we are not necessarily agreeing with the balance they struck. Indeed, our strong view is that there should have been more criminal trials than there were and in particular that key figures such as General Wiranto should have been tried.²⁰

Our conclusion is that it was a return to realism by the United States and other UN members to oppose an international criminal tribunal for Timor-Leste. Our conclusion about the position of Gusmão and Ramos-Horta is quite different. They were not freedom fighters turned realists. They were asking the balancing questions that republican freedom fighters must ask. But they did not get the balance right from a republican normative perspective of securing peace with freedom and justice.

The republican normative view is not that all those guilty of crimes against humanity must be punished. That never has happened after a war and never could happen. On a republican analysis, it is irresponsible for public figures to claim this is possible or wise or say this is what should happen. For this reason, we are critical of UN Secretary-General, Kofi Annan, at his press conference of 10 September 1999. It raised unrealistic expectations about punishment that could only deliver more pain to victims. The extent of criminal punishment, on a republican interpretation, should be decided in terms of what will maximise

20 One reason is the evidence that, statistically, credible prosecutions in combination with a truth commission on average seem to reduce human rights abuses, likely through a combination of deterrence and memorialisation (moral education) effects (Sikkink 2011). In Sikkink's (2011:184) study of 100 countries that underwent a transition from authoritarianism to democracy or from civil war to peace between 1980 and 2004, the prosecution effect was modest, with her repression scale 3.8 per cent lower in cases with the maximum possible prosecution score (20) in comparison with countries where the prosecution score was zero. Having a truth commission as well further increased the reduction in repression. Of course it is possible, statistically, that lower repression allows more prosecutions and a truth commission to take place, rather than the reverse. Another study, by Olsen et al. (2010a, 2010b), on a somewhat different data set failed to find a positive effect of transitional justice prosecutions and truth commissions alone in reducing human rights abuses cross-nationally. A combination of prosecutions, a truth commission and amnesties occurring together, however, did reduce human rights abuses. Olsen et al. interpret this as support for a 'justice balance' approach to transition, where credible trials and truth commissions can support accountability and amnesties can support stability.

freedom as non-domination (see Braithwaite and Pettit 1990). That leads to the very cautious diplomacy of modest but serious expectations for criminal trials that Ramos-Horta pursued. Our critique, however, is that the balance of criminal trials accomplished in the wash-up from that diplomacy was sorely insufficient with regard to the most serious perpetrators.

Timor did not build on the international criminal trial momentum of the 1990s, because Indonesia saw the risk that the weight of world opinion posed to them. It responded with a strategy of delayed impunity. The essence of that response was to: a) conduct an Indonesian Human Rights Commission inquiry from September 1999, allowing it to recommend prosecutions of many big fish (Hirst 2008:6); b) establish the Ad Hoc Human Rights Court on East Timor in response to the Human Rights Commission recommendations in March 2001 and lay charges against many higher-profile alleged perpetrators of crimes against humanity; c) prosecute, as time wore on, only 18 individuals of which only one conviction stood (of Timorese militia leader Eurico Guterres, whose sentence was halved on appeal) after appeals were finalised in May 2006 (Cohen 2003; Pascoe 2006:Fn. 189); d) announce in March 2005 and slowly establish the Commission of Truth and Friendship bilaterally with five Timor-Leste and five Indonesian commissioners that did expose some new truth and critical national self-reflection, but brooked no new prosecutions. This approach of the Indonesian leadership did something to keep international momentum for international criminal trials at bay while preventing their military from turning on them.

Ironies of the Commission of Truth and Friendship

There were, however, some ironies in how this impunity strategy unfolded. It was initially proposed by Timor-Leste, but driven by Indonesian civil servants who ran the secretariat. Like non-governmental observers generally, John Braithwaite was shocked at the weakness of the Timor-Leste Truth and Friendship Commissioners in failing to challenge Indonesian military commanders at the Jakarta hearings when they said, for example, that no Indonesian soldiers committed rape—in contradiction of previous evidence the commission had heard and of the overwhelming evidence in the CAVR report.²¹ Yet the final

21 Megan Hirst (2008:23) likewise concluded: 'The primary complaint [by human rights NGOs] has been that the hearings provided a platform for those accused of bearing responsibility for international crimes in Timor-Leste to defend themselves without being seriously challenged by available evidence contradicting their claims.' When John Braithwaite put the unchallenged denial of rape by Indonesian soldiers to the Timor-Leste Co-Chairman, Dionisio da Costa Babo-Soares, he knew exactly the testimony referred to in the question. He felt it was not necessary for the commission to chastise the general because they had the evidence. They

report surprised. It was in some ways responsive to the deluge of criticism its hearings had received from human rights NGOs, including Indonesian ones. It did push some doors open towards truth about the extent of the human rights abuses that had occurred and how these could not possibly be interpreted as the work of 'rogue elements'. It did speak some truths to the people of Indonesia and the people of Indonesia did listen to some of the most horrible truths about 1999 more openly than before.

The Commission of Truth and Friendship began a process of questioning the once 'near-universal perception within Indonesia that the 1999 violence was a result of a conflict between two opposing East Timorese factions, rather than a military-orchestrated terror campaign' (Nevins 2003:684). Most strikingly, the commission's terms of reference invited it to recommend amnesties (something the Timor-Leste Commission for Reception, Truth and Reconciliation was prohibited from doing) and it recommended none. When the terms of reference were released, its mandate to focus on institutional, not individual, responsibility seemed a disturbing retreat from the approach of previous truth and reconciliation commissions, such as South Africa's. Yet the Peacebuilding Compared project is revealing that quite often reconciliation comes more quickly than truth. And Timor-Leste might be one of those cases where reconciliation slowly nudges peoples towards truth. Even from Bougainville—the case where individual truth and reconciliation about war crimes have been greatest to date in the analyses of the project—we learnt that often an individual admission to murder or rape would start with a military unit as a collective admitting responsibility for the pillage of a village. The individual admission often came much later, after iterated collective negotiations and rituals of reconciliation gave them confidence that they could return the individual bones for which they were responsible without retaliation.

Our colleague Jodie O'Leary is completing a PhD on the idea of 'institutional responsibility' in truth and reconciliation processes, drawing on the history of the Commission of Truth and Friendship. Perhaps we were indeed too harsh and distrustful in our initial reaction to the commission. Adérito Soares was so distrustful that he declined an approach to serve as a Timor-Leste commissioner because there was no consultation at all with civil society groups in Timor-Leste (the Church, victims, and so on) on its establishment, and because he wanted first to discuss changes to certain terms of reference. In the event, the report

allowed people to save face in the public hearings. He said there were people who denied everything in the public hearings but in the private hearings told the truth of the situation, what their orders were, who had given them and how the carnage was implemented. That private testimony, he said, convinced the Indonesian commissioners that Indonesian crimes against humanity had occurred, and in turn allowed a report that held the Indonesian military and intelligence services institutionally accountable for them. In turn, he credited that with a huge campaign in Indonesia arguing that the two ex-military presidential candidates in the 2009 election who bore some responsibility for atrocities in Timor should not be elected President or Vice-President.

did promote diagnosis of the problems of the responsibility of institutions such as the Indonesian military and intelligence services.²² An army and intelligence mentality of a revolutionary people's army was one critical institutional factor identified:

Another underlying cause of violence arose from the conception of military institutions as based upon the legacy of the revolutionary army of freedom fighters. This legacy created distortions in upholding the principles of democratic rights. Above all, these distortions arose from the conception that the revolutionary army is the embodiment of the people. This conception tends to lead military institutions to believe that they have direct 'ownership' of the state and its national resources, including the people. This conviction of 'ownership' by the military puts them in the position of policymakers, and subordinates civilian authority in the realm of politics. This, in turn, produced very weak democratic control over military and intelligence institutions. (Commission of Truth and Friendship Indonesia–Timor-Leste 2008:302)

An important part of this institutional problem diagnosed in the commission's report was the long history of the use of paramilitaries as auxiliaries of Indonesian security agencies: the 'Total People's Defense and Security System', which was explicitly designed to extend the political reach of the military among the people. A related institutional failure was of the police to disarm civilians when they formed themselves as militias (p. 274), which was a manifestation of the deeper problem of the subservience of the police to the military in matters of domestic security. Among the reforms proposed was the development of 'a human rights training program focused specifically on the role of security forces and intelligence organizations in situations of political conflict' (p. 291), a transformation of security and intelligence doctrine to a professional, democratic ethos under a rule of law, and a special training emphasis on the rights of women and children to protection.

Another commission recommendation was visa-free 'peace zones' that already had a de-facto existence on the border between East and West Timor. The 'peace zones' should accommodate family reunions, cultural events, traditional markets, houses of worship and 'a meeting place for government officials, public and community figures' (p. 293). This was linked to training programs in 'conflict mediation approaches and other mechanisms to promote peaceful resolution of disputes' (p. 292), including establishment of a 'Documentation and Conflict

22 Not only did the report find that the intelligence services bore an institutional responsibility for the terrible events of 1999, it also identified specific intelligence officers as leading specific atrocities. For example: 'In the case of an attack and killing of people in Liquica Church compound on 6 April 1999, Emilio Barreto testified that Sergeant Tome Diogo from the Intelligence Unit of Kodim 1638/Liquica was involved in the attack. In addition the witness testified that it was Tome Diogo who gave the order to begin the attack' (Commission of Truth and Friendship Indonesia–Timor-Leste 2008:172).

Resolution Center’ in Dili and Jakarta on the grounds that ‘[h]ealing the wounds of the past and achieving true reconciliation will be the work of a generation’ (p. 302). The two governments were urged to develop ‘effective programs to equip government, religious and community leaders to identify, prevent and resolve emerging and active social and political conflicts’ (p. 296). These should embrace ‘traditional forms of resolving conflicts which employ local wisdom and traditions’ and ‘survivor healing programs’ (p. 296). It also proposed a joint ‘Commission for Disappeared Persons’ to identify the whereabouts of Timorese children separated from their families, dual citizenship for children born of mixed national heritage and joint promotion by the two governments of cooperative historical research to encourage an understanding of their shared history (Commission of Truth and Friendship Indonesia–Timor-Leste 2008:295). While implementation progress is very slow, there is reason for hope that the two governments might implement much or some of this.

The commission was the first time that two nations that had been at war came together in a bilateral truth commission—and this when, as Dionisio Babo-Soares noted, the ‘international judicial atmosphere provides little room for “undefeated” countries like Indonesia’ to cooperate with its citizens being tried by an international tribunal and to then survive politically (cited in Harrington 2007b:16). Susan Harris Rimmer (2008:58) has said to us that in a better future world, the international community would take the pressure off peacebuilding leaders like Gusmão and Ramos-Horta (vis-a-vis a powerful state like Indonesia) by asserting international authority to prosecute the worst crimes against humanity.²³ Harris Rimmer in her conversations with us also quoted Sergio Vieira de Mello as saying the United Nations has ‘the attention span of a three-year-old’, implying that it is difficult in any circumstance to get commitment and cash for long investigations and trials. Possibly its attention span has lengthened since his death. In retrospect, we might see the Commission of Truth and Friendship as a flawed journey of bilateral learning to have occurred in such a short space of years after the ending of hostilities. It added significant value. It is also possible that one day the people of an increasingly democratic and open Indonesia might even agree to an international tribunal for the crimes of 1975–99 (see also Walsh 2011). Not likely, but not impossible.

Years before Indonesia took the initiative of establishing the Commission of Truth and Friendship, Timor-Leste had established the Commission for Reception, Truth and Reconciliation (CAVR). In 2009, the CAVR report was published in Jakarta in bahasa Indonesia and attracted some publicity and truth telling in reporting by the now free Indonesian press. This became an additional reason

23 Harris Rimmer (2008:58) quotes President Gusmão from 2004: ‘I say don’t force East Timor to punish. Have an international tribunal. The international community should deal with punishment of crimes, not East Timor.’

for us to rethink our previous cynicism about the truth and justice journey between Timor-Leste and Indonesia and open our minds to what then President, Xanana Gusmão, said in a letter to the UN Secretary-General of 22 June 2005:

The Commission of Truth and Friendship is not a final phase of justice. Over time, as both [Timor-Leste and Indonesia] mature democratically, people's need for justice will be met. There is, after all, no statute of limitations for such crimes. As nations become more politically mature, past grievances and past wrongs can be righted. (Pascoe 2006:Fn. 331)²⁴

The Commission for Reception, Truth and Reconciliation (CAVR)

The CAVR was established by UNTAET Regulation No. 10 of 2001. The 'Reception' part of its title referred to the reception of refugees back from West Timor. After collecting statements from 7669 people, conducting more than 1000 interviews (Rae 2009:180), 217 hearings, six healing workshops for survivors of human rights violations who were deemed unusually vulnerable (Laakso 2007:173–4), extensive data collection, statistical analysis and other research, CAVR produced a beautifully written report of 3500 pages. It is one of the best documentations any nation could have of its recent history. The combination of politically plural Timorese commissioners who were independent of the executive government and dedicated international staff resulted in potent prose that held the United Nations institutionally accountable for its failures, as well as the Governments of the United States, Australia and Portugal, international corporations and of course many different types of actors within both Indonesia and Timor-Leste (CAVR 2006:Part 8). The appointed commissioners were a diverse group including leaders formerly affiliated with the pro-integration party Apodeti and with UDT.

UDT leaders showed wonderful leadership towards reconciliation in the televised CAVR hearings:

'[A]s Secretary-General of UDT, I ask forgiveness of widows and young children from our action'. [Then] Joao Carrascalão admitted his responsibility as a UDT leader. 'I am here to make reconciliation...In twenty-four years I have been so ashamed.' [Prime Minister] Alkatiri [later] said, 'I wanted to hear what Joao would say before I decided what

24 This conclusion is reinforced in the report of the Commission for Truth and Friendship Indonesia–Timor-Leste (2008:303): 'These conclusions do not represent the end of a process of closure and reconciliation, but rather a beginning.'

to say. He spoke truthfully. I congratulate him for his courage. 'UDT killed Fretilin and Fretilin killed UDT', Lu'olo said. 'As President [of Fretilin] I apologise and ask forgiveness.' (Scott 2005:362)

Daly and Sarkin (2007:64) quote remote villagers as saying that national leaders never before came to listen to them, but this happened for the first time with the CAVR process. In addition, because commissioners invited ordinary people to send messages that they thought should be heard by the whole nation and because hearings were broadcast on radio and television and much listened to, the invitation to tell and the commitment to listen and record each story 'transform(s) it from hidden shame to part of the permanent record of the founding of the new nation' (Daly and Sarkin 2007:64).

The Community Reconciliation Process, which we discuss in the next section, also gave voice to a large section of the Timor-Leste population. Most commentators see CAVR as a success in making its contribution to the peace, while seeing the total package of truth, justice and reconciliation as having failed badly because other institutions faltered in making their contributions. So, the Serious Crimes Panel failed to deliver criminal trials for the most culpable, Indonesian justice failed, international justice failed and the Commission of Truth and Friendship conducted insipid hearings in light of these failures. The CAVR report (2006:Part 11) recommended contributions to a reparations trust fund for victims, particularly from Indonesia, but also from members of the Security Council who bore some responsibility for the nation's misfortune, and weapons manufacturers who profited from it. Timor-Leste's political leadership, particularly Xanana Gusmão, but also José Ramos-Horta, rejected this out of hand. Instead of government-to-government approaches for compensation to victims, it was the Commission of Truth and Friendship that emerged from intergovernmental conversations.

Elizabeth Stanley (2009:110) summarises the final outcome as 'offering a participatory and recognition-based justice without a corresponding redistributive justice'. The Gusmão point of view, in contrast, is that payments to victims would be an obstacle to redistributive justice at three levels. First, demanding reparations from Indonesia or Australia would not be in the long-run interests of the security of the nation and therefore would jeopardise all Timor-Leste's justice gains, and would not achieve a result in any case. Second, such demands would not be the best way to sustain the commitment of donor nations to keep aid flowing to Timor-Leste. Third, victim reparation is not the most strategic anti-poverty investment to make with either foreign or domestic funds. Quite a lot of it would go to the elites who were targeted by the Indonesian military, such as Xanana Gusmão's own family. The latter need not have been the case had the government heeded the reparation fund priorities CAVR (2006:Part 11, p. 43) suggested in the conclusion to this part of its report: support for single

mothers and scholarships for their children, support for the disabled, widows and survivors of sexual violence and torture, support for severely affected communities (funded from collective applications) and memorialisation.

Both these perspectives have merit and only local politics can sort out the competing merits. In doing so, there are complex questions of detail. Should victims who fled to other countries as refugees receive payments? Should only violence that produces permanent injury attract payment? What about torture? Where does torture begin and police beating of a kind that frequently occurs throughout Indonesia end? Should families who lost children to starvation receive payment? Should destroyed houses attract payment? Destroyed businesses? Destroyed homes that also housed a business? Destroyed crops? Should a person who lost a limb while being coerced by militia to be present during an attack on a pro-independence village receive payment? Most importantly of all, how much in the way of reparations should be put aside for victims so traumatised or ashamed (including many female rape victims) that they will not be ready to share their story for years or decades?

Whether reparation is a good idea or not turns considerably on whether all of these questions of detail could be settled in ways that would not trigger diabolical new conflicts. There actually was an extremely limited program of reparations to victims who participated in the Community Reconciliation Program and were judged to have suffered serious trauma; US\$200 was paid to 712 people, of whom 196 were women. Considerable feelings of injustice were reported to us among people who felt they had suffered more than these 712, at the under-funding of women, even that some had lied to get the \$200 (see also Stanley 2009:125–6).

Almost all families in Timor-Leste suffered terribly from the occupation and conflict, are poor and would like to receive reparation payments. The peoples of wealthy nations such as Australia might have agreed to fund reparation as a symbol of culpability, recognition and vindication of the suffering of victims. That can still be associated with implementing the recommendation of the CAVR (2006:Part 11, p. 4, para. 1.6) that nations which supported Indonesia with military cooperation programs during its occupation of East Timor should apologise to the people of Timor-Leste for that failure to honour their international human rights obligations.

We would not, however, interpret Xanana Gusmão and José Ramos-Horta ruling reparations to victims out of hand as a failure to listen to the considerable demand among their people for reparations, of them being aloof from the very democratic impulses they struggled to bring about. On the contrary, the process of CAVR debating in public hearings, recommending reparations, political leaders disagreeing, their disagreement being understandably and robustly

criticised, but their being elected regardless—all this seems the essence of the kind of democratic debate of complex issues that the people of Timor-Leste fought for.

There is a third position, between one supporting the CAVR recommendations for reparations and one supporting the Gusmão–Ramos-Horta view that this is not in the interests of the people of Timor-Leste. This is to take the view that a grassroots institution such as the CAVR calling for reparation from culpable institutions, especially ones like armaments corporations who would never pay, and the political leadership insisting it was folly to pursue such claims, amounted to a good division of labour between the important business of symbolic politics and the important business of practical politics.

The Community Reconciliation Process (CRP)

Unlike so many of the internationally funded programs of the early 2000s, CAVR employees were 80 per cent local, and commissioners 100 per cent. Regional staff from each district ran the Community Reconciliation Process (CRP) in their district. While we will see that the CRP was a perpetrator-centred process that could have done much more to give voice to female victims (Harris Rimmer 2008), at least in requiring by regulation that 30 per cent of the regional commissioners who chaired the hearings were women (CAVR 2006:Part 9, p. 43), front-stage empowerment of women was higher than among officers of the formal justice system. There were even some cases where all the members of panels (usually with three to five members) were women (CRP interviews, September 2009). Regional commissioners negotiated with local elders the appropriate way of ritualising *nahe biti bo'ot* ('stretching the big mat' on which deponents²⁵/perpetrators, victims and elders would sit) for that locality (Scheeringa 2007). *Adat (lisan)* leaders had a reduced role from their traditional role of judge and jury, deferring to the mediation role of a panel of prominent community members and a chair from the CAVR staff from that district (Larke 2009:658), but it was nevertheless an important role. Pre-negotiations before the ceremony often lasted three months. Usually the ceremony itself ran for one day, during which more than one deponent would be heard. There was usually chewing of betel-nut, drinking of wine or blood or both mixed together, cooling conflict by sprinkling coconut water, sacrifice of animals and reintegrative feasting (Babo-Soares 2004; Stanley 2009:114). A storyteller and interpreter of traditional law (*lian nain*) would mediate between victims and perpetrators in pursuit of an

25 The use of the term 'deponents' rather than perpetrators was intended to communicate that it would often be the case that people who burnt houses did so under fear of violence from the Indonesian military, so it would be possible for all present at the CRP—deponents, victims, community members—to share an identity as survivors of the occupation (Larke 2009:660).

agreement and restoration of balance between the spiritual and the secular worlds that had been disturbed by the wrongdoing. There was great variation from place to place in how large the spiritual balancing issues loomed. Figure 10.1 reports the typical seating arrangements for CRP hearings because it is a distinctive Timorese contribution to the spatial separation of powers over transitional justice. This was complemented at the opening of the hearing with space for a reconciliatory prayer by a local Catholic priest in the local language. This also represents the genius of the CRP in mobilising a ritually serious engagement of truth and reconciliation by drawing upon the legitimacy of state justice (through reading a letter from the Prosecutor-General authorising the hearing), of *lisan* through ritual calling upon ancestors to join the proceeding and enforce its conclusions (CAVR 2006:Part 9, p. 24) and of the legitimacy of the Church through the priest’s prayer.

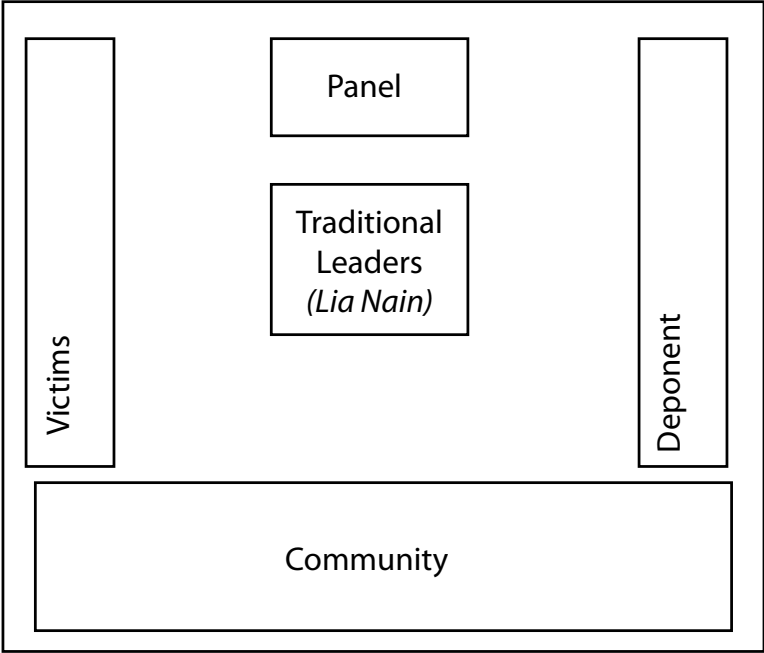


Figure 10.1: Typical seating arrangement in a CRP hearing

Source: CAVR (2006:Part 9, p. 17)

Where agreement on a peaceful way forward was not reached, cases would be referred to the police. Where it was reached, the Community Reconciliation Agreement would be read out and signed by panel members and by deponents, who would apologise to the community. Once perpetrators of crimes had been welcomed back into the community at the end of the process, they could no

longer be prosecuted for those crimes. Many of the matters dealt with were not crimes, but the kind of degrading speech that occurs during violent conflict that is crucial to heal, but quite beyond the competence of a criminal court:

In one of the CAVR reconciliation meetings, the mother-in-law of a former militia member came to reconcile with her son-in-law. In the past, this militia member had deeply offended his mother-in-law by cursing her in public, which was severely aggravated by the fact he used the name of her sexual organs. The mother-in-law said she was willing to reconcile, but she expressed the following: after this meeting, I will go home naked. By stating that she would go home naked, the woman expressed that the offender had undressed her publicly. The community leader present at the meeting had a firm knowledge of customary law and immediately knew the right solution. The son-in-law had to dress her again by providing her with a traditional weaving (*tais*). The offender provided the *tais* and his mother-in-law stated that she accepted him again. (Scheeringa 2007:138)

In Timorese traditional law, cases like this one are extremely serious because a tight connection is drawn between violent speech and violent acts: violent speech is read as part of violence and a precursor to physical assault. Fox's (2007) research among the Roti of West Timor found that resort to physical violence was ridiculed as evidence of a lack of speaking ability.

Most CRP cases would commence with the Chair of the local Community Reconciliation Process Panel explaining the process, followed by remarks by village leaders. Unlike Timorese courts and the Indonesian courts before them, here, the entire proceedings were conducted in the local language. The opening remarks (in common with the closing agreement) would usually include a renunciation of the use of violence to achieve political ends. Then the perpetrator/deponent would read a statement he or she had voluntarily prepared in advance with assistance from CRP staff. Questions were then asked, including from victims, who were also invited to make statements of the impact of crimes on them. Reparations and other measures would then be agreed and registered with the Dili District Court (Zifcak 2005:52–3). In a majority of cases, apology was not accompanied by reparation or community work in the agreement (Combs 2007:221). The final stage of the process usually involved some kind of ritual of readmission of the wrongdoer to the community.



Figure 10.2a: Community Reconciliation poster



Figure 10.2b: Community Reconciliation poster

Photos: CAVR

Only 20 per cent of those indicted by the Serious Crimes Panel process went through to a trial (and these were overwhelmingly less serious criminals than the 80 per cent not indicted). In contrast, 90 per cent of deponents who requested that they be called to account under the Community Reconciliation Process—1371 individuals—saw the ordeal through to completed community reconciliation hearings (Scheeringa 2007:138). The incomplete cases were adjourned and then dropped, or were cases where the deponent did not attend. If the CRP was a less punitive justice than that of the Serious Crimes Panel cases, it at least consistently delivered the kind of justice it provided once a case was under way.

Yet it would be a mistake to conclude that the widest impunity gap was where serious crime process indictments were not realised as trials. Numerically, the much more gaping impunity was with alleged serious crimes that were not indicted. In theory, district courts were responsible for serious past crimes that were not crimes against humanity, but in practice they mostly just sat among a backlog that district courts never returned to. Some crimes against humanity were not indicted because they were missed at that time, sufficient evidence had not been accumulated by that time, the perpetrators were informally promised impunity if they returned to East Timor and surrendered their weapons, or the Serious Crimes Unit did not target them as one of their highest priority cases for which they could find the resources to prosecute. There were also many serious crime defendants who were presented to the CRP as potential deponents and rejected there because they were above the seriousness threshold of the crimes the CRP was allowed to deal with. Putting it crudely, the big impunity gap was with cases that were too serious for the CRP and not serious enough given the limited resources of the serious crimes process.

There was also a problem, in the words of Zifcak (2005:53), of the CRP becoming a 'victim of its own success' after 30 000 people had attended its hearings (others say 40 000). His rough estimate is that there were another 3000 deponents interested in coming forward to make admissions and seek reconciliation after the CRP shut down. There were also cases where the CRP visited local towns but not more remote villages where people were waiting and expecting them to come (Stanley 2009:16).

Zifcak's (2005:54) evaluation concluded that reintegration of perpetrators was based more on their level of contrition than on how much truth they spoke, that not much truth was revealed in many CRPs, and in some cases specific victim concerns were not addressed or wounds were reopened (see also Kent 2005:63–4).²⁶ There was minimal trauma counselling follow-through for victims

26 People whom we interviewed also expressed concern that in the CRP, burning down a house and the entire possessions of a family was sometimes not viewed as a serious matter. Zifcak (2003:11) writes: 'In a

(CRP interview, September 2009). On the other hand, Larke (2009:660) pointed out that, backstage, most CRP deponents provided to the Serious Crimes Unit ‘details of the individuals and structures that had coordinated and commanded their actions’. Deponents and victims shared a deep sense of injustice that the masterminds of the violence enjoyed impunity in Indonesia. More work went into preparing deponents for the CRP than preparing victims. Female victims were particularly neglected (Kent 2004). Unlike most restorative justice processes, in the CRP, victims were frequently not afforded an opportunity for personal testimony; it was a process centred on deponent reintegration, with the victim role only reactive to the deponent statement (Larke 2009:665).

Victims had no right to object to a deponent being declared reconciled and therefore immune from prosecution. Victims suffering trauma getting little access to professional support was perhaps one reason so many victims, especially female victims, decided against participation (Stanley 2009:116–18). Cases of murder—even participation in the mass murder of 74 people or more (Robinson 2003:234–6), as recorded in the documentary film *Passabe* (Leong and Lee 2004)—were (illegally) reconciled by CRP hearings, and in some of these cases there was dissatisfaction at the leniency of outcomes: ‘I saw a case in which people had had their mother killed and it was reconciled by giving a goat. That is not the right process’ (quoted in Stanley 2009:121).

Some people complained that CRP staff protected militia relatives from being called to account (Stanley 2009:119). There were also cases where CRP staff oversimplified conflicts as caused by Indonesia when the independence conflict had in fact been used as an opportunity to settle older inter-village scores (Stanley 2009:124).

Closing the Impunity Gap

The basic design idea of taking an impossible weight of cases off the serious crimes process by establishing the CRP was prudent. But the impunity gap could have been further closed by: a) allowing the serious crimes process at least a modicum of extra time and resources;²⁷ b) leaving more discretion to the CRP to confront serious cases that the courts did not have the resources or time to

hearing I observed, for example, one perpetrator accepted responsibility for burning down 19 houses in tandem with militia colleagues. This was a lot. Yet, the final agreement was that the matter should be resolved by the issue of a public apology alone.’ Victim dissatisfaction, particularly with failure to locate missing persons, was also a big issue with the serious crimes process (Reiger and Wierda 2006:32).

27 Implementing CAVR (2006:Ch. 7, p. 24) recommendation 7.1.1 is something the international community really should have seen itself having an obligation to fund: ‘7.1.1 The Serious Crimes Unit and Special Panels in Timor-Leste have their respective mandates renewed by the United Nations and their resources increased in order to be able to continue and try cases from throughout the period 1975–1999.’

process; c) keeping the doors of the CRP open indefinitely via a low-cost model of continuing state–police support for post-conflict indigenous justice;²⁸ and d) UN-endorsed smart sanctions such as visa refusals and freezing bank accounts of culpable leaders of the Indonesian military and state from the 1974–99 period.²⁹ In other words, the impunity gap could have been closed at a few of its widest points without a hugely costly succession of thousands of criminal trials and a large prison construction program. Bread-and-butter case management investments for the District Courts discussed earlier would also have helped.

The impunity gap was mostly a result of good rule-of-law intentions. Consider sexual violence: CAVR documented 853 cases—a number generally agreed to be a huge undercount because of victims who suffered secretly and then just disappeared, and because so many survivors were not emotionally ready to reveal their story by the time the CAVR finished taking statements. The CRP provided no justice for any of these 853 identified victims because the intent was that such cases would go before the Serious Crimes Panel. The tragedy was that in the upshot Larke (2009:670) found that only five cases that included charges of sexual violence had been tried. Harris Rimmer (2008:154) concluded there were only three that were decided under the serious crimes process³⁰—one of them a case where the judges found that they had no jurisdiction over an abduction to West Timor and rape alleged to have occurred in West Timor. That case in effect institutionalised impunity for cross-border abduction and rape. The second case was a conviction for aiding and abetting a rape for which the alleged principal perpetrators were hiding in Indonesia, and the third a four-year jail sentence for a militia commander convicted of rape.

Political leaders stepping back from interfering in the judicial branch would also have helped build some confidence in Timor-Leste's flawed transitional justice. In August 2009, a former militiaman, Maternus Bere, was arrested on an outstanding warrant for crimes against humanity after he crossed from West to East Timor. He had been indicted years earlier for his alleged role in the Suai Church massacre of at least 40 unarmed people including children and priests in 1999 (Robinson 2003:225–8). Militia responsible for the massacre raped considerable numbers of women in the vicinity afterwards (Wandita 2007:1–12). One of Bere's associates was alleged to have abducted and forced into sexual slavery in West Timor a girl known in Timor-Leste as Alola. Bere was alleged to be complicit in Alola's abduction (Daley 2009:29). Kirsty Sword Gusmão established the Alola Foundation for the support of women and children in 2001 in the girl's memory. On 10 September in a nationally televised address,

28 The CAVR report (2006:Part II, p. 30, paras 8.1–8.2) recommended more or less to this effect.

29 See CAVR (2006:Section 11:4, para. 1.9).

30 We presume the other two cases referred to by Larke (2009) were run by line prosecutors in the district courts after the serious crimes process shut its doors.

Prime Minister, Xanana Gusmão, announced Bere was released from custody and handed to the custody of the Indonesian Embassy without judicial sanction of his order to lift the indictment. This was an abuse of the separation of powers, transacted in a shocking way, for which the Prime Minister openly accepted personal responsibility. We return to lessons from this case in the final chapter.



Figure 10.3: Refugees seeking safety in a Suai church to avoid attacks before the Suai massacre. Many of these refugees perished

Photo: John Stanmeyer/VII/Corbis

Another worrying aspect of this history is that it has left open to people the interpretation that the only justice that worked was mob justice. We interviewed one INTERFET peacekeeper still suffering in 2009 from post-traumatic stress disorder. He had the job of picking up a militia member arrested for his alleged involvement in the Suai massacre to take him to Dili where he would be tried. A crowd stepped in front of his truck as he was leaving Suai and demanded that he hand over the man. The soldier was concerned for the safety of the people if he tried to get away by driving through the crowd. He was concerned for the safety of a private who was with him if he simply refused to use his keys to hand the man over. So he agreed to do so if the crowd cleared a path for his

truck, created a circle where everyone stood back from the man, and agreed that nothing should be done to him until the truck departed. When the peacekeeper took the handcuffs off the man and pulled him out of the back of the truck he was screaming and clinging onto the seat to stay in the truck. He told the man to kneel in the centre of the circle as the crowd moved back from him as agreed. The elder with whom he negotiated this arrangement kissed the peacekeeper's hand as a sign of respect. As the peacekeeper safely drove away, he saw in the rear-vision mirror the crowd surge in on the man accused of the atrocity. The peacekeeper felt the man deserved what happened to him as he had admitted to his participation in the Suai massacre. In Dili, the peacekeeper truthfully told a military police superior what he had done and offered to take full responsibility for it after initially saying the suspect must be coming on a later vehicle. The officer said that as far as he was concerned 'nothing had happened'.

A number of simple things could have been done to ameliorate the problem that 'those who did submit to the CRP felt resentful because perpetrators of more serious crimes remained outside the scope of either process' (Reiger and Wierda 2006:35).

Zifcak (2005:54) speaks for most of the qualitative researchers of transitional justice in Timor-Leste when he concludes: 'Most people I interviewed regarded the CRP as a qualified but significant success. At the same time, most regarded the continuing de facto immunity of serious and middle-level perpetrators from any criminal or civil prosecution as an unqualified failure.'

The UNDP (2004:11) evaluation of the CRP concluded that it had helped reduce tensions in many communities and that victims and deponents mostly reported high levels of satisfaction with the justice and reconciliation obtained, as did CAVR's (2006:Part 9, pp. 33–40) own two evaluations based on 40 and 116 interviews with participants. The CRP was probably also useful in preventing violence against individuals returning from West Timor by communities suspicious of what they had and had not done (Kent 2005:62). Some who were herded across the border during the chaos of 1999 were afraid to return for fear of guilt by association with the militia who herded them. 'Reception' of militia leaders of such herding was one of a variety of contexts where, in practice, for the safety of communities, the CRP dealt with more serious crimes than were allowed under its guidelines (Combs 2007:222).

Deponents interviewed by Lia Kent (2005) had been worried about people 'speaking behind their backs' and reported feeling 'freer' or 'lighter' after clearing the air and felt their children would be more accepted. The CRP was also successful in restoring the authority of community leaders over violent young men—a ritual that signified that 'the base of power lay once again in the community and with its leaders' (Larke 2009:667). This is one of the neglected

ways in which we would regard the CRP as a considerable, if qualified, contribution of the Timor-Leste peace process to international thinking about how to graft hybridity into a transitional separation of powers (Brown and Gusmão 2009). The CRP created a distinctive new separated power in civil society that actually reinforced the power of *lisan* (the authority of traditional elders) and also reinforced the power of the state justice system. Through our lens of evaluating the Timor-Leste peace in republican terms, we see the CRP as an innovation that mattered because it enriched separations of powers in both state and society.

Without stepping back from the need for more trials for crimes against humanity, the modest cost of the CRP shows that it might not be impossible—if a program of this kind were extended to very serious crimes, over a period of many years—to deny impunity to most war crimes, large and small. Nancy Combs (2007) discusses this as the option for large numbers of restorative guilty pleas and reparation agreements combined with an opportunity for victims to have a say on what should happen in particular cases. People might be more satisfied with this justice than most criminal lawyers would predict. Or at least they might if the United Nations and other political leaders desisted from pronouncements that all crimes against humanity should be prosecuted, when the United Nations and its members never go even slightly close to providing the justice budgets required to realise such an objective³¹—and when the Security Council is always opposed to the very long transitional justice windows required to lend integrity to such a policy.

Addressing the Timor-Leste Parliament when the CAVR report finally was presented, President Gusmão, consistent with his positions outlined above, strongly opposed the recommendation that reparations be sought from other nations complicit in the crimes of the Indonesian military. And he excoriated the recommendation to re-establish the Special Panel for Serious Crimes to further pursue those alleged major criminals who had escaped justice. The great surprise, however, was that he opposed making the report public. Fortunately, he did not have the power to withhold it. It was a sad moment to witness such a great democrat advocating a course so distrustful of open debate with the people of so many of the people's truths in the report.

31 A problem is that the UN system encourages loose rhetoric on the role of punishment in regulation of undesirable things, such as the report of the Commission of Experts (2005:125) on human rights in Timor-Leste: 'No violation of human rights, no invasion of human dignity and no infliction of pain and suffering on fellow human beings should be allowed to go unpunished.' Lying to loved ones inflicts great pain quite frequently. Should it always be punished?

The Place of Non-State Justice

There is a tendency for some of the literature to interpret post-conflict justice and reconciliation as occurring through either the CRP or criminal trials. Grassroots reconciliation that had no or limited connection to the CAVR, the state or the United Nations was widespread. For example, from 2000 through to the present, returning refugees from West Timor have been greeted at the border by the receiving community, where a grassroots ceremonial handover occurs. In this ceremony, refugees

are expected to face their own communities and confess their offences... An elected representative of the refugees or an elder makes a confession on behalf of the group. After receiving that confession, the community members present can address complaints to particular individuals, and a discussion typically ensues. Upon arriving home, refugees participate in a welcoming ceremony, which also features confessions and apologies. The ceremony will culminate in an exchange of betel nut or an 'oath of blood', in which both sides drink each other's blood. (Combs 2007:219, drawing heavily on the work of Babo-Soares 2004)

Breach of these oaths (*juramento*) may result in 'punitive acts by the ancestors, such as loss of crops or the death of a family member' (Graydon 2005:34; Hohe 2003; Hohe and Nixon 2003). In a society like Timor-Leste where the promises of state punitive enforcement of the law are rarely delivered, the promise of punishment from above when oaths to renounce violence are breached is probably of considerable value in violence prevention. People certainly believe it is. Dionisio Babo-Soares concludes that with family and wider community mediation of post-conflict reintegration and reconciliation, 'welcoming ceremonies were held in a way that allowed the representative of the refugees to address the public, usually in a public square, confessing their actions and offering apologies and their acceptance of being brought before the court should they be found guilty' (Babo-Soares 2004:20).

So, in a sense this non-state justice was couched to reinforce the limited enforcement power of state justice while calling on both the clout of the ancestors and the informal power of the disapproval of friends and family listening in the public square should undertakings be breached. '[P]ressure normally takes the form of shaming and acquiring a disgraced name in case of non-compliance' (Trindade and Castro 2007:25).

Elders are sometimes called upon by civil society groups to support contestation of their authority from state justice because that contestation is part of the meaning of the Democratic Republic of Timor-Leste they struggled for. Police and courts in turn are sometimes urged to support *lisan* or *adat* justice

because that represents part of the survival of a Maubere identity they resisted Indonesian oppression in order to salvage. Jennifer Laakso (2007:238) makes the importance of traditional justice to identity clear by quoting a number of *chefe de sucos* and *chefe d'aldeias*:

If the traditional model is lost, it means the culture is lost, and where do the people of Timor-Leste go? Then we will have no identity to show to the world. Timor is strong now because of this identity that it has. (Maliana *chefe*)

If we lose our traditional model everyone in society will have no morals or culture and will not be living like civilized people anymore. (Suai *chefe*)

It should not be lost. Resolving problems through *adat* is part of our culture, and if we lose this, it means we will lose our culture. Loss of culture for us is like another war. (Suai *chefe*)

Case-management and justice system administration failings combined with a long history of rural distrust of state justice caused most people to persist with customary justice in their search for a venue that would give them an authoritative result in resolving their disputes. McWilliam (2007a, 2007b) describes Timorese village dispute resolution as providing a form of 'restorative custom' that delivers more widespread satisfaction than the courts. In the earlier part of this chapter, we saw the overwhelming evidence that most citizens and even most state administrative officials for most purposes prefer non-state justice in the village to state justice in the courts. Indonesian occupation strengthened *lisan* justice as the only viable alternative to the justice of the Indonesian state (Hohe and Nixon 2003). While international legal advisers and educated urban elites alike agreed that a modern state legal system was what mattered, and agreed that customary non-state justice was something to be sceptical about, an eternity of delay and backlogs of state justice vindicated non-state justice as the kind most citizens preferred during the first 12 years of Timor-Leste's transition.

Non-state justice can be better equipped to deal with contextually specific lived injustice that sits beneath violence. For example, Fataluku society in Lautem is caste based, and 'there was a tendency for militia members to be from the *akanu* (slave) caste' (Kammen 2003:82). *Alcolhimento* (reception–welcome–reintegration) of such militia back to the new Democratic Republic of Timor-Leste required empathy for that caste injustice. The traditional justice of reception came under pressure to graft onto itself the sensibility of the liberation of the new Timor-Leste as a society in which no-one would be welcomed as a slave. Across Timor-Leste in various ways state law proved less capable of grafting into its legal culture a capability of responding to such complex local social injustices. We

have already seen in the discussion of the CRP that it was *lisan* that was able to reframe both the killer and the killed, the arsonist and the homeless, as victims of an unjust war and an oppressive military occupation.

On the other hand, on the crucial legal issues of rape and domestic violence, state policing, UN–NGO–state human rights and feminist advocacy, and even to some degree the backlogged courts have been a check on and balance to oppressive traditions in *lisan* for accommodating gendered violence, such as requiring marriage to their rapist for unmarried victims (Hohe 2003). While most men and women might continue to prefer the justice of *lisan* to the justice of the courts for gendered violence, police and human rights advocates have succeeded in persuading them that victims have a right to state justice and that the norms of state justice with respect to rape and domestic violence can always trump *lisan*. Therefore elders today must be more responsive to demands from victims, to feminist and rights sensibilities within their village, when young women resist forced marriage to the very man who oppressed them, when men insist that they have a right to beat their wife and children. Carolyn Graydon (2005:37) reached the preliminary conclusion from her field research that

local justice leaders are surprisingly open to engagement in debate and training around human rights issues in the local justice domain. They crave the opportunity to talk to each other and to engage with the government on how they can best fulfill their roles. Early indications are that many view positively suggestions that local justice mechanisms could over time be reformed to mitigate human rights concerns. There was also support for an approach of identifying human rights values already entrenched in East Timorese culture as the basis for running education campaigns concerning sensitive human rights issues such as domestic violence.

We return to this theme in Chapter 12 when we discuss Sally Engle Merry's (2006) work on the 'vernacularisation' of rights consciousness. In a sense, we see a state of play where *lisan* is a check on the inability of state law to grapple with contextual injustices in a local language in which citizens can understand the proceedings, and state justice is a check on the failure of traditional justice to guarantee the rights of women, the right of investors to secure leases to land on which they build their business, and certain other rights of modernity. This is quite a progressive aspect of transition from a republican point of view. It might be read as reflecting the tensions consciously drafted into the law by the Constituent Assembly. Article 31 of the Constitution entrenched a primacy of state criminal law, though Article 2.4 required the state to 'recognise and value norms and customs of East Timor and any legislation dealing specifically with customary law'. This constitutional compromise can be read as a continuation of the primacy of state law that had been applied by the United Nations. In

entrenching this primacy of state law, the East Timor Constituent Assembly, which drafted the Constitution, can be seen as acting in opposition to the views that were 'expressed in a grassroots consultation process on the content of the Constitution, indicating that communities wanted local systems of justice to acquire substantive formal recognition and usage' (Graydon 2005:68).

Yet the reality of constitutional interpretation on the ground has become one where *lisan* normally prevails, but where state justice trumps it when someone succeeds in making an issue of the injustice of a decision emanating from *lisan*. *Lisan* has the power of default justice; state rights law has the power of reform justice. Grappling with the non-justice realities of backlogs, international judges (JSMP 2005a) as well as local judges were soon interpreting this tension in the Constitution to decide that serious cases did not need to be tried under state law when non-state justice in the village had deliberated the case and the parties had agreed on compensation and other remedies. Yet it is inconceivable that a rape victim who was being forced to marry her rapist would not have this struck down in favour of punishment of the rapist if she could manage to have her case heard in a district court. Because elders know this, they serve their authority poorly if they refuse to back down when a young woman says she will take her rape case to court should they insist on her marrying the man. Local police commanders can be quick to assure elders that the case will be taken away from their jurisdiction unless there is accommodation of such victim demands.

This is the sense in which feminist and human rights networks—partly through their own direct agency, partly through the agency of the police—have become significant checks on and balances to rights abuse in traditional justice. The hybridity we describe might be the beginnings of a productive separation of powers between traditional justice, state justice and human rights advocacy from civil society and international society. It happened in spite of the failure of UNTAET to 'appreciate the resilience of local structures' (Hohe 2003:35) and take non-state justice seriously through any conscious policy settings to reconcile state and non-state justice.³² The weak link of this separation of powers is that in practice it is difficult for a woman to push her way through court backlogs to get a rape trial or a domestic violence trial into the District Court.³³ The reform priorities by our republican lights are to improve practical access of rape and domestic justice survivors to the justice of the courts and to continue to ratchet

32 See Grenfell (2006), Laakso (2007) and Nixon (2006) on why this path is still open. 'The central argument of this thesis is that during times of political transition, a hybrid legal system, which combines local and introduced justice systems; utilizes indigenous language; and is sensitive to cultural tradition and context is more likely to promote sustainable peace than imported systems...If local justice mechanisms continue to be ignored, and artificial and non-organic justice mechanisms remain the sole focus in the future, it could adversely impact communities across Timor-Leste by increasing division and atomization, and potentially lead to serious conflict' (Laakso 2007:242, 246).

33 Laura Grenfell (2006:312) reports Judicial System Monitoring Programme tracking of 148 domestic violence cases in the Dili District Court in which 104 of the complaints were withdrawn, with lengthy delays mentioned as an important reason.

up the pressure on police and traditional elders through relentless human rights education so that when the inevitability of *lisan* justice as default justice kicks in, it does so in a fashion that is increasingly respectful of rights. By relentless, we mean human rights education that never accepts that the job is complete, but that persists from decade to decade, generation to generation, rejecting the folly that programs that last only a few years can secure transformation.

De-legitimizing *lisan* justice is not the priority on this analysis. To the extent that non-state justice shuts down, the state justice backlog will become more intractable and injustice will spiral downwards. Contestation between state and non-state justice where the access to justice that each provides is improved by the contest seems the more productive path of continuous improvement in rights to non-domination.³⁴ The flaws of Timor-Leste's justice system are very visible, regularly revealing cases of shocking abuse of rights. Nevertheless, a separation-of-powers analysis helps us see that its dynamic is much more clearly one of continuous improvement than is evident in societies where international intervention has caused the collapse of non-state justice, leaving state justice swamped and unchallenged by contestation from traditional justice.³⁵

Contestation seems a more productive model than what in our interviews was often described as a philosophy of minor disputes being settled on the mat and the most serious matters going to the police and courts. First, this does not seem an accurate description of what happens. We have seen that in the two domains survey research shows to be the most common forms of serious legal conflicts—land and domestic violence disputes—resolution is mostly by non-state justice. And rape and murder are also frequently negotiated on the mat. Second, in circumstances where almost none of the rape and violence of 1974–99 and 2006–08 resulted in punishment by courts, where tens of thousands of deaths and the rape of a large proportion of the female population resulted in an aggregate of fewer than 100 years of prison sentences (even then reduced by pardons), the hope for some level of justice for serious crimes was found in the CRP and in non-CRP *lisan* justice. *Nahe biti* (justice on the mat) in future will continue to be the hope for much of the justice after serious violence.

34 In one of our UNMIT interviews, a senior justice support official said that their approach was 'a progressive realization approach to human rights' (Interview, September 2009).

35 David Mearns (2001:4) actually used separation-of-powers discourse in reaching a similar policy conclusion: 'The formal system should embrace the principles of victim compensation (restorative justice), transparent and public deliberation, and consultation with village elders and the families of victim and perpetrator in the determination of punishment. This will produce culturally appropriate and socially acceptable outcomes that are likely to be adhered to. Magistrates and judges must act as independent monitors and courts of appeal for the decisions of local leaders regarding disputes arising in their area. They must over-rule decisions that are against natural justice, corrupt, politically motivated, or breach the international standards of human rights. They should be trained to understand the social and cultural values of the people they judge. While local cultural understandings and practices should be taken into account, local political and administrative authority must be separated from judicial powers. The confidence of all citizens in the legal and justice systems of the new state will depend on this.'

State–non-state justice contestation is the more productive model than tracking less serious matters to the mat and more serious matters to the police, because sometimes it is a grave mistake for the police to slough off pleas for help from the community with matters they regard as ‘less serious’. Hohe and Nixon (2003:50) make this point by reference to an incident from the research of Mearns (2001:20) where a man arrived at a police station in an agitated state, suggesting that the police had better come quickly to his village:

When asked what the problem was the man reported that another man in the village was harassing his daughter. Persuaded to elaborate, he went on to say that the man was accusing his daughter of being a witch and practicing magic against the man and his family. The international policeman stopped the man immediately and said there was no law dealing with this and the police could not become involved in such matters. He advised the man to return to the village and try to sort the problem out by ‘traditional’ means. A couple of days later, the man returned to the police and told them that he had taken their advice and resolved the issue by traditional means—he had killed the accuser. Needless to say, he was arrested for murder.

The Mearns (2001) example should not be read as peacekeeping exotica.³⁶ In societies where sorcery is feared, sorcery allegations often cause violence, even to the point of conflict over sorcery allegations sustaining civil war in parts of Bougainville, including Siwai (Braithwaite et al. 2010b:31) and Selau (Braithwaite et al. 2010b:67). ‘Witches’ have been murdered from time to time in Timor-Leste (for example, Mearns 2001:21), including recently (Wright 2009). The wise approach for a police officer is to listen when culturally knowledgeable locals suggest that a dispute is a situation they should be concerned to defuse. State–non-state justice contestation means the police listening to traditional elders and disputants when they believe non-state justice should handle it and also listening when they believe the police should get involved. And it means traditional elders listening to the police when the police argue that this is a matter that would be better settled before a judge. The state–non-state sovereignty contest should not simply track the seriousness of the alleged offence. Elders often ask the police in Timor-Leste to intervene with comparatively minor offences by young men they cannot manage on the mat or to help out when young men are armed with machetes even if they have committed no offence yet. Threats of domestic violence where no-one has actually been hit can be cases where joint mobilisation of the authority of both the police and the elders is justified. Swaine (2003:4) argues ‘[a] combination of the two systems were

36 ‘Matters such as witchcraft and sorcery and belief in the power of ancestors and other spirits to apply sanctions remain a real force in social life in East Timor. Conflict arising from such issues has to be dealt with in order for social life to continue but the formal justice system cannot deal with it’ (Mearns 2001:3).

seen [by victims] to be most forceful...Police were seen to have more force and capacity to scare husbands into stopping their actions' while follow-up *lisan* justice could result in greater acceptance of and compliance with agreements (see also Grenfell 2006:327).

Our interviews revealed that *lisan* justice is layered (see also Grenfell 2006:317). When an alleged injustice is of a member of one family against another, elders of the two families will first meet to try to resolve it to everyone's satisfaction, sometimes under the oversight of the *lian nain* or traditional judicial authority. If a sense of injustice persists, it goes to the *chefe d'aldeia* and then on appeal to the *chefe de suco* who may involve some or all of the *suco* council in hearing the case. If that fails, the police are called in or it may go to the *chefe de posto* (subdistrict head). As Deborah Cummins (2010:1) puts it, the *suco* council acts as a 'bridge between modern and traditional institutional structures' that permits a politics of mutual recognition. The *suco* council is a check and balance not only on state structures, but also on the local authority of a *chefe de suco*. There is a hybridity where the traditional penetrates the modern and vice versa. A subsidiarity principle rather than a separation of powers is in play in this layering. Yet there is no doubt that higher layers can be quite independent of lower layers and act as a check and balance against abuse of powers at lower levels. Josh Trindade (2008) has argued that Timorese ancestors had an understanding of institutional design similar to the separation of powers where the *liurai* (ruler) is bound (acts under the spiritual authority of) the *dato* (the spiritual authority) and the *dato* is bound by *lulik* (all that is sacred) including norms inherited from and overseen by deceased ancestors. James Fox also detects checks and balances in Timorese traditional governance:

At the heart of this governance is a critical distinction between power and authority. Ideas of authority are paramount in the Timorese conception of governance. Authority is represented as an inner unity: symbolically 'feminised', immobile and silent. By contrast power can be multiple: symbolically masculine, active and invariably clamorous. Whoever or whatever attains power can only act in relation to, and in recognition of, authority. Power can speak on behalf of authority, but is not that authority nor can it assume authority without relinquishing its recourse to force. Without deference to authority, even the most powerful of forces loses all allegiance. But with authority, there can be a balance—an array of different powers—in recurrent complementarity. Thus there existed in Timor a variety of levels of delegated power with 'checks and balances' that maintained coherence and militated against excesses. (Fox 2008:121)

Xanana Gusmão (2005a) has interpreted *lia nain* (literally, 'keepers of the word') as 'men of law' who have a role separated from the different layers of community—

village–district governance. One of the consequences of transition from a government more dominated by Mari Alkatiri until 2006 to one more dominated by Xanana Gusmão has been recognition of the resilience of non-state justice, and acknowledgment of the limits of state justice and of the impossibility that it could simply sweep away non-state justice:

As the world moves towards restorative justice as a way to solve the problem of overcrowded prisons, to save money from the tax payers because prisons and the death penalty no longer are acceptable as the best form of deterrence, customary laws in various countries may gain new vigour and respect, because they contribute towards real harmony and reconciliation of communities and, above all, they provide a reasonable degree of sense of security for the local communities, which no amount of police force can do. (Xanana Gusmão quoted in Laakso 2007:242)

The traction of traditional powers varies greatly from place to place and is hybridised with colonial and state forms of authority in different ways in different places. We should not think of peacebuilding as coopting these different layers of traditional governance into some kind of vision of how separations of powers should work in a particular place. Rather, the point is for a constitutional separation of powers and for donor interventions to leave space for whatever residual separations of powers of non-state origin continue to be effective checks that humble power in that particular place. And to be careful about crushing them through the way modernist reforms are implemented.

Impunity Again, Payouts to Buy Peace, Reconciliation Fatigue

The near-fatal wounding of President Ramos-Horta in February 2008 and the killing of rebel leader Reinado jolted all levels of civil society and the state into resolve to put a mostly permanent stop to mob fighting and get refugees to move from the camps that continued to destabilise the country. It also ushered in another bout of impunity. On 20 August 2010, President Ramos-Horta commuted the sentences of 23 individuals involved in the attacks in which he was shot and of the only three F-FDTL members sentenced to prison over the attacks on the police in May 2006 that killed 10 and wounded 30 of those who had been surrendering under the UN flag. The three F-FDTL members were not to be found in prison when UN officials checked. In fact, the United Nations has a photograph of one of them standing over President Ramos-Horta in full uniform carrying a gun just after the President was shot. UNMIT officials believed three and a half years after the killings that these men had not paid any compensation

to the victims' families as ordered by the court. The only senior leader to go to prison over the violence of 2006, former minister responsible for the police Lobato, had already been freed within months of his conviction in 2007. Other senior figures recommended for prosecution over the violence of 2006 by the United Nations were not touched. Here is Kingsbury's (2009:170) account of Lobato's remarkable release:

Having a sometimes-strained relationship with Alkatiri...there was a real possibility that Lobato could discuss more freely what he knew about the events of 2006. To this end, it appeared that there was an arrangement that if Lobato went to prison and stayed quiet during the election period, his associates would help him manufacture an excuse to leave prison, whereafter he could be allowed to escape. Within weeks of being jailed, Lobato began a campaign to be assessed as having a heart problem that needed urgent attention overseas. [After some doctors refused to sign a medical certificate, Lobato obtained one and headed straight from the doctor's surgery to the airport]...and boarded a Lear jet with his wife and two children bound for Malaysia. There was a stand-off at the airport for twenty-four hours when prison guards refused to allow the plane to leave. However, under pressure from Fretilin to allow Lobato to have medical treatment or else it would boycott parliament, and with him promising to return, the then just sworn in Justice Minister, Lucio Lobato (Rogerio's cousin), approved his departure and the plane left. He did not have medical treatment, did not stay in Malaysia and did not return to East Timor.

So again the courts were allowed to play no significant role in the justice transition from the nation's violent convulsions of 2006–08. Various reconciliation bodies played much more important roles. There were in some cases high-profile ritual reconciliations within the police, within the military and between the police and the military.³⁷ The petitioners were each paid US\$9000 and returned to civilian life in July 2008. This generous dollop of cash ended their era of collective grievance, dispersing them to new lives across the country.

From 2006 a number of NGO and government bodies organised reconciliations between fighting gangs and reintegration of refugees back into communities to which they had previously been afraid to return. By 2008 this work appeared to have been successful, with 95 per cent of a random sample of citizens, 95 per cent of a police sample and 96 per cent of a community leaders sample reporting 'No' to the question: 'After the return of IDPs to your community/area, has there

37 At these reconciliations, PNTL and F-FDTL were 'maturely compromising for their country. They were re-stabilising the country. They were honest with each other. There was a lot of emotion. These were guerillas acknowledging their mistakes, but doing it in a way that protected their sense of pride' (Interview, Senior civil servant, September 2009). They hugged one another at the end.

been an increase in conflict' (Chinn and Everett 2009:20). UNMIT established the Gang Task Force with the Timor-Leste Police. Some reconciliations were led by the President or the Prime Minister. Various peace agreements were signed between gangs that had been fighting each other. Organisations involved in this work included the government's Simu Malu (meaning 'welcome one another') process for refugee reintegration, the Peace and Democracy Foundation, Ba Futuru, Comição Justiça and Paz, HAK Association Peacebuilding Programme, Belun, the Catholic Commission for Peace and Justice and the National Committee for Dialogue (an initiative of President Gusmão) (Kingsbury 2008). The last also organised high-level dialogues and national reconciliation, including among the President, Prime Minister and others at the top. Many of the reconciliations drew upon *lisan* traditions. Others used gang youth work techniques from elsewhere such as identifying moderate gang leaders and working with them to steer the group to nonviolent projects. There were also many pro-peace marches during 2006, and a women and peace conference that helped create an environment for reconciliation to begin.

When we interviewed the leadership of President Gusmão's National Dialogue in November 2006, it was chaired by Maria Domingas Alves, founder of the women's rights organisation Fokupers and now a senior cabinet minister. National Dialogue meetings were moderated by prominent church leaders such as Norwegian Bishop Gunnar Ståslett and Bishop Belo. We were told that the dialogue had reached a consensus that the ancestors had been asked to help ritually during the conflict against Indonesia. The ceremony to close this off with the ancestors and express appreciation to them had not been held. 'As a result leaders have spoken without consideration because they were lacking the wisdom of the ancestors.' Loch and Pruella (2011:315) comment on the total disconnect between internationals' analyses and the predominant indigenous analysis that the fighting of 2006–08 was 'caused by disharmony between the world of the living and the dead'.

On 6 December 2006, a large traditional reconciliation ceremony was held in the square in front of the main national government buildings. During that period, our research team attended various reconciliation meetings and *lisan* rituals for peace that were poorly attended. By late 2006 people were suffering 'reconciliation fatigue'; they were jaded and cynical about the sincerity of their leaders in wanting peace after an change of leadership seemed only to change which side was working to create chaos on the streets that might destabilise the incumbent Prime Minister. The 6 December 2006 event was not as well attended as one might have expected given what a dramatic occasion it was, though there were thousands of ordinary people present and everyone who was anyone nationally and in the diplomatic community. There were prayers and speeches by church and political leaders as Gusmão, Ramos-Horta, Alkatiri

and the first Fretilin President, Francisco Xavier do Amaral, sat side-by-side in the centre of the front row. At a later stage of the proceedings they moved to sit together on the big *lisan* mat. Here are some of John Braithwaite's fieldwork notes from the four-hour event:

I sat at first among the section of seats allocated jointly to PNTL and F-FDTL officers. The GNR (Portuguese UNPOL) patrolled this part of the audience with automatic weapons. I spoke to Captain Barales of the GNR. He said 'Individual places were marked carefully for them [with an eye to avoiding conflict or tension]. Details', smiled Barales, who indeed was an impressive details man. National symbols such as the singing of the national anthem were combined with *lisan* symbols throughout. In their speeches, the leaders admitted mistakes and said they would not make them again. In the oath they said that for he who breaks the national peace there would be no mercy. That person would bring awful afflictions from the ancestors upon the land. Norwegian Bishop Gunnar Ståseth [who had nominated Belo and Ramos-Horta for the Nobel Prize] quoted at length from the Belo and Horta Nobel acceptance speeches. That was the most moving part of the proceedings for me when he read Horta's words that it was the imprisoned Gusmão who should be there, not he. I heard others around me say they were moved. Yet it was not as moving as it could have been because there was reconciliation fatigue here. And there is more than a bit of impunity-induced cynicism. So many people feel the leaders want to forget the injustices and use traditional reconciliation as a cover for doing that. Also the Xanana-inspired gestures at reconciliation get discredited by Fretilin and vice versa. Yet they seem genuine about engaging with the reconciliation. The commitment of the leaders to reconciliation and tradition is sincere; it is their commitment to justice that is not... There was a great rush forward when it was announced that something would be done between Mari Alkatiri and Xanana Gusmão. I imagine that they either hugged or shook hands but I could not see with hundreds of people pushing in front of me. There was dancing and sharing of betel nut by traditional leaders from across the island. At one key moment in the long oath to 'peace, love and wisdom' I was near Alkatiri [I could not see the others through the crowd] and saw him hug at least 30 other leaders. He seemed emotionally engaged with it most of the time [interesting, as the leader who seemed most dismissive of both *lisan* and the Catholic Church]. A squealing pig was brought out. An Australian official with whom I shared an interest in Bougainville peacemaking reminded me of a kindred Bougainville reconciliation at which Australian Foreign Minister Downer sat uncomfortably for four hours with a squealing trussed pig under his chair. She said with kindness in her voice that the pig is going

to have a bad day. Indeed the pig was ritually carved up in an adapted ritual of national unity. As I recall the eyes were given to Alkatiri and the first Fretilin President Francisco Xavier do Amaral because they had the vision to see the path that would take the nation to independence. The ears went to the leaders of the Parliament because they must listen to each other and to what the people are saying. The tongue went to the traditional elders present because they are the true speakers for the people. Lawyers will be pleased to know that the President of the Court of Appeals got the brain. Standing next to a lawyer who thought this was a good choice, I smiled with a worried shake of my head. Xanana got the remaining body as the embodiment of the people [this reminded me of Mario Carrascalão saying to me that ‘every Timorese has Xanana running in their veins’]. At the end Xanana and (I think) TMR [Taur Matan Ruak] danced with the dancers waving a sword. A Timorese UN police interpreter who was at the ceremony wandered off for a moment and was found stabbed to death in a nearby alley. Later there was a riot at the site with people injured and half a dozen cars smashed up. But the press coverage the next morning was all positive and reintegrative.

The most interesting part of the ritual was that it involved political leaders going as far as one might reasonably expect them to go in admitting their personal responsibility for the violence as they prepared to face one another in a 2007 election. Yet agreement on blaming the nation’s calamities on their failure to close the peacebuilding loop with the ancestors on the mat took pressure off them. Now things would be better because the ancestors were in the loop. It was not necessary to delve any deeper into the root causes now that the nation understood and had put right this factor that was external to elite machinations. Their reckless actions in inflaming gang violence could be forgiven. Now we were asked to understand that, for example, Xanana was a lesser man when he was making those inflammatory speeches only because the ancestors had abandoned him at that time.



Figure 10.4a: Mari Alkatiri (left), José Ramos-Horta (centre) and Xanana Gusmão (right) with other dignitaries awaiting the ceremony described in John Braithwaite's 2006 fieldwork notes



Figure 10.4b: Xanana Gusmão on the mat with traditional elders



Figure 10.4c: Elders dance around Xanana Gusmão (centre) after the ceremony

Photos: John Braithwaite

While these reconciliations doubtless did contribute to the successful reintegration of refugees and the ending of gang fighting, the decisive contribution was generous payouts after the shooting of President Ramos-Horta to those living in the refugee camps that were the focus of so much of the gang fighting. Refugee families were paid up to \$4500—a lot of money in Timor-Leste—in compensation to return to their place of origin and rebuild (Kingsbury 2009:207), and 150 000 refugees benefited, which was 14 per cent of the population. Much of this was funded by the European Union. Many national and international staff involved in administering this program said there was a great deal of fraudulent claiming, even cases of four different families claiming that a particular house that was torched in 2006 was theirs. In the short term, it was probably highly cost effective in freeing up donor funds tied up in expensive UNPOL commitments. The masses held when camps were closed were attended by all factions who had fought over those camps; they were beautifully conducted by the bishops as rituals of reintegration among those factions. Of course, resettlement was not universally accepted: Muggah et al. (2010:55) reported at that time that 3000 of the 150 000 refugees were still awaiting resettlement and many of those who were resettled went into transitional arrangements like burnt shells of houses.

In the long term, the whole package involves a moral hazard. At some future time of unrest will troublemakers calculate that the lesson of Timor-Leste history is that no-one is punished for violence and that those who lose their house in the

violence are given enough money to build a rather good new house? In a society where the justice system is prevented from working, will elites draw the lesson that violence as a political tool can get leaders their way, and even be reputation enhancing? A senior Australian military officer put it colourfully in 2006:

Xanana and TMR would never kill each other, which is saying something because there are a lot of people they would kill...TMR's offsideers would kill Alfredo if they had a chance...It's not a bad thing in Timor to have on your CV that you have killed a few people.

While the moral hazard concern should be pondered seriously, in this context we have probably overstated it. Leaders also learnt lessons from 2006–08 about the limits of what they could get away with, how they could be burnt by fires of their own lighting. The social capital of the dialogue teams that did so much good work in crafting the peace of 2008 has been consolidated for the future through a UNDP program that rolls them into the new Department of Peace Building and Social Cohesion, established in 2010. The strategy of the new department has four components

1. institutionalising peacebuilding mechanisms and procedures in the National Government
2. strengthening conflict-resolution capacity and mechanisms at the community level
3. enhancing women's participation and role in peacebuilding
4. conflict-sensitive development (Scambary 2010:34).

Everyday Rituals of Rebirth

Peacebuilding scholars have a tendency to focus, as we have in this chapter, on the contribution to peace and reconciliation of formal rituals such as war crimes trials, truth commissions and *lisan* justice rituals on the mat in villages (*nahe biti*). One of the things we learnt about how reconciliation actually proceeded following the seven other Indonesian conflicts we studied was the importance of rituals of everyday life (Braithwaite et al. 2010a). Following Muslim–Christian conflicts, these included a Muslim leader shepherding a group of his flock to the church to attend the funeral of a respected Christian leader soon after the bloodshed, Christians helping to rebuild the mosque they had burnt down, Muslims bringing gifts on Christmas Day to Christian neighbours, Christians reciprocating by attending the celebrations for Mohammad's birthday, folk of one faith welcoming with music, affection and piles of food returning refugees of the other, Muslim children helping Christian refugee children to catch up on the

lessons at school they had missed, Christians returning to purchase goods from a Muslim trader and exchanging smiles for the first time, common kindnesses of everyday life where a Muslim religious leader picks up in his car a weary, old Christian man struggling to get to the market.

At the village level, we have also seen countless and diverse local kindnesses across UDT–Fretilin, militia–victim and other divides. Annette Field (2004) documented the importance to healing in rural Bidau of rituals, particularly weddings and funerals, which brought people together in feasts, sociability and shared emotion. Repair of ‘wounded’ landscapes and damaged selves fed off each other as citizens transcended trauma in remaking landscapes and remaking themselves (Field 2004:352). Field found sharing of housing as the homeless were helped to rebuild their lost dwellings was also important as the gradual erection of new buildings signalled rebirth. Loch and Prueller’s description of the central importance of families in conflict rebuilding the *uma lulik* (shared sacred house) together has much in common with the importance of *gotong royong* (joint bearing of burdens through shared work) that we found in our six Indonesian cases of peacebuilding where churches, mosques and other symbolic structures were rebuilt (Braithwaite et al. 2010a):

These reconstruction efforts bring together men and women, materials, rituals, leaders, and—most remarkably—community members who are in conflict with each other. The restoration of ancestors’ houses is too important an issue to be hampered by ordinary human quarrels. Reconciliation of the conflicting parties is a prerequisite for the reconstruction of an *uma lulik*. The process of rebuilding East Timorese sacred houses has a psychohygienic or even group therapeutic function. People carry materials together, dance, sing, sweat, and laugh and thereby reconcile the family networks of ‘wife-givers’ and ‘wife-takers’ connecting the houses...East Timorese intellectuals have even suggested the construction of a national *uma lulik* in Dili as this might foster national unity and peace following the latest crises (Trindade and Castro 2007). (Loch and Prueller 2011:324)

Hundreds of *uma lulik* have been built across Timor-Leste since 1999, constituting local reconciliation through rebirth of cultural attachments. Susan Harris Rimmer (2007) draws our attention to quite a different ritual of everyday life that can heal—the birth of a child and the coming together of families and friends at a christening.

Census data from 2004 revealed a baby boom, perhaps in response to the emotional losses of the occupation. The fertility rate was found to be the highest

in the world, at 8.3 babies per woman.³⁸ The baby as the symbol of both wound and healing is clearly at play in Timor at the present time (Harris Rimmer 2007:323).

Harris Rimmer's interpretation of this striking statistic is speculative, yet could be a profound peacebuilding insight. In the West, we speak of the baby-boomer surge after World War II as purely a statistical artefact of large numbers of young people serving overseas, unable to create children with their partner at home, then a wave of doing so when they return. Yet when those of us who are baby boomers talk with mothers of our parents' generation they sometimes speak of their children symbolising the birth of a new life, of healing after the sorrow, anxieties and privations of their war. And, of course, Falintil fighters in the 1980s and 1990s were few in number, were not overseas and were hiding among the people producing their share of babies. Tragically, so were many of the wives of Falintil men whom the Indonesian military targeted to compromise them as unfaithful, in order to alienate them from their communities and their husbands. This included the first wife of the Commander-in-Chief, Emilia Baptista Gusmão, who 'bore a child by an Indonesian army officer after one of the many interrogations she was put through to influence him [Xanana] to surrender' (Harris Rimmer 2007:329). The child later died. The aftermath of the razing of all the infrastructure of the country, houses burnt to the ground, every person employed in a waged job now unemployed, hunger because of crops unattended by fleeing villagers, livestock stolen and trucked to West Timor—this is a quintessentially irrational time to deliver new mouths to be fed. So we find Harris Rimmer's speculation about the fertility splurge immediately after 1999 compelling. And we think it might have a practical peacebuilding implication. Harris Rimmer's (2007:323) paper focuses upon mother-child policies as a post-conflict welfare priority, especially discrimination against children born of rape by the enemy and the absence of 'official policies to deal with the needs of these children and their mothers'.

We see another implication that directs our attention to the fact that organising formal rituals of reconciliation is costly and sometimes can disappoint by opening up as much conflict as it heals. An alternative path for peacebuilders is to be alert to the naturally occurring opportunities for harnessing rituals of everyday life to the project of peace. So, for example, priests might be trained to reframe the christening of a postwar babe as an opportunity to embrace people who were formerly killing one another—in the church within this ritual of

38 This amazingly high statistic of 8.3 births per woman is estimated for women's lifetimes in UN comparative statistics. For World Bank data on Timor-Leste having the highest fertility in the world during the first half of the 2000s, see: <<http://siteresources.worldbank.org/INTTIMORLESTE/Data%20and%20Reference/21988255/PopulationGrowth2008English.pdf>> (viewed 26 April 2011). By 2007–09, the post-conflict baby boom had fallen back to 5.7—still one of the highest in the world (National Statistics Directorate 2010:53).

rebirth of the village and the nation. Where this is a baby born of rape, there are things that can be said in the church that might help bind the community to non-discrimination and to affirmative offers of support in the church for mother and child. Likewise with christening and communal commitment to the perhaps 40 000 war orphans (Harris Rimmer 2007:326), some of whom might never have been christened in this widely Christian country. Healing through the renewal of birth is just one instance of opportunity for reconciliation through rituals of everyday life. Our point is simply that peacebuilders can ponder projects of sensitisation to the possibilities offered by rituals of everyday life because they might be more potent and more cost-effective than set-piece contrived reconciliations at the local level, and even at more aggregated levels of the polity.

The Big Picture of the Transition to Justice

When a formal justice system is built from scratch, there is much to do. A legal profession must be trained and imbued with professional norms, professional experience and a work ethic. A rights culture needs to be planted and nourished. A multitude of institutions is constructed: layers of courts, from appellate down to district; an independent prosecution service; a victims' support service; police; prisons; a probation and parole service for reintegrating offenders; a forensic service, and so on. Laws themselves must be written, requiring a legislative drafting service. We have sought to give a sense of how fraught and protracted drafting a land law is bound to be. In the next chapter, we argue that an anti-monopoly law is a fundamental of separating powers. Timor-Leste's lawmakers have not begun to think about this yet.

As all this is being built there is a danger of legal formalism crowding out customary justice. The worst outcome is where the modernist legal project crushes custom before formal law acquires anything approaching the justice-processing capability that customary justice surrenders to it. A rule-of-law vacuum attracts the most oppressive of forces. This is a bigger problem than semi-organised gangs of young men resolving grievances through violence instead of through legitimate dispute-resolution channels. Anomie in which no legitimate institutions can authoritatively assert and enforce the rules of the game invites in totalitarian forces who insist that only their authoritarian revolution can install law and order. This is the history of groups like the Taliban getting a foothold in rural areas where disorder makes life unsafe in post-conflict contexts like Afghanistan. David Kilcullen has described the Taliban as an 'armed rule

of law movement'.³⁹ The justice services Taliban courts offer are not just about regulating violence but also about settling destabilising civil disputes such as land claims.

The approach to this problem we have advanced is to aspire simultaneously to expand access to the justice of the courts and to the justice of customary dispute resolution. In the next chapter, we take this normative analysis further with the idea of vernacularising state justice (particularly rights jurisprudence) into customary justice and vernacularising customary justice into the justice services of state police and courts (Merry 2006).

War crimes trials can overwhelm a country by sapping the limited justice capacities of a people into processing the past so that justice is neglected in the present; this, we argue, can increase risks of future violence. More than that, prioritisation of formal justice can leave poor people feeling that the state does not spend enough on training the nurses and teachers that are their priority, because the state spends too much on training lawyers. Timor-Leste is a rich and instructive case study in how those dilemmas were debated. One reason, we conclude, is that much of the work of truth, justice, reconciliation and memory was done neither on the mat nor in courts, but within rituals of everyday life.

39 Comments at the launch of Mason (2011), The Australian National University, Canberra, 21 April 2011.

This text is taken from *Networked Governance of Freedom and Tyranny:
Peace in Timor-Leste*, by John Braithwaite, Hilary Charlesworth
and Adérito Soares, published 2012 by ANU E Press,
The Australian National University, Canberra, Australia.