

# Harnessing *Lisan* in Peacebuilding: Development of the Legal Framework Related to Traditional Governance Mechanisms in Timor-Leste

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This article contributes to the discourse on hybridity by reviewing the development of the legal framework related to traditional governance mechanisms in Timor-Leste in the twenty years since independence in 2002. It analyzes how this framework has contributed to nurturing governance in the country and argues that traditional governance mechanisms have had a considerable role in improving governance since independence. It is also argued that with regulation and proper support from stakeholders, a traditional governance system can facilitate democratization, and that the host community can become the driver of positive change.

**Keywords** traditional governance, hybridity, Timor-Leste, *lisan*, *Nahe Biti*

## Introduction

This article reviews the development of the legal framework related to traditional governance mechanisms in Timor-Leste during the two decades since the restoration of independence in 2002. It then analyzes how these traditional governance mechanisms have developed over this period and how their formalization is being considered. It will also discuss how the political leaders and the Timorese people perceive traditional governance mechanisms and customary laws.

In the discourse on hybridity, both Hunt (2018) and Boege (2018) argue that “the concept of hybridization tries to capture the fluid, dynamic, emergent and relational quality of the reality it is meant to grasp” (Hunt 2018, 52). In the context of hybrid peacebuilding, Uesugi (2020, 2) notes that hybridity is “continuous interaction of different actors—both locals and internationals,” while emphasizing that it is not just a marriage between Western norms and traditional

values. Jackson and Albrecht (2018) reinforce the arguments of Hunt and Boege on the notion of hybridity, underlining that it is a “starting point to comprehend” coexistence, interaction, and overlap of structures, rules and logics. It is becoming obvious that the recent discourse goes beyond perceiving hybridity as merely the coexistence of local and international norms, but instead builds on that argument, in that it clearly invites analysis of a process that accommodates the co-functioning of social systems, as well as interaction among the intersectoral actors and elements that are involved in that process.

Through an ongoing analysis of the traditional governance mechanisms in Timor-Leste, this article contributes to the discourse on hybridization of governance by providing an example of the blending of traditional rules and liberal peace.

## Definitions

Here, we primarily apply C. K. Allen’s definition of customary law: “Native customary law means a rule or a body of rules regulating rights and imposing correlative duties, being a rule or a body of rules which obtains and is fortified by established native usage and which is appropriate and applicable to any particular cause, action, suit, matter, dispute, and includes also any native customary law” (Allen 1939). We also refer to the definition of customary law employed by Tetsumi Kato in his 1992 article, “Theory of Customs.” Kato (1992, 11) defines customary law thus: “The social norms, apart from the basic laws and state laws implemented by a state or a statutory authority, that the various members and the groups of people of a society are accustomed to, and comply with as rules, are collectively called customary law.”

There are many definitions of community, but in this article, it is defined as a geographical distribution of individuals (in this case in Timor-Leste) who have close ties to a geographical area in terms of natural resource management. This is a slight adaptation of Ernest W. Burgess’s definition of community as “social groups where they are considered from the point of view of the geographical distribution of the individuals and institutions of which they are composed” (Burgess 1967, 144). Community in Timor-Leste is therefore the geographical distribution of people at the village (*suco* in Tetum) and hamlet (*aldeia* in Tetum) levels.

## Background

After its establishment in October 1999, the United Nations Transitional Administration in East Timor (UNTAET) operated in collaboration with the

then ruling party, the Frente Revolucionária de Timor-Leste Independente (FRETILIN). Many of FRETILIN'S political leaders were in exile in other Portuguese-speaking countries during the Indonesian occupation, where they were influenced by the style of contemporary Portuguese left-wing politics. This inevitably brought influences from Portuguese-speaking countries to bear on Timor-Leste in addition to what was visibly imported by UNTAET.

The same can be said about the enactment of laws. For the practical reason of avoiding the risk of disruption to daily life, UNTAET retained laws that were in force during Indonesian rule, such as the Road Traffic Law, as long as they were not in conflict with the Basic Law introduced by UNTAET. In particular, UNTAET Regulation 1999/1, which more or less functioned as the temporary foundation for the laws in Timor-Leste, was strongly influenced by the West, and the series of laws introduced thereafter were influenced by Portuguese philosophy of law through its legal advisers and registration drafters who had been trained in Portugal and other European countries. Such influences were accepted without much deliberation, particularly because of the political sensitivity surrounding any mention of Indonesian influence at that time.

Western influence through UNTAET on the one hand, and Portuguese influence through the Timorese political leaders on the other, contributed to the formation of a “modernized” style of governance and rule of law in the country. Building on that foundation, the president and the government of the Democratic Republic of Timor-Leste promulgated a constitution when the country became an internationally recognized independent state in May 2002. During the years of instability and recovery from the continued violence, the political leaders called upon their constituencies to reflect their customs and traditions in the formation of a Timorese identity that emphasized the difference between Timor-Leste and other former Portuguese colonies. During an August 2013 interview concerning perceptions of customary laws in Timor-Leste, Senior Minister Agio Pereira told the authors,

Our traditions and culture...became the sense of identity that triggered the power to resist the Indonesian occupation. Not the Marxist ideologies or communist/socialist ideologies like in Angola or Mozambique, where they had this ideological angle to justify the anti-colonial/anti-imperial struggle.

Senior Minister Pereira's words indicate that culture and tradition, rather than ideology, formed the backbone of Timorese identity. Timor-Leste's nationhood may have been socially crafted, but the senior minister almost suggests that it does not pass the test of Benedict Anderson's “imagined community” theory (Anderson 1983). Is Timorese nationalism a creation that drove the movement that led to independence in 2002, or is it a legacy of the pre-colonial, pre-national era, in the communities that existed in the small-scale kingdoms that

were led by *Liurai* (local kings in Tetum)? In order to answer that question, we should consider how customary norms and traditional governance have been acknowledged in the constitution.

The legislation drafted by the new government of Timor-Leste and the laws suggested by international legal advisers did not visibly refer to the country's customary norms or traditional governance mechanisms that were dormant at that time. Under Indonesian rule, activities based on Timorese culture and traditions were restricted or suppressed, because they were often suspected of having links with the anti-government movement. In many areas, particularly in the rural towns, memories of this suppression continued to influence the Timorese people long after the arrival of UNTAET and independence, undermining traditional practices, particularly their associated governance mechanisms. That being said, a small number of traditional practices appear to have slowly revived under the transitional administration, one of the earlier instances of which was an inauguration ceremony for *Tara Bandu* held in a mountain village in Liquica Municipality in February 2001.

Traditional practices were not given the attention they deserved until the formation of the Commission for Reception, Truth and Reconciliation in East Timor (Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste, CAVR). CAVR employed *Nahe Biti*—a traditional judicial process that is one of the main mechanisms of governance in Timor-Leste—in its community reconciliation process. Enquiries into the violence and human rights violations and community reconciliation were sought through *Nahe Biti Boot*, or “big Nahe Biti,” hearings that took place in almost every village in the country between 2002 and 2005. Existing studies on *Nahe Biti Boot* predominantly highlight positive views of the process's deliberations and conclusions, although some (pivotal) negative views have been expressed. This study underlines the significance of CAVR's use of the process at a time when traditional governance mechanisms were not mainstreamed by international advisers and aid workers. In CAVR-hosted reconciliation, needless to say, the parties who made most effective use of the traditional governance mechanisms were the Timorese and their traditional leaders.

Definition of these traditional institutions of governance is ongoing and requires further deliberation. Many examples of so-called traditional governance may be found in Southeast Asia well as in Africa and the Americas. *Adat* in Indonesia and Malaysia is one tradition that is linked with governance mechanisms. In the neighboring Indonesian island of Bali, there is *awig-awig*, a traditional regulatory framework which is often administered by the *desa adat* (customary village in Bahasa Indonesia) or *banjar* (hamlet in Balinese). Some argue that traditional governance systems are “led by local indigenous knowledge in collaborative and participatory processes” (Gakhal 2020), but they are not always collaborative and participatory, as we can see from this study

on Timor-Leste. Holzinger, Kern, and Kromrey (2016, 3) look at traditional governance entailing “selection of chiefs and elders, or procedures for decision-making, dispute settlement, land allocation, or inheritance.” They point out that “contemporary and traditional forms of governance coexist with the political institutions and laws of states” (Holzinger, Kern, and Kromrey 2016, 3). However, they do not define traditional governance and conclude by saying, “an institutionalist research agenda addressing the need for theory and systematic data collection and explanatory approaches” will help efforts to define it as it is still a work in progress (Holzinger, Kern, and Kromrey 2016, 2). Similarly, this study does not intend to define the traditional governance mechanisms as they exist in Timor-Leste but instead will consider *lisan*—which translates as “customs” in the local language, Tetum—as the foundation of traditional governance.

Such traditional governance mechanisms were implemented and enforced by “kingdoms,” led by the local kings (Liurai), that existed before and during the Portuguese colonial period and were reactivated by the communities with assistance from Timorese civil society organizations, such as the Haburas Foundation, during the UNTAET period. Lisan institutions now coexist with the Timorese government and their regularization in state laws is under consideration, as they can be used to help realize the rule of law.

Lisan, the substantive set of customs for traditional governance in Timor-Leste, has transformed its functions according to certain standards, such as the notion of democracy that the communities accepted in response to the reality that they faced in the post-conflict period. One well-known example of the application of traditional law in Timor-Leste’s peacebuilding process is the civil reconciliation process led by CAVR. Since then, the traditional governance mechanisms in Timor-Leste, which were seen as part of its feudal heritage, began to be transformed into more liberal institutions with the support of international organizations and bilateral agencies (Miyazawa and Miyazawa 2020). This transformation was carried out by the Timorese government out of a desire to regularize customary laws. From another angle, efforts to regularize the traditional governance mechanisms made those mechanisms more consistent with the relevant laws of Timor-Leste. While this study recognizes the efforts made by the Timorese Ministry of Justice in defining and regularizing customary laws, it is argued here that *lisan*, or traditional governance mechanisms, are being reinstated in Timorese communities through regularization.

## The Nature and History of the Conflict

Timor-Leste was colonized by Portugal in the seventeenth century. In 1975, after decolonization a year earlier, the pro-independence party, FRETILIN, declared the independence of Timor-Leste. The Indonesian government of the time was

interested in Timor-Leste's natural resources, especially the oil and gas reserves in the Timor Sea. This interest converged with the pro-annexation position held by mainstream military officials and presidential advisers, so Indonesia took advantage of decolonization to invade the territory. To gauge Western reaction to its move, Indonesia took a step-by-step approach to the invasion. The initial deployment of troops to Timor-Leste was met by silence from the Western countries, so Indonesia carried out a full-scale invasion. In the midst of the Cold War, the Western countries, particularly the United States, had an interest in maintaining safe passage through Indonesian waters and in preventing the left-wing insurgents from holding power in Timor-Leste. Against that background, Indonesian forces invaded Timor-Leste in December 1975 and occupied it until 1999.

During the Indonesian occupation, resistance continued in the form of guerrilla warfare, waged mostly in the countryside (Candio and Bleiker 2001). Pro-Indonesian militias and the security forces committed large-scale human rights violations, including murders, rapes, torture, and forced relocation on a massive scale. Repression by the authorities is asserted to have resulted in the deaths of about two hundred thousand Timorese, or approximately one-quarter of the population (Chomsky, Shalom, and Albert 1999).

In the August 1999 popular consultation, about 79 percent of Timorese voters opted for independence from Indonesia. But immediately after the announcement of the ballot result, the security forces and pro-Indonesian militia groups went on a nationwide rampage in Timor-Leste, destroying an estimated 70 percent of the territory's infrastructure (Tee 2000). The death toll was estimated at six hundred people, although the UN conceded that the number could have been much higher (Candio and Bleiker 2001). Timor-Leste regained its status as an independent country in May 2002.

Under Portuguese rule, the underdeveloped infrastructure and geographical conditions hampered traffic between urban areas and villages, and under Indonesian rule, the authorities restricted the movement of people. As a result, each village community became solidified, and the custom of treating a "community" as one social unit was enforced. Furthermore, familial ties established by marital relationships developed within geographically limited areas, thus creating a network of relatives within a community. These circumstances facilitated the strengthening of the community model headed by a *lia nain* (traditional clan leader, or "keeper of the words" in Tetum) with a patrilineal (matrilineal) extended family sharing an *uma lulik* (sacred house for a clan/clans). Such a community structure centered on a sacred house that hosts the spirits of the clan's ancestors is an indication that Timorese society has its foundation in animism.

## Overview of the Community in Timor-Leste and Traditional Governance

With the above definitions of customary law offered by Allen (1939) and Kato (1992) in mind, it is appropriate to define Timor-Leste’s lisan as a set of customary laws that comprise the traditional governance mechanism. Although there is some variety in interpretation, since Timorese culture and traditions have been transmitted orally, three main types of lisan instruments have been identified: Nahe Biti, a traditional judicial process involving village arbitration and mediation functions; Tara Bandu, a set of rules or norms in the village; and *Feto San Uma Mane* which defines and regulates the mutual aid relationship among the relatives of married couples. This article will focus on Nahe Biti.

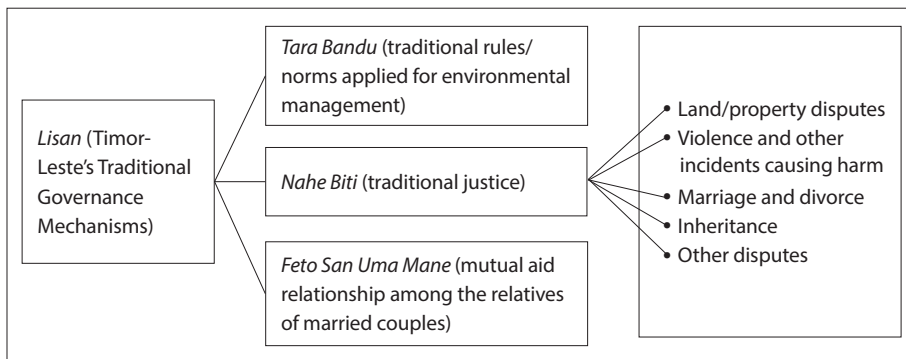
The overall characteristics of traditional governance mechanisms are similar in all thirteen municipalities. For example, the traditional justice system, Nahe Biti or its equivalent, uses the same procedures for both criminal and civil cases. Another feature is that it has strong restorative justice functions as it focuses on maintaining relationships between people and communities. Another unique characteristic of lisan in general is that the boundary between the private (such as private ownership) and the public (such as community ownership) is blurred.

Keeping those points in mind, this article will examine the general structures of the traditional governance mechanisms in Timor-Leste, particularly Nahe Biti.

### Implementing Organization

Which body presides over a particular case depends on which of the three main instruments shown in Figure 1 is implemented (there are some regional differences). The Tara Bandu process is mainly led by a *Chefe de Suco*, the village chief and traditional leader of ceremonies. Who implements Nahe Biti depends

Figure 1. Three Main Instruments of *Lisan*, the Timorese Traditional Governance Mechanism



Source: Satoru Miyazawa and Naori Miyazawa (2018).

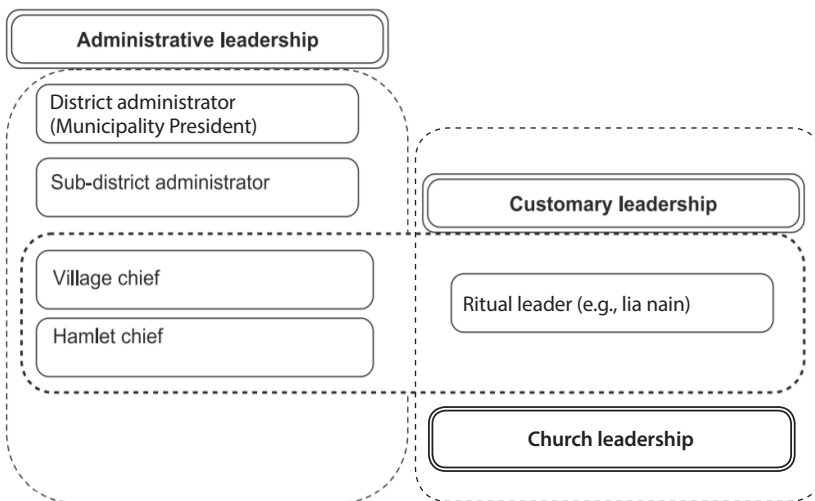
on the scale of the case or the incident. The role of implementer may also be assumed by the local government or the church.

For example, the Draft Act on the Traditional Judiciary (of December 2020) specifies the village chief as the implementer of Nahe Biti. However, in practice, this position is usually taken by the lia nain. For example, a village official in Aileu Municipality, who regularly facilitates the Nahe Biti procedures, emphasized that it is the lia nain who takes the leading role, while the village chief merely witnesses the procedure and acknowledges its rightness (Interviews with villagers in Aileu, July 2013). This point was confirmed by a senior official of the Ministry of Justice who is leading the drafting of the Traditional Justice Act (Interview with Vital Nelinho, December 30, 2016).

Of the above-mentioned five main types of cases/issues adjudicated through the Nahe Biti process, cases regarding land and property ownership disputes that involve more than one village or hamlet are handled by the village chiefs and/or the sub-district administrator (see Figure 2). Responsibility for implementing Feto San Uma Mane is often assumed by the lia nain or an adult male such as a father or uncle.

While Nahe Biti is regularly conducted by local chiefs at village/hamlet level, the process may also be carried out by the district/sub-district administrator (president of the municipality) or by the church when it is a matter of concern to the wider community. When Nahe Biti decisions made at village/hamlet level are seriously contested, the process at district/church level can function as an appeal process, although this hierarchical relationship is neither formal nor written down. Regardless of the implementing body, Nahe Biti procedures carried out at

Figure 2. Conceptual Relationships between Administrative and Customary Leadership



Source: Naori Miyazawa (2012).



the district/church level are often called Nahe Biti Boot, or big Nahe Biti, and they involve the wider community. As the name implies, this is a large-scale traditional justice procedure. Nahe Biti Boot was the community reconciliation process typically implemented by CAVR. In this context, traditional governance acts as a veneer for the formal government administration or the church. However, it also takes more of a hybrid form.

Nahe Biti may also be implemented jointly by the local chiefs and the district/church, depending on the magnitude and the scope of the matter under consideration. In June 2016, a Nahe Biti was held in Ermera District on the occasion of the opening of a new church. Some members of the community or their relatives had not been repatriated from Indonesian-controlled West Timor because of their past affiliation with the pro-autonomy forces, and the purpose of the Nahe Biti was to promote reconciliation among the community members and facilitate the repatriation (Interview with Mario Nunes, official of the Ministry of Agriculture, Forestry, and Fisheries, Timor-Leste, December 28, 2016). This Nahe Biti process is not only credited with amicably resolving the dispute and arranging the return and reintegration of the community members, but is also indicative of a hybrid conflict resolution approach involving both the traditional community and the church.

## Traditional Justice: Nahe Biti

In this section, the overall mechanism of Nahe Biti is explained. The explanation is based on data that has been continuously collected since 2001 by the authors, information obtained from interviews conducted at a village in Aileu Municipality in July 2013, and interviews in Dili City, Dili Municipality, in December 2016. From the interviews, it was found that the procedural flow of Nahe Biti is similar in all thirteen municipalities of Timor-Leste, but the details of the procedure may differ depending on the region.

As shown in Figure 2, Nahe Biti is generally used to adjudicate five main types of matters: land and property ownership disputes, violence and incidents causing damage (e.g., arson, theft, violence, domestic violence, etc.), marriage and divorce, inheritance, and other disputes related to the village such as violation of Tara Bandu or village regulations.

Nahe Biti translates as “spreading (*nahe*) the carpet (*biti*).” The term derives from the practice of conducting the dispute settlement procedure on a large carpet. The principal administrator of Nahe Biti is the *lia nain*, leader of an extended patrilineal family consisting of members of an *uma lulik*. The Nahe Biti process is used to adjudicate matters internal to a clan or matters or incidents involving two or more clans within a community such as a village (*suco*) or hamlet (*aldeia*). In some cases, it is a procedure for confirming the facts of a conflict

and then mediating between the parties concerned and repairing the relationship. One party, usually the victim (or the perpetrator in some cases), makes a complaint to, for example, the *lia nain* or the Council of Elders (*Katuas/Catuas*). The *lia nain* or the *Chefe de Suco* hears the case and adjudicates on it. The Council of Elders invites all the persons involved in the case and their patriarchs (or relatives who play the role of patriarchs) to the hearing. The Council of Elders is a committee consisting of elders from the village or the clan who are knowledgeable in village matters. The size and composition of the Council differ from one village/clan to another.

In most cases, the participation of all villagers or all patriarchs is required, except when the hearing requires privacy. However, there are some differences in the composition of the participants depending on the case and the region. In cases where a certain level of privacy is required, only those involved in the case may be invited. Generally speaking, there are no absentees, but if an individual or a party does not comply with the convocation, it is believed that they will be cursed by the spirits of their ancestors and they will be isolated from their family and socially excluded from the community. The threat of a “curse” and social exclusion enables the adjudicators to enforce the procedure and the subsequent decisions.

#### *Implementation Procedure of Nahe Biti*

The *Nahe Biti* procedures are conducted in a sacred house in front of the spirits of the ancestors. This is because many Timorese set great store by the blessing of these spirits along with the spirits of nature and the earth. The legitimacy of the procedure is enhanced by the interpretation that the mediation is “protected” by the ancestors. By hearing testimony and carrying out evidence confirmation, fact finding, and agreement in front of the souls of the clan’s ancestors in the *uma lulik*, the parties in conflict are motivated to tell the truth and accept mediation. This also strengthens the binding force of the decision or agreement.

#### *Nahe Biti and Timorese Culture*

*Nahe Biti* appears to be trusted by Timorese communities. Under Indonesian rule, the people distrusted the formal judicial process, not only because they resisted the Indonesian authorities, but also because only a small number of people had access to justice for various reasons, including socioeconomic ones. Despite pressure from the Indonesian authorities and regulations against the practice of traditions and customs, *Nahe Biti*, along with other traditional governance mechanisms, continued to be implemented under the occupation, particularly in rural areas. There are several reasons why people trust the traditional governance mechanisms.

Culturally, Timorese people are resistant to formalization. Timorese communities were formed under the leadership of a traditional leader or clan leader,

who is usually the eldest son of the clan. With Timor-Leste being a relatively small, mountainous island, the community unit could only grow to a certain extent, mostly due to geographical limitations. In addition, natural disasters such as landslides and floods, triggered by the country's harsh climate, require community members to support one another in order to safeguard their livelihoods and to rely on justice administered by the *lia nain* in the *uma lulik*. Finally, community members are not accustomed to depending on outsiders in judicial matters and are reluctant to deal with household affairs in a formal judicial setting.

Even if the community decides to resort to the formal courts, access is limited for both systemic and socioeconomic reasons. The country's mountainous terrain and underdeveloped transportation infrastructure make it difficult for most inhabitants to reach the capital city of Dili. This is where the national courts and many legal service providers are located, with only a few district courts located outside the capital. Under such circumstances, people face difficulties in accessing formal justice options.

For the purpose of assessing the international community's support for various judicial reforms, the United Nations compiled the "Report of the Independent Comprehensive Needs Assessment of the Justice Sector" in 2009. The report highlighted "limited access to courts" as the core challenge associated with access to justice. Regarding the number of judges and the limited capacity of legal services (i.e., private lawyers), it emphasized the need to upgrade the Legal Training and Research Institute and increase the number of courts, as there were only four courts serving the whole nation. Along with other solutions, a proposal to establish a circuit court was mentioned, but considering the limited resources, it may not be a realistic solution for the time being (United Nations Mission in Timor-Leste 2009).

## Regularization of the Traditional Governance Mechanisms

The government of Timor-Leste recognized the relevance of Timorese traditions, inevitably including the traditional governance mechanisms, in the process leading to independence, and it has emphasized their significance in various rules and regulations. The government began by highlighting the value of customs and traditions in Timor-Leste's constitution of 2002. Article 2, Paragraph 4 of the constitution reads: "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."

The relationship between customary law and the constitution is codified as mentioned above. One question that remains, however, is how traditional governance mechanisms are regularized by legislation. Among other laws of

Timor-Leste, the most relevant is the Lei Sobre Justiça Tradicional (the Draft Act on Traditional Justice).

### *The Draft Act on Traditional Justice*

As of December 2020, the Draft Act on Traditional Justice (hereinafter, the Draft Act) was still under discussion by the cabinet. It envisages a traditional justice system that will have legal effect, although it does not explicitly define customary law or traditional justice. The purpose of the Draft Act has been defined as follows: “The Act envisages, by approving the customary norms and practices in accordance with the provisions of Article 2, Paragraph 4 of the constitution, the nation will be enabled to establish a functional link between the mechanisms of the traditional judiciary and the formal judiciary represented by the courts” (Interview with Vital Nelinho, December 30, 2016). The Draft Act describes the traditional judiciary that is widely used by the people and the legal effect that the decisions of this traditional system should be granted. It also clarifies how appeals should be made to the formal courts if decisions of the traditional system are not respected.

In confidence, a Ministry of Justice official suggested to the authors that the drafting of this particular act is an initiative led by the Ministry of Justice and that it is perceived as a rather technical act. Therefore, the official expected that it would be difficult to obtain the necessary cabinet decision for the act to be submitted to parliament as there was a lack of political will among certain leaders. Understandably, the Ministry of Justice considers it imperative that the law should define traditional governance mechanisms if such mechanisms are to function as a regulatory instrument in the country.

Regardless of how well such mechanisms are understood, whether they are adopted, and how they are applied by the communities, the regularization process must be solidified for it to be legitimate in terms of democracy. The question remains as to why this act has still not been finalized twenty years after independence given the widespread acceptance of traditional governance mechanisms in the communities.

### *Responsibilities of the Village Chiefs*

Article 10, Paragraph 1, Section (a) of the Law Concerning Community Leaderships and Their Election (LAW 3/2009, of July 8, 2009), approved by the parliament in 2009, stipulates that village chiefs are responsible for the promotion of peace and harmony in their villages (Laò Hamutuk 2009). The Draft Act on Traditional Justice cites the Nahe Biti traditional dispute resolution procedure, conducted by the village chief, as a means of fulfilling this responsibility.

The Draft Act provides for the recording and reporting of dispute deliberations and decisions; it requires the village chief to record the decision/agreement reached during the procedure (by the traditional method of dispute

resolution) in writing and to subsequently submit the record to the relevant authorities of the central government. This provision, therefore, puts in place a link between village chiefs, as the custodians of traditional justice, and the formal judiciary. In the past, as traditional governance mechanisms were part of the oral culture, the decisions/agreements obtained through traditional methods such as Nahe Biti were not commonly written down. The fact that many procedures still rely on oral decision/agreement, and that the literacy rate remains low at 68 percent (World Bank 2018), may pose a challenge to the effective implementation of the Draft Act when it is approved. Another issue is that the Draft Act regards the village chief as the implementer of traditional justice. However, in reality, the village chief is not involved in all the proceedings undertaken by the traditional judiciary.

As described above, the communities of Timor-Leste primarily consist of clan-based social units centered on the leadership of the *lia nain* and the Council of Elders, as well as the *uma lulik* to which the clan belongs. If the scale of a case/issue is relatively large, such as when a dispute involves members of different villages or clans, the village or hamlet chief may also be the adjudicator or the arbitrator. However, in traditional judicial proceedings, especially in rural areas, it is the *lia nain* who manages the session. During the interview with Director Nelinho in 2016, it was explained that the Draft Act mentioned above stipulates the involvement of the village chief in Article 6, Paragraph 1 regarding traditional judicial proceedings, as follows:

In order to register the agreement obtained by the traditional judicial system, the head of *suco* (village) must be officially involved in the dispute resolution. The mission of the head of *suco* is to determine the method of dispute resolution and to assist the parties and the participants in the resolution procedure, but he does not enforce the decision. If the head of *suco* is not involved in the proceedings, in accordance with this provision, this Act will not acknowledge the decision/agreement obtained by the traditional judicial method. (Interview with Vital Nelinho, December 30, 2016)

In other words, it is understood that the Draft Act would not acknowledge many of the decisions/agreements reached by traditional dispute resolution proceedings because the village chiefs are not involved. In fact, as this study reveals, village chiefs are not often involved in the dispute resolution process. This puts into question the definition of traditional dispute resolution contained in this Draft Act.

According to the Ministry of Justice and the practitioners in villages, it is actually the *lia nain* who takes the initiative, and the village chief participates only to give legitimacy to the proceedings (Interview with Vital Nelinho, December 30, 2016). In view of that, it is necessary to continue examining how traditional judicial proceedings are conducted in the villages.

*Registration of Agreement*

Regarding the registration of the decision/agreement, Article 7 of the Draft Act stipulates that “agreements obtained by the traditional judiciary are recorded in writing by the head of the village,” and “the registration agreement is prepared by the head of the *suco*, including the statements from all parties concerned that proves their participation in the proceedings, and their agreement to the decision/agreement reached. Such a consent form needs to be attached to the record of the proceedings.” The registered agreement will be sent to the court or public prosecutor’s office. The responsibilities of the presiding judge or the public prosecutor’s office are stipulated in Article 9 (3), as explained by a senior official of the Ministry of Justice as follows:

The public prosecutor’s office or the presiding judge plays an important role in examining the conformity of the decision/agreement obtained by the traditional judicial proceedings in accordance with the provisions of Article 216, Paragraph 3 of the Code of Criminal Procedure. Therefore, the authority is responsible for confirming (1) whether the decision/agreement is included in the scope of the law as per Article 2 of the Act, and (2) whether or not there is a written consent of the parties that must be attached to the registration of the decision/agreement in accordance with the provisions of Article 7, Paragraph 2, and (3) to confirm whether the extent of the effect of the traditional judicial proceedings outlined in Article 11 is respected. (Interview with Vital Nelinho, December 30, 2016)

The courts and the public prosecutor’s office have the authority to examine whether the agreement complies with the provisions of Article 11 of the Draft Act. Article 11 provides for the protection of basic human rights. It reads, “Decisions/agreements obtained through traditional judicial proceedings must not include provisions that violate the basic human rights of the parties or sanction the freedom of the parties.”

*Women’s Rights in Traditional Judicial Proceedings*

From the liberal peace perspective, what vastly undermines many of Timor-Leste’s traditional mechanisms is their ambiguity when it comes to women’s rights. In order to protect women’s rights, Article 6 of the Draft Act stipulates the following: “In a case where one or more parties are women, the head of the village can preferentially offer women participation in the proceedings.”

In some regions, women are not permitted to participate in traditional judicial proceedings. Violations of women’s rights of this kind have not gone unnoticed. According to a multi-year survey on law and justice conducted by the Asia Foundation, 25 percent of respondents to the 2004 survey were resistant to women speaking in traditional (*lisan*) proceedings. In a 2008 survey, 58 percent of respondents expressed resistance. In 2013, this rate dropped to 36 percent, although it was still higher than it had been in 2004 (Asia Foundation 2013). The

Ministry of Justice is aware of these data and is making efforts to overcome the challenge of women's interests not being fully taken into consideration during traditional judicial proceedings.

#### *The Law Concerning Community Leaderships and Their Election*

This law, which came into effect in July 2009, details the authority of village and hamlet chiefs (Lao Hamutuk 2009). Their roles in traditional judicial proceedings have been described above. In addition, the law provides for chiefs to advise the parties whether to formally lodge a case before the court (instead of relying on the traditional judiciary) in the event of a serious incident that may be subject to criminal proceedings.

According to the United Nations Development Programme (UNDP), it is often reported that some cases that merit criminal proceedings are being referred to the traditional judiciary by village chiefs when it is considered more effective to handle them within the community (Interview with Masako Yokoyama of UNDP, July 24, 2013). This is the result of the court's view that settlement by village mediation led by a village chief who has a good overview of the details of the case is a rational solution. At the same time, it is seen as a way of reducing pressure on the formal courts which are experiencing a backlog of undecided cases.

As indicated above, if there is a legal issue that presupposes the implementation of traditional norms, particularly when access to legal remedies is scarce, an analysis of the correlation between formal and traditional legal frameworks needs to be made. In addition, there may be situations in some regions where the jurisdiction of the criminal law differs from (or overlaps with) that of the traditional judiciary if the responsibilities and roles assigned to village chiefs by the Law Concerning Community Leaderships and Their Election are applied. It is necessary to clearly define the jurisdiction of traditional justice and its correlation with state law in order to minimize differences in the interpretation of the law and to maintain fairness.

Considering these points, it would be appropriate for the Ministry of Justice to study the traditional governance mechanisms and define them in state law. In addition, given that several bills defining customary law are currently under discussion, it may be necessary to appoint a competent authority responsible for coordinating the state laws or ministerial decrees lodged by different ministries. According to the Ministry of Justice, there is a research officer in charge of culture and tradition in the President's Office who is conducting studies on the traditional judiciary (Interview with Vital Nelinho, December 30, 2016). These studies, however, are being conducted from a cultural point of view, and the office does not have the function of ensuring consistency with the relevant state laws.

#### *The Stance of Political Leaders on Traditional Governance Mechanisms*

Meanwhile, Timor-Leste's political leaders have not pressed hard for legal

centralism during parliamentary deliberations on the legal framework but have instead accepted the potential roles of the traditional governance mechanisms, including the customary laws. Political leaders even appear to be openly tolerant of legal pluralism. Particularly in the domestic context, they do not shy away from keeping such an approach at the core of the debate on the legal framework, as is evident in the above-mentioned statement by Senior Minister Pereira. That said, their public positions are more nuanced when they are addressing the international community.

Leaders' tolerance of legal pluralism is explicit in the political debate over constitutional recognition of and protection for their customs, including customary laws. Such a position is reflective of community support for traditional governance mechanisms, particularly since independence in May 2002. The decision of CAVR to use Nahe Biti is a bold example of the national recognition of traditional governance mechanisms and the intention of political leaders to nurture a sense of ownership over the entire reconciliation process among community members.

The "modernization" carried out through the 250 years of Portuguese colonization, which was followed after 1975 by Indonesian rule, facilitated a departure from customs and resulted in an increase in educational and economic opportunities. The country's traditional governance mechanisms, particularly the customary laws, have visibly evolved since independence in 2002.

Having discussed how these traditional governance mechanisms have developed in Timor-Leste since the restoration of independence and how their formalization is being considered, we will turn, in the following section, to a discussion of the challenges and opportunities associated with the application of these mechanisms.

### *The Application of Traditional Governance Mechanisms: Challenges and Opportunities*

Both the ruling and opposition parties have expressed support for traditional norms, including customary laws. That position is reinforced by the people's trust in traditional mechanisms and community members' recognition of their effectiveness. That said, during the first years of independence, customary laws were often portrayed as remnants of feudal society which could not coexist with "modern state laws." Such a perception was expressed by political leaders in their speeches during that period. As Xanana Gusmão, the president at the time of independence, stated at the International Conference on Traditional Conflict Resolution & Traditional Justice in Dili, Timor-Leste:

Common or traditional laws also represent the stage of evolution of a society and usually correspond to societies based on feudal relationships both in the social and religious (non-formal religions) aspects; both aspects are combined with the political



and economic ones and add to another which refers to castes as the lower echelons of society, slaves and those who practice witchcraft and whom [*sic*] are usually denied rights (Gusmão 2005).

Further investigation reveals that this statement was targeted at foreign stakeholders, particularly development partners; the tone of Gusmão's speeches delivered to the Timorese people was quite different, and they highlight his affirmation of customs and traditions, including their rules and norms.

The Ministry of Justice's struggle to confer legitimacy on traditional governance mechanisms within the legal framework is a work in progress that needs to be built upon with a delicate balance between tradition and modern liberal values. As noted above, Senior Minister Pereira holds the view that traditions and culture, rather than ideologies, were the foundation of Timor-Leste's independence. This leads one to believe that political endorsement of tradition and culture should not involve a struggle. However, the senior minister also articulated thus in his August 2013 interview:

So when we build a state and transform people's mentality to accept the individual as the unit, not the communal family as the unit from the customary law, you have a serious challenge here. ... But for the state to develop, you need this concept of private property. Because that is the concept of justifying the existence of a state. So, once you have private property, then you have individualism, and individualistic approach to existence and development.

These views explain the need for balance and why the Draft Act has still not been finalized after twenty years. It is a constant struggle and an ongoing process of transformation, within which the people and communities of Timor-Leste must experience the process of modernizing traditional governance mechanisms in their own way.

## Conclusions

Conflict-riven Timor-Leste has faced challenges resulting from limited social resources during the period of reconstruction. In these circumstances, it is a realistic approach to utilize traditional governance mechanisms, such as traditional judicial proceedings and traditional norms. Furthermore, if the state laws can adopt some of the properties of the traditional restorative justice system, the resulting hybrid legal framework might be considered progressive and sustainable. This would retain the positive elements of a community approach.

In other words, rather than using the traditional governance mechanisms as a temporary measure in lieu of other legal instruments, traditional knowledge and institutions could facilitate the realization of the rule of law, particularly if

such mechanisms are regularized. During the twenty years since independence, the people of Timor-Leste have built the foundation upon which transformed traditional mechanisms can be integrated into state law. In this context, the anticipated finalization of the Draft Act will be of great significance.

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