

Major Needs and Challenges for Achieving Gender Justice in Timor Leste

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Introduction

Timorese society is patriarchal, so the Timorese women live in a social structure where their rights have been largely oppressed. Women in Timorese society are an under class and often subordinates to men. The repressive situation that Timorese women face is not unique to Timor Leste, and although international law provides guarantees to women, we continue to see discrimination and violation against women.

Legitimation of the traditional culture, is another means to oppress women. Women are oppressed through their restricted access to the economy, law, and education amongst others which marginalize women from participating in public life. The use of cultural factors to argue women into set roles is unacceptable to women and although women are respectful of cultural values they do so of those values which do not go against human and women's rights. Traditional practise for example excludes women from inheriting property or registering property in her name. Property is passed down through the male of the family, creating extreme economic dependence by the woman which is also an impediment when a woman seeks justice.

Barlaque a form of dowry means that men perceive their wives as possessions and can beat their wife at their own will. Lack of laws to protect women also result in the practise of adultery and men leave their wife and their children and are not required to provide support. After marriage, when a woman does not borne children or a male descendant traditional practise allows the man to leave his wife and live together with another woman. Where the family intervenes the tendency is to blame the wife.

Context

Timorese women's pursuit of and access to justice, through the formal justice system and through customary law, from Portuguese colonialism, to the Indonesian occupation through to an independent Timor Leste have yielded few successes. This has been true for crimes committed against women around the UN conducted 1999 ballot in Timor Leste and during the dark years of occupation to more recent crimes committed post 1999 during the transition under UNTAET and the 1st Constitutional Government. Nevertheless some important steps forward have been taken in formalising a legal framework from which to defend and ensure women's rights in the legal realm. Timor Leste's Constitution contains various provisions on equality between women and men. There is a non discrimination clause (Article 16), a clause on equality between women men (Article 17) and another clause which mandates the state to promote equality between women and men, and another (Article 65) which conditions the attainment of democracy to the full and equal participation of both women and men. Notably another article (Article 9) in the Constitution provides for the applicability of international law over domestic law in Timor Leste where domestic law contravenes international law. Significantly Timor Leste also ratified without reservations, the Convention Against All Forms of Discrimination Against Women (CEDAW) and its Optional protocol and is currently trialling a treaty reform process in the drawing up of its first report to the CEDAW Committee and other Treaty reports it is obliged to report to.

Despite these advancements and the government's overall commitment to gender equality, Timor Leste's judiciary continues to contain various systemic flaws which are not favourable to women's attainment of justice. This is augmented by the absence of clear laws that protect women's rights and a patriarchal society which is the cause of an inherent insensitiveness to women's rights by legal actors.

Timor Leste's judicial system is a little over 4 years old and uses Indonesian law as secondary law. Indonesian law itself does not have specific laws that protect women's rights. There is no other alternative in laws that may protect women especially in relation to ordinary crimes eg. domestic violence, sexual violence, and other forms of abuse.

Most of us, judges, prosecutors and public defenders recruited by the United Nations Transition Administration (UNTAET) in early 2000 and still formally considered as interns/stagiaires. We have in fact just initiated training which will last 2 years, and will contain a series of tests to ascertain our capabilities and lead to a phased admission as professional judges, prosecutors and public defenders. This is a complex task as many factors combine to make the process arduous. This involves a combination of inadequate and clear laws, and understanding of international customary law and the applicability of these by court actors, institutional weaknesses natural to a newly independent country like Timor Leste and lastly the inexperience of legal actors.

Case study

I would like to explore each of these factors in turn by summarising and sharing a case study documented and released in July 2004 by an NGO called the Judicial System Monitoring Programme (JSMP). I do so in attempt to give you a practical example of the problems encountered by women when they seek justice and is by no means a judgement of my colleagues. The case is an analysis of a decision taken at the Dili district court concerning a sexual assault case involving a female minor under the age of 15 years by an older adult male distantly related to the accused. The accused had previously attempted to rape the victim some months prior to the actual rape. In describing the rape, both the victim and the accused stated that the rape occurred for some minutes. A medical examination which occurred after 32 hours reported no bruising to the anus or vagina and that the hymen was still intact and notes that the accused had placed his penis in the victims anus. It is not clear whether this was based on the medical examination or from statements taken by either the accused or victims or the police report.

The original indictment charged the accused with offences under Articles 285 which provides for cases of rape, 290 (2) which provides for indecent assault of minors of the Indonesian penal Code. The final indictment charged the accused with offences under article 290 only.

Article 285, has 4 elements required to prove rape and a maximum 12 year term.

1. Offence occurred with violence or the threat of violence
2. The offender was a man and committed the offence against a woman without her consent
3. The woman was not offenders wife
4. The offence involved sexual intercourse

Article 290 (2) is about sexual indecency “ commits obscene acts with someone who he knows or should reasonably presume that she has not yet reached the age of fifteen years or it is not obvious from her age, not yet marriageable”.

In this case the prosecutor did not use Article 285 because it is based on Dutch Law which defined sexual intercourse in terms of reproduction and therefore only involving penis vaginal penetration, where as this case may have involved anal rape.

Furthermore neither the prosecution nor the judge regarded international law in the indictment or the judgement, which includes anal rape and does not require corroborating evidence for victims

testimony. This includes the International Criminal Court governing statute which Timor Leste has signed and ratified.

Procedurally there were 8 adjournments in total including a 6 month postponement to allow for a doctors report which was never produced and a 5 month period where nothing happened. The final decision rendered by the court happened over a year after the victim was assaulted.

This case is important as it raise several issues regarding what proof is required to establish that rape (vaginal/anal) has occurred, the status of anal rape in Timor Leste, and factors considered in the indictment and sentencing. Despite statements by the victim and accused stating that penetration had occurred , the medical report was relied on although no evidence was presented by doctor.

The prosecutor requested 5 years sentence due to the need of the parents of the accused for being provide for by the accused, repentance shown and the absence of attempted rape of other minors. In sentencing the Judge substantiated the decision on the family circumstances of the accused and that a rape had not actually occurred.

Aggravating factors such as the use of a machete to threaten the victim, ejaculation, the age of the victim, and previous attempts were largely ignored in both the indictment and sentencing.

Important reforms have been initiated. The draft domestic violence bill includes in the definition of rape, anal, oral penetration and marital rape in Chapter IV Section 6 – Forms of domestic Violence Offences. The draft Penal Code also does the same and provides for stronger punishment of between 3-12 years when the victim is under the age of 16 as opposed 2-8 years for victims over the age of 16 years.

The draft domestic violence bill in currently being harmonised with the Penal code. I am hopeful that the domestic violence bill and the Penal code when adopted will contribute to the protection of women's rights. The draft bill is important because it clearly states that Domestic Violence is a crime and therefore can not be regarded as private and must be prosecuted .

Other impediments

Legal actors in Timor Leste also face many impediments. Language is a serious issue. Timor Leste Constitution has adopted Portuguese and tetum as the official languages. In addition, English and Indonesian are working languages. Tetum is an oral language, recently efforts to make it a written language. Judges and prosecutors have been sent to Portugal for further training. The majority of judges, prosecutors and public defenders are not portuguese speakers, as we studied in Indonesian universities.

WE also have a serious lack of facilities in Dili for example we are a total of four prosecutors and must share a computer with no technical support. When the computer has a problem it takes a long time for it o be fixed and therefore we are forced to make use of the next available. I often take my work home and work from home for lack of facilities.

Lessons learnt

In terms of some lessons learnt it is important to find urgent solutions to immediate problems but it is just as important to realise that the development of a justice system takes time. In Timor Leste we were

recruited and thrust into positions which we did not have prior experience in due to the legal vacuum. It was an emergency period but a longer vision is required with long term training rather than short courses such as the month's training given in Darwin Australia to the new phase of recruits. There are no quick solutions although interim measures need to be adopted but for us to be able to absorb all that is required in a training as well as learning by practising takes time.

Reconciliation and Justice

Gender justice issues need to be divided into two parts. The crimes which were committed against women during the years of occupation and in 1999 and those which occurred afterwards. Significantly the UN established Serious crimes in indicting some 20 cases which would represent the crimes committed in 1999 has failed to indict a specific sexual violence case. The mechanism established in Jakarta through the adhoc tribunal has clearly not worked and justice thus can not be sought there.

Women in Timor Leste continue to demand justice for the crimes committed during the years of occupation through the establishment of an international tribunal for Timor Leste. There has been much discussion on this and it appears that there is little support even though the crimes committed in 1999 occurred whilst the UN was conducting the referendum in Timor Leste. Other mechanisms are being discussed and explored and here it should be stressed that both the 1st and 2nd Congress of Women of Timor Leste in 2000 and most recently in June 2004 continued to call for reconciliation with justice.

There is understanding that the government is in a difficult position, in terms of needing to establish good relations with Indonesia whilst meeting the people's continued demand for justice through an international mechanism. Nonetheless it can not be forgotten and indeed experience from other countries has shown that justice is indispensable. The few remaining women victims of World War II in Timor Leste have not forgotten their ordeal and have spoken about their need for justice so many years after World War II and an elderly woman travelled to Japan to testify in the NGO convened adhoc tribunal in Tokyo in 2002.

The people in Timor Leste including the women have embraced reconciliation and in many villages have accepted the return of perpetrators of crimes in 1999 who currently live amongst them. This was always on the understanding that justice would be done and people continue to wait for this justice. We are starting and our justice system is weak and perhaps it is one of the weakest of our state institutions, but its importance can not be undermined. The state can only function with an equilibrium between all of its institutions, if one is overly strong or another overly weak the peace that we sacrificed so much for is threatened.

Thank you for the time given to me.