

## Customary Law in Timor-Leste

Hercus Pereira dos Santos

Instituto de Sao Joao de Brito Kasait, Likisa, Timor-Leste

**Corresponding Author:** Hercus Pereira dos Santos [santoshercus10@gmail.com](mailto:santoshercus10@gmail.com)

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### ABSTRACT

The Democratic Republic of Timor-Leste as a modern state is governed by its Constitution, which was drawn up by the Constituent Assembly in 2001 with the presence and fundamental support of the United Nations Transitional Administration in Timor-Leste - UNTAET (United Nations Transitional Administration in East Timor), under the leadership of the late Sergio Viera de Melo. This means that Timor-Leste, as a logical consequence, was founded on the foundations of the Western Roman-Germanic legal doctrine and especially of Portugal. We can clearly see that the Constitution of Timor-Leste integrates the basic and important foundations of the modern rule of law where the supremacy of positive state rights prevails: The Constitution and other state legal norms, respect for human rights, democratic culture, the principle of separation of powers, political, social, religious pluralism and the determination to fight any tyranny, dictatorship and at the same time the Constitution of Timor-Leste also seeks to reiterate cultural pluralism, the customary right existing within the society of Timor-Leste to create a just and prosperous state for all citizens. That is why we can safely say that the Constitution of Timor-Leste as a fundamental law of the state seeks to guarantee that Timor-Leste, on the one hand, as a modern state of law based on Western legal standards and on the other hand, the Constitution itself seeks to value and respect the use of customary law that is still in use to regularize the life of the people within the society of Timor-Leste.

## INTRODUCTION

Timor-Leste has a long and rich history. The first migrations took place in Timor-Leste with the arrival of the Papuan or Melanesian peoples who came from Papua New Guinea and Australia who corresponded with the Papuan languages such as Fataluku, Makalero, Makasae and Bunak. Ancient research at Jerimalae led by Australian archaeologist from the Australian National University has shown that there is evidence of human presence in East Timor as early as 42,000 years ago. While recent research by the same archaeologist has identified a new discovery in the Laili cave in the Laleia area showed it even older 44,000 years ago.

The second migration happened with the arrival of the Austronesian peoples in 4500 years ago who came from Taiwan and crossed the islands of the Philippines and Indonesia to Timor-Leste. These Austronesian peoples spread on the island who corresponded with many languages of Timor-Leste such as Tetun Tenik, Mamba To facilitate our understanding, we must memorize the four languages of Papua and the other languages belong to the Austronesian languages besides Hakka, Cantonese, Mandarin, Portuguese Language, Creole Portuguese of Bidau, Arabic and Indonesian Language.

This situation of the cultural and linguistic plurality of the peoples can also influence the existence of the variety of customary rights in the resolution of conflicts within Timorese society. In addition to the existence of varieties of customary rights in the resolution of conflicts, Timor-Leste as a modern state chooses to follow the Roman-Germanic law that it inherits through Portugal. Even so, the Constitution of Timor-Leste seeks to give the importance of customary law that it contemplates in Article 2(4). But this appreciation must be in harmony with the Constitution and other state legal norms that respect Human Rights, because any interpretation of fundamental rights must be in line with the Universal Declaration of Human Rights, as mandated by Article 23 of the Constitution of Timor-Leste.

Therefore, Timor-Leste as a state of law, on the one hand, seeks to value its ancestral customs including in the matter of conflict resolution and all its customary law that still live and strongly regulate the life of the people within society but on the other hand, the State of Timor-Leste seeks to be careful with customary rights so that these customary rights cannot violate the Constitution and other state legal norms and the International Human Rights System that Timor-Leste has ratified. In other words, the state of Timor-Leste seeks to value customary law that is in harmony with the International Human Rights System.

## LITERATURE REVIEW

Some scholars have already done a study on the use of Customary Law in Timor-Leste. Patricia Jerónimo made a study on the mechanism of traditional justice in the rule of law of Timor-Leste. While Laura Grenfell studied legal pluralism in Timor-Leste where legislation was needed to regulate the use of traditional justice so as not to conflict with the state system of justice.

Daniel Schroeter Simião saw that the role of the state justice system has a lot of influence in Timor-Leste. While Tanja Hohe and Rod Nixon argue that customary law has a fundamental function for harmony in the cosmos and for

community members is insured again. Manuel Atienza argues that local law and state law for harmony and regularize the life of the population in the process of the country's development. These objectives can be considered as a system of social control of law from.

## **METHODOLOGY**

This study uses the method of qualitative research of observation and important documents that are related to Customary Law in Timor-Leste.

The use of the method of observation due to the fact that the author of the research also lives within Timorese society and directly observes the use of customary law in the lives of Timorese, especially at the time of traditional ceremonies, such as in the affairs of *fetosan-umane* in relation to *lia mate* and *lia moris*, in the traditional ceremony of the sacred houses and in the resolution of conflicts within Timorese society.

In addition, the author also analyzes important documents in relation to the doctrine of Roman-Germanic law and the international human rights system.

## **RESEARCH RESULT**

The Constitution of the Democratic Republic of Timor-Leste gives special recognition to the existence of local norms and customs. Article 2, number 4 says: "The State recognizes and values the norms and customary practices of Timor-Leste that do not contravene the Constitution and legislation that deals especially with customary law".

By interpreting the constitution, we have seen that it is an obligation of the Timorese state to create a mechanism for the integration of customary law into the state legal system, because on the one hand, without a concrete mechanism of the state in the application of this article, the Timorese state is falling into violation of the constitution and on the other hand, in a state of law such as Timor-Leste it must safeguard the guarantee of legal certainty within the population even if the guarantee of legal certainty in a state of law is only up to the state courts.

It is because the Timorese constitution recognizes and values customary law, then the Timorese state must create legislation to regulate or define the clear action between customary law and formal-state law within society. We share Laura Grefell's idea as she says that "East Timor's government needs to enact legislation, clarifying the relationship between the two systems of law and setting out some judicial guidelines so as to remedy the present confusion in East Timor's courts as to whether and when local law can be used".

On the part of the Timorese government there is this concern to collect data on the customary law of Timor-Leste. Patrícia Jerónimo defends in her article, entitled *Rule of Law and Traditional Justice Essays for a balance in Timor-Leste*, this attempt by the Timorese government in 2009 to carry out a survey on Customary Law and intends with this to see how customary law can solve problems of a lesser scope.

This survey is very important, we saw that there are multiple mechanisms to do justice within the community. At least with this the Timorese government can control the mechanisms of application of traditional justice that will not

contradict the general principles of human rights or any fundamental principle of the Democratic Rule of Law of Timor-Leste.

We have seen that the recognition of the Timorese government is limited only to minor problems. In fact, this idea can also be seen in the resolution of conflicts not serious crimes, during the mandate of the CAVR, in the community by its district commission.

This decision is commendable because it helped facilitate the integration into the community of the former pro-autonomists and re-establish good harmony and peace in the community. In addition, it also helped to reduce the weight of the state, which then only dealt with the policy that the state takes in relation to serious crimes against humanity without worrying too much about dealing with the minor issues that the leaders of the community may deal with. The success of the district CAVR committee in using traditional conflict resolution mechanisms can serve as an example of how important and effective the use of customary law in the community is.

Timor-Leste, as a post-conflict state that came from a history of wars for centuries and where there are many ethnic-linguistic groups that can jeopardize the stability of the country, where the population does not have much access to the state justice system, needs an adequate mechanism to deal with issues of justice and conflict resolution within the grass-root community. As Daniel Schroeter Simião says, "there is a low penetration of state justice mechanisms (police, public prosecutor's office, public defense and courts) among the population in all Districts".

This situation is also clearly defended by Patrícia in the same article, saying "It soon appeared, however, that the real impact of the reforms undertaken by legislation on the populations was very limited, who continued to govern their lives by the customary norms (sometimes in clear violation of official law) and to resort to traditional instances for the resolution of conflicts arising within the communities". Therefore, it is not very surprising that with this difficulty of difficult access to the state justice system, the population often resorts to traditional justice as a faster and more accessible means to resolve existing conflicts.

Traditional justice does not only aim to resolve the conflicts of the interested parties, but more than resolving conflicts, it is also seen as a mechanism to ensure the existence of harmony in the community, and often what the population seeks in traditional justice is just that: the restoration of harmony within the community; the restoration of the disturbance of the social order of the community. Tanja Hohe and Rod Nixon say that "local law is mainly about the replacement of values, to re-establish their correct exchange and thus reinforce the socio-cosmic order". The two concretely underline that local or traditional law is for "[harmony in the cosmos and for community members is insured again]". While the state law of Timor-Leste, nowadays, as a source of Western origin, in which it focuses on the protection and enhancement of the human rights of each individual, the individual as a value in itself from a Kant perspective, seen from a Western perspective of individuality, the customary law of Timor-Leste seeks to emphasize the common interest of the community. The

interest of the community is the greatest of all isolated individual interests. That is why any decision of the state court puts the interest of the victim first as an individual and center of attention. While the decision of the "court" of traditional justice seeks first and foremost the harmonization of the community because any problem is seen as a disruption of the harmony of the community. The problem is of interest to all for the sake of community harmony. The problem is not isolated, not only the victim and the accused, but it is in the interest of the community in the name of community harmony and, moreover, the participation of the community in the resolution of conflicts is active.

Even though customary law plays a very important role in the lives of Timorese in the rural community, the recognition of customary law is confusing within the state of Timor-Leste. On the one hand, the Constitution of the Republic recognizes and values customary law and on the other hand the national parliament made a law number 10/2003, of 10 December to prevent its valorization. It seems to us that this law is not in harmony with the Constitution, the main law of Timor-Leste.

This reality, for us, shows that the state of Timor-Leste is in doubt in relation to the importance of customary law in the process of the country's development (State Building). More than the explicit concern, which is contained in the law, we can also think (only as a possibility) that one of the reasons may be the concern that there are practices in customary law that can jeopardize the lack of respect for the dignity of the human person, freedom and gender equality that sometimes happen with the application of customary law in Timorese society.

We think that, in order to avoid this concern about the arbitrariness of certain customary rights, we should converge customary law into the formal state legal system in harmony with the Constitution of Timor-Leste. Any act of Customary Law that contravenes the Constitution must be prohibited. Because the Constitution already provides for respect for the dignity of the human person (Article 1, paragraph 1), the guarantee and promotion of the fundamental rights and freedoms of citizens, and respect for the principles of the democratic rule of law (Article 6, paragraph b), other principles for the defence of fundamental rights, such as in relation to rights, freedoms and guarantees (Articles 29 et seq.) and economic, social and cultural rights (Articles 50 et seq.) and in addition the Constitution also respects and gives supremacy to International Law over any ordinary laws of the State. Because according to article 9 number 3 of the Constitution, any formal state law will be invalid if it contradicts the conventions, treaties and international agreements received in the domestic legal order.

This recognition shows the supremacy of international conventions, treaties and agreements (received in the domestic legal order while completing the process required in Article 9 number 2 of the CRDTL) over the ordinary laws of the state. We must therefore bear in mind that any customary law that converges in formal state law must always be in harmony with the international conventions, treaties and agreements that the state of Timor-Leste has already ratified.

With certainty and certainty we can say that the Constitution of Timor-Leste is playing an important role in prohibiting any act that violates any fundamental rights of the citizen.

Therefore, the State of Timor-Leste has a commitment to, while making legislation and ordering on Customary Law, take out and prohibit any act that contradicts the Constitution. For example, in the resolution of crime in traditional justice, we must take into account the principle of legality in the legal-criminal sphere in its maximum amplitude, at the substantive level and also in the criminal procedural sphere, and must guarantee the right to legal peace on the part of the accused, subject to a final judgment, as well as the right to compensation for unjust conviction in the application of criminal law, according to Article 31 of the Constitution. We must ban any act, in the resolution of crime in traditional justice, that could jeopardize this article.

In addition, in customary law there is the death penalty or inhuman and degrading treatment of the guilty and this cannot be accepted and prohibited in the light of the United Nations Convention Against Torture that Timor-Leste has already ratified. Or even in relation to women, in which in Timorese society there is a lack of respect or there is discrimination against women in customary law, then this discrimination is also prohibited, according to the Convention on the Elimination of All Forms of Discrimination against Women, which has already been ratified by Timor-Leste. Or, for example, in the Timorese custom that gives more priority to sons for formal education than daughters, then this act we should also prohibit in the light of Article 4 of the Universal Declaration of Human Rights.

All of these acts mentioned above also violate the Universal Declaration of Human Rights in relation to articles 1 (Everyone has the right to become human and to be treated as such), 2 (Everyone has the right to life), 3 (everyone has the right to independence) and 4 (Everyone has the right to know). Any act of Customary Law that jeopardizes Human Rights must also be banned because the Constitution of Timor-Leste provides in its article 23 that "The fundamental rights enshrined in the Constitution do not exclude any others contained in the law and must be interpreted in accordance with the Universal Declaration of Human Rights". The issue of Human Rights, according to Article 23, becomes a guiding guide in the drafting and interpretation of the laws of the rule of law of Timor-Leste, including in the future drafting and interpretation of laws regulating customary law (Article 2, number 4, second part).

We have seen that there is an appreciation on the part of the international community in relation to customary law. We find this in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was adopted in 1985, in which the United Nations General Assembly admitted the use of customary law or indigenous practices of justice, always in favour of the victim. It also includes the appreciation by the United Nations Economic and Social Council with resolution 2002/12 of 24 July 2002 which talks about restorative justice in criminal matters. The Human Rights Committee also values the legitimacy of customary law courts to make mandatory sentences from

matters only in relation to minor criminal and civil matters (which has come to coincide with the Timorese government's intention mentioned above).

We can say that the application of customary law must be in the light of the Constitution. Therefore, in the application of Customary Law in Timor-Leste, according to Article 2 of the Constitution, a principle of *praeter legem* and not *contra legem* is followed.

We have seen in reality that both customary law and formal state law have the same objective, which is to resolve conflicts, ensure stability or re-establish harmony and regularize the life of the population in the process of the country's development. These objectives can be considered as a system of social control of law from the perspective of Atienza. He says that "a actividade do controlo parece ter por objecto a conduta em geral dos membros da sociedade, enquanto que, num sentido mais restrito, o controlo social se limite aos desvios de conduta."

Starting from this function of law as social control, we must seek how to make a good convergence between customary law and formal state law for the good of society as a contribution to this process of development and consolidation of the Democratic State of Law. Because customary law is born with the population. To devalue customary law also means to devalue the cultural heritage of a people and that this will contravene Article 5(g) of the CRDTL and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and that, as we have already mentioned above, any elaboration and interpretation of customary law must be in the light of human rights, which it confirmed with Article 2, paragraph 1 of that Convention.

## CONCLUSIONS AND RECOMMENDATIONS

If today this practice of customary law still exists in Timorese society, it means that at least among the rural population, this customary law has a sense of its importance and its effectiveness in application, accessible in the eyes of the local population in the regulation of the life of the community. Now, what should we pay attention to in the situation of legal pluralism as in Timor-Leste so that any customary law does not contradict with the formal state law (including international law recognized in the internal legal order of the state); ensure reparation for victims' damages; the recovery of the social order of the base community as part of the community's traditional retributive justice system and at the same time we must also assign an adequate "punishment" to the guilty so that they do not commit the crimes again in the future.

\*Human Rights Master Degree from Minho University – Portugal and Lecturer of East Timor History and Culture, Peace Education at Higher Institute of São João de Brito Likisa, Timor-Leste.

## ADVANCED RESEARCH

Further research on the role of customary law in Timor-Leste should explore how traditional practices can be harmonized with the formal state legal framework without diminishing their cultural significance. Such research needs to assess the mechanisms through which customary law contributes to conflict resolution, community cohesion, and restorative justice, while simultaneously

ensuring compliance with human rights standards and international legal norms. This will help to identify pathways for integrating customary and formal justice systems in a complementary manner, rather than in opposition.

In addition, future studies should analyze the long-term impact of customary law practices on both victims and offenders within rural communities. Particular attention should be given to whether these practices effectively provide reparation, promote reconciliation, and deter future violations. By examining these dimensions, research can contribute to developing a more inclusive legal system in Timor-Leste—one that respects cultural heritage, strengthens community-based justice, and upholds the principles of accountability and human rights protection.

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