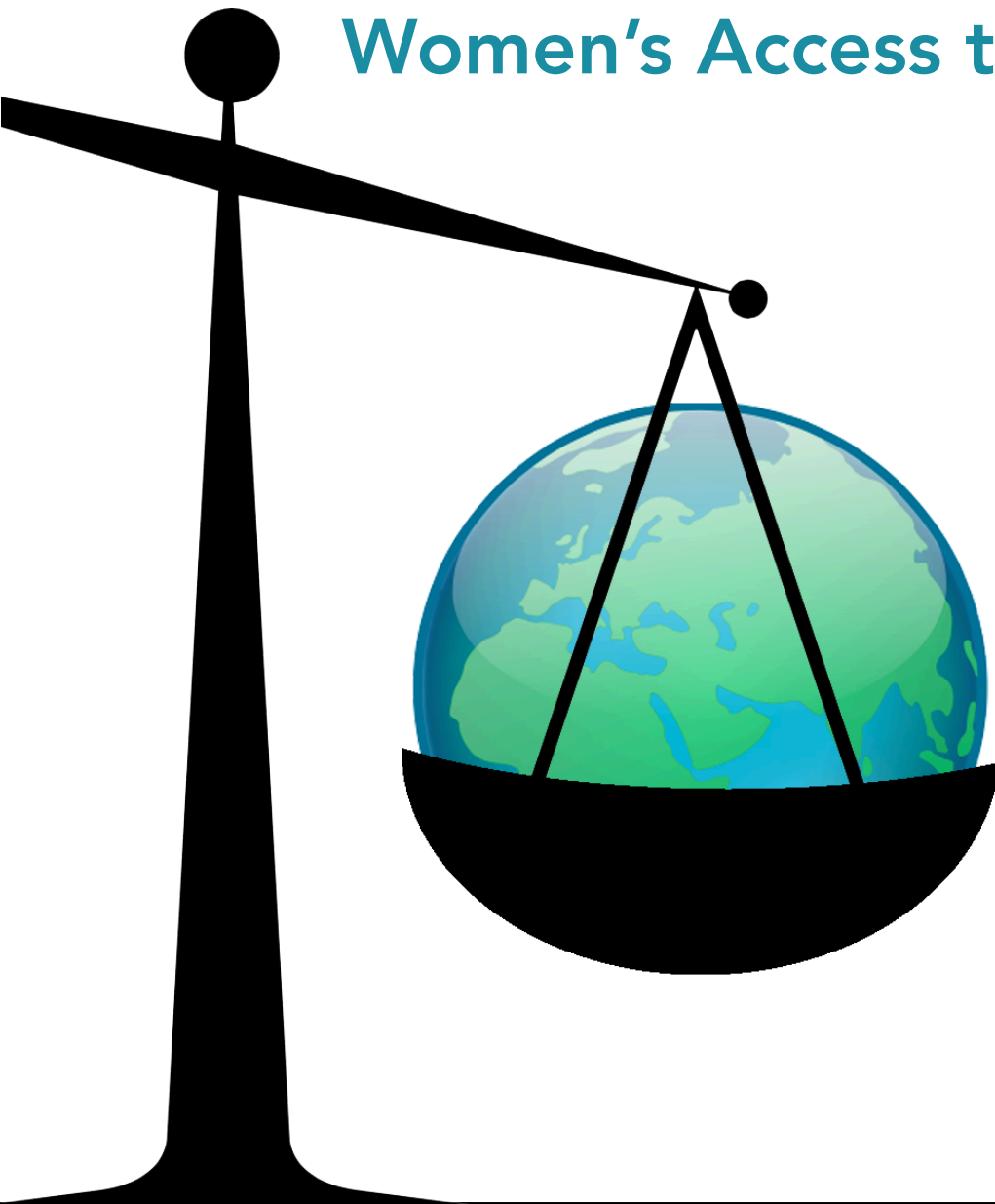
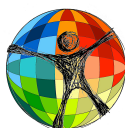


# Engaging with Customary Law in Timor-Leste: Approaches to Increasing Women's Access to Justice



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# Introduction

The sporadic and unregulated relationship between the formal and informal legal systems in Timor-Leste is severely undermining women's ability to access justice. In 2009, Timor-Leste's Demography and Health Survey revealed that 80 percent of male respondents and 86 per cent of female respondents believed that a husband was entitled to beat his wife should she fail to fulfill an important household duty.

The high prevalence of domestic violence in Asia's newest nation led Parliament to enact the Rule Against Domestic Violence in May 2010; eight years after the law had first been drafted. The law treats violence against women as a public crime, which must be investigated and prosecuted by the state regardless of whether the victim has filed a criminal complaint.

While the law's enactment represents a formidable accomplishment for the fledgling democracy, the law's application has failed to substantially change the vulnerable position of women involved in cases of domestic violence.

The ability of the Rule Against Domestic Violence to effectively empower and protect women is crippled by the formal and informal legal system's ad-hoc relationship. In Timor-Leste, recent studies suggest that 83 per cent of the population relies on the customary justice system for dispute resolution.

Consequently, women who are victims of domestic violence may be forced to overcome the barriers imposed by two systems as they attempt to navigate between the formal and informal legal regimes to obtain justice. While this paper recognizes the critical role of the Rule Against Domestic Violence in helping protect women against domestic violence, it argues that the law's capacity to create substantial change for women is

hampered by the sporadic contact between local justice mechanisms and the formal judicial system. Functional linkages between the two legal systems are thus needed to provide greater access to justice to female victims of domestic violence.

# Methodology

The purpose of this paper is to demonstrate how engagement with Timor-Leste's customary law system may be one way to improve women's access to justice in the newly independent country. This paper begins by outlining the history and judicial context of Timor-Leste. Part I explores the role of the formal and informal justice system in Timor-Leste, while assessing how each system affects women's access to justice. Part II demonstrates how the ad-hoc relationship between formal and informal law has resulted in a state of legal confusion that hinders women's access to justice. Part III argues that in order to improve women's access to justice, actors in Timor-Leste's formal legal system must actively engage with the customary law system in order to minimize the chasm between formal and informal law. Specifically, this paper explores three different ways through which the state of Timor-Leste could establish "functional linkages" between the formal and informal justice sectors: first, through formal legislation that incorporates customary law values; second, through legal education; third, through the social transformation of views regarding gender-based violence.

# Part I. Country Overview and Judicial Context

After 400 years as a Portuguese colony and 24 years under Indonesian occupation, Timor-Leste formally gained independence in 2002. In a 1999 United Nations (UN) sponsored referendum, Timorese citizens overwhelmingly voted for independence from their former occupier. As Indonesia was forced to withdraw, its military forces conducted a brutal military campaign, burning and destroying houses, government buildings, infrastructure and agricultural fields. The local population was forced to escape the widespread violence by either fleeing into the mountains or entering West Timor as refugees. The brutal military “rampage” left the newly independent nation “laying in ashes.” According to Grenfell, the UN Transitional Administration in East Timor (UNTAET) had to “literally rebuild the country from scratch,” including the judicial system. Therefore, in 1999, the UNTAET was granted all legislative, executive and judicial powers by UN Security Resolution 1272.

Following independence, the UN was mandated to secure the viability and political stability of the newly independent state. In 2006, violent outbursts in the capital destabilized the security situation in the country after causing dozens of deaths and the displacement of 150 000 people. Furthermore, in 2008 the Prime Minister and the President of the Republic were victims of armed assaults by local perpetrators who were subsequently pardoned by the President for their acts, enhancing the public perception of impunity for violent crimes. In addition to disrupting the security situation in the country, the events resulted in political instability, which halted the progress of the judicial system. As a result, the courts only functioned sporadically from 2003 to 2006.

Timor-Leste celebrated ten years of independence in May 2012 and held their third Parliamentary elections in July 2012. The international community praised Timor-Leste for conducting relatively peaceful elections, which were widely seen as free and fair. Although one person was killed during protests following the announcement of electoral results, the

security situation quickly stabilized. Consequently, the United Nation Integrated Mission in East Timor began exiting the country. It is expected to fully withdraw by December 2012.

The people of Timor-Leste had much to celebrate on the country's tenth anniversary in May 2012. Yet Timor-Leste remains a fragile state. The population continues to endure increasing poverty rates, a lack of formal education, a high fertility rate, high rural to urban migration, high rates of unemployment in urban areas, poor economic growth in the private sector, inadequate road and communication infrastructure, political violence and corruption. Furthermore, the country is experiencing food insecurity and seasonal flooding. This represents a huge security risk for a country where 80 per cent of the population of 1.1 million people survives off sustenance agriculture.

The political, economic and social instability of Timor-Leste particularly affects women, who are still recovering from decades of conflict and violence. Many women continue to suffer from physical and mental injuries as a result of rape, torture, and other acts of violence inflicted on them throughout the years of conflict.

Today, they continue to suffer from high rates of domestic violence. Most worryingly, a 2008 survey conducted by The Asia Foundation revealed that attitudes condoning domestic violence have worsened in recent years and that citizens are becoming less accepting of the right of women to access justice. Timor-Leste seems to be following the trend outlined by Rashida Manjoo, in which post-conflict societies become increasingly tolerant of violence within society. Moreover, Timor-Leste also fits the pattern of a post-conflict country where the "the needs of women who are victims of gender-based violence (GBV) are inadequately addressed by the transitional justice system." While the government of Timor-Leste has responded by enacting The Rule Against Domestic Violence, numerous social, cultural and economic barriers remain, which continue to obstruct women's access to justice in both the formal and informal legal systems.



## **Timor-Leste's Formal Legal System**

Since independence, there have been notable achievements in Timor-Leste's state judicial sector. To begin, the Constitution of the Republic of Timor-Leste was drafted and adopted in 2002. In addition, the Penal Code was enacted in 2007 and the Civil Code of Timor-Leste in 2011. Furthermore, Timor-Leste ratified a number of important international conventions, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination against Women, the Convention against Torture, and the Convention on the Rights of the Child. Judicial actors, including judges, prosecutors and public defenders were also appointed and trained, and four district courts were established in Timor-Leste's four main districts: Baccau, Dili, Suai and the enclave of Oecusse.

Despite the aforementioned achievements, Timor-Leste's court system has numerous deficiencies. To begin, the formal system suffers from case backlog, insufficient case file management, inadequate court facilities and a lack of competent judicial actors. For instance, in 2008, there were only 13 national judges, 13 prosecutors and 11 public defenders for the entire country.

Furthermore, many judicial actors today refuse to work in the country's districts because of the lack of adequate court and accommodation facilities. As a result, the formal judicial system is centralized in the capital, Dili. In addition, the Civil Code of Timor-Leste is a direct replica of Portugal's Civil Code; therefore, Portuguese is the language in which laws are passed and court proceedings conducted. Yet the majority of the local population does not speak Portuguese. As a result of this language barrier, most Timorese citizens, particularly uneducated women, are unable to understand, discuss or engage with formal legislation.

The importation of foreign legal norms, languages, values and procedures corrodes the judicial system's legitimacy in the eyes of local populations. According to Graydon, the international community failed to consult local Timorese leaders when they began developing the judicial sector in the aftermath of the 1999 referendum.

Consequently, the judicial system is not "context specific to the history, culture and society of Timor," and thus remains detached from local perceptions of justice. The formal system's disconnect from local reality in Timor-Leste was echoed by Xanana Gusmao, the first president of Timor-Leste, in a New Years speech in 2000:

what seems absurd is that we absorb standards just to pretend we look like a democratic society and please our masters of independence. What concerns me is [the] non-critical absorption of (universal) standards [and] that the East Timorese may become detached from their reality and, above all, try to copy something, which is not yet clearly understood by them.

In a survey conducted by the Asia Foundation in 2008, it was reported that the lack of confidence in the formal court system was due to its ineffective resolution of problems (31%), its high costs and lengthy delays (15%), and its inability to "find the truth" (11%). According to Graydon, the weaknesses of the formal judicial system are unlikely to diminish in the foreseeable future, which will render it incapable of "penetrating deep into Timor-Leste's rural heart." Such deficiencies create additional barriers for women seeking to access justice through the formal judicial system.

The perception of the formal justice system as illegitimate has a direct impact on women's access to justice through formal legislation. For instance, with respect to domestic violence, criminal punishment through The Rule Against Domestic Violence is viewed in fundamental opposition to the traditional justice goals of reconciliation and compensation, valued by women and their communities. Therefore, women are often discouraged from

bringing a case forward to police or other judicial authorities. Furthermore, the formal legal system is unable to meet many of the “core justice needs” of women. For instance, the punishment of a perpetrator under The Rule Against Domestic Violence is problematic for female victims because they cannot economically support themselves if their husbands are absent from the home. This helps explain the findings of a 2008 survey in which 83 per cent of respondents said that they preferred to approach local authorities rather than the formal system in cases of domestic violence. In order for women to access the formal justice system, it must be relevant to their values, traditions and beliefs.

## **Timor-Leste’s Customary Law System**

There is no unified customary legal system in Timor-Leste. The terms “informal,” “traditional” and “customary” thus depict a vast array of legal systems, practices, and traditions, each varying according to their specific context. This paper recognizes the inherent difficulty in defining Timor-Leste’s customary law system since no description can accurately represent or encompass each of the unique mechanisms used to deliver access to justice to Timor-Leste’s various communities.

Nevertheless, common values can be identified between the country’s wide “collection” of local practices: their oral transmission, layers of authority, collective notions of justice and enforcement of penalties through social sanctions. Women most often seek justice through the informal legal system because of its familiarity, trustworthiness, immediacy and accessibility. Furthermore, the customary legal system bears directly on the interests of women, such as customary marriage and divorce, property rights, inheritance and child custody. Women also identify with customary laws because they reflect community norms and values, particularly the collective nature of rights. Consequently, women rely on customary laws to promote strong family ties and reconciliation. Many Timorese express their preference for the informal judicial process because it allows cases to be mediated between

families and communities. In addition, local justice mechanisms are widely perceived by the population as responsible for maintaining law and order in communities.

Generally, it is only once local justice mechanisms have been exhausted or have failed to generate an acceptable solution that female victims will be encouraged by family members to seek justice through the formal legal system. This reflects the layered authority of the local justice system, where cases pass first to family members, then to the aldeia (hamlet) leaders, up to the Chefe de Aldeai (hamlet chief), up to the lia nain, who are the traditional elders, and finally to the Chefe de Suco (village chiefs). The binding nature of the agreements depends on the “moral authority” of the decision-maker and the social pressure spawned by the decision.

Despite customary law’s traditional and cultural significance, the system suffers from numerous pitfalls that undermine the protection of women’s rights. Most worryingly, the customary law system often serves to further entrench the social and cultural norms responsible for the subjugation of women. For instance, many community leaders oppose the ability of women to own property, which results in women’s economic dependency and subordination. Furthermore, few community leaders categorically condemn acts of gender-based violence and believe that “less serious” acts of domestic violence may be tolerated within the community. This renders women susceptible to severe human rights violations. Also, both men and women in the community are reluctant to recognize the right of women to participate in dispute resolution. Consequently, women rarely speak for themselves during a mediation process. Finally, men are the dominant actors in the customary law process. Women thus risk being subjected to their patriarchal views regarding the acceptability of gender-based violence.

According to a Judicial System Monitoring Program report in 2002, local justice mechanisms also suffer from an absence of fairness in trials, inconsistent decision-making, lack of safeguards against human rights violations, deficient enforcement mechanisms, corruption and partiality amongst decision-makers, an absence of fair-trial standards, and a general lack of fairness and accessibility for vulnerable members of the community, including women. The international community often invokes such concerns as reasons for refusing to acknowledge the role and relevance of the informal legal system.

## Part II. The Pitfalls of Timor-Leste 'Hybird' Legal System

It is necessary to understand the history of Timor-Leste's "hybrid" judicial system in order to comprehend the barriers faced by women as they attempt to access justice. Local justice mechanisms in Timor-Leste survived 400 years of Portuguese colonization as well as Indonesia's brutal occupation. Today the customary law system of Timor-Leste remains the country's primary method of dispute resolution and therefore plays a fundamental role in ensuring local security and stability. As previously mentioned, the importance of customary law was ignored throughout the development of Timor-Leste's formal law system. According to Tanja Hohe, the international community's focus on establishing "a western legal system" precluded the consideration of how formal and informal justice systems could positively interact to increase access to justice in Timor-Leste.

Whether customary law should be recognized within Timor-Leste's formal legal system has been the subject of debate since the country's independence. Yet regardless of how the role of customary law is envisioned by UN officials or Timorese politicians, the customary law system continues to function in parallel with the formal justice sector. Therefore, rather than bifurcating the justice system into the "formal" and "informal" realm, it may be more accurate to speak of Timor-Leste's legal sector as a "continuum between informal and formal justice providers or systems."

For instance, in its Law and Justice Survey, The Asia Foundation found that:

the East Timorese concept of justice clearly includes a continuum that encompasses both the adat system and the formal legal system. For more 'minor' offences, people are most likely to seek justice from the traditional adat system, while for more 'serious' crimes, the formal system seems appropriate.

Most women in Timor-Leste envision a role for both the formal justice system and customary law. They “see no contradiction in seeking justice through both systems at the same time.” Consequently, access to justice for women inevitably entails the availability and protection of state law and customary law.

## **Legal Pluralism in Timor-Leste**

Since customary law has yet to receive formal recognition, legal pluralism in Timor-Leste remains “in a state of transition.” According to Vasudha Nagaraj, the concept of legal pluralism “seeks to understand the complex ways in which local practices and the formal law compete, co-exist and incorporate each other in contemporary societies.” While this paper discusses legal pluralism through the lens of customary and state law, it should be kept in mind that “the simplified image of the state versus cultural local communities can (...) blind us to essential internal differences of a seemingly homogeneous community, be they political, economic, social or cultural.”

Nevertheless, understanding the advantages and disadvantages of legal pluralism in Timor-Leste is important for conceptualizing how to increase women’s access to justice in the country’s hybrid system. According to Tanja Hohe, the UNAET ignored the reality of legal pluralism in Timor-Leste when it began to develop the new nation’s formal justice sector; it thus failed to coordinate the “development of an informed approach to the matter of local law throughout the various government instrumentalities (both UN and East Timorese).” Today, the formal and informal legal systems remain highly integrated and interdependent. Yet few links have been established in order to regulate the interaction between formal and informal law.

As previously mentioned, many Timorese have voiced their preference for the informal legal system because of its focus on reconciliation, a “key cultural expectation of justice.” Despite the development of the formal court system, women continue to rely on local justice mechanisms to resolve disputes over land, property, paternity, divorce, ownership and domestic violence, including sexual and physical assault. Women’s access to justice is thus likely to remain centered in customary law, particularly since the formal legal system lacks the capacity and resources needed to fill the role currently performed by local justice mechanisms. As such, the formal legal system will likely remain at “the periphery” of the country’s justice sector and legal pluralism will remain a reality for years to come.

## **The Impact of Legal Pluralism on Women’s Access to Justice**

Legal pluralism in Timor-Leste paradoxically enhances and undermines women’s access to justice. Women in Timor-Leste do not experience access to justice in a uniform way. Rather, women’s perceptions of justice, and their access to justice vary significantly depending on the community in which they live. Today, the different perceptions of justice reflect the “complexity of building a state from domestic and imported fragments of a social, political, and economic order.”

For instance, justice for a female victim of domestic violence may entail a promise by the perpetrator to stop, public humiliation for his actions, or reconciliation between the families involved. As such, women may perceive local justice mechanisms to be the only avenue through which to pursue such justice goals. Alternatively, a victim of domestic violence who has exhausted local justice mechanisms may be encouraged by her family to seek the removal of a repeat offender through imprisonment. The Law Against Domestic Violence and the engagement of the formal justice sector would thus be essential. Access to justice thus incorporates both formal and informal justice mechanisms.



Legal pluralism in Timor-Leste enhances women's access to justice because it enables women to "forum shop" between both systems. Women are thus able to pursue their justice goals strategically by selecting the legal system that best aligns with their objectives, which consequently enhances their chances of success. Though both systems suffer from latent defects, "forum shopping" presents women with a unique opportunity to access justice in different ways, depending on what their vision of "justice" entails.

Nevertheless, legal pluralism also presents numerous dangers for women's access to justice in Timor-Leste. For example, Leila Chirayath warns that the "choice" available for women disregards "the social pressure on women to adhere to community norms" as well as the fact that in most situations women have "internalized community values which are not necessarily in their own interests."

Finally, because the concurrent operation of the formal and informal judicial systems is unregulated, communities and local justice providers control the linkages and interactions between the two regimes. The following section will explore how this ad-hoc relationship obstructs women's access to justice.

## **Legal Pluralism or Legal Confusion?**

Today, the Constitution of Timor-Leste provides little guidance on how the formal and informal legal systems should interact. Section 2(4) of the Constitution provides that "the State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law." Evidently, the Constitution only affords "symbolic respect" to the informal justice system. Consequently, the two systems interact without any oversight mechanisms or regulation, whether formal or informal.

While theoretical guidelines have been developed with regard to justice sector interactions, such guidelines have not been regulated nor enforced through practice or policy. In 2009, Timor-Leste's Independent Needs Assessment Report recommended that any national legislation recognizing customary law should ensure that such laws respect basic human rights standards and coordinate with the formal justice system. Furthermore, it suggested that any initiative recognizing customary law should seek harmony with the formal justice system to prevent the operation of a parallel or separate justice system.

Currently, the legal framework also prohibits (in theory) the diversion of cases from the formal system to the informal system. Specifically, it forbids the resolution of crimes of domestic violence through local justice mechanisms. Unfortunately, such recommendations have not evolved into explicit policy or practice. The "dysfunctional" interaction between the two systems therefore persists and is likely to "become more common in the future." The current state of "legal confusion" thus creates additional barriers for women trying to access the formal or informal legal system.

## **How "Legal Confusion" Affects Women's Access to Justice**

This section will demonstrate how the absence of policy regulating the interactions between formal and informal law impedes women's access to justice. First, the absence of a clear framework results in women blindly navigating between the two systems as they struggle to realize their justice goals, thereby increasing the myriad barriers women already face in their attempts to access justice.

Second, it risks subjecting women's experiences of justice to the value-laden assessments of male community leaders. Third, "legal confusion" diminishes the rule of law in Timor-Leste. After exploring each of these interdependent problems in detail, section III will explore how to improve the chasm between the formal and informal law system in order to improve access to justice for women.

The first reason the state of “legal confusion” in Timor-Leste impedes women’s access to justice is because it forces women to navigate both systems without an understanding of their boundaries or jurisdictions. The absence of an established framework creates the risk of a female’s case being shuffled back and forth between the formal and informal legal systems. Without an understanding of how formal and informal laws are meant to interact, women cannot protect themselves against such risks. Consequently, even if a female victim of domestic violence succeeds in overcoming the myriad logistical, economic and social barriers obstructing her access to the formal justice system, judges or police officers may divert her case back to the community level for mediation.

The second reason the absence of an established framework for legal pluralism in Timor-Leste inhibits women’s access to justice is because it enables male community leaders to determine how formal and informal laws should interact. Deborah Cummins warns that the subjection of women’s access to justice to the value-laden assessments of community leaders is dangerous because such leaders are often insensitive to the needs of society’s most vulnerable members, specifically victims of domestic violence.

Furthermore, in the event that a female victim is aware of the criminality of domestic violence, community leaders or family members may choose to settle “minor cases” (defined as cases where there is no bleeding and no visible physical injury) through the existing social framework because they perceive it to be more expedient, economically efficient and culturally appropriate. Women thus face extreme legal disempowerment as men dominate their experience of, and access to justice. Women’s lack of education and economic dependency further compounds their vulnerability to community perceptions of justice.

Finally, the inadequate regulation of the relationship between the formal and informal legal regimes replaces legal pluralism in Timor-Leste with a state of “legal confusion.” To begin, the absence of jurisdictional arrangements between the formal and informal legal systems results in numerous discrepancies in how cases of domestic violence are treated. For instance, some court actors may give serious consideration to decisions reached by local

leaders in a mediation process, while others may not. Furthermore, communities may seek reconciliation between parties despite a formal sentence having been declared, which may result in a defendant being punished twice for the same crime. Finally, the absence of an established framework prevents women from anticipating which legal regime will be applied to their case.

The unregulated and spontaneous decisions of local authorities spread confusion throughout the judicial sector and thereby diminish the rule of law in Timor-Leste. This state of “legal confusion” creates an additional barrier that women must grapple with in order to access justice.

Overall, the absence of clear guidelines on the interactions between formal and informal laws severely complicates and undermines women’s access to justice. Compounded by women’s lack of education and economic disempowerment, the absence of formal policies or guidelines prevents women from understanding the divide between formal and informal law, which prevents their legal empowerment. Consequently, women are less likely to understand and explore the strengths, weaknesses, resources and capacities of each system. Ultimately, legal pluralism can only become a source of legal empowerment for women if they are able to develop the capacities required to understand and control their interaction with each legal system. This paper posits that Timor-Leste’s laws and institutions will only improve if women are empowered to negotiate their relationship with formal laws and customary practices. Establishing functional linkages between the formal and informal system is thus identified as one way to enhance access to justice for women. More broadly, functional linkages between the formal and informal system remains one of the “critical building blocks in the nation’s efforts to establish the rule of law.”

## Part III. Strategic Engagement with Customary Law

This paper has thus far demonstrated how the state's failure to strategically engage with Timor-Leste's customary law system has hindered women's access to justice. Consequently, this paper argues that developing positive interactions between formal and informal laws is one way to alleviate women's struggle to access justice in cases of domestic violence. At a basic level, the acceptability of domestic violence in society is centered in community perceptions, which are reflected in customary law. By engaging with customary law and developing functional linkages between the two jurisdictions, the state could begin to disassemble at least one of the barriers women currently face in accessing justice. Furthermore, there is evidence that the state's refusal to engage with customary law will only further impede the protection of women's rights. As argued by Chirayath:

There is ample evidence that ignoring or trying to stamp out customary practices is not working, and in some cases is having serious negative implications (...) Ignoring traditional systems and believing that top-down reform strategies will eventually change practice at the local level may mean that ongoing discriminatory practices and the oppression of marginalized groups in the local context goes unchallenged (...) Focusing purely on state regimes and access to formal systems assumes that such systems can be made accessible to all, while clearly even in the most developed countries this is not the case.

It is thus imperative that the government, civil society and the international community not only recognize, but also engage with the customary law system in order to strengthen women's access to justice and reduce impunity for acts of domestic violence. Developing a strategic framework for engagement would help ensure that the customary law system does not merely "fill the legal void left by the teetering formal justice system." Greater complementarity between both justice sectors would also help prevent formal law from being viewed predominantly as an option of last resort. Furthermore, regulating the

interaction between both legal regimes, whether formally or informally, would help prevent the state of “legal confusion” from further obstructing women’s access to justice.

It is necessary for Timor-Leste to recognize that “reform of indigenous justice systems should be a central part of any strategy” aimed at increasing women’s access to justice.

First, positive interaction between the formal and informal system could help incorporate aspects of Timor-Leste’s collective notion of rights into the “human rights paradigm” that currently dominates the formal judicial sector. This is important because the “paradigmatic conflicts that occur between the two legal systems” are often the underlying reasons for which local communities prefer to mediate cases of domestic violence at the community level.” Furthermore, functional linkages—by increasing exchange between the formal and informal systems—would allow “the translation of Western human rights concepts into local cultural contexts and, the other way around, of local structures and ideas into an internationally comprehensible human rights language.”

In the following section, this paper explores three ways in which the government of Timor-Leste can begin to strategically engage with local justice mechanisms: first, the state may develop functional linkages through legislative reform; second, the state may encourage cooperation between judicial actors in the two legal regimes through clear legal education policies and programs; third, the government may seek to increase access to justice for women by working with communities to encourage attitudinal shifts regarding domestic violence.

## **Interaction Through Formal Legislation**

Legislative reform is the first way in which the state of Timor-Leste could seek to establish structural and procedural interactions between the formal and informal legal sectors in order to increase women’s access to justice. Legislative reform has been used in countries like South Africa, Indonesia, Papua New Guinea and others in order to influence

and modernize the development of customary law systems. Specifically, it has been used to limit the application of customary law to certain domains, to discipline local justice providers, to apply human rights standards to customary law mediations, or to formally integrate local law features into state law. For instance, in neighboring Papua New Guinea, village courts were established through statute, which allowed disputes to be resolved by local laws while calling for their supervision by formal state courts. Furthermore, the Criminal Law Compensation Act of 1991 sought to incorporate local justice resolutions into formal law by allowing victims of domestic violence to claim compensation from perpetrators. In 1999, Indonesia passed Law No.39 on Human Rights, which explicitly mentions that local adat law must be recognized and protected by the people and the state.

Similar steps could be taken in Timor-Leste, whose customary law system shares numerous characteristics with Papua New Guinea and Indonesia. Although reform through legislation is in no way sufficient to improve women's access to justice, such legislative reform could be useful for three reasons: first, formal recognition and protection of customary law mechanisms and values would accord national respect to customary law; second, it would help increase the formal legal system's legitimacy at the community level; third, legislation could help ensure that judges do not refer cases of domestic violence back to the community level for mediation.

First, legislative reform resembling that in Papua New Guinea and Indonesia would press the government to pronounce clear national goals on how the formal and informal legal regimes should interact. While Section 2(4) of the Constitution of the Republic of Timor-Leste provides that the state will recognize and value the norms and customs of East Timor, the nature of this theoretical interaction remains ambiguous. The Constitution neither recognizes customary law as an official source of law, nor calls for its protection. By strengthening national respect for customary law as a source of law, legislative reform could help enhance the legitimacy of the formal legal system at the community level.

Second, incorporating customary law values into the formal legal system would encourage women and community members to identify with the formal justice system and claim ownership over it. As argued by Hohe, if "people are to own the law (...) they must feel that it recognizes their customs." For example, if the Law Against Domestic Violence were reformed to allow victims to claim compensation from the wrongdoer, as occurred in Papua New Guinea, it would allow this piece of legislation to better align with women's justice goals. Since it is often the female victim's economic dependency on her husband that discourages her from engaging with formal law, incorporating these customary law principles would allow the formal legal system to better adapt to women's needs and circumstances. Though in no way sufficient, such incremental change could serve as a stepping-stone toward establishing functional linkages between the two systems and thereby enhancing women's access to justice.

Third, the government should develop mechanisms to ensure that policies and procedures affecting cases of domestic violence are followed. In April 2002, the government passed a guideline to prohibit actors in the formal judicial sector from diverting cases back to the community level to be mediated. Yet no explicit policy or law has yet been implemented to ensure that such procedure is followed. Therefore, this essay recommends that this guideline be converted into legislation that clearly outlines when a judge may refer a case back to the community for mediation. Such guidelines should broadly outline the jurisdiction of customary law and specify which types of cases would be appropriate to refer back to the customary law system. Furthermore, enforcement mechanisms should be put in place to ensure that cases of domestic violence and all criminal acts are strictly referred to the state court system.

While this paper recognizes that such formal legislation may have little impact at the community level, it would be valuable for women who have succeeded in bringing their case before a court. Specifically, women could invoke such legislation in instances where judges



attempt to send their cases back to the community for mediation. In this way, legislative reform could help protect women's rights and increase her access to justice by ensuring that her case is not turned away from the court. Furthermore, authors like Manjoo have highlighted the importance of strengthening the judicial sector and national legislation in order to counter rising occurrences of gender-based violence. Particularly in cases of sexual violence, judicial reform can address the ongoing discrimination of women in law and practice, can increase reporting of GBV cases as well as reduce impunity for such crimes.

Despite the aforementioned recommendations, it is important not to overestimate the ability of formal legislative reform to substantively change women's access to justice in Timor-Leste. For instance, as a response to the non-alignment of the formal and informal justice systems, Timor-Leste's Ministry of Justice began drafting customary law and mediation legislation in 2008 to harmonize and formally link both legal systems.

The state also passed Decree Law No.5 in 2004, which holds suco and aldeia chiefs responsible for developing mechanisms to prevent domestic violence. While the latter law seeks to guide the interaction between local leaders and the Rule Against Domestic Violence, its inadequate implementation thus far highlights the need for training programs to be implemented alongside such legislation.

Furthermore, customary law systems in Timor-Leste may not comply with or enforce state-enacted laws. For example, although the Rule Against Domestic Violence makes domestic violence a public crime, local leaders continue to mediate "minor" or "less serious" case of domestic violence. As argued by Chirayath, the "uniqueness and idiosyncrasy of each context means that attempts (...) to introduce new, uniform procedures are inherently designed to struggle." Furthermore, Cummins warns that rigid regulation of the interaction between formal and informal law must be careful not to "decrease the number of justice options available to women."

Therefore, this paper argues that legislative reform, while crucial, is not sufficient to succeed in substantively improving women's access to justice. In order to truly address the barriers faced by women, legal education policies and programs, in addition to social transformation regarding women's rights, must accompany legislative reform.

## **Interaction Through Legal Education Policies and Programs**

The political-legal norms and practices that subjugate women must change in order for women's access to justice to improve in Timor-Leste. To effect far-reaching change in the delivery of justice to women, the government should work closely with community authorities to modernize the discourse on the relationship between formal and informal law and the rights and roles of women in society. Government should approach judicial actors and community leaders with an understanding that increasing women's access to justice requires "a more nuanced and circumspect approach, combining concern and respect for human rights with understanding and respect for local cultural systems given the central role they place in Timorese society."

This paper recommends that the government of Timor-Leste develop and implement a broad legal education program in order to forge functional linkages between the formal and informal legal sectors. Such policies should focus on creating "new mediating institutions wherein actors from both realms can meet-following simple, transparent, mutually agreed-upon, and accountable rules-to craft new arrangements that both sides can own and enforce." Judicial actors in the formal and informal realm must cooperate to create a sustainable legal norm that dictates how cases of domestic violence should be resolved and how women should be aided in their access to justice. It is vital that such legal norms translate into concrete change—however incremental—for victims of domestic violence. Through legal education programs, the government should also work with local authorities and judicial actors to implement case file management systems. With the cooperation of educated local justice providers, monitoring programs could provide the state with data on

the number of cases that are mediated through local justice mechanisms and the kinds of cases that are brought before community authorities. Recording decisions would reveal trends in the ways in which women's cases are resolved. Furthermore, this could help judicial actors develop a case referral process by providing court actors with information on the history of each case and how it was previously resolved through customary law. Nevertheless, the state must be careful not to use monitoring programs to criticize, control or compete with local justice mechanisms. Rather, they should be viewed as opportunities to hear the concerns of community authorities and respond to such concerns through further educational policies and program reform.

Legal education programs would also enable state actors to work directly with local justice providers to delineate broad jurisdictional divisions between the formal and informal legal regimes. While the legal framework already establishes that cases of domestic violence must be referred directly to the formal justice system, greater cooperation is needed from community authorities to delineate, enforce and monitor these jurisdictional divisions. While Decree Law No.5/2005 represents the legislative attempt to engage community authorities in deterring domestic violence, programs designed at training community authorities on judicial reform and women's rights must accompany such legislative reform.

Furthermore, in order to increase women's access to justice, the government should incorporate legal education models — focused on issues of domestic violence— into all legal policies and programs. This would help foster greater access to justice for women by helping ensure that Timor-Leste's formal legal institutions do not "function as organized sites for the production and reproduction of ideologies and beliefs such as patriarchy."

Education policies should be designed to encourage attitudinal shifts among the country's legal elite. This would in turn help ensure that tolerance for acts of domestic violence are not perpetuated through the formal justice sector; for instance, through the referral of cases back to local justice providers.

A broad legal education program offers a simple solution to reducing barriers faced by women in accessing justice and countering the trend of tolerance for acts of domestic violence. Legal education would not only teach judicial actors how to use the structures and procedures of both legal systems to deliver greater access to justice for women and prevent acts of domestic violence, but could be used as a wider strategy to “frame the demands of diverse social movements.” It could thus help create broader social change regarding attitudes on domestic violence.

## **The Need for Social Transformation**

The final way to improve women’s access to justice is to seek social transformation through attitudinal shifts on the acceptability of domestic violence. The recommendations made in this essay are unlikely to improve women’s access to justice unless accompanied by societal change regarding the role of women. If the Rule Against Domestic Violence is to be accorded a more substantial role in protecting women against domestic violence, functional interactions between formal law and customary law must be accompanied by community-led change to the social structures that propagate views of gender-based violence as socially acceptable.

Local paradigms are the epicenter of solutions to women’s access to justice since they “form the prism through which every new occurrence is classified and ordered.” Thus, rather than focus solely on the state’s role in increasing access to justice, it is important to also work “with the existent socio-cultural value systems-which are legitimate, acceptable and understood in that community,” to generate change for women’s rights. The local power structures that allow men to dominate women’s access to justice must be challenged. Furthermore, “substantial social reconstruction” should be pursued as a way to end the rise of domestic violence. Since male community leaders and family members often control a woman’s access to justice, their views must progress in order to create sustainable change to

women's current positions in society. For instance, Annika Kovar argues that a "promising approach may be to utilize the existing social framework in order to increase positive pressure on men." As argued by McCann:

law is understood as particular traditions of knowledge and communicative practice. The focus is not simply on behavior but on the inter-subjective power of law in constructing meaning. As such, attention is directed to how legal discourses and symbols intersect with and are expressive of broader ideological formations within societies.

Attitudes toward the status of women are therefore shaped by, and reflected in, the legal system. Customary law will only change when social transformation forces it to. And as social views shift, customary law systems will be forced to reflect this change, as will the formal legal system. As argued by Martha Minow, social change involves alterations to the "contexts of politics and culture in which people forge consciousness of their society and aspirations for it."

Ultimately, social transformation must come from education and wider development goals. Over time, as attitudes toward the status of women change, I am hopeful that these shifts will be reflected in both the customary and formal law systems.

# Conclusion

This essay has argued that engagement with Timor-Leste's customary law system is one way to increase women's access to justice in the newly independent country. Specifically, this paper has demonstrated how the unregulated relationship between the country's formal and informal laws adds an additional barrier that women must overcome in order to access justice. Consequently, the ad-hoc interactions between the formal and informal legal systems must change in order to help legally empower women. Although no specific policies were explored in detail, the purpose of this paper was to reflect on what I observed as an intern in Timor-Leste during the summer of 2012. These pages represent my initial thoughts on how access to justice for women can be improved. Ultimately, if women are to begin engaging with and controlling their access to legal justice, they must be socially, culturally, economically and politically empowered by their communities. The answer therefore lies in a mix of formal legislation, legal education and social transformation. Graydon argues that post-election periods are the perfect time to seek change in Timor-Leste since "the national mood is conducive to fundamental changes in the core of community life." With the UN prepared to officially withdraw from Timor-Leste in December 2012, the government and local leaders should collaborate to begin this new phase of independence by placing judicial reform and women's right at the forefront of the political agenda.

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