Protecting the Rights of the Child:
Regulating Restorative Justice and Indigenous Practices in Sudan and East Timor

By Cyndi Banks ©
Professor of Criminology & Criminal Justice
Northern Arizona University

With only two exceptions, all States are party to the 1989 Convention on the Rights of the Child. The Convention and its supplementary instruments, the Beijing Rules and the Riyadh Guidelines, have globalized child rights and child protection by setting international norms for child rights and protections that include a mandate to apply restorative justice practices in juvenile justice laws and procedures. Other international instruments such as the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters[1] encourage States to apply restorative justice principles and practices.

In some states, indigenous traditional customs and practices have been applied to dispute settlement since time immemorial. In some jurisdictions, these practices have been appropriated and are now presented as forms of restorative justice. As Griffiths and Corrado (1999: 237) point out, "Aboriginal peoples and communities have served as the catalysts for the development of a wide range of innovative, community-based restorative justice practices."[2] For States with indigenous dispute settlement processes, designing laws that give legal effect to the Convention on the Rights of the Child and its supplementary instruments has involved policy choices about whether or not to incorporate these indigenous modes into new laws. In this sense, these States have had to decide whether to appropriate the indigenous modes and enact them, or to apply restorative practices and procedures designed in the West which have been incorporated in international restorative justice instruments, or both. Paradoxically therefore, States in this situation may appropriate not only their own indigenous modes but also internationalist and western modes of dispute settlement and restorative justice.

In Southern Sudan and East Timor, both which have suffered extreme violence and conflict over lengthy periods in their recent histories, lifestyles are predominately traditional, and values and beliefs, including those relating to the family and children, remain rooted in custom and tradition. Both entities are categorized as 'post conflict' societies and both possess legal systems that are pluralistic in nature comprising colonial law, statute law and custom and tradition as sources of law. As Deng notes (2006: 2), in the newly created autonomous entity of Southern Sudan:

> "Customary law is being projected not only as a central element of the Southern identity for which the people fought, but as an important source of legislation, constitutionalism and the rule of law for the government of Southern Sudan."

[1] Economic and Social Council resolution 2002/12

[2] Kathleen Daly, citing Blagg (1997) and Cain (2000) suggests there has been an orientalist appropriation of indigenous justice practices, largely in the service of strengthening advocates' positions.

South Sudan has recently enacted a new law on juvenile justice which incorporates forms of restorative justice designed and practiced in the west. In East Timor, a draft law on juveniles and juvenile justice takes a different approach by appropriating indigenous forms as well as modes of internationalist restorative justice.[3] Comparing and analyzing these laws reveals differences in state practice about how culture is to be enacted and regulated for the benefit of children who come into contact with the juvenile justice system and the extent to which the international child rights discourse embodied in these proposed laws is congruent with customary and traditional values and beliefs about children. A comparative examination of the two draft laws, contextualized according to local cultures, provides insights into policy choices about the incorporation of culture and the relationship between international norms of child protection and traditional restorative practices.

It is noteworthy that the now substantial literature on restorative justice contains very little discussion concerning international advocacy for restorative justice whether through the resolutions of international bodies or in the treaties and conventions that shape international law. Emerging and established international norms about restorative justice, whether expressed explicitly or in terms of the appropriateness of promoting forms of 'diversion' from the formal justice system, add another dimension to the concept of restorative justice beyond national practice. As well, although the literature sometimes alludes to indigenous practices as a source of restorative justice, there is very little discussion of indigenous practices beyond those of the Maori in New Zealand and aboriginal punishment in Australia. This is despite the fact that numerous states, especially in Africa and Asia, possess plural legal systems where indigenous forms of dispute settlement are dynamic and in play daily as modes of 'restorative justice'. It is my hope that this paper will not only inform about the international dimension of this discourse but also reveal the necessity of engaging the multiple indigenous forms of restorative justice in a comparative process.

While a number of western jurisdictions continue to develop restorative justice practices through family group conferencing, circle sentencing, victim offender mediation and the like, almost no research exists on the issue of how policy makers in the developing world are struggling with the enactment of culture (including forms of restorative justice) in particular instances. One such field of policy is the enactment of laws that are intended to give effect to the Convention on the Rights of the Child. This paper examines how East Timor and Southern Sudan are managing this articulation between culture, modes of indigenous dispute settlement, international mandates concerning diversion and restorative justice, and law making. The results are paradoxical, states may use their own indigenous forms *AND* internationalist and western modes of dispute settlement and restorative justice.

This paper has five sections. The first briefly discusses the recent history of East Timor and Southern Sudan revealing their status as post conflict societies; the second section is concerned with the informal justice practices of the two entities and particularly with practices applying to children; the third explores international instruments that advocate or mandate the application of restorative justice type principles and practices and contextualizes those provisions by reference to restorative justice as it is applied in a number of States. The fourth

[3] East Timor is a sovereign state but Southern Sudan is an autonomous part of the sovereign state of Sudan with the power to legislate, including on juvenile justice. For the sake of convenience this paper will refer to both East Timor and Southern Sudan as 'entities'.

section illustrates how tradition and custom have been located within the new law of Southern Sudan and the draft law in East Timor; and section five, after exploring the articulation between the policy choices made by these two entities with the international instruments concerned with restorative justice and indigenous dispute settlement, offers some tentative thoughts about the development of restorative justice and its relationship to custom and tradition.

Recent histories of Southern Sudan and East Timor

Geographically, Sudan is the largest African State comprising a territory of about 1 million square miles. It encompasses several hundred ethnic groups residing in the Arab-Muslim North and the African South with the South more indigenously African in race and culture. The people of the South followed traditional religions until British colonialism promoted conversion to Christianity. In the first stage of a civil war, from 1955 to 1972, the South fought for independence from Sudan and upon the cessation of hostilities, the South achieved autonomy and acceptance of its Christian beliefs and traditional religions. After a period of peace that lasted eleven years, the war resumed in 1983 when President Nimeiri imposed Islamic law throughout the country violating the 1972 peace agreement. Although the North is in fact a hybrid – not only in its racial composition, but also in cultures and religious beliefs, particularly in the rural areas – the dominant group at the center saw itself as monolithically Arab and Islamic and sought to project a national identity to that effect.

In 1983 the Sudan People's Liberation Movement/Army (SPLM/A), was established with the objective, not of seceding from the North, but securing the liberation of the entire country from Arab-Islamic domination and establishing a New Sudan free from discrimination based on race, ethnicity, culture, religion or gender. In the mid 1980s, the Nuba of Southern Kordofan and the Ingessana or Funj of Southern Blue Nile who border the South joined the South in the struggle. The Ngok Dinka of Abyei, who, though racially ethnically and culturally part of the South, but administered in the North, fought with the South. On January 9, 2005, following another 22 years of conflict, a Comprehensive Peace Agreement was signed between the North and the South. Under the agreement, the people of the South are given the right to hold a referendum after a six-year interim period to decide whether to continue as part of a united Sudan or to separate from Sudan and become an independent sovereign state. During this interim period under the agreed principle of "one country, two systems," Islamic law applies in the North, and in the South a secular democracy will apply "the values and customs of the people" as one of the sources of law (Deng 2006).

The CPA gives the South a largely autonomous status, able to maintain separate legislative and judicial branches, and a role in the government of the Sudan through the President of the South becoming First Vice President of the Republic. As well, the South has the right to maintain its own army. Revenue sharing from Sudan's oil resources gives the North 50% of revenues from oil produced in the South and 50 percent of national non-oil revenues generated in the South.

There are about 7.5 million people in the South with about 54% under 18 years and 21% under the age of 5.[4] The conflict between the North and the South displaced had numerous

[4] World Vision 2004, paragraph 3.2.0.

children and young people and separated them from their families. Many below the age of 18 fought in the conflict which resulted in a:

> "*demographic shift* [which has] *drastically altered the family and community care networks which prevailed among families and tribes in their home areas, as the fact of being in large towns encouraged breakdown of the support systems in which children were the focus of the extended family. The civil conflict also destroyed the structure of child communities in the war zones, as well as their homes, schools, health systems and cultural and religious institutions".*[5]

In East Timor, the overthrow of the Portuguese military dictatorship in Portugal in 1974 put an end to almost 450 years of Portuguese colonial rule. The new Portuguese government promoted decolonization and so independence for East Timor seemed an immediate possibility. Timorese political parties were established but instigated political conflict and unrest enabling Indonesia to invade and annex the country (Hohe and Nixon 2003: 28). Immediately before the invasion, a group of Portuguese-educated intellectuals, under the banner of the Revolutionary Front for an Independent East Timor (Fretilin), declared an independent 'Democratic Republic of East Timor' (RDTL). Following the Indonesian occupation, some, like Ramos Horta, became exiles fighting against the occupation through political and diplomatic means while others remained in the country and hid in the mountainous regions employing guerilla tactics against the Indonesian authorities. They formed the National Liberation Armed Forces of East Timor (Falintil).

Indonesian rule was harsh and brutal and many Timorese were murdered and killed. The local population offered support to Fretilin and Falintil and over the next 25 years a secret resistance movement struggled against Indonesian rule. For example, while many young people studied under the Indonesian education system they remained active in the resistance movement at the same time. Finally, the fall of the Indonesian Suharto government in 1998 created an opportunity for political change in Indonesia and in January 1999 it offered East Timor a choice by referendum between autonomy within Indonesia or independence. In a 'Popular Consultation' referendum organized by the United Nations in August 1999, a majority of the people of East Timor chose independence over autonomy. The outcome of the referendum resulted in a brutal rampage by pro-Indonesian militias supported by the Indonesian military, during which persons were attacked and killed and numerous buildings destroyed. Many fled to the mountains and others were forced across the border into West Timor. At the end of September 1999 the UN-organized International Force for East Timor (INTERFET) entered the country and supervised the withdrawal of Indonesian Forces.

In October 1999, the UN established UNTAET to administer the country because of the destruction of almost the entire administrative system with the departure of thousands of Indonesian public servants. In these circumstances it was thought that the country was incapable of self-administration and during the next two and a half years, UNTAET established district and sub-district administrative units and created political institutions and re-established the judiciary. An elected Constituent Assembly drafted a constitution, parliament was elected and following a second election for the presidency, UNTAET saw the country finally achieve

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Sudan as a whole has a population of approximately 40 million (CIA Fact book, July 2005). Sudan as a whole is rated 139 out of 177 countries in the Human Development Report 2004 (UNDP).

[5] Sudan's State Report to the *CRC*, *CRC*/C/65/Add.17, 6 December 2001, paras. 330-331.

independence on 20 May 2002. The UN continues to maintain a presence in East Timor and policing and security are largely in the hands of international contingents and forces. Given that neither the colonial rule of Portugal nor the Indonesian occupation impacted the traditional systems of dispute settlement significantly, conflict resolution mechanisms continue to operate amongst a population very much allied to traditional social systems and forms of community.

Traditional and customary justice practices concerning juveniles in South Sudan and East Timor

Here I will explore indigenous forms of dispute settlement in the entities and will endeavor to identify the forms and processes that are applied to juveniles in East Timor and Southern Sudan. As many scholars have pointed out, it is essential to reject any tendency that associates the notion of custom, tradition and indigenous practices with immutability. Thus, contemporary dispute settlement practices applied in indigenous communities in both South Sudan and East Timor are very unlikely to be accurate representations of ancestral practices. As well, as Mearns (2002:31) has noted in relation to East Timor,

> *"*there is not one tradition of dispute resolution in East Timor. In an important sense, there are as many 'traditions' as there are local cultural and social groups that seek to solve the disputes confronting them in their everyday lives from their own cultural and social resources*".*

Similarly, Swaine (2003:11), in studying gender in local justice in Timor reports on the absence of uniformity in the country concerning processes and procedures. Thus, in both entities, indigenous modes of settlement are unsettled, will always change over time and lack any kind of standardization. They may, however, possess commonalities, especially underlying common principles.

East Timor

In describing Timorese relations, Swaine (2003:11) writes:

> *"In general, Timorese societies are ordered through the maintenance of relations with the ancestors, whose presence and influence helps to stabilize society through the practice of rituals and protocols. Social interactions at base level take place between 'houses' and relationships[6] linking these houses are established through marriages that take place between their members in a typical patrilineal society, through marriage, a woman is transferred to her husband's kinship group and her welfare is then their responsibility[7]*."

Every house possesses an elder who is charged with responsibility for contact with the ancestors and for ceremonial and ritual and every hamlet has a king or *liurai* who is responsible for external and political relations.

[6] Nixon and Hohe, 2003,pp. 13
[7] Mearns, 2002, pp. 21

Mearns (2002: 31) favors the term 'local systems of justice" to reflect the degree of difference in dispute settlement practice. His study of local justice systems in East Timor revealed common underlying processes including for example, the principle that all disputes among members of different families went first to the elders of the two families in a meeting. If this did not settle the dispute an approach was made to the *chefe d'aldeia* hamlet chief for mediation. If the dispute remained unresolved after mediation, the *chefe d'aldeia* would refer the matter to the *chefe do suco* (village chief) who could meet together with the knowledgeable elders of the village, including those considered to be the depositories of customary practice. Mearns (2002: 37) noted that the community much preferred to settle issues within the village and were reluctant to resort to the police unless it was impossible to resolve the dispute.

In much of East Timor the response to an injury/grievance does not focus so much on punishment for the injury as on securing compensation for the victim and his or her family whose honor has been damaged by the crime or offence (Mearns 2002: 43). Individual wrongs implicate not only the wrongdoer but also his or her family who suffer shame and dishonor as a result of the wrongful act. Punishing the wrongdoer through imprisonment for a crime cannot satisfy the community sense of 'justice" because when an injury is inflicted on another, this creates a kind of debt that requires settlement to restore normal social relations. Mearns (2002: 54) identifies the Timorese concepts of reciprocity and fair compensation as the key principles of local justice systems and recommends essentially that the formal justice system incorporate elements of restorative justice in the forms of victim compensation, open public deliberation and involvement in settling the dispute, and consultation with village elders and the families of the injured person and the wrongdoer in fixing the penalty or recompense to the victim.

Tanja Hohe and Rod Nixon (2003:12) deny the existence in East Timor of anything that could be termed 'customary law' and agree with Mearns (2002: 54) that restoring harmony within the community and even the cosmos, and not punishing the wrongdoer is the primary objective in settling wrongs. Hohe and Nixon (2003:18) explain:

> *"The Tetum word for 'custom' (lisan) comprises everything that is 'old' and inherited from the ancestors. It refers to the 'order' given by the ancestors, but not specifically to what in a western context is classified as 'crime'. Yet, there are certainly conflicts arising in a community as people feel someone else has 'done wrong' and acted against the 'order'. Concerning the punishment of a crime or conflict resolution, local law is mainly about the replacement of values, to re-establish their correct exchange and thus reinforce the socio-cosmic order."*

Hohe and Nixon (2003:21) explain that for a case of theft, the thief must pay compensation according to the value of the stolen property plus an additional amount. Forms of compensation include horses, goats and buffalos and the scale of compensation is variable according to the locality. For example, in Bunaq society in Bobonaro, it is stipulated that in the case of theft of a goat, the wrongdoer must kill a goat and a cow.[8] Where a house is burnt, the wrongdoer's family must compensate the victim's family according to the value of all items lost or the victim's family may take possession of the wrongdoer's property. Where the offender cannot raise the required compensation, his or her family may provide one of their children to

[8] Village Chief, Bobonaro District, November 2002 in Swaine 2003

work for the victim's family. Swaine (2003:12) found that in cases of domestic violence there would usually be an exchange of goods, which would 'close' or dissolve the shame experienced by the offended family and restore relations between the two families.

Shame, (a core element in the notion of reintegrative shaming in restorative justice practice) also manifests itself in local justice through notions of "shaming the perpetrator and 'covering' the victim's shame". Hohe and Nixon (2002: 21) point out that in a case of rape, where the raped woman is married, the rapist has in fact shamed the husband. Similarly, in a case of adultery where the adulterer is married, he must compensate his parents-in-law 'to cover their shame' (p. 21). In the past, shame was also an element in cases of murder because the murderer had to be shamed in addition to paying compensation (p. 22).

Shaming itself cannot be considered reintegrative in East Timor. For example in one community, Bobonaro, Hohe and Nixon (2003:22) were told that a thief would pay a penalty of undressing, having his sarong placed on top of his head and sent through the village. Dressing a wrongdoer in this manner is said to symbolize the disorder he has created. Swaine (2003:12) similarly found that shame is 'covered' through compensation for the wrongful act and that this dissolves the feelings of shame experienced by the victim's family. Swaine (p. 31) points out that in rape cases, compensation will be paid to dissolve the shame suffered by the woman and to compensate for the adverse effect on her 'value' because she might not be able to marry at all after having been raped. In her discussion of domestic violence Swaine (p.32) recounts that a *chefe do suco* explained to her how he handled such cases:

> *"When a man beats a woman they take the case to me……I ask the man to carry the woman around the village until he decides to come back ……..I make them do this because then everyone in the village will know what has happened and they will be ashamed so they won't do it again…"*

Commonly, reconciliation ceremonies are held following a compensation settlement to demonstrate publicly that the conflict has terminated and both parties have restored relations. A ceremony restores harmony to the community and removes tensions (Swaine 2003:12)). This ceremony also ensures that any agreement reached will be honored because after a reconciliation ceremony has been performed under the eyes of the ancestors, any violation of the agreement reached can result in ancestral sanctions (p.12).

The community is very much concerned and involved in the process of dispute settlement because wrongdoing is regarded not as an individual act, but as a community problem (Hohe and Nixon 2003:23). For example, where a fight between two individuals from different villages results in a death, the entire village of the survivor would be expected to contribute to the compensation payment for the family of the deceased (p. 23). Obviously, there is a powerful incentive to settle disputes. Name and reputation must not be tarnished within the community because this could bring on the wrath of the ancestors.

The *lian nain*, or depository of knowledge of custom in the community are members of families that 'own the words', and can 'speak'. They are able to give an account of family histories including marriages and kinship relations, are aware of the interrelations between families, have knowledge of ancestral rules and can give an account of ancestral sanctions. The involvement of the lian nain is contingent on the nature of the dispute. Where the disputes exists within a family, the head of the family is responsible. If the dispute involves two families, their leaders will come together and resolve it. It is only when they are unable to find a

resolution or when a greater number of families are that the lian nain would become involved. They are expected to be neutral and must hear the relevant families' accounts.

Hohe and Dixon (2003: 25) report like Mearns (2002) that where the family heads cannot resolve a dispute between themselves, it will be made a public matter when the dispute reported to the village or hamlet chiefs. A 'helper' takes note and reports events to the *lian nain*. The village or hamlet chief organizes a meeting and ensures that all conflicting parties are invited. Meetings take place quickly, usually the next day or soon after because of the necessity to avoid social disorder in the community. Meeting in the communal place, a symbolic woven mat (*biti boot*) is unfolded and placed where the discussions will take place. Those present will include the families, the *lian nain*, the leaders and authority figures such as ritual leaders, warriors, the local priest, and the hamlet and village chief. Nowadays civil society representatives and even the police may also attend.

The objective of the meeting is to negotiate the compensation and those who address the meeting are the traditional legal experts who have the competence to make decisions and determine the fine or compensation (Hohe and Nixon 2002:26). The specialist participants are present to endorse the settlement from within their sphere of specialization. For example, the ritual authority will approve a settlement on the basis of whether the 'ritual sphere' (p.26) and the ancestral world agree to it. The hamlet or village chief must ensure the decision is consistent with government regulations. The final decision is a consensus of the 'law experts' and the other participants who possess authority.

Hohe and Nixon (2003: 64) suggest that the formal justice system of punishment and imprisonment is regarded as an anomaly. They explain the local conception as follows (p. 64):

> *"The perpetrator receives a place to live and is served food without working for it. The general perception seems that a detainee becomes 'fat', which normally is a privilege of the rich. Here, in the eyes of the locals, the cosmos is turned upside down. Further, a conflict or crime does not merely involve the individual, but more than one family. If the individual perpetrator is taken to prison, the families - equally wound up in the social tensions – remain with the seemingly unsolved problem."*

Similar to Mearns (2002) and Hohe and Dixon (2003), Swaine (2003:2) explains that in local justice cases involving women, it is usually the family of the woman who initiates action. Initially the family will ask members of their own family to solve the problem and may involve the *'lian nain'*. During the meeting accounts are presented by the victim and the wrongdoer who are supported by their respective families. Others from the families, friends and neighbors supplement the accounts of the parties involved. After this procedure, blame is allocated to one or both parties and is followed by payment of compensation between the families. If the participants are not satisfied with the outcome they may decide to refer the issue to the *Chefe do Suco*. In cases of domestic violence, Swaine (2003:32) points out that dispute settlement may result in 'moral advice' being offered as a means of reconciling the parties to the violence. The process involves the determining authority advising the parties about how to 'lead a peaceful life together" (p. 31). Specifically this may include: *"instructing the man not to drink so much and counseling the women to refrain from provoking her husband and to stay out of his way at times like this"* (p. 31).

Southern Sudan

In Southern Sudan, there are over 50 different tribes, with the Dinka being the largest single grouping and the Nuer the next largest (Deng: 2006: 37). Deng (2006:2) explains that 'customary law' is the most common source of law for communities of Southern Sudan and that disputes are overwhelmingly processed by employing local justice rather than written statute law:

> *"A paradox surrounds the way customary law is viewed in Southern Sudan. The educated, modernized elite largely see customary law as backward and incapable of addressing the needs of a rapidly changing and modernizing society. Yet in the context of the civil war that has raged intermittently for half a century between the dominant Arab-Muslim North and the subordinated South – where the overwhelming majority adhere to traditional beliefs or are converts to Christianity – customary law is seen as an integral component of the identity the South has been defending against Arabization and Islamization from the North"* (p.2)

In Deng's view, more than 80% of persons in the North and in the South settle their disputes through local justice mechanisms (p.2). Like East Timor, local justice systems in Southern Sudan are not uniform and every tribe (and sometimes sub-tribe and clan) adheres to its own processes and procedures and upholds its own norms.

According to Deng (2006:16) local justice resolves issues concerning family disputes over marriage, adultery, divorce and custody; some 'criminal' matters, such as rape, murder, manslaughter, theft; some child protection issues; and property disputes. No distinction is made between issues that are criminal or civil, in the ways these concepts are understood under the introduced law. The underlying principles in local justice systems include *"the desire to resolve disputes, seek conciliation between parties, and achieve satisfaction for as many parties as possible, in order to maintain the social cohesion and stability of the community"* (p.16). It is common for local justice to determine the compensation be paid in the form of livestock, or agricultural goods to the injured party in order to restore what has been lost or damaged or to 'restore social equilibrium'.[9]

Whenever a dispute is taken to local justice for settlement, Deng (2006:19) explains that the process involves convening a council or a meeting of a number of elders. The party who referred the dispute will explain the issue and if he or she is the wrongdoer, he or she will admit the wrong, express willingness to remedy it, and make a plea to the elders for reconciliation. The injured party will then state his or her case, initially without directly responding to the offer of reconciliation. In the often lengthy process that follows, those present make statements intended to contribute toward an acceptable resolution, including addressing the value of compensation or restitution required.

[9] Akechak Jok. A., Leitch, R.A., Vandewint, C., *A., A Study of Customary Law in Contemporary Southern Sudan* (World Vision International and South Sudan Secretariat for Legal and Constitutional Affairs, 2004)

Chiefs play a central role in dispute settlement having been given the power to decide disputes under local justice involving customary rules or norms by the *Chiefs' Courts Ordinance* 1931 (Deng 2006: 18). Usually the decision makers in dispute settlement are the Headman, elders or the head of the sub-clan. It is only when the parties believe their dispute has not been dealt with satisfactorily that the case taken to the Chief's court [10] or where the Headman believes that the dispute requires a formal hearing. The Headman deals with cases informally whereas the Chiefs court applies formal fixed procedures that are inquisitorial in nature. Thus, the Chief and the other members of his court play an active role in seeking out the facts in dispute from the parties and witnesses.

In the Chiefs court, families, rather than individuals, are considered the parties to the case. Deng (2006:21) explains that when the court President is satisfied that there is a case to proceed with, a date will be fixed and all the relevant parties will be summoned to attend. No lawyers may appear in this court and despite the formality associated with the proceedings; the procedures are simple and straightforward. Parties and witnesses can be questioned by all members of the Court and after hearing the evidence, each member of the court gives a judgment which the President takes account of in making the final decision. There is a right of appeal to the formal court system but Deng reports that in practice there are few appeals (p.21). However, when formal courts render decisions that have the effect of overriding customary rules, Chiefs will be informed and must follow those decisions.[11]

Deng (2006:34) points out that Southern Sudan statute law and custom differ significantly in dealing with crimes. While the written statute law focuses on the punishment of the wrongdoer, custom attempts to repair the wrong by requiring the wrongdoer to provide compensation to the injured party. Custom aims to restore and then maintain social order and avert an act of revenge or an escalation of violence (p. 16). In the case of wrongful acts by children, the entire family is responsible for the child's actions and therefore the family appears before local justice and pays compensation to the family of the victim. Although local justice is not lawfully empowered to deal with serious criminal offenses few juvenile cases are passed to the formal court system, and most cases are dealt with in the community (p. 35). Deng indicates that in practice children are liable to be apprehended, detained and interviewed by police in the communities (p.35). When a child's family is unable or unwilling to pay compensation, the child may be imprisoned until payment is received. Additionally, the police and the Chiefs often use corporal punishment on juveniles.

In a survey report on Traditional Authority in Western and Central Equatoria for a United Nations agency, conducted in January 2005, Cherry Leonardi observes that informants strongly emphasize the need for dispute settlement with relatives and elders and that only where this process fails should the matter be passed on to headmen, s/chiefs and chiefs.[12] She found dispute settlement procedure to be informal with local justice operating under a tree and substantial discussion among members and the public. She observed that the principal authority in local justice would summarize the majority opinion and help to reach consensus.

[10] The members of the Buma Courts and Executive Chief Courts are elected by their communities.
[11] In Koch County decisions of higher courts are relayed to lower courts by the Regional Court (Chairman of the Appeal Court for Koch County, Gabriel Guoy, meeting 31st May 2005). CITE & REference
[12] Interview with elder and church leader in Maridi, 27 Jan 2005, meeting with youth and women's groups, Maridi town, 29 Jan 2005.

As Leonardi indicates, "many people go to witness the hearing to judge whether it is fair"[13] and according to Leonardi, local people prefer to use local justice which tends to favor community interests over the rights of individuals.

Deng (2006:13) reports that culturally children are highly valued in South Sudan society because they are the foundation on which the ancestral line is built and maintained. Boys add their names to the line, while girls, through bridewealth, provide the means for their brothers to marry and beget children, particularly sons, to perpetuate the ancestral line. The son is more directly identified with the father, while the daughter, though also identified with the father, is permitted to be closer to the mother.

Indigenous practices and local justice in both East Timor and South Sudan share common underlying principles that parallel the principles and practices of western and internationalized restorative justice and restorative processes. For example, both require that disputes be settled in the interest of community harmony, both follow similar modes of settlement in that the first venue for settlement is the family unit, and both involve the community in settlement processes. While Southern Sudan appears more formalistic and East Timor less so, both local justice systems embody forms of restorative justice as it has been developed in the west and through international instruments. In this sense therefore, indigenous dispute settlement systems 'qualify' in many respects as forms of restorative justice consistent with international norms and standards. In making policy choices about whether, and how to bring restorative practices into formal statute law both entities could therefore elect to appropriate indigenous modes of settlement.

International instruments and modes of restorative justice

The Convention on the Rights of the Child (CRC), which entered into force in September 1990, is the primary international instrument that defines child rights and provides for their protection. Only two states, the U.S.A. and Somalia, have failed to ratify the CRC. Generally, the scheme of the CRC is to enumerate a series of child rights in the social, economic, and health and welfare fields, thereby creating a set of norms that have effectively globalized childhood. My focus in this paper is on the restorative justice type provisions of the CRC and on those appearing in its supplementary instruments, the Beijing Rules and the Riyadh Guidelines and therefore the scope and purpose of the CRC will not be explored further. It is noteworthy that the preamble to the CRC states that the Convention takes "due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child".

Amongst a series of provisions that set norms for the operation of juvenile justice systems, Article 40.4 of the CRC mandates that:

> *"A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."*

[13] Meeting with New Sudan Women's Association, Kotobi, Mundri County, 1 Feb 2005.

Although there is no specific reference to restorative justice as such, it seems clear that the kind of non-institutional penalties specified could include restorative justice practices such as youth conferencing, sentencing circles and victim and offender processes found in a number of jurisdictions. These western and now internationalist forms of restorative justice will not be discussed in detail in this paper are fully described in the extensive literature on forms of restorative justice. [14]

The 1985 UN *Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)* enhance the broad norms of the CRC in relation to non-institutional dispositions by referring specifically to diversion. Rule 11, for example, mandates generally that:

> *"Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority"*

Rule 11 goes to specifically apply diversion to policing and prosecution as follows:

> *"The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules."*

The Rules make it clear that any form of diversion must have the consent of the juvenile or his or her parents or guardian. The Rules suggest that appropriate forms of diversion include*: "community programmes, such as temporary supervision and guidance, restitution, and compensation of victims"* and the Commentary to the Rules adds specifies:

> *"Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended*."

Similar to the Beijing Rules, the Fundamental Principles enumerated in the 1990 UN *Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)* include:

> *"Community-based services and programmes should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilized as a means of last resort (Fundamental Principle 6)".*

There are now at least two further international instruments where the term 'restorative justice' is explicitly employed in connection with criminal justice proceedings. The first is the *Guidelines for Action on Children in the Criminal Justice System, 1997, which* are intended to assist states in implementing the CRC. Under the heading of specific implementation plans for implementing the CRC, the Guidelines set specific targets including:

[14] See for example, Gerry Johnstone. 2002. *Restorative Justice: Ideas*, *Values*, *Debates*. Collompton, Devon and Portland, Oregon: Willan Publishing.

"A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives to the classical criminal justice systems should be developed to avoid recourse to the criminal justice systems for young persons accused of an offence. Appropriate steps should be taken to make available throughout the State a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders. Whenever appropriate, mechanisms for the informal resolution of disputes in cases involving a child offender should be utilized, including mediation and restorative justice practices, particularly processes involving victims."

The second instrument, the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* is devoted entirely to the employment of restorative justice programmes in criminal matters. It is beyond the scope of this paper to discuss these principles in detail but significantly the preamble recognizes that 'restorative justice initiatives' 'often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people." The principles incorporate many of the general principles and practices that comprise restorative justice as it is widely defined and practiced in a number of jurisdictions. The Basic Principles adopt the concept of 'restorative process" defined as:

"any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles".

Elaborating on the restorative process, the Basic Principles identify the following as elements of the concept:

- restorative justice respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities
- enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs
- provides an opportunity for victims to obtain reparation, feel safer and seek closure
- allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way
- enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime.

A comparison of this set of standards or elements with the various theoretical formulations and practical schemes and applications of restorative justice worldwide indicates that this international statement in entirely consistent with national standards. For example, Van Ness (1989 in McElrea 1996: 72) sets out three fundamental principles of restorative justice:

"(1) Crime results in injuries to victims, communities and offenders; therefore the criminal justice process must repair those injuries.

(2) Not only the state, but also victims, offenders and communities should be actively involved in the criminal justice system at the earliest point and to the greatest possible extent.
(3) The state is responsible for preserving order, and the community is responsible for establishing peace."

However, as Daly (2002: 196) and others have noted it is difficult to satisfactorily define restorative justice because it covers a wide range of practices that occur at different stages in the criminal justice process.

Finally, it is worth noting that the Basic Principles call upon States to:

> *"consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favorable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities".*

The articulation between indigenous modes of dispute settlement and law

In light of the customs and traditions of East Timor and South Sudan discussed above, and the international obligations and advocacy concerning restorative processes what policy choices have these two entities made in their new laws on juvenile justice? How specifically has culture been enacted and regulated for the benefit of juveniles who come into contact with the law? To what extent have modern forms of restorative justice found in jurisdictions such as Australia, Canada and New Zealand (with significant indigenous populations) been incorporated into new laws?

Before explaining how culture (and therefore restorative justice) has been enacted by each entity, it is necessary to note that according to the Sudan State report to the Committee on the Rights of the Child on its implementation of the *CRC,* when an international instrument is ratified it becomes part of national legislation under the Third Constitutional Decree of 1989 by the Revolution Command Council *"and consequently enters into force as a binding law on all parties, including the bodies and institutions of the State"* (p. ?) .

As well, the National Constitution of Sudan, adopted in July 2005, specifically incorporates children's rights, stating in Article 32(5) (Part 2 Bill of Rights) *"The State shall protect the rights of the child as provided in the international and regional conventions ratified by the Sudan"*. It follows, therefore, that child rights contained in the *Convention on the Rights of the Child*, are part of the Constitution of Sudan and therefore laws and practices that violate these rights can be challenged as unconstitutional.

The Child Act 2008 of Southern Sudan

The Child Act explicitly states that its intention includes extending, promoting, and protecting the rights of children in Southern Sudan as defined in the 1989 *United Nations Convention on the Rights of the Child* and other international instruments, protocols, standards and rules on the protection and welfare of children to which Sudan is a signatory (Section 3).

Indigenous practice is given a privileged status under law because the Act allows customary and traditional regimes that are more protective than the Act to apply to children, except where those regimes are contrary to the best interests of the child (section 4(4)).

Restorative justice practice from other jurisdictions is expressly incorporated in the form of family group conferences which are explained as follows:

> *"family group conference" means a meeting involving the child, his/her parents and family members, the victim of the offence, his/her parents and any other relevant party to find ways to restore the harm and broken relationships caused by the child's offending."*

The detailed provisions on family group conferencing specify how they shall be convened, the procedure for giving notice to those who are expected to participate, and the enumeration of those entitled to attend. These include, the child, parents or guardians, family members of children concerned, a social worker, a lawyer, a body or organization recommended by the families, and a person recommended by the Chair of the of the Child Justice Committee working in consultation with the concerned families. A family group conference decides its own procedures and is to focus on the care and protection of the child, formulate plans for the best interests of the child and review those plans from time to time. An important provision makes the statements and admissions made during such conferences inadmissible in any court and the proceedings may not be published.

The principal aims of the Juvenile Justice System are set out as:

(a) reformation, social rehabilitation and reintegration of the child, while emphasizing individual accountability for crimes committed; and
(b) the restoration of harmonious relationships between the child offender and the victim through reconciliation, restitution and compensation (section 135).

An entire part of the Act is dedicated to restorative justice and the Act requires that crimes committed by a child be dealt with in accordance with restorative justice principles that have the following aims:

(a) provide an opportunity to the person(s) or community affected by an offence to express their views regarding the impact of such harm;
(b) encourage restitution of a specified object or symbolic restitution;
(c) promote reconciliation between a child and the person(s) or community affected by the harm caused; and
(d) empower communities to address children at risk of offending without resorting to criminal justice (section 153)

Restorative justice processes under the Act include: family group conference; victim - offender mediation; and any other restorative justice processes. A wide range of persons and authorities have the power to refer a child for a restorative justice process, including police and the court and chiefs (section 157).

The provisions on victim–offender mediation parallel practices developed in other jurisdictions. For example, the function of such mediation includes: enabling the victim and offender to talk about the crime, express their feelings and concerns; enabling the victim to participate directly in developing options for trying to make things right; and, affording the offender an opportunity to make apologies, provide information and develop reparative plans and gain insight for personal growth.

As well as these express stipulations concerning restorative justice processes the Act explains the purpose of diversion in restorative justice terms as follows:

> *"(1) The purposes of diversion are to:*
>
> *(a) encourage the child to be accountable for the harm caused by him/her;*
>
> *(b) promote an individualized response to the harm caused which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused;*
>
> *(c) promote the reintegration of the child into the family and community; and,*
>
> *(d) prevent stigmatization of a child which may occur through contact with the criminal justice system.*
>
> *(2) Where possible and appropriate, diversion shall include ingredients of the restorative justice process which aim at healing relationships, including the relationships of the victim (s) and offender(s)." (section 158).*

Beyond the very broad statement that privileges custom and tradition as noted above, culture has not been enacted and regulated in any manner in this Act. The Act has, in an exemplary manner, appropriated the western and internationalized forms of restorative justice. As to custom and tradition and indigenous forms of dispute settlement, the Act potentially opens the way to a complete abrogation of the Act's internationalized regime of juvenile justice if the threshold of a 'more protective' regime can be crossed. The Act gives no further guidance however, on the concept of 'more protective' nor does it give local justice any other explicit role in juvenile justice despite the fact, as noted above, that the majority of such cases are dealt with by local justice.

Proposed Juvenile Justice Act of East Timor

The Portuguese legacy in East Timor (Portuguese is one of the official languages) has meant that the laws of Portuguese speaking states are often relied upon as models for local laws. Although based on Brazilian legislation, (a civil law system like that of East Timor) the proposed Juvenile Justice law makes significant attempts to enact and regulate Timorese custom and tradition and forms of local justice. In addition, it appropriates the internationalist discourse of restorative justice. Thus, in East Timor, policy makers opted for an approach that appropriates and incorporates both indigenous modes of local justice and the internationalist discourse.

The civil law drafting style differs radically from the common law style employed in Southern Sudan. Civil law systems often incorporate statements of principle, and contain structural material and procedural details not usually found in common law models. For

example, this draft law states the dimensions of the Juvenile Justice System as comprising three dimensions:

a) Preventive dimension;
b) Social and educational dimension;
c) Restorative dimension.

The restorative dimension of the Juvenile Justice System is explained further as being based on reconciliation and on the responsibility to repair damage caused by the conduct of the juvenile in conflict with the law. This restorative dimension aims to achieve:

a) Community reconciliation;
b) Harmonization of relations between the victim, the family, the community and the juvenile in conflict with the law;
c) Overcoming of guilt and discrimination against the juvenile in conflict with the law;
d) Reparation for the harm caused;
e) Peace building.

Article 109 elaborates on reparation to the victim as follows:

1 – Reparation to the victim is represented by the juvenile's willingness to:
   a) Apologise to the victim;
   b) Compensate the victim financially, wholly or in part, for the damage caused, provided the victim accepts it before the judge;
   c) Carry out, in favour of the victim, wherever possible and adequate, an activity related to the damage.

2 – The apology made to the victim is achieved by the juvenile expressing his or her regret for the act,
   a) by making a promise before the judge and the victim, not to carry out a similar action
   b) Giving moral satisfaction to the victim, through an act that symbolically expresses regret.

A key provision of the draft law is Article 131 which mandates that the Juvenile Justice System guarantees the right of the juvenile in conflict with the law to participate in one of two forms of mediation before court proceedings are instituted in the Juvenile Court. The two forms of mediation under Article 132 are Community Traditional Practice of Mediation and mediation through a Mediation Panel. The prior consent of the juvenile and the victim are required before mediation can take place and the juvenile and the victim must jointly elect to follow one form of mediation (Article 135). Where they cannot agree, the prosecutor general is to establish a Mediation Panel.

The Community Traditional Practice of Mediation is explained as a practice based on mediation and reconciliation (Article 136) with the objectives of:

a) Mediation and Reconciliation;
b) Listen to the victim and the juvenile in conflict with the law;
c) Promote expression of emotions from the victim and juvenile;

d) Restore the relations and promote forgiveness between the families;
e) Promote forgiveness between the victim and the juvenile in conflict with the law;
f) Promote the participation of the Katuas and Lian Nai who know local culture, through counselling in accordance with the law;
g) Repair the damage caused by the act described by law as a crime;
h) Increase the knowledge of culture and tradition by the juvenile in conflict with the law;
i) Enable the juvenile and the victim to express themselves in their own language;
j) Overcome the guilt and remorse of the juvenile in conflict with the law and prevent similar acts from re-occurring;
k) Restoration of community relations;
l) Strengthen local capacity to solve specific community problems;
m) Stimulate peace-building. (Article 137)

This mode of mediation takes place under the authority of the Head of Village or the Head of the Suco of the place where the mediation takes place. Those permitted to participate in the mediation include:

a) Persons recognized by the victim or his family as Village Counsellor;
b) Persons recognized by the juvenile in conflict with the law or his or her family as Village Counsellor;
c) Victim and the representatives of the victim's family;
d) Juvenile in conflict with the law and the representatives of his or her family.

The mediation must be completed within 30 days or the prosecutor general is to proceed with an inquiry into the alleged offense (Article 149). According to Article 140, a written agreement is to record the outcome of the mediation and may contain recommendations including one or more of the following: a verbal or written apology to the victim and his family; a verbal apology to the community through its representatives; a verbal or written promise not to repeat the action again; compensation for the material damage caused; and a promise to respect the community.

The recorded mediation agreement is to be distributed throughout the district where it took place (Article 146) and ultimately must be sanctioned by a judge. There are elaborate provisions concerning delivery of the agreement to specified government agencies and the prosecutor general must be satisfied that it complies with the Law. Once it has passed through all the procedural requirements the mediation agreement has the effect of terminating the inquiry into the offense committed by the juvenile.

The non-traditional and non-community based Mediation Panel is to carry out the same objectives as the Community Traditional Practice Mediation but it is constituted by the following persons:

a) The office of the Prosecutor General;
b) Victim;
c) Juvenile;
d) Public Defender or Attorney;
e) Member of the victim's family;
f) Member of the juvenile's family;

g) Member of the Multidisciplinary Technical Team (a team of professionals with special skills concerning children and child development)

Nevertheless, there is some community involvement in this process because a representative from their community may accompany the victim and the juvenile to observe the Mediation Panel. While no procedures are specified for Community Traditional Practice the procedures of the Mediation Panel are prescribed and include mandates that: techniques of conflict mediation and peace-building be applied and that the victim be permitted to express his or her suffering and to be heard by the participants and the juvenile in conflict with the law have the same right (Article 150).

Discussion

Work on restorative justice contains only meager discussion of the emerging international discourse of restorative justice procedures and practice. The internationalization of restorative justice and its articulation with the globalization of child rights and child protection seem to have largely escaped attention. Similarly, indigenous dispute settlement practices that mirror the internationalized and western restorative justice discourses find little place in studies of restorative justice beyond mention of how family group conferencing is an attempt to 'revive' Maori traditional practices, how circle sentencing reflects the community focus of indigenous Canadian societies, and how Navajo peacemaking relies on a rurally based and tightly knit community for its survival. Generally, only legal anthropologists study indigenous dispute settlement processes and they do not seem to interact very closely with restorative justice advocates and practitioners. This lack of attention to indigenous modes of restorative justice may be considered surprising in view of claims made by restorative justice advocates of ancient cultural underpinnings, including notions of shaming found in many indigenous cultures, including those of Southern Sudan and East Timor.

Policy trajectories and policy choices in East Timor and Southern Sudan about new juvenile justice systems reveal the tensions apparent in the articulation between international restorative justice discourses and indigenous systems of local justice that parallel those international discourses. There appears to be uneasiness about the local and particular justice systems in Timor and Sudan in the face of the internationalist hegemonic discourse of restorative justice. In Southern Sudan, indigenous modes of dispute settlement are generally excluded unless they can pass the test of being more protective of children than the internationalist discourses incorporated so explicitly into law. This seems to signal a clear intention that local justice must exceed international norms if it is to have any place in the lives of juveniles. The question arises as to why policymakers have chosen to require that local justice must surpass and not simply equal international norms.

In East Timor local justice and internationalist restorative justice have both been embedded in a draft law that gives the juvenile and the victim the right to determine whether court proceedings can be forestalled by a 'traditional' or non traditional form of mediation. However, the mode of traditional mediation seems to owe little to indigenous practice because the process includes only a village or hamlet chief and some village counselors from the community. Apart from these members, the process takes place in private rather than in the public sphere as it is done traditionally.

In East Timor and Southern Sudan new laws on juvenile justice that seek to incorporate restorative justice principles and practices do not draw much of their content from indigenous forms of local justice but rather, make policy transfers from the West and from new international discourses on restorative justice to create what Daly (2002: 202) calls 'spliced justice forms'. As Mark Findlay observes in relation to South Pacific cultures, attempts to 'splice justice forms' in this manner "reveal the dangers of cultural abstraction, and the potential to compromise the essential and contextual elements of customary justice resolution elements." (2000: 399).

According to Sally Engel Merry (2003: 59) the conceptualization and drafting of international human rights instruments is an intensely legalistic process in which culture is conceived by international lawyers and international bureaucrats, not only as static and an obstacle to progress, but as the opposite of modernity. As Merry puts it:

> *""While there is recognition of the importance of cultural diversity and of responding to difference among cultures, the transnational modernity created in these human rights institutions is generally committed to promoting a universal system of norms and values. Culture emerges as the obstacle."*

The paradox here for restorative justice is that its advocates claim indigenous local justice practices as a major source of restorative justice principles and practice. If Merry is correct, international lawyers and policy makers who create instruments that protect child rights and promote restorative justice take a contrary view and regard local cultures with indigenous dispute settlement processes as unchanging obstacles to the advance of modernity.

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