East Timor Information Session

The Australian branch of the International Commission of Jurists is one of a number of non-government organisations which have been keen to offer assistance to the East Timorese in their difficult and important task of nation building. It is very important that any Australian organisations which become involved in this process do so with open hearts and generosity, guided at all times by the principle that it is the East Timorese people and their representatives who must determine what assistance is required and the nature of the assistance that is to be given.

There are a number of factors which must be taken into account in determining the present and future needs of East Timor and suitable political, administrative and judicial structures.

The first is the historical context of East Timor. As we all know East Timor was a Portuguese colony for hundreds of years. After the end of the second World War, the creation of the Indonesian nation out of a number of separate Dutch colonies required the development of a supra-national policy with Sukarno wishing to unite Indonesia as a nation from the western tip of Sumatra to Merauke on the Papua New Guinea border. In the midst of this national ferment, East Timor remained as a Portuguese colony. However under the Suharto Government in 1975 after the Portuguese revolution, East Timor was invaded by the Indonesian army and forced to become part of the Indonesian nation. In the twenty-five (25) year period between the Indonesian invasion and the vote for independence, East Timorese institutions were integrated into Indonesian institutions

but significant leaders were in exile becoming familiar with, or educated in, systems other than the Portuguese colonial or the Indonesian systems of administration and law. Jose Teixeira is a shining example.

The geography of East Timor is defined by its proximity to Indonesia, South East Asia and Australia. The modern context is further defined by the presence of the United Nations Transitional Administration in East Timor (UNTAET). Added to all of these are the informal systems of conflict resolution which grew up outside the imposed order, the customary law and the Catholic church to which most East Timorese belong.

All of these factors have to be taken into account in determining what political and judicial systems will be put in place in East Timor and indeed in what language the government of the country will be conducted.

As I have said, it is the wishes and needs of the East Timorese people that must determine such questions but it is important that Australian lawyers be aware of and respect the complexities involved in reconciling these different influences with the traditional mores, languages and religion of the East Timorese people.

I should also say immediately that I have no first hand experience of East Timor. My own comparable experience was gained by a visit to South Africa in November/December 2000 in a program funded by AusAid to assist the South African government in the implementation of its *Equality Act*. It may be that a number of

common patterns can be seen in the implementation of law and policy in different states each moving from an oppressive regime to an open and democratic government. Certainly my experience of South Africa was that suspicions and hatreds are not easily cleansed and the process of political, administrative and judicial reform is arduous and far from straight forward.

My own experience is also that one of the areas in which countries emerging from under the yoke of oppression need most assistance is in the area of competent and principled administration. Those of us who live in countries with a public service with high standards of competence and independence can easily underestimate how significant that is to the proper working of a civil society. While we as lawyers might tend to concentrate on political and legal institutions and the content of laws and the constitution, the implementation of those laws by a well-resourced administration is critical.

TYPE OF LEGAL SYSTEM

One of the important matters for the East Timorese people is the type of legal system which will exist in East Timor. There are a number of conflicting influences, some of which would suggest the introduction of a Civil Law / Inquisitorial model and others which would suggest the introduction of a Common Law / Adversarial model. Although the differences between the two can tend to be exaggerated, there is a distinct difference in the judicial system which exists under each. The history of East Timor under Portuguese rule would tend to suggest the development of a Civil Law / Inquisitorial

system and this has apparently been favoured by UNTAET. Yet Australians, trained in the Common Law system are more comfortable and more knowledgeable about the Common Law / Adversarial system. This has become a very real problem in the assistance that can be offered by Australian lawyers.

The Australian Institute of Judicial Administration has a committee to provide support and training for the East Timorese judiciary convened by Richard Coates, Director of the Northern Territory Legal Aid Commission. The AIJA arranged for the President of the Dili District Court, Dr Domingos Sarmento, and two other East Timorese Judges, to attend the AIJA's annual conference in Darwin in July 2000. It was reported in the AIJA News of February 2001 that Dr Sarmento gave a moving address to the conference, outlining his view that the law had been used for the past 500 years as a tool of oppression by the various colonisers of his country and that the challenge of the judiciary was to promote respect for a system of law which was seen to be both fair and independent and able to serve the community's needs. The East Timorese Judges were keen to establish a collegiate relationship with their Australian counterparts and saw that as a means by which they could promote the belief in and respect for judicial independence.

The AIJA Committee arranged for two East Timorese Judges to attend the Judicial Orientation program in August 2000; however last minute problems in obtaining visas meant the Judges were unable to get to Sydney in time for the course. The AIJA reports that UNTAET in East Timor has determined that, in the interim at least, the legal system

in East Timor will follow the Civil Law/Inquisitorial model. It has concentrated on providing judicial training from a civil law perspective and has, so far, shown little interest in accepting the many offers of assistance from lawyers with a common law background.

Justice John Dowd in an address given to the conference of Supreme and Federal Court Judges in Hobart on 25 January 2001 said of this dilemma:-

> "Most people from European Civil Law systems have an unhealthy mistrust of people from Common Law systems and the early UN bureaucrats turned their faces steadfastly against assistance from Common Law countries such as Australia. This has not made the process of assistance easy. There are also many of the leaders who do not necessarily have a good view of Australia as a likely mentor country to the new East Timor, a view which is perfectly understandable in the circumstances."

This is a matter for the East Timorese people.

REMEDIES FOR PAST INJUSTICES

A second significant area in which the role of assistance may be offered by Australian lawyers is in dealing with the past. All countries emerging from oppression have to make important decisions about the extent to which, and the way in which, they will attempt to remedy past injustices. The solution to dealing with the past in places such as South Africa has been to set up a Truth and Reconciliation Commission, while others have

favoured a War Crimes Tribunal or prosecution of crimes committed in the name of political action. While the two solutions are not mutually exclusive, a War Crimes Tribunal is expensive and time consuming but can bring finality where terrible crimes have been committed. There is a fundamental question as to whether or not prosecution or reconciliation is the appropriate route to take.

If crimes are to be prosecuted, the question then arises as to what law applies. Dowd J has said:-

> "There is quite a healthy argument, that since few nations recognised the Indonesian occupation of East Timor, that the law which should apply to UN intervention is Portuguese Colonial Law as applied to East Timor. The alternative argument is that the law which applies is the law of the occupying country, that being the law which was applied during the period of Indonesian occupation."

These questions of course are relevant not only to the law which should apply in the future but also to the question of whether or not the law has been breached in the past.

The country with recent experience of a Truth and Reconciliation Commission is South Africa, with this commission being mandated under the new Constitution. Such a commission has no prospect of success unless it has the support of the various groups who are in conflict. It cannot be imposed on a people who do not fully support it. As Frank Brennan says in his article "*Knowing Your Place*" in the January 2001 edition of

"Eureka Street" a commission with limited political legitimacy and partisan affiliations would be counter-productive.

The purpose of the Commission in South Africa was to discover the truth about the past, grant amnesties and reconcile the many groups in conflict in the society. How successful was it? According to Antjie Krog, a significant commentator on the Commission, the answer is both complex and simple. She says at pp 447-449 of her book about the Commission, "*Country of my Skull*"

> "If one regards the TRC as a mere vehicle to grant amnesty, it succeeded reasonably. A lot of amnesty applications were dealt with, albeit unfairly on occasion. . . . . If the TRC is regarded as an effort to create a forum for victims to bring some form of balance to the political ideal of amnesty, then the Commission succeeded in a most remarkable way. The experiences of the victims did indeed become part of the national psyche and part of [South Africa's] acknowledged history for the very first time. But, in terms of repairing and healing the trauma of the victims, the TRC itself was the first to declare that this was, singularly, its biggest failure.
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> If the TRC was seen as a body to establish the truth, it also succeeded fairly well in establishing factual truth, in determining 'what happened'. It was far less successful in convincing South Africans of the moral truth, 'who was responsible'.

> If the idea of a TRC process in South Africa was to prevent violations of human rights from ever happening again, the commission failed.
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> The biggest question, however, is whether or not the TRC process achieved reconciliation. Few people believe that it has."

However, she continues:-

> "Peculiarly, the word "reconciliation" still resounds in the land. It carries within it the full variety of survival strategies – among them choice, flight, amnesia, rituals, clemency, debate, negotiation, brinkmanship and national consensus. The goal is not to avoid pain or reality but to deal with the never ending quest of self-definition and negotiation required to transform differences into assets."

I agree with the analysis of Frank Brennan who urges a focused commitment to the building of mainstream political institutions – courts and parliaments – and leaving reconciliation to the leaders of East Timor civil society. Reconciliation can and is apparently occurring on a local level as people return from the camps to their villages but, as Father Brennan says, reconciliation can only be enacted nationally by political and legal processes determined by the people and their leaders.

Whether the statements gathered by the East Timor Evidence Project conducted by AICJ are used as evidence for prosecutions or for a Truth and Reconciliation Commission (or both) is in my view a matter for the East Timorese people.

CONCLUSION

Australian lawyers and judges should be ready to assist with the process of the creation and protection of a legal and judicial system and astute not to re-colonise by insistence of the adoption of solutions with which they are most comfortable rather than responding to the needs and desires of the East Timorese. Areas of practical assistance may well include the areas of criminal, constitutional and human rights law – assistance with and more importantly training in the drafting of laws, the implementation of systems, and the training of and support for an independent and accountable judiciary.