

Negotiating Memory and Forgetting:
Customary law and local politics in
post-conflict governance

Lessons from East Timor and Somaliland

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Abstract

This dissertation explores the role of customary law and local leadership during statehood reconstruction in war-torn regions. Particularly, we compare the historical experiences of East Timor and Somaliland to clarify the linkages between local traditions and the international peacebuilding agenda when the aim is to renew trust and recover social order. We assess the sources of “political legitimacy” -connections between “indigenous psychologies” and institutions enabling stability- to critically evaluate peacebuilding efforts. A detailed comparison between Timorese and Somali experiences will allow us to discuss how customary law was historically incorporated in the encounter between Western and Southern worlds, and how it is actually considered in contemporary projects towards peace. Therefore, this paper tries to critically assess “hybrid justice” endeavours and the concept of “pragmatic realism” as issues incorporated in the security agenda. To conclude, we argue that a sustainable and just peace is possible from a dialogical morality between the local and the international. A possible foundation of a new model of governance.

Introduction

The main purpose of this dissertation is to investigate the role of customary law as developed by local actors in the process of order and trust rebuilding after violence. The East Timor transitional model integrated “Nahe biti” -a native mediation model- which aims to restore peace by public sharing of apologies. Nahe-Biti was applied within a “top-down” political experiment in which United Nations succeeded on discriminating main local constituencies working towards national construction. On the contrary, Somaliland peace is sustained on locally led model of clan negotiation and “duudsi”, a system of social forgetting which endorsed reconciliation. This country still has not been internationally recognised. The comparison of these experiences is a source to critically evaluate a holistic approach to conflict transformation towards just peace, avoiding the wrongs of colonial and post-colonial past. Some features of the “liberal” peacebuilding format replicated around the world are contested. Chapter One introduces the “politics of legitimacy”, Chapter Two and Three are focus on the case studies, Chapter Four critically compare both experiences, and Chapter Five and Six reflects around a cross- cultural understanding of justice and peace base for a new model of governance.

The research and conclusions are based on the consultation of secondary resources; ideas arise from my participation in informal meetings with Somali and Timor activists living in the UK, and inspire thoughts born during my years of social activism and professional engagement in Latin America.

This dissertation is dedicated to life: which put me in the place where I am today¹, and to the Latin American fighters including my family, friends and colleagues.

¹ Sublime el sueño que me dejó, justo, en el lugar donde estoy (León Gieco).

Chapter 1

Who and how: the politics of legitimacy

To explore the role of customary law in the process of statehood reconstruction after violent conflict requires revisiting the politics of legitimacy building. Social orders do not exist in a vacuum. Historical change is the product of negotiations among individuals, groups and their institutions which form the basis of social organisation. That negotiation can take the form of violent conflict, as in the cases explored in this paper. Nowadays ‘international peacebuilding policies’ are supposedly the way to overcome violent conflict. Nevertheless we argue that local actors are the main stakeholders able to constitute the new order’s legitimacy. In times of globalisation of the so-called “liberal peace”, to assess the function of local customs and leadership becomes central, especially if that peace is to be sustainable and positive.

Sociology and anthropology are key theoretical sources with which to understand the role of law –including customary law- in the formation and functioning of any society. Classical sociologists such as Durkheim have defined ‘customary law’ as a ‘social fact’ with the power to organise social life: *“a social fact is every way of acting which is general throughout a given society. Such an action is said to be potentially universal, accepted and recognised as part of collective life with the power to organise it. It forms the collective aspects of beliefs, tendencies and practices of a group that characterise truly social phenomena”*, (Durkheim, 1895). Bourdieu (1984) studies how individual “*habitus*” and social systems are interlinked, enabling life organisation. Furthermore, Weber (1904) clearly explains the centrality of protestant beliefs-

valuing self-control and legitimising an individual credit system- in the process of consolidation of the capitalist system. The invisible world of beliefs enables the organisation of logical and functioning social systems. Without coherence among these we could not expect stability. The eagerness of individuals to conform to the norms and adapt to the function of society requires the individual's acceptance of social order.

Several studies affirm that native norms -which compel the individual to obey – are central for at least 80% of the population in the recently independent “global South”. This population manage life in accordance with customary law, sometimes interlinked with religion and at all times based on specific and well developed methods of mediation recognizing local modes of leadership and authority (World Bank, 2008, Babo- Soares, 2004). East Timor and Somaliland are clear examples of this reality.

For that reason, it is important to appreciate the role of “ethno-psychologies”, the relation between the “self” and the “outside world”, as a powerful base to organise social life. This relation varies among cultures and is characterised by multiplicity and diversity of languages and territories. *“Indigenous psychologies are in fact necessary if three interrelated functions are to be fulfilled: sustaining the “inner” self, sustaining the self with respect to the socio-cultural, and enabling socio-cultural institutions to operate”* (Hellas and Lock, 1981). Every human being operates with the specific “indigenous psychology” related to its environment; the coherent relation between both levels is the unique guarantee of institutional functioning. Education is the link between the two. *“By providing ways of thinking about the self, together with interpersonal and institutionalised relationships, indigenous psychologies provide frameworks enabling participants to make sense of what they are about, how they live their roles, how deviants should be handled, and in general how an individual should operate in society”* (Op. Cit., 1981). It is not possible to imagine an institution which does not contain indigenous psychologies, for the simple reason that all institutions bear on human life.

For the purposes of this dissertation, we briefly explore two large “*indigenous psychologies*” which have been in a conflictual relation since colonial times: the Western and Southern ones. In very general terms, we could describe today’s Western psychology as individualist while Southern psychology as communitarian. Scholars studying transitional justice and processes of legitimatisation give special attention to the particular institutions that sustain these diametrical different “selves”. Most of the studies in this field agree on describing the institutional and justice systems of both worlds in the following terms: the individualist approach understands breaking the norm and abnormal behaviour as an individual problem, therefore justice is about punishment and “re-education” of that given person, usually performed in large institutions such as prisons, and as indicated in anonymous written codes. Justice is a matter of legal representatives and distant courts. As the capital is able to reproduce itself without that deviant person, imprisonment is not very problematic. On the contrary, as native communities reproduce life in cooperative systems of production and resource management, community is the main source of justice: discipline is a matter of ancestors, elders and extended families. Infringement of norms is a community issue which might be solved in a restorative manner and through participative mediated processes. Unwritten codes of conduct reproduced every day life, allowing predictable connections between a community’s members as base for social organisation (Penal Reform International, 2002)

The “encounter” between these two “psychologies” took the form of colonisation for several centuries, followed by the instauration of political organisations called “national central states” as implemented by local elites and under the pressure of Cold War Real Politics and the Post- Second World War new international order (United Nations and so on). Today the encounter takes the form of peacebuilding and aid politics and global trade. This encounter is a struggle towards social control, as source of economical benefits and security, and is an effort to build, maintain, destroy and re-build the institutions which sustain this process.

Considering this scenario, it is important to evaluate transitional justice as a legitimacy building process: the re-creation of the connection between the “self” and the “outside world”, a link which is specific to each cultural group, holding as they do specific “*indigenous psychologies*”. As we discuss more in detail in Chapter Five, reconciliation is about constitutional building. In this process, to treat the mentioned symbolic encounter as a matter of technical and forceful control is dismissing the subtle and labyrinthine politics of legitimacy. Also it is blind to the lessons of history: “*Africa has the highest proportion of countries where the process of state creation was exogenous to their societies and where the leadership of the ruling class inherited the state rather than shaping it as an instrument of its existing or developing hegemony. As a result, African states were born lacking legitimacy; they were not historically embedded into domestic relations of power and domination. They furthered the urban bias of their states by marginalizing peasant populations. This lack of domestic statehood which translates into a lack of legitimacy of the political system as a whole reduces the loyalty of citizens vis a vis state institutions perceived as alien and makes them more likely to choose ‘exit’ rather than ‘voice’ options when faced with policies of leadership they disapprove of. Therefore, rulers of non legitimate states are caught up in a crisis of power*” (Kimathi, 2005).

Considering this, we need to critically evaluate international endeavours aiming to create order from outside and in a “top-down” fashion. It is crucial to appraise the conflictual relation between the local and the international, without forgetting the fact that social order is always dependent on the “content” given by people in specific times and places.

It might be that if today Southern countries face disorder and violence it is also due the continuous and abnormal insistence to sustain exogenous processes of state reconstruction, many times, bases on the dichotomies superior/ inferior or backward/ developed approach. This is not useful if we are concerned with the maintenance of peace which will promote sustainable ways of wealth creation and distribution.

The exploration of the role of customary law and local leadership in East Timor and Somaliland will allow us to critically assess the chance to sustainable peace considering the *“Politics of legitimacy building”*.

Chapter Two

East Timor: Nahe-biti in the UN Kingdom of East Timor

“It is not the purpose of punishment to impose sentence blindly but to create discipline. Evil must be cured at its roots. To eradicate evil in political life, it is best to kill the ringleader and forget the followers. In educating oneself it is best to root out bad habits and tolerate those that are harmless. For asceticism that is too strict, like sentences of undue severity, fails in its purpose” (I Ching)²

East Timor is a paradigmatic illustration of a “*top-down*” peacebuilding endeavour towards state formation. The Timorese process was the first political experiment seeing the UN exercising sovereign authority over an “independent” country. This process was as such that Chopra (2000) has claimed that East Timor was, in fact, the “*first UN Kingdom*”. Following other alarming examples of flawed international interventions in local and regional conflicts, East Timor is still mourning for the death of those who were not protected by the international forces deployed during the election time; the country suffers extreme poverty and faces continuous outbreaks of violence³ which still justify the presence of international military forces in Timorese sovereign territory. There is an increasing perception that justice has not been achieved and the local population feel discriminated from what was supposed to be a great moment of national reconstruction. The “*top-down*” governance’s model also comprises the role played by the local elite and political parties over-concentrating power.

² I Ching as translated by Wilhelm and Baynes, (1967). The I Ching, or Book of Changes; is one of the oldest Chinese classic texts. The book is a symbol system used to identify order in random events.

³ Including fighting between pro-government troops and disaffected Falintil troops (2006) and the attempted assassinations of President and Prime Minister Ramos Horta and Gusmao (2008)

Nevertheless, this East Timorese model of transitional justice incorporated local and customary methods of conflict resolution in an attempt to achieve more effective results on post-conflict management⁴. East Timor Commission for Reception, Truth and Reconciliation (CAVR) integrated into their work a customary model of conflict resolution called “Nahe-bitu”⁵ dealing with **less serious** crimes committed during colonial and post- independency violence. Considering the context, in the coming paragraphs we describe the Timorese experience of statehood reorganisation and analyse its relation with local participation and customary law.

Social solidarity and the sources of legitimacy: if we suppose there should be any relation between law, social order and “the people” that was forgotten in East Timor. The transitional UN government was successful in discriminating against all political parties and local formations in the initial process of Timorese state reconstruction. CNRT (National Council of Timorese Resistance) proposals were totally ignored and conversations between Gusmao – one of the main local leaders in the struggle for independence - and UNTAED were inexistent for quite some time. To further describe this dangerously authoritarian tendency, we can cite UN concrete actions seeking to jeopardise World Bank’s CEP (Community and Local Empowerment Project) which aimed to start a council-led participatory process to strengthen the mechanism of self-determination and involvement at the local level (Chopra, 1999). Timorese professionals were discriminated from taking leading roles within the UN and other institutional teams with the subsequent formation of two economies: one for the rich “expats” and the second for the poor locals. Many of the people interviewed by Cristalis (2009) declared that the UN members of staff exhibited “colonial style- behaviour” and Xamana Gusmao affirmed “*we do not feel very comfortable with some people acting like kings of East Timor, coming here to impose their*

⁴ As in Rwanda, Mozambique, Sierra Leone, South Africa and other countries facing post-conflict reconstruction (Huyse and Salter et al, 2008)

⁵ This means “stretching or rolling the mat”.

models... we are strong enough to expel anybody from our country"⁶. Furthermore, even when only a minority of the local population speak Portuguese, this was made the official language during national foundational process⁷.

Local constituencies in charge of the country after power transfer did not show particularly different behaviour. Freitlin and some political subgroups concentrated full power. This was visible during the constitutional building of East Timor: constitution was drafted solely by Freitlin and approved within a short space of time not including suggestions of women, ex-combatants and other social groups (Garrison, 2005). Richmond (2007) asserts that *"even it is well documented how dangerous could be rush elections under the international pressure this was not considered in East Timor, and the consequences are visible in "damaging" concentration of power in hands of Freitlin"*. A poor process of negotiation of grievances among all rival factions and a bitter feeling about the extreme power of international actors are some of the root causes of present violent outbreaks. Paradoxically, while UN staff enjoyed immunity... the local population was subject to the "rule of law" and was broadly included in the process designed by CAVR to – supposedly – heal the violent past and create a "new national sentiment".

Forgiving or the mysterious functions of acknowledgment: The top-down launch of East Timor integrated customary law as supplementary tool of the liberal endeavour. In this "authoritarian" state of affairs, CARV and Chega! (CARV's final report) aim was to legitimise a new "just" system, divergent from the oppressive and unfair past. The bureaucratic function of memory, truth telling and forgiveness had the enormous duty of sustaining the creation of a wider process of national sentiment based on reconciliation, and educating young generations in the new common Timorese history (Kent, 2008).

⁶ Interview with Norwegian Journalist Torgeir Norling, November 1999, as cited by Cristalis, 2009

⁷ After some time, Sergio de Mello – Special Representative of the UN Secretary General and Transitional Administrator – admitted in an unpublished paper (2000, as cited in Cristalis 2009) that he had *"no clear conception on how to exercise fair governance with absolute power, other than to seek for a model of benevolent despotism"*.

The Timorese CARV satisfied all international standards for TRC⁸ and, as mentioned above, creatively included local customary models to deal with minor crimes and reintegrate ex-combatants. Authorities acknowledge that 90% of the East Timorese prefer the customary system of dispute management which is still widely used (Mac William, 2007). Local people simply do not trust in the public formal system as it was always an oppressive Portuguese or Indonesian project. CARV adapted “Nahe-bitu” as a model of restorative justice practiced since immemorial times by native communities and transmitted via ritual chants, myths and story telling (Soares, 1999). *Nahe-Bitu* is a moment/space in which the people (parties) are invited to sit together (at the mat) and, surrounded by the community, vent grievances and problems in search for common solutions built on consensus. This method is used both in large meetings (inter-clans) and minor ones (family issues or intra-clan difficulties).

Traditionally, the ancient values of harmony, apology and inter-group solidarity (restoration of community relations) are renovated in every communal meeting ending in feasts celebrating new agreements⁹. Soares (2004) describes cases of inter-border and grassroots reconciliation: welcoming ceremonies organised by family members after “refugees”, living in West Timor in fear of reprisal, were invited to confess their actions in a public square and offered apologies; and how CARV organised public hearings at the local and regional levels with the aim of truth-seeking and the public sharing of victims and perpetrator’s painful stories¹⁰. Supposedly, perpetrators’ confessions opened the chance for “forgiveness”. The indigenous procedure of restorative justice was only accepted if the perpetrator was not found guilty of “serious crimes”¹¹. The Timorese hybrid system of justice and reconciliation compromised the

⁸ Some tips on mainstream recommendations on how to organise a TRC on <http://www.ictj.org/en/index.html> and <http://www.transitionaljustice.org.za/>

⁹ When phrases like ‘*Saida mak ladiak haluha tiha ka monu hela iha ne’e, labele louru ba liur. Maibe buat nebe mak diak lori ba hodi fo hatene ba, no hanourin, oan sira*’ (‘What is bad should be forgotten, and should not be taken home with you. However, you may take the good things to tell, and to teach, your children’)

¹⁰ Nahe-bitu method was sometimes organised in an informal level –self organised communities- besides the formal strategy sponsored by UNATED and executed by CARV.

¹¹ For serious crimes, the internationally funded Serious Crimes Unit arranged full investigations, prosecutions and punishments in accordance with “international” (western-style) judicial standards.

demands of international stakeholders and the practices and needs of local people, the majority of whom still lived in rural areas. Yet, the process of hybridization of Nahe-bitu in the context of a “top-down” internationally supported reconstruction effort- implied several changes and had results which are not fundamental to its philosophy and essential purpose.

Time or not time to explain or wait: Contrary to Somaliland’s case, in East Timor there was no time. No time to explain, wait or discuss. After all, not much time “*to be with the other*” as a broader foundation towards governance and wounds healing¹². CARV’s Minor and Serious Units as well as the constitutional process (mentioned above) were characterised by urgency and a Western “do it quickly” manner. It is not that easy to deal with so much pain while meeting donor’s deadlines and funding scarce. The “faster and cheaper” “rationale” which justifies, to some extent, the hybridization of the transitional justice system might be argued to work in opposition to the deeper aims and values of the native method. In fact, the report prepared by the Judicial System Monitoring Programme (2004) remarks on some unsatisfactory outcomes of the Timorese experiment: a) the lack of preparation for victims participating. b) Participants not fully aware of its aims and consequences, as briefing meetings were insufficient¹³. One of the explanations for this is that the CAVR “hybrid” goal was to work for a deponent’s reintegration to the community rather than for particular victim- perpetrator reconciliation. The victim’s needs were put partially to one side, as the limited time was invested in assuring the participation of all perpetrators. The small CPR team was busy dealing with the increasing number of deponent statements: after all, it was a race to gain formal immunity. The “healing” and “reconciliatory” expected Nahe-bitu outcomes for all parties involved were, at the least, weak. Perpetrators felt

¹² What is governance if not another form of human relation? The ascendant “*do it quickly- no time*” manner of today’s Western world might be affecting all kind of relations? (from marriage-families to friendships and governance systems).

¹³ As exemplified in the following testimony: “I joined the meeting because the CAVR came and brought me a letter one day, asking me to come to a meeting. I didn’t know what the meeting was about, but when I got there the next day I found it was a meeting about my house that had been burned down” (Senhora Balbina, a victim in Alieu, Judicial System of Monitoring Programme, 2004)

“lighter”, “less fearful” while the victims felt confused and angry. The same reports concludes that CAVR adapted model was far from being indigenous: *“the views expressed by victims interviewed in this study are a reminder that sacrificing individual needs for the “collective good” IS NOT a indigenous East Timorese concept, as for the native wisdom the individual needs of the victims need to be taken in consideration as a way of knitting together again the Bati (mat)”* (Op. Cit. 2004)¹⁴. If there was no time for real connections can we conclude that the customary system was successfully implemented in East Timor with reconciliatory principles?

The power money?: It is worth noting that, beyond the massive funds aiding East Timorese process, the achievements in poverty reduction were meagre. The country remains one of the poorest in the world¹⁵. On this point, very briefly; we can evaluate how this environment affected the justice and reconciliation process in East Timor. In a context of deprivation and loss, the poorly informed participants of the CAVR hearings were hiding an expectation: to gain some kind of economic compensation after the destruction or robbery of communal or family properties. Why not to get as much benefit as the perpetrators gaining immunity or the “expats” enjoying a generous standard of living? In the words of one young person interviewed (Op. Cit., 2004): *“Justice to me means economic justice for everyone. I see those who were pro autonomy living well but those of us who were pro merdeka (pro-independence) are still struggling. If they come back to their house and continue to be hungry they cannot accept reconciliation. We can’t just keep sitting and talking every day. We need to resolve our economic problems”*. The shortcomings in relation to the customary ideals were deepening: an unfair policy of resource distribution was getting dangerously entrenched in the flawed reconciliatory process and mixed up with demands on material compensations¹⁶.

¹⁴ To even complicate more the scene, the Serious Crimes Unit failed to deal with most serious crimes and the local Timorese people continued to feel the *“small and avoided people”* and as always, as before.

¹⁵ Another example which poses questions to the idea that Western-like democracies and development go together (See Leftwich, 1996, Craig and Porter, 2006, and Khan, 2004).

¹⁶ Besides material compensation there were victim’s demands to get key information in order recover the bodies of the loved ones. Many times, victim’s participation in the local hearings were motivated by these two very concrete requirements.

The local are who?: a judicial system administrated in Portuguese, an independent state ruled by the UN, a Constitution drafted by one political party, victims excluded from understanding the reconciliatory process, a doomed application of a ancient system of restorative justice and locals still the “*small ones*”¹⁷...all this makes one question: who are the locals?

East Timor poses questions in relation to how reconciliation –as a legitimated process involving “indigenous psychologies” along institutional building - can be achieved when customary law and local leadership are mere accessories of an exogenous and top-down endeavour.

Somaliland could be presented as the “other side of the coin”.

¹⁷In several interviews cited in Cristalis (2009) the Timorese locals called themselves the “small people” as opposed to those international and local actors in power.

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“If you want to dismantle a hedge, remove one thorn bush at a time”. Somali proverb

Chapter Three

Somaliland: duudsi and shir beeled in contemporary times

Somaliland is a paradigmatic illustration of “*society-rooted process towards state formation*” (Brons, 2001). As an example of an effective bottom-up effort to achieve peace, Somaliland fosters the debate on peacebuilding and statehood reconstruction in contemporary times. The locally led peace process – in opposition to all “international recipes” – resulted in years of stability and prosperous social and economical accomplishments benefiting the local population¹⁸.

In the coming paragraphs, this chapter will unravel the intrinsic qualities of the Somali kinship system of social organisation which successfully promoted peace settlements and the creation of institutions, all inspired by a Somali pastoralist worldview. The central actions were several “national” inter-clan peace conferences and grassroots local assemblies dealing with clan reconciliation, constitutional issues and institutional formation. All following local customs: a local conference can last several months; peace is based on forgetting (*duudsi*) and arduous consensus building; and the elder leaders – inspired by ancient poetry – the basis for a possible new encounter with harmony. This case study will open up the opportunity to discuss the

¹⁸This is dramatically contrasting with dreadful counterpart Somalia.

concluding thoughts in relation to the promises of customary and locally-led practices of peacebuilding and state formation (Chapter Five and Six).

Social solidarity and the sources of legitimacy: the sources of the actual Somali legitimised social order are found on its ancient system of kinship. Lewis (1993) explains that all Somalis are born within a family clan which directly defines individual identities attached to a scheme of political organisation – (to be referred to when facing a problem of grassland or water distribution for example), social organisation (relations with elders and decisions about marriages), and economical organisation (regulations of production and trade). Bradbury (2009) remarks upon the relevance of this social model beyond the profound changes that took place since the colonial period and the increasing process of urbanisation during the last decades. In fact, Somaliland clans never welcomed the predatory and ineffective state imposed by Barre with centralising powers in Mogadishu, amongst other reasons because is a: “*nomadic society that never demanded or produced a central state*” (Bradbury, 2008). On the contrary, the same people deposited faith in the security and predictability that the kinship system could provide during state collapse and the long and painful process of reconstruction.

While unsuccessful and expensive internationally sponsored peace conferences were held to end conflict in Somalia (still considered as a unified territory), Somalilanders immersed themselves in the organisation of customary and self-funded inter-clan conferences which were the seeds for the actual national system of government (Ahmed and Green, 1999). Old wisdom and modern creativity were joined to facilitate the declaration of ceasefire and the secession from Somalia. An affirmation of “forgetting” (*duudsi*) became the base for the renewal of inter-clan bonds and stability, violent outbreaks were managed rapidly –for example, fights around the control of the Berbera port-, internal security and disarmament was locally organised and, importantly, transitional constitution and governmental institutions were created. The founding

codes (Peace Charter and Transitional National Charter) set up a code of conduct in accordance with the traditions or “*xeer*” (unwritten contracts and social codes between clans). All institutions were encouraged, crafted and legitimised by at least 33 local long conferences (Shir beel) holding inspiring names such as “The Grand Brotherhood Conference of the Northern People”. The system developed from this process was described by the Academy for Peace and Development as a “*dynamic hybrid of Western form and traditional substance*” (1999) as it consisted of an Executive, a Parliament (Upper House of Elders and House of Representatives) composed by “Guurti” -the highest political council comprising titled and non-titled clan elders selected locally for their knowledge and wisdom-, a judiciary and Auditor General.

This process was of course not without problems including a short return to civil war. However, the customary system of social organisation proved to be effective and vigorous enough to rearrange the governmental apparatus and administer to grievances and particular needs. “*Somaliland had more success in legitimating the state in the eyes of its citizens at least because it was based on cultural notions that neither colonialism nor “scientific socialism” were able to eradicate... it could, indeed, be seen as a first indigenous modern African form of government which entails traditional forms of organisation based on reaffirmation of lineage identity and territoriality within a democratizing framework containing an emphasis on self-reliance*” (Kibble, 2001)¹⁹. Today Somaliland has put in place a concrete constitution which was voted for by more than 90% of the population and which established a multiparty system allowing the election of presidents and members of parliament (more details on the political parties formation see Renders, 2009). Different from East Timor, the Constitutional drafting and final approval took several years and even Somali Diasporas participated on line discussing ideas about it.

¹⁹ No need for this case of arduous planning on how to gain “mind and hearts” of the local populations neither for assessing who are the “spoilers” and how to avoid them. Native mediation promotes all clans participation.

Forgetting or the mysterious function of erasing memory: We can picture a big local school with seats for elders and leaders representing all the warring clans. None of them could be declared innocent of sustaining violent conflict, coordination of mass killings, robbery and responsibility for the displacement of thousands in search for survival. Nonetheless, at *“The Grand Brotherhood Conference of the Northern People”* all agreed to erase that past and restart history from the basis of “forgetting” or “duudsi” in accordance with customary law. In a trickling down fashion, at every grassroots and local assembly, the neighbouring clans agreed to resurrect their relations on the basis of new agreements of mutual respect, non-revenge and respectful dealing of future affairs by local councils following mediation and arbitration procedures of Somali society. The concept of “Xalaydhalay” – *He was born last night* – is essential to understand how peace was restored in concordance with Somali wisdom. Walls (2009) explain: *“It is notable that this principle of forgetting grievances rather than calculating and enforcing compensation payments was applied in each Somaliland peacebuilding process. The term “Xalaydhalay” is used to signify the wiping clean of past grudges, with relations between antagonists rebuilt without retention of the memory of perceived injustice”*. Somalilanders began to operate a subtle system of “reloading” re-initiating relations without anger. The mysterious model erasing memory is transcendently blessed by the wise elders and the religious leaders. In this context, there is no time or money spent on high-priced lawyers or researchers accounting for human rights violations, no space for punishments or the interference of institutions such as the International Criminal Court, no crowds of youngsters piled in prisons as in the Western-like system of “righteousness”. Neither have we found resonances of the mainstreamed transitional justice model of the Truth and Reconciliation Commissions (as with the case of East Timor). The particular Somali culture honours a special policy of forgetting which could be deplorable in the eyes of most stakeholders of contemporary peacebuilding.

Time or patience and sympathy under the acacia trees: another central feature of the Somali peacebuilding process is related to the local management of time and the qualities of patience and sympathy that wise elders embrace. Peace conferences lasted several months. For example, the Borama conference was supposed to last one month but finally, respecting the needs to fully and clearly address all issues, it lasted 5 months. Besides, the setting of the meetings (most of the time public schools) allowed the participation of thousands of people who gathered to listen and share along the process. It is calculated that the same Borama conference was followed by more than 2000 Somalis including those from the Diasporas who had time to travel, especially women, business leaders, observers, advisers and whole families. To clarify this point we can cite Farah and Lewis (1997) field records of the peace-making techniques of the Somali people: *“Once started, a conference continuous, rather slowly, until satisfactory consensus is reached by all parties”*. If all voices are to be heard as bases far reaching agreement then time is precious and honoured²⁰. It was important to chew together under an acacia tree and discuss – in an informal, slow and reconciliatory manner – while enjoying the breeze and observing a new sunset. This scenery is the gateway to what called *“sympathetic attention”* (Op. Cit., 1997) which encourages mutual interest. Might *“sympathetic attention”* be related with the essential role of empathy in re-humanization of former enemies (Halpern and Weinstein, 2008). These authors remark the necessity to develop empathy as a *“process which involves imagining and seeking to understand the unique perspective of another person”* (op cit, 2008) to achieve true reconciliation towards peace²¹. Time to listen and exchange ideas is essential to the process towards re-humanise ourselves, and subsequently, our “enemies” in the search for new accords²².

²⁰ Could we creatively infer that if for the protestant-capitalist culture “time is money” (Abraham Lincoln) for the Somali culture “time is politics”?

²¹ Intellectuals such as Gesine Schwan wrote –in the aftermath of the Second War World- that: *“if reconciliation is merely not an intellectual but also an emotional process (contritia cordis), then major role in generating the capacity for reconciliation will be played by education on attitudes, or what is used to be known by the old-fashioned term “cultivation of the heart”... which enables us to incorporate other people’s perceptions, to see the experience with their eyes, plays a key role”* (Op. Cit. 2008)

²² Interestingly, this case is an example of the role of “empathy” during constitutional building process and not just focus on victim- perpetrator mediation process.

Local leaders or we are from here – we are here: during peace conferences elders of each clan interchange the role of mediator of the disputes amongst other clans. This mediation role has to be developed by elders, as representatives of kinship morality²³. For example, the SNM included in its ranks people who were not Isaaq and who later on were able to mediate with other clans to end the war. Colonel Abdirahman Aw Ali and Garaad Abdiqani Garaad Jama are mentioned by Bradbury (2008) as key “insider mediators”²⁴. Nevertheless, it is important to mention that elders were not the only actors mediating conflicts. For example, women were important peace brokers, passing messages between warring parties as they cannot be attacked according to ancient regulations.

Mediation and arbitration are old methods undertaken by Somali and many other ancient cultures. In this process, time, modes and participation were in harmony with local customs. The lack of international interference was a central for this to happen. Somaliland people say “we are from here and this is our responsibility”, becoming a good example which providing insights to critically compare Timorese and Somali peacebuilding models.

²³ How important could be, in this context, shacking hands with Tony Blair, Bill Clinton or some high representative of the African Union as international “neutral” mediators?

²⁴ It is possible to consult an interesting perspective on “insiders mediators” facilitating informal peace talks in the reports developed by Berghof Foundation for Peace Support and its programme “Mediation Support Project” (2009). Anyhow, their understanding of “insider mediators” is in relation to compare “formal and informal” negotiations, the first set up officially by governments and the second being the informal contacts around the “official” table. In the case of Somaliland is difficult to distinguish “official and non-official” political spaces as the “collective” is understood in another way as explained before. And everyone could be considered “insider” mediator.

“Si la historia la escriben los que ganan, eso quiere decir que hay otra historia” (If history is written by those who win, that means that there is another story), Popular Argentine Song.

Chapter Four

Lessons: resonances in a comparative perspective

East Timor and Somaliland are the antithesis of one another. Timor could be referred to as a “successful” example of the implementation of international peacebuilding strategy (Doyle and Sambanis, 1999) and the second as an indigenous exemplar of “autonomous recovery” (Weinstein, 2005). Both cases are also the antithesis of one another in terms of how the empires dealt with indigenous forms of social organisation. East Timor suffered the continuous annihilation of its customary systems of leadership at the hands of the Portuguese and the Indonesians, while the Somalis enjoyed a certain level of British “candidness” oriented to the utilisation of local leaders as a cheap form of social control (indirect rule). However, both countries managed to preserve and revive vigorous customary practices in dealing with conflict.

This chapter will unfold critical observations around both cases and compare them in the light of peacebuilding, Alternative Dispute Resolution (ADR), and “failed states” reconstruction literature. It is organised around the following transversal points which will help the comparative task: a) Governance and security; b) Governance and customary system of conflict management and social organisation; c) Dealing with “the other”.

1) Governance and security (or the art of governing)

East Timor and Somaliland seem to be opposing one another in the difficult art of governing.

East Timor can be categorised as a clear example of the application of the “liberal peace agenda”. The Berlin Wall’s collapse allowed for the replacement of a policy of non-intervention and respect for national sovereignty with one of increasing levels of international involvement blessed by the “Agenda for Peace” (Boutros-Ghali, 1995) and the incessant activity of the United Nations peace forces as order’s new guarantor. East Timor is one of several political experiments within this new framework of international relations. As explained in Chapter Two, Timor underwent an unparalleled level of intervention with the UN characterised by lack of respect for local politics (reminding us of colonial times), and a difficult “top-down” transition to effective independence. In this context, governance and security resulted in local forces being ignored in their role to address the conflict’s roots and consequences, and the replication of a policy dictated in the manuals of “war to peace transitions”²⁵. In East Timor military and political international authorities were in charge of building the new state, a good example of “neo-trusteeship” (Fearon and Laitin, 2003), while preoccupations over how to balance “sticks and carrots” were crucial.

The fundamental paradox that East Timor presents is how is it possible to think that independency and freedom can be gained by displaying a colonial-like policy... *“In its advocacy for conditional sovereignty²⁶, peacebuilding justifies a degree of international intervention within “failed states” which has been formally absent since the decline of colonialism after the Second World War”* (Heatershaw, 2008). Liberators became oppressors and freedom a matter of force and control. This paradox affected local politics: subsequently, political parties concentrated power and found difficulties in building broader consensus among diverse political groups, while local population felt highly discriminated. These liberal policies of stabilisation

²⁵ 1) International “impartial” mediators brokering a agreement between conflicting parties – Indonesia and pro-Indonesia militias and East Timor independency stakeholders –, 2) Deployment of military forces controlling and enforcing agreements-, 3) Organisation of externally monitored elections -pro-against independency elections followed by new authorities election-, 4) Accord on a new Western-like constitution, 5) Process of transitional justice and reconciliation based on the scaling up the model of Truth and Reconciliation Commissions –East Timorese CARV (details chapter 3).

²⁶ See latest development on the Responsibility to Protect: <http://www.responsibilitytoprotect.org/>

might be weakening social forces and making a broader and genuine democratic consensus able to sustain effective public policies in the long term more difficult (Weinstein, 2005). Today, economic recovery and social inclusion are pending. It would be very interesting to assess if the cause of this situation is, at least partially, related to early political dependency on international actors. Is it possible after all, to envision a strong process of economic recovery based on weak political institutions?²⁷ Meantime, present political violence justifies the presence of international military forces deepening doubts about Timorese sovereignty. However, antipathy to international forces was not widespread as consolation of the liberation from Indonesia was sufficient. Ten years later, the international community was invited to the feast celebrating Timor's tenth anniversary of independence.

Unlike East Timor, Somaliland is an original example of self-managed and “autonomous recovery” (Weinstein, 2005)²⁸. Somaliland is challenging the underlying assumptions of contemporary peacemaking literature at least in two aspects: a) the impossibility of failing states to emerge from their crises on their own, validating international mediation as completely necessary; and b) the need to stop war. As explained in Somaliland's chapter, firstly, reliance on local actors and customary practices was the path to peace and to organising recovery; secondly, Somaliland is an example of Luttkas (1999) “*give war a chance*” accounts on war as an enabler of peace after antagonism. In fact, the SNM was one strong victorious faction after Barre's defeat and was controlled by the majority Issaq clan. This group was in a strong political position to start a well-built phase of political reconstruction, being “democratic” enough to open *participation* to all clans and their representatives following customary practices of negotiation

²⁷ The Asian “Tigers” might be an example showing that weak institutions and development do not go together. The Asian “developmental states” sustain economic growth and social development defending local political codes and economical rules which are far from being democratic or close to the liberal forms sponsored by liberal peacebuilding.

²⁸ “I define autonomous recovery as a process through which countries achieve a lasting peace, a systematic reduction in violence, and post-war political and economic development in the absence of international intervention. It can be usefully contrasted with aided recovery, a process in which international intervention plays a significant role in bringing war to an end, maintaining or guaranteeing a negotiated settlement, and assisting in the recovery process” (Weinstein, 2005).

(Menkaus, 2002, Weinstein, 2005). In addition, 2003 elections show the victory of one of the minority clans without any sign of threat to political stability²⁹. This could not have been possible with the sometimes disregarding interference of international institutions during peacebuilding efforts (as in East Timor) and the potential discrimination of customary values from the process of constitutional building. Somaliland's isolation opened the chance for local leaders to focus on how to gain a popular base of support, very relevant to creating a coherent system of taxation.

The outcomes are remarkable on both political and also socio-economic levels: *"Somaliland has shown steady improvement in basic health provision, life expectancy, and access to education. The populations of Somaliland's urban centres enjoy average per capita incomes that compare favourably with regional averages and are well ahead of many post-conflict states in sub-Saharan Africa"* (UNDP, 2004). Thus, the Somaliland experience is the antithesis of most post-Cold War conflict reconstruction processes: peace agreements reached and enforced by customary law, lack of international funding (other than the Somali Diasporas), local business leadership oriented towards the restoration of the economy (rather than controlled by international companies), a minimum presence of global NGOs and UN authorities. If Somaliland is seen today as a *"remarkable example of indigenous democracy in a corner of Africa that possesses more than its share of problems"* (International Observers to Somaliland Elections Press Release, 2009)³⁰ it is due to the combination of the above-mentioned factors.

2) Governance and customary system of conflict management and social organisation (or the ancestors today):

²⁹ While writing this paper there is a intensification of political conflict in Somaliland over the next presidential elections which were postponed for third consecutive time with the danger of a stalemate scenario. This provokes concern, however, there are serious indicators that the escalating level of disagreement among political parties can be solved based on a renovated consensus sustained by the sense of proud of Somaliland political groups and citizens.

³⁰ Full Press Release: http://www.progressio.org.uk/progressio/internal/98220/deep_concern_at_prospect_of_one_party_race_in_soma/

East Timor and Somaliland are examples of the ancestors' importance today. Centuries of oppression of customary forms of social organisation were not powerful enough to destroy local structures legitimised by family-kinship and community membership. However, and due to the distinctive role given to local political forces, East Timor and Somaliland seem to be, again, the antithesis of one another. While customary practices were incorporated in a functional and rational manner to the liberal strategy in the former, Somali traditions were themselves the path to rebuilding trust and new institutions in an autonomous approach.

The East Timor case is useful for discussing how customary law is today "integrated" into the political systems. Nader (2002) specifies that today's peacekeeping tendencies incorporating customary law in the management of local conflicts are a continuation of the colonial policies of "*pacification*" by other means. What is desirable is a level of harmony suitable to the effective functioning of global economies³¹. Today's efforts on legal pluralism and past colonial experiences³² seem to blur. Local traditions are kept inside of the framework of the Western model: they do not become part of new constitutions and are just included as part of the system of grassroots reconciliation not affecting the implementation of hegemonic liberal ideas. "*Members of the East Timorese Constituent Assembly, elected in August 2001 to write Timor-Leste's Constitution, decided to retain the UN established system of law and declined to give substantive formal recognition, in Section 2, to local justice systems beyond symbolic respect for traditional practices 'that are not contrary to the Constitution and to any legislation dealing specifically with customary law' (RDTL 2002). This was contrary to views expressed in a grassroots consultation process on the content of the Constitution, indicating that communities wanted local systems of justice to acquire substantive formal recognition and usage*" (Graydon, 2005). Furthermore, CARV's hybridisation project and the

³¹ Alternative Dispute Resolution literature presents a very interesting discussion on how today mediation and arbitration models as broadly applied in the UK and the US are a form of control and expansion of the state power by using non-state actors. The avoidance of conflict by the perfection of system of regulations, codes and dispute methods is presented as a disciplining forms of violence limiting the power of conflict as trigger of political change (especially, Abel, 1982)

³² Extensively documented by anthropologist of law

staff-leading application of Nahe-Biti could be related with the critical review of the “*therapeutic state*” presented by Humphrey (2005): injustice is presented as a psychological injury to be “healed” by the power of truth-telling, and “exclusion and domination” are presented as problems of interpersonal-communal communication. “*Internationally a new ‘therapeutic security paradigm’ justifies external intervention on the grounds that trauma in war-affected populations is potentially conflict producing. The subject is constructed as ‘a vulnerable damaged victim’ requiring third party support for self-empowerment justifying intervention as peacemaking. This intervention is not primarily focus on social re-integration but on control and containment of violence*” (Humphrey, 2005). East Timor could exemplify this idea: its problematic needs justified international interference. Yet justice is not achieved: neither in terms of punishment or reconciliation with political powers that supported Indonesian imperialism or pro-Indonesian militias; nor in economic and political terms by creating a new inclusive and fair system for and with the Timorese population. The speedy application of Nahe-Biti was useful to contain reprisals, manage the return of some refugees, and provide the “*small people*” with a tiny chance to vent grievances.

On the contrary, Somaliland’s experience of conflict management and constitution building was entirely based on customary forms of negotiation and forgetting towards institutional formation enabled without international intervention, exemplifying the key connection between “indigenous psychologies” and institutional building. This case can be linked with Lederach’s (1997) advocacy towards a long term vision and plan in relation to post-conflict reconstruction. If a minimum of 20 years is necessary for the achievement of social stability and institutional building, Somaliland is clear evidence for this affirmation³³. This

³³ A comparison with the post- independency Latin American civil wars leading to national state formation could be a valuable source for contemporary research on peacebuilding. For example, Argentina faced almost 50 years of civil war and internal conflict till the final formation of today’s national state (between 1810 and 1856). International interventions as organised today where unknown even tough links between global elites where strong and very influential into the local process of political organisation.

endeavour is a matter for those who inhabit the territories. Long-lasting peace is based on dynamic political arrangements including grassroots organisations, social movements, local and religious leaders, and traditional customs (Poulogny, 2006). Somaliland's process was not subsidiary or complementary of something else, but was itself the "official" one as led by the clans. This allowed the local development of "*symbolic reconciliation*" (Kauffman, 2006) based on the customary method of forgetting and the Somali worldview. This goes beyond a situation in which a Western interest of "quick problem solving" prevails. Sources of legitimacy are not found anywhere other than in the constituencies of the Somali territory, even though this confronts the risks and limitations of not being internationally recognised.

3) Dealing with "the other" (or constructing borders):

The contrasting cases in relation to governance and the role of customary law compel us to understand who "*the others*" are throughout national identity formation.

We could argue that for the liberal "*regime of truth*" (Fetherstone, 2000) "*the others*" are the local native communities, those subjects and territories to be incorporated gradually into the "enlightened" norms of the "world" (world as Western world). Modern national identities erase the native past. This is the case with East Timor: Timorese customary law was not included as part of foundational norms but as a technique allowing the normalisation of community relations; while local actors suffered a significant level of neglect. East Timor is an example of how the discourse of modernity is still at the centre of the liberal agenda (Chandler, 2004); ideas which justify the Timorese "top-down" process of reconstruction. Local political actors are in "transition" towards modern forms of organisation. The other is an issue to be fixed: the locals must be "recovered" and included on the political scene authorised by international actors. In the same direction; acknowledgement of Western responsibilities on

causing those disturbances is not required: it was not necessary to politically address the fact that the US and Australia were the main countries supporting the Indonesian invasion of East Timor. Contemporary saviours sitting at diplomatic tables forget their own responsibilities, liberating themselves as the way to persist with modernising interventions.

On the contrary, for Somalilanders “*the other*” is the international community. As Bradbury writes, (2008) there was a reluctance to deal with or incorporate external actors into the self-regulated process of social and political reconstruction as they were persistent in the idea of having a “united Somalia”. Until today, the international community hold this notion that is against Somaliland’s will, and the country has not gained international recognition. This position gave the country the chance to use its own timing and procedures to solve conflict and regenerate, but also put it in a difficult situation of being an excluded nation. The bottom-up Somali exercise today faces the opposite challenge: how to gradually incorporate its “*other*” – the international community and its political standards – as a way of gaining global approval, expanding its trading opportunities and becoming eligible for international assistance. This process has been characterised by the slow formation of political parties not dismissing the clan system and the organisation of Western-style elections in which ballot boxes replaced the traditional conferences towards decision and policy-making. The problems in relation to the 2010 presidential elections are a clear example of how difficult the adaptation to a “modern” system of governance is. The international community is challenged by the results of the indigenous experiment and is compelled to not continue discriminating against Somalilanders and accept their sovereign rights. Somaliland is now negotiating with its significant “*other*” from the certainties gradually achieved from within.

Considering this historical comparison we can move forward to discuss more generally the role of customary law and local leadership in contemporary peacebuilding.

Rural bandits are difficult to trap... rebellious riders flying wild winds. Wanting to catch them is like to wire stars in nobody land³⁴.

Chapter Five

Towards a cross-cultural understanding of justice and peace

The contrasts between East Timor and Somaliland's experiences leave us facing challenging questions: Is it possible to design a global–local political experiment appreciating the role of “indigenous psychologies” during legitimacy building process? Can we avoid the failures of contemporary peacebuilding as a project still embedded in colonialism and modernisation theories? This chapter presents the latest theoretical developments on conflict transformation and pragmatic realism as the way to attempt some answers to these questions.

The resilient Somali and Timorese customary systems were effective and central to the war to peace transition. In East Timor, customary law was a technical tool for the liberal agenda. In Somaliland, it was the key foundational stone of the new Republic of Somaliland, which is open to incorporate, from within, international standards.

Considering the “*politics of legitimacy*” (Chapter One) and sustaining an interest in sustainable peace, connecting “indigenous psychologies” and institutions, we evaluate **reconciliation as constitutional building: creating the political “we” and its parameters of justice**. Therefore reconciliation should not be seen just as a moment of “restorative” justice but

³⁴ Bandidos rurales, difícil de atraparles, Jinetes rebeldes por vientos salvajes. Bandidos populares, difícil de atraparles. Igual que alambrear estrellas en tierra de nadie (Leon Gieco)

as a **revolutionary moment** (Veitch, 2007). *“This WE cannot be entrusted solely in the rule of law, but ultimately depends on the willingness to live together with others in the mode of acting and speaking, this implies legal faith and a political risk”* (Arendt, 1998).

A constitutional building process encompassing customary law and led by local actors is much more than the “protection” offered by the “responsible” international community. It is also much more than giving to local customs and leaders a subsidiary role on the side of the diplomatic table. Constitutional building is a symbolic struggle: involving the mutable forms in which “the others” meet. It is not something to be “determined” but something “evolving” in conflictual communication. *“Contradictions cannot be “resolved”, but rather transformed and the terrain for this transformation is undoubtedly political: it is a struggle, the fight for the proliferation of modes of reason and separate protocols, for the conquest of zones, of regions of thought with different tempos, disjunctions, movements and dispersions. It is a fight to remove the obstacles that are set up within the channels of communication. This process of communication takes place through a clash. I believe, these reciprocal movements do not mean at all autonomy”* (Franco, 1994).

Local leaders do not have full autonomy, nor does the international community. The politics of legitimacy requires the recognition of the “game of positions”, military and symbolic ones³⁵. *“Peace processes are moments of change when the new rules of the game and one’s position in the game are decided; in this sense they always involve ‘positional conflicts’. Peace processes cannot be reduced to generalisable technical exercises”* (Goodhand, 2009). How “the others” in conflictive relationship are positioned to construct the new order is the central issue to be explored: subordination or equality; customary law segregated and/or

³⁵ A serious analyzes military actions symbolism should be included in peace “operations”. It is important to consider that the “international community” sometimes is still perceived as the “coloniser”. After all, a negotiation of forgetting or forgiveness of colonialism is still pending. A strong exogenous intervention without considering this is dismissing Global South’s reminiscence of colonial violations.

supplementary, negative peace or positive peace based on self-organisation and revitalisation of social balance³⁶.

In this positional game, what is becoming clear is that the vigour of customary law and local ownership cannot be ignored. In the coming paragraphs we will explain interesting observations from the latest theoretical developments on conflict transformation and pragmatic realism as the way to evaluate peacebuilding strategies.

Much of the literature that critically analyses contemporary peacebuilding, asserts the need to sustain a vision of conflict transformation that is aware of the dichotomy adversarial/principled vs. cooperative/process. Top-down application of the “rule of law” as a Western project imported to Southern countries is part of the first factor of the dichotomy; a holistic and facilitative approach based on the participation of legitimated local actors envisioning long-term legitimated institutions is part of the second factor (Parlevliet, 2009). It is not just that a constricted and legalistic understanding of human rights is insufficient in the context of conflict transformation, it is also dangerous and offending the basic idea of overcoming inequality, injustice and, above all, violent conflict. Denial of peoples’ identity also violates human rights standards. This violation will remain a source of resistance and violence, especially if we consider that in order to achieve just peace there is a need to respect the diverse identities and ensure well-being, freedom and participation for and of all (Galtung, 1969). Structural violence –the denial of a certain group’s rights-, and cultural violence –denial of the dignity and humanity of those groups by stereotyping and demonising them- are some of the multi-layered sources of violent conflict³⁷. Consequently, *“It is necessary to realise that the very nature of peacebuilding...”*

³⁶ We need to remember that “civil war is not a stupid thing” that just have to be stop by the “responsible” deployment of peacekeeping forces and simply organisation of several international conferences but is about understanding and dealing with the reality that contemporary wars are also about disturbances of the class structures and conflictual reconfiguration in the access to resources and opportunities like land and water which generates great social uncertainty, (Cramer, 2006). The cases of East Timor and Somaliland remind us the importance to analyse the relation between clans and class and management of tensions within these groups as something related with customs and ancient history.

³⁷ Statements made by international organisations such as Amnesty International in relation to the process of inclusion of customary practices in conflict transformation provoke concern: “Alternative methods of conflict resolution have their place in many societies, but basic human rights, including the right to fair trial, are all put at

(as a discourse which idealises and attempts to self-legitimate the international community) institutionalises a gaping chasm between what is represented and what is practised. Its goals are self-images which must be simulated by the other” (Heathershawn, 2008)³⁸. The simulation demanded to the global South³⁹ left local communities with the difficult task of defining how their local traditions do not violate constitutional norms and human rights standards, generating a situation of continual adaptation to strange principles which end up in confusion, corruption, and lack of effectiveness. Human rights are mere rules out of context if we forget their source in terms of behaviour, habit, and language. And are enforced by illegitimate and empty institutions and courts created from the power of force and money. This tends to be at odds with the objectives of building a “just peace”⁴⁰. Then, we need to dispute: How can the dispersed locals take political risks other than in their own language? How can locals be the outsiders of a constitutional building, the creating of this “we” like in East Timor? Besides, we could think that “duudsi” (forgetting) without trial or forgiveness is against contemporary practices of peacebuilding. However, it was the basic value in action that made Somaliland’s constitutional building possible. All political actors have to overcome certain shortcomings when negotiating with “the others”.

Another theoretical development focuses on how the integration of customary law is the so-called “*pragmatic realism*” or “*legal pluralism*”: projects sympathetic to customary law and local leaders, which support the incorporation of “non-state actors” within the Southern justice structures. The approval to incorporate restorative justice inspired in native philosophy

risk where traditional justice is used without safeguards, Amnesty International said”
<http://members.tip.net.au/~wildwood/01juljustice.htm>

³⁸ Today there are many examples on how customary law is incorporated in Western-like justice systems (and not just in post conflict reconstruction). Just to cite some: Rwanda, Burundi, Mozambique, Sierra Leone, Southern Sudan, Afghanistan, etc. We cannot incorporate examples and ideas from all these cases, but the field it is undoubtedly gaining great importance and centrality in contemporary analysis towards reconstruction of “failed states” as well as democratisation of Southern states (for example, Argentine constitution incorporated the respect of indigenous rights just ten years ago into its new constitution)

³⁹ Simulation require also in terms of economical policies (Ifs conditionalities, Washington Consensus, etc.)

⁴⁰ It is worth to note in this point that modern Western democracies were born illiberal and undemocratic: for example, woman voting rights or inclusion of black populations in the political system was a result of long and local struggles.

in the scaled-up models of the Truth and Reconciliation Commissions is one example. What is vital is reaching an effective “compromise” between modern and customary law. UN agencies and the World Bank are implementing several worldwide programmes, blessed by Kofi Annan’s words: “*due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international and local tradition*” (United Nations, 2004). The concern is around how to provide access to justice for all, which can only be guaranteed by the tolerance of customary law as practised by majorities. Luckily, there is an acceptance that discrimination of local forms of organisation is part of the problem. Another type of inequity, feeding “*horizontal inequalities*” (Steward, 2005) and increasing power imbalances, as one of the main causes of violent conflict.

From comparing the East Timor and Somaliland cases we can critically analyse these tendencies. We face a dangerous risk: promoters of the so called “*pragmatic realism*” might have the goal to integrate “*the other*” but just in terms of usefulness; never as a legitimised political actor with whom to start an equal dialogue. The colonial resonances are evident: customary systems should be established and tolerated as far as they remain subsidiary to the Western liberal rule of law and “human rights” international standards. For example, the Afghanistan Human Development Report 2007 argues how traditional forms of justice are key to successful political transitions and help in the advancement of “human development”, suggesting that a bridge between modern law and traditional jirga-shuras systems must be built as the way to effectively communicate cities and rural areas. Again the discourse remains trapped in the echoes of evolutionary thinking: the traditional informal system of justice which will never be part of the formal, modern Afghani justice, it can only “*work alongside the state institutions*” (Op. Cit, 2007) and “*must remain compatible with the Constitution*” which was imposed by an invasion led by international military forces until today combating in Afghan territories. As

anthropologists of law are well aware “*most colonial regimes introduced colonial clauses recognising customary law only to the extent that it conformed to European legal norms*” (Chirayath, L., Sage, C. and Woolcock, M., 2005). Similarly, there is a tendency to incorporate customary law but just to deal with “minor cases” (as in East Timor). “*Traditional forms of justice are designed to deal with relatively small numbers of cases of minor wrongdoing- theft, disputes between neighbours and so on... do they have the capacity to re-store peace after years and sometimes decades of violence?*” (Huysse and Salter et al, 2008). This statement clearly shows two discursive movements. The first: Modern Western-style justice would be the only one ready to deal with “*big-important*” issues of political order, while traditional system, are located to the side to deal with “*minor*” problems. This is reminiscent of a colonial superior-inferior politics. Secondly, it appears that native communities never experienced war and settled their disputes along the past centuries. East Timor’s ‘top-down’ experience shows a liberal tendency of how to incorporate customary law: it must deal with small cases while locals are excluded from constitutional and institutional building and “serious” cases are treated following retributive justice (punishment that, nevertheless, did not take place). Minor cases are delegated to minor, customary representatives. Nonetheless, Somaliland presents the alternative: standing strong in its self-managed achievements towards peace: Somalilanders knew how to deal with “big issues” such as constitutional building based on clan reconciliation.

If peace is a living reality daily renovated in political actor’s performances, then, a “process oriented” and “horizontal-holistic” vision of politics is required: the accommodation of diverse interests and cultural systems in an integrative manner. A legitimate state is the only political instrument able to address the problems of structural and cultural exclusion. The so far successful experience in Somaliland as opposed to the one in Somalia could be taken as a

supportive example of this. The violence and exclusion still felt and suffered by Timorese might be another example useful to sustain this point⁴¹.

Sustainable and just peace relies on how *the process* towards peace is developed, and how local stakeholders own and execute the constitutional plan. For this, it is necessary to see “*the other*” in conflict “*as emerging political complex. This way, rather than remaining a pure projection, the object of governance is endowed with the possibility of volition of its own*” (Duffield, 2002).

In the search for an integrative and inclusive peacebuilding theory, we advocate to incorporate Habbermas’s (1984) communicative premises advocating for a new global paradigm open to a dialogical state of affairs among diverse political entities (from individuals to countries): “*A dialogical view of morality rather than a monolithic voice of law*” (Habbermas, 1984). This requires all parties to be truly ready to recognise volition, worldview, and power within the “*others*”. Openness to real equal dialogue is a matter of true *moral effort* (Folger and Bush, 2008).

In the final chapter we will discuss how it would be possible to develop “*dialogical morality*” within a potential new model of governance. This might be necessary to transform contemporary peacebuilding into a legitimate and effective venture.

⁴¹ This paper cannot explore in comparative perspective all cases of international intervention towards peace in contemporary times; nevertheless, it is interesting to quote a short commentary by Goodhand (2006): “In Sri Lanka and Afghanistan heavily internationalised peace process had changed the domestic constellation of power in the communities. Whether these interventions will lead to sustainable peace remains to be seen” Three years later both process can be considered a disappointment, which creates more doubts on the possibility to impose legitimacy from outside.

Negotiating Memory and Forgetting,

Customary law and local politics in post-conflict governance

Lessons from East Timor and Somaliland

“If the other is not my enemy, then how can he become one who wrests me from my identity and whose proximity wounds, exhaust and hounds me, tormenting me so that I am bereft of my selfhood and so that this torment, this lassitude which leaves me destitute becomes my responsibility?” (Blanchot, 1986)

Chapter Six

A new model of governance?

Developing a new model of governance requires a symbolic shift. It is about crafting a new local-global dialogue serious enough to deal with the linguistics of political change. This is a matter of power and the connection of multiple languages expressing numerous ways of life. Global politics face the incessant perseverance of the local. *“Power speaks every language. It does not exist on its own but only in the languages that it causes to speak, in the relation that it establishes. We must recognise the indefiniteness of the struggle, reactivate local knowledge... The insurrection of subjected knowledge must take action against the inhibiting effect of “global, totalitarian theories”. Is not about anthropologists searching for information to try to understand and integrate the other but the rescue of local knowledges against the power of the totalitarian-scientific discourse” (Foucault, 1981).* Somaliland and East Timor, like many other countries, are examples of the power and persistence of the local. Even though we cannot make generalisations from just two cases, the points presented in this paper are a reminder that what matters is how we mutually speak to each other in the attempt to enjoy sustainable peace. A transformative peacebuilding should create the ground for multiple voices joined in a fruitful process of legitimacy and institutional building.

In this final chapter, we will briefly explore some ideas of how it would be possible to create a “dialogical morality”. To do this, we distinguish three points: a) dialogical morality and state reconstruction considering customary law; b) dialogical morality, civil society participation and customary law, and finally; c) the dialogical negotiation of memory and forgetting towards peace.

a) Dialogical morality and state reconstruction considering customary law

If this dissertation’s main conclusions points are relevant then one moral effort should be required to all peacebuilding endeavours: the effort to seriously consider the “*software*” of peace and state building as directly related to the “*hardware*” (Parlevliet, 2009). Most projects to “rescue” failed states just concentrate on the technical side of structural reforms, forgetting that building legitimacy is an issue of “software”: how local constituencies are placed within specific cultures, understanding and negotiating power changes towards constitutional building, and how education reinforces social order⁴². Considering the role of “local constituencies” (Goodhand, 2006) when assessing how to success in peacebuilding involves understanding and respecting constituencies customs. If reconciliation as a constitutional building process, the inclusion of customary law “*otherness*” should be more than a mere adapted tool within a Truth and Reconciliation Commission -as in East Timor- but recognition of importance of local leadership and customs in the institutional building -as in Somaliland- as a condition for genuine democracy⁴³. Moreover, new law systems should seriously consider that land tenure and management are still the central responsibility of indigenous communities in countries like East Timor and Somaliland.

⁴² In the “hardware” race, massive amounts of funds are transferred in order to create public services, buy computers, train Western- style lawyers and decorate courts of law... huge projects that face the danger to end up ineffective as they are far away from the notions of justice and order of local people.

⁴³ When customary models are adapted to facilitate reconciliation within TRCs, then, these processes should be lead by locals -as the premise for efficacy and legitimacy- like in South Africa.

How, then, this will be compatible with the capitalist private rights sometimes dismissing customary communal rights and native methods of resource administration? How is this equation put in place in contemporary post-conflict societies without reproducing symbolic and physical genocide as perpetrated, for example, in Latin America?⁴⁴

Furthermore, international interventions should not become intrusive processes which do not allow the formation of local elites working towards securing consent as the way to create a sustainable political and economical institutions –including a legitimated taxation system– (Weinstein, 2005). If “software” is important then there must be space to let local constituencies “speak” their language and as such culturally legitimate political institutions. Each process has its own rhythm, pace, and shape. Blind replication of models threatens the exercise of freedom and the potential for economical and political effectiveness of post-conflict institutions.

b) Dialogical morality, civil society participation and customary law

In literature, there is a growing focus on the importance of involving civil society actors during post-conflict reconstruction. To enforce this “bottom-up” effort we need to fundamentally realise that “civil society” associations in Southern countries do not have the same shape as their counterparts in the North. Southern civil society encompasses native communities still organised around systems of kinship and communal membership, many times in direct relation to transcendental orders, as well as forms of organisations that are family-like (Hilhorst and van Leeuwen, 2005). Management, accountability, and communication systems of these groups are relevant to the local context. If we admit its central role, then, we must accept its specificities and dialogue considering their identities. Considering this scenario, it is vital that

⁴⁴ This equation is still also being violently debated in Latin American countries: local indigenous communities are still organising “toma de tierras (taken land) as they consider themselves the legitimate owners (before national colonisation and establishment of individual-private rights following Western standards). To explore this issue beyond the purposes of this dissertation, nevertheless, is a central point very much related with power distribution as established along constitutional building.

human rights activists and international staff understand and connect with the worldview of Southern cultural groups. Intercultural education is a must in order to avoid dangerous “contextual innocence” (Goodhand, 2006)⁴⁵. Similarly, international funding criteria and forms must be adapted to a “local beneficiaries” worldview. An honest appreciation of local modes is essential to promote “just peace” recovering the power of history.

c) Dialogical negotiation of memory and forgetting towards peace

Finally, if we agree on the idea that contemporary peacebuilding echoes colonial and modern discourse and practices, and that conflict is also the responsibility of the Western community endorsing illegitimate states, then we might need to sustain the moral effort of acknowledging colonial crimes and its discriminative discourse. One potential result of this original process could be the consideration of “aid” not in terms of help but as a genuine compensation to populations in the South. This way, the South would no longer be a beneficiary and recipient of conditionalities -as a passive actor- but the sovereign legitimated administrator of funds towards reconstruction from post-colonial war -the difficult road towards stability after conquest and destruction of indigenous social order-. This political and symbolic change would transform patronising and inflexible international strategies into more humble and supportive policies, helpful to rebuilding authentic local legitimacy. Furthermore, this movement would promote an equal relationship between the international and the local... the condition for an authentic dialogue not deepening power imbalances feeding contemporary violence.

In all, it is necessary to acknowledge that judicial system (ergo, a political system) is,

⁴⁵ Unfortunately, most professionals sent “abroad” to work in peacebuilding projects do not understand -or aim to do so- and keep holding a vision of the world in which Western modernity is to be aimed at. A special training for journalists working on international issues should be required as well.

above all, a product of conquest and supremacy established by force. *“The origin of the judicial system in many parts of the world is to be found in conquest, historically rulers even presenting themselves as neutral, establish and underwrote judicial institutions simply to remain in power... this is a historical truth from cases like Europe, back Africa, China or Rome”* (Palmer and Roberts, 2005). The imposition of Western “rule of law”, a rigid clan system or a military regime are dangerous operations of acculturation developed in the name of “what is right” and might be continuation of “war by other means” (playing with Clausewitz’s words).

If what is right always maintains its static status, there is no chance for a dialogical morality. The “game of positions” should comprise international and local actors rotating seats. A new dialogical encounter is everyone responsibility. Lessons from history and wrong- past are an excellent source for contemporary peacebuilding to become a project promoting “dynamic coexistence”. A new encounter towards just peace.

Conclusion

“Before you asked me, I understood just what time was. Now I'm not so sure...” (Socrates)

This dissertation explored the Timorese and Somali endeavours towards peace and stability after violent conflict, and, especially, the role played by local customs and leaders. Discussing historical facts and relating them with conflict transformation and pragmatic realism's theories was the base to attempt a preliminary conclusion: peacebuilding efforts can gain legitimacy and effectiveness if they consider more carefully the “politics of legitimacy” – the relation between “indigenous psychologies” and institutions – and the delicate and mutable dialogue between the local and the international in post-colonial times. Customary law and leadership are central to building “just peace” and should not be treated as a mere supplement. Customary law should be fairly recognised in the constitutional building process.

Considering this, we propose a change: to make a moral effort towards sustaining a new “dialogical morality”, responsibility of all actors. A political communication – in the form of a peaceful struggle – moving away from utilitarian policies and wrong colonial and post-colonial past. This requires recognising volition and power in Southern political actors while Northern actors practice a new kind of political humbleness. A pre-requisite to rotate seats.

Negotiating Memory and Forgetting,
Customary law and local politics in post-conflict governance
Lessons from East Timor and Somaliland

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