

East Timor: The Challenges of Drafting a Constitution

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Introduction

On 30 August 2001, the East Timorese voted to elect members of the Constitutional Assembly (CA) to draft a Constitution for the new nation. The CA has now completed the ninety days plus one month debate on the matter and approved the provisions in that document. At the time of this writing, the draft is being socialised in the 13 districts before its formal promulgation on 20 May 2002, the date set for the official hand-over from UNTAET to the first government of East Timor.

Since September 2001, the Constitution has been at the centre of debates, discussions and seminars around East Timor. Political debates have centred very much on administrative systems (presidential, parliamentary or quasi systems), Human Rights and power structure issues. Little attention has been given to the substance of the draft, or particularly the process, including consultation, drafting mechanisms and power sharing. As a result, instead of reflecting a balanced approach, the draft seems to give more weight to certain powers of the state. Likewise, it is seen by many East Timorese to be a one-party draft rather than reflecting the aspirations of all members of the Constitutional Assembly (CA), since small parties' voices were somehow ignored in the drafting process.¹¹¹ This article does not address specific provisions in the draft but provides a general assessment of some substantial issues related to the draft Constitution.

¹¹¹ See East Timor Newspaper, *Suara Timor Lorosae* 12–20 December 2001. A number of articles published in *Timor Post* during that period also voiced the same pessimism as far as the debates on the Constitution are concerned.

Approved Articles: Symbolic Provisions

On 9 February 2002, the East Timor CA completed a draft Constitution containing 168 articles. The draft outlines issues ranging from the fundamental principles of the state, the division of power, the electoral system to issues of constitutional revisions. Section 1 point 1 of the Constitution states that 'The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person'.¹¹² To expand on this section, the draft outlines issues related to the sovereignty of the country (section 2) and citizenship (section 3), and determines the territory of the new country (section 4). In general, 'the 168-clause document establishes a semi-presidential system of government [and] [u]nder [which] an elected president can dismiss the Prime Minister and veto legislation, but in a framework of strong checks and balances'.¹¹³

The Assembly has also passed articles regarded as 'sensitive' such as the issue of Flag, National Anthem and Date of Independence, issues that have been at the centre of debates and discussions during the drafting process. One view is that the country should use neutral symbols such as icons of the state, but another is that the proclamation of Independence in 1975 should be reinstated and its symbols should be recovered as state symbols. Indeed, since Fretilin members constitute almost 65 percent of the CA and are supported by conservative parties such as Associação Democrática de Timor Leste (ASDT), the National Republican Party (Parentil) and the Christian Democratic Party (PDC), they faced no serious challenge in reinstating the symbols of the short-lived República Democrática de Timor Leste (RDTL) proclaimed unilaterally on 28 November 1975. The flag¹¹⁴ and the national anthem of RDTL, *Foho-*

¹¹² The East Timorese refer to the Constitution as LEI-INAN (lit., Law-mother) or the mother of all laws. It is understood locally as the source of all state laws, meaning that future (organic) laws of the nation will have to adhere to Lei-Inan. Traditionally, Lei-Inan is believed to originate from Lia-Tuan (lit., old/sacred words), locally revered for their sacred status in the forms of ritual chants and ritual narratives. These form the basis for *ukun ho bandu* (lit., regulate and forbid) or the foundation on which decisions regarding lineage, clan or society's life are based upon.

¹¹³ Jill Jolliffe, Sydney Morning Herald Correspondent in Dili — SMH 11 February 2002.

¹¹⁴ Section 15 of the Constitution states that: (1) The National Flag is rectangular and is formed by two isosceles triangles, the bases of which are overlapping. One triangle is black and its height is equal to one-third of the length overlapping the yellow triangle, whose height is equal to half the length of the Flag. In the centre of the black triangle there is a white star, meaning the light that guides. The white star has one of its points turned towards the upper right end of the flag. The rest of the flag is purple-red. (2) The four colours mean Golden-yellow – the wealth of the country; Black – the obscurantism we had to overcome; Purple-red – the struggle for national liberation; White – peace.

Ramelau (lit., Mount of Ramelau) thus remain the national symbols of the nation. The date of the proclamation of RDTL (28 November 1975) has now been approved as the date of Independence (Section 1 point 2) despite the fact that most of the opposing parties wanted more discussion to be held on the issue. The latter also argued that the new nation should use the symbols of the former resistance body, CNRT which were used to represent East Timor during the referendum in 1999. However, this demand fell on deaf ears since the Fretilin-dominated CA decided otherwise.

Another fundamental point is that section 152 of the Constitution automatically transforms the current National Assembly into the first Parliament of the new nation. This decision has its basis in the United Nations Transition in East Timor (Untaet) regulation 2/2001 section 2 point 6 on the establishment of the Constitutional Assembly, which states that ‘the Constitutional Assembly shall become the legislature of East Timor, if so provided in the Constitution’. The next section will discuss this issue in detail.

Between late February and mid March 2002, the Assembly members embarked on a nationwide ‘socialisation’ and gathered public feedback on the draft Constitution. The full Assembly hopes to sign the final draft on 16 March 2002 after debating any concerns or suggestions arising from the ‘socialisation’ campaign.

General Summary: Fundamental Principles

There are several fundamental principles in the Constitution which will be addressed briefly in this section. Highlighting these is important because they constitute the main parts of the document and have been the subject of debates throughout East Timor. Let me begin with the issue of ‘rights’ and then discuss other substantial issues in the document.

Perhaps, being a new country in the third millennium, East Timor has several advantages as far as drafting a Constitution is concern. The success and weakness of earlier Constitutions can be taken as points of reflection, and countless numbers of International Conventions on Human Rights had served as the foundation for writing the new nation’s Constitution. Thus, the interpretation of fundamental rights in the Constitution follows what is enshrined in the Universal Declaration of Human Rights and International Conventions. For example, the Constitution guarantees basic civil liberties

and advocates a mixed economy for the new state. Provisions to strengthen human rights protection are significant in the Constitution, which include the assurance of equality to all citizens and no restrictions on East Timorese with acquired citizenship. It also guarantees the extension of certain legal rights to foreigners as well as citizens; the precedence of ratified international conventions, treaties and agreements over national laws; clearer rules on judging the constitutionality of legislation; and the renaming of the independent national ombudsman the 'Provider of Human Rights & Justice' and strengthening of the office's powers (see sections 16–28).

On Universal Suffrage, the Constitution guarantees that the people have the right to exercise political power through universal, equal, direct, secret and periodic suffrage and through other forms laid down in the Constitution (section 8). In addition, it also guarantees the rights of citizens (section 16), gender equality (section 17), child protection (section 18), and the rights of disabled people (section 19). Such sections, which owe much to the existing International Human Rights documents, were approved unanimously by factions despite fears that traditional groups might refuse to back them since the issue of women and children has a unique place in traditional customary law.

Another important issue is the revision of the Constitution. Contrary to demands from Fretilin opponents that the Constitution should remain as an *ad interim* document pending its promulgation after a period of three to four years, section 154 states that a revision may be initiated by the Members of Parliament and Parliamentary Groups (sub-section 1) subject to certain conditions. For instance, sub-section 2 states that the Constitution may be revised by the National Parliament after six years have elapsed since the last date on which a law revising the Constitution was published. Such a revision, however, should be accepted by a majority of four-fifths of the Members of Parliament in full exercise of their functions (sub-section 4). This issue nevertheless, encountered fierce opposition from anti-Fretilin factions within the CA. They reasoned that the first draft Constitution has been drawn up in a rush and still needs further revision. Thus, in the first five years there should be a period of transition for correction to take place. In addition, the people have not had the chance to be consulted on issues concerning their rights, giving the impression that the Constitution lacks consultation and participation.

However, after securing the decision on revision and blocking any possible change to issues considered 'sensitive' in the Constitution, the

Assembly — in which Fretilin constitute the majority — successfully approved section 156. This section proposes that Laws revising the Constitution shall respect the fundamental provisions in the Constitution. Those included in sub-section 1 underline: (a) the independence and the unity of the State; (b) the rights, freedoms and guarantees of citizens; (c) the republican form of government; (d) the separation of powers; (e) the independence of the courts; (f) the multi-party system and the right of democratic opposition; (g) the universal, direct, secret and regular suffrage of the office holders of the organs of sovereignty, as well as the system of proportional representation; (h) the non-existence of an official State religion; (i) the principle of administrative deconcentration and decentralization; (j) the National Flag and (k) the date of proclamation of national independence.¹¹⁵

On the system of Government and the Presidency, the Assembly is in favour of the semi-Presidential system and the need to have power sharing between the President and the Prime Minister. In this system, the president will be elected through a separate election in a free and direct ballot. The Supreme Court can remove the President for ‘clear violations of his or her constitutional obligations.’ Thus, the grounds for removal are not limited to criminal behaviour only. If a President dies, resigns or has a permanent disability, the Parliament is equipped with the power to elect a new President from among its members during ‘exceptional situations of war or protracted emergency’ or if there is ‘an insurmountable difficulty of a technical or material nature ... preventing the holding of an election.’ A President can only be selected by a national election¹¹⁶ and is allowed to stand again for a second election.

The state respects the principle of decentralisation of public administration and that a law should be established to determine the administrative characteristics and competencies of the different territorial levels. Since the territorial organisation of the state acknowledges the particularity of the enclave of *Oe-cussi/Ambeno* in West Timor and the island of *Ataúro* to the north of Dili, the special administrative and economic treatment for both regions is determined by law (section 7). The peculiarity of *Oe-cussi* was an

¹¹⁵ In sub-section 2, the same section states that paragraphs c), h) and j) may be reviewed through a national referendum, in accordance with the law.

¹¹⁶ UNTAET Daily Press Briefing Media Notes, 13 February 2002. Source: <http://www.un.org/peace/etimor/DB/UntaetDB.htm>. See also article 76 of the Constitution.

interesting point during the drafting process. Being located in an enclave and within another country, speaking a rather different language and inheriting different cultural characteristics from those on the mainland, the administration in this enclave will be run in an autonomous format. This means that the administration of this region inherits the power to make decisions of its own as long as they do not contravene the Constitution. This particular emphasis on *Oe-cussi* requires particular attention since it concerns not only transportation but also international border arrangements with Indonesia. Any passage to and from the enclave would have to go through Indonesian territory.

The issue of language possesses a unique status. After a marathon debate, members of CA agreed to adopt Tetum and Portuguese as the official languages. In this regard sub-section 2 of section 13 states that Tetum and the other national languages should be valued and developed by the State as languages to be used in communication between different linguistic groups. English and Bahasa Indonesia were declared working languages (section 159). There is some uncertainty about how these discussions will be put into effect since Tetum is not a standardised language, leaving Portuguese to fill the vacuum, although it is spoken by less than 10 percent of the population whereas the former is spoken by almost 90 percent of the East Timorese. Likewise, it remains to be seen how much English and Bahasa Indonesia will be used since they will be treated as foreign languages when the United Nations has completed its activities in the territory.

The draft Constitution also permits police uninvited, night-time entry into private residences if there is a 'serious threat to life or physical integrity' — a clause expected to aid victims of domestic violence, a major social issue in East Timor.

Challenges

While in general, the draft provides a comprehensive basis for the functioning of a state, the process of drafting the Constitution has itself been haunted by dissatisfactions and protests by opponents of Fretilin. Thus, some provisions in the draft still require further explanation as far as the rights of the people are concerned. The CA is being haunted by the lack of consultation, apart from other issues such as claims that Fretilin unilaterally imposed its will, thus 'undermining' the view of smaller parties during the drafting process. The following paragraphs list some of these problems.

a) Non-Technical Problems

In contrast to the drafting of modern constitutions such as those of South Africa, Fiji, and Ghana, which took a great deal of time to come up with a final version of the Constitution, the CA was given only ninety days with one month extension, to finalise a draft Constitution for the new nation. The speed of drafting the Constitution — forty days — remains a concern to East Timor's civil society and the people at large. There is growing discontent not only among factions within the CA which oppose Fretilin but also among sections within the population who are concerned about the one party dominance of the process¹¹⁷. Opponents of Fretilin claim that, being the majority, the latter undermined the efforts of others and thus used all possible means to advance its opinion. For example, the adoption of the procedure that every resolution was to be voted on by 'hand raising', as requested by the speaker of the Assembly who is also the General Coordinator of Fretilin, and not through secret ballot compelled party members to follow the party line rather than deciding on the basis of individual conscience. Party members risked 'recall' should they disagree with the party line throughout the drafting period.

Being the minority in the CA, opponents of Fretilin were powerless and had no chance to have their submissions approved. Interestingly, the debates that took place during the drafting process were aired through the local Television and radio stations throughout East Timor, thus giving the people the opportunity to see how these debates were being conducted. Dissatisfaction has been voiced about the fact that while thousands of submissions were forwarded by the population in general, the CA failed to consider or even read any of these submissions (Cidadaun 2002, No 22). The Constitution relies heavily on a number of documents provided by some Portuguese experts, such as the Constitution of Portugal and the Constitutions of the former home countries of some political leaders while in exile, such as Mozambique.

In view of the above, it remains to be seen whether the Constitution will represent or accommodate the 'true wishes' of the people. Indeed, accusations against the dominant party for failing to consider earlier submissions and the ideas of other parties during the drafting process is one issue of much contention. Some members of CA held demonstrations to protest against Fretilin-orchestrated decisions regarding the Constitution and to complain that it does not reflect the nation's interest (Cidadaun, 2002: No.II).

¹¹⁷ See Pro-Kontra Pemilu Parlemen Nasional (Pro-Anti National Parliament Election), *Cidadaun*, No. 22, Minggu II Januari 2002

Interestingly, although controversially, the CA—with the majority of Fretilin — voted to transform itself into the first Parliament of East Timor (section 166). With the exception of Fretilin and its traditional allies—ASDT, Parentil and PDC — almost all other political parties abstained in the voting. They insisted that a new election should be held since the CA's mission was only to write the Constitution. The decision however, had the backing of Untaet regulation 2/2001 article 2.6, which states that the CA may transform itself into the future Parliament, if so provided in the Constitution.

b) Technical Challenges

After browsing the general issues, let us now move into some more substantial debates concerning the provisions within the Constitution.

First, there are a number of gaps that still need to be debated further, for example, on the system of government. While the draft Constitution agrees that a semi-presidential system be adopted, in which a president is elected directly by the people and enjoys a status almost equivalent to the parliament, the domination of the Prime Minister is emphasised in almost all aspects of state affairs. The prime minister even limits the position of the president in that even those powers which are the prerogative of the president are required to have approval from the government, making the latter, in some instances, more powerful than the president. For example, section 85 point (g) states that 'to declare a state of emergency or a state of siege, the president requires the authorisation of the National Parliament, *after consultation with the Council of State, the Government* (emphasis is mine) and the Supreme Council of Defence and Security'. In fact, in contemporary democratic states, with a popularly elected president, such an act is not usually scrutinised in strict terms since the president is elected directly by the people and has the power above the government. In reality, the president needs only to consult the Parliament after hearing the advice of the Supreme Council of Defence and Security, and not the Prime Minister or the council of ministers. In a state of siege or emergency, the president should not even need the approval of the Parliament, provided that the declaration is conducted in line with the Constitution and is reported back to the parliament after the state of siege or emergency has ended.¹¹⁸

¹¹⁸ Please refer to the Constitutions of the United States, France and Fiji for comparison.

Another example is section 87 point (b) regarding the competence to appoint and dismiss ambassadors, permanent representatives and special envoys, following *proposal by the Government* (emphasis is mine). This is generally an absolute prerogative of the president, even in a semi-presidential system, and instead of waiting for any proposal from the government, the president may initiate any appointment or dismissals provided that they do not contravene the Constitution. The government might be consulted but it is usually a state business and does not require too much government intervention.

Second, since the Prime Minister is elected, and since the Constitution is written by the dominant party in the parliament, there is a tendency for the UK Westminster style parliamentary system as it applies in Australia to be doomed to be repeated in East Timor. Thus it means the 'President [is] carrying out little more than the functions of an Australian Governor General, making the office of President effectively totally subordinate to the office of Prime Minister'.¹¹⁹ For example, section 80 of the Constitution of East Timor requires the president to remain in the country during the parliamentary recess period and not to leave the country without the consent of the Parliament. This raises questions as to how much 'flexibility' a president can have in times of siege or emergency when the Parliament is in recess and does not have time to reconvene itself, despite the fact that the president's trip abroad may be necessary to prevent external threat. Therefore, should the president be required to wait until the parliament reconvenes itself to ask for its permission or should he/she be allowed to take the necessary steps to prevent such a threat?

Third, discontent with the voting system during promulgation of some provisions is widespread, particularly in relation to certain 'sensitive' issues, as mentioned before. For example, on 3 December 2001, the CA adopted a motion from Fretilin to apply a nomination voting system for three specific provisions: the name of the country, the flag and the date of Independence. This means that to vote on these articles the CA-president calls the names of the individual members one by one. Each has to say whether they are in favour or against the motion or abstain. In this way, the party, rather than individual interest featured much in the voting system, and members of a political party had no chance to oppose the leadership or challenge the party's line.

¹¹⁹ Commentary on the Draft Constitution proposed for East Timor by the Constitutional Assembly. Australian Section International Commission of Jurists, Sydney, November 2001,

Fourth, the party political system entrenched in the Constitution is not a system that comes naturally to the East Timorese people and deprives many of them of the opportunity of having elected members representing the particular region of East Timor from which they come. The party voting system means that you vote for a party ticket not the person. In the proposed Constitution it is even more difficult for any independent or smaller parties to be elected as the quota has been enlarged and there is no requirement for geographic representation at all. Even the thirteen regional representatives have been eliminated in the draft Constitution (sections 62–66)¹²⁰.

Five, with regard to the issue of land, there are currently three different law regimes governing land and properties in East Timor (Adat, Português and Indonesia). The three systems have different legal consequences as far as land titles are concerned. Land has traditionally had the potential to destabilise the security of the nation. Lots of claims, both from groups and individuals, are being made at the moment, and the local courts find it difficult to resolve these since there is no legal framework to solve conflicts among these law regimes when it comes to land disputes. Some political leaders are big landowners, and some of the lands are alleged to have been acquired illegally in the past. Likewise, some people have sold their lands more than three times since ownership of land has changed with the introduction of new administrations and new law regimes in the last 20 years. The draft Constitution has not mentioned anything at all about this issue.

Six, while East Timor falls under the civil law system, it is not known how the courts will be structured since both the Portuguese and Indonesian law systems which have been applied previously in East Timor have few similarities. The Constitution offers a very general structure that allows any government to adopt whatever might suit its interest, thus making the judiciary vulnerable to executive intervention.

Seven, in relation to the economy, the draft Constitution gives the state absolute power to control natural resources (section 139) but at the same time ignores the rights of the indigenous people. East Timor is a society which places high value on its tradition and culture. Veneration of land and ritual sites is part of daily life. In each ethnic group, land is considered 'sacred' (*lulik*) and constitutes the traditional heritage of the clan (*knua*). Exploration

¹²⁰ See also Australian Section International Commission of Jurists, Sydney, November 2001, unpublished document.

of resources in these areas requires close consultation with the locals, yet in the Constitution, not one single provision is designated to give protection to these local heritage issues. The control of the state over resources is almost absolute, resembling that of former communist countries or the most questioned Indonesian 1945 Constitution¹²¹.

Some political problems

While from an academic point of view, the constitution of East Timor resembles other modern Constitutions in the world, much remains to be done in terms of adjusting it to suit local needs.¹²² In addition, East Timor is a Small Island country. Traditionally, the survival of its people depends very much on their relation to the land. Thus, while the Constitution might be guaranteeing the fundamental rights of the people, it needs to accommodate local exigencies and adopt policies that suit local characteristics.

If these are ignored, political implications might follow since it is widely perceived that:

The Constitutional Draft seems to have been driven by certain personalities in the parliament and — according to some internal sources — there has been heavy reliance on the models from Portugal and Mozambique. Indeed, the prominent leaders of Fretilin — the dominant party in the CA — were formerly residents in both countries and are very familiar with the Constitutions of these countries.

In the drafting process, the debate has concentrated very much on the ideas of several personalities, thus it is feared that the Constitution might represent only the interests of certain sections of the community and ignore the interests of the population as a whole. Examples can be seen in section 139 mentioned above.

Uncertainties and inconclusive decisions have plagued the drafting process. For example, the consultations about the document are scheduled to finish on 10 March 2002, and the final approval date for the Constitution has been adjourned to the 16 March 2002. This has raised concerns as to the time

¹²¹ See section 33 of the Indonesian 1945 Constitution. It states that the country has absolute control over the natural resources which will be used for the well-being of the nation. This allows the government to seize both movable and immovable properties that are considered to fit into the above category without giving any right to claim by those who owned them.

¹²² See Untaet press releases from 12–15 February 2002. Source: <http://www.un.org/peace/etimor/DB/UntaetDB.htm>

given to hearings and discussions. Will the six days left for discussion and debates suffice to summarise the feedback gathered during the Consultation period? Will they represent the wishes of the East Timorese?

Concluding remarks: Some Strengths

Despite all the above problems and misgivings, let me point out that East Timor can benefit from various universal and international human rights documents and expertise. Nevertheless, many problems still need to be dealt with in the Constitution. The points presented in this paper are only a few of them, and if not resolved to the satisfaction of all will only aggravate the situation of human rights in a country where the last 25 years has witnessed criminals acting with impunity. Discontent will put the Constitution in a vulnerable position and encourages different regimes to repeatedly revise it since the Constitution does not meet their criteria.

Despite all these drawbacks, it is unlikely that the East Timorese will be drawn back into another civil war. A strong nationalist vision is a guarantee of the stability of this new country. Having been colonised for almost five centuries and having suffered a brutal occupation during the 1975-1999 period, the East Timorese seem to prefer peaceful resolution to physical confrontation when resolving differences. Various sections in the society are working actively to promote reconciliation among the people and political leaders also actively encourage the population to avoid violations of the law.

Strong national leadership is another key factor of unity. During the years of struggle, national leadership has been one determining factor in bringing East Timorese together. The involvement of the Church and the strong faith in the Catholic Church has added to this point of strength. In addition, the long tradition of customary practices and the institutions affiliated with such a tradition seem to provide a strong basis for arguing that there is no room for confrontation in East Timor. What is needed here is political maturity and professional undertaking in order to bring the country forward. Likewise, a good Constitution that is backed up by strong organic laws could guarantee stability and uphold the rule of law in the new nation.