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CONSTITUTIONALISM OLD AND NEW IN “THE UN KINGDOM OF TIMOR-LESTE”

Rui Graça Feijó

CES, Centre for Social Studies, University of Coimbra, Portugal

For the last quarter of a century, constitutionalism has been an important feature of the political landscape of Southeast Asia. The notion encompasses two different, although sometimes associated, meanings. In a narrow, mostly juridical, sense constitutionalism can be thought of as the process through which formal constitutions are drafted. It has an institutional dimension most often supported in specifically designed state bodies, with the expectation that the charter that emerges will frame the future of the polity. However, it can also be understood as a significant step in adoption of ‘constitutional policies’ or the development of such political factors as separation of powers, rule of law, checks and balances, and human rights. Here constitutionalism is closely associated with the spread of democratic polities, a trend that Samuel P. Huntington (1991) dates to the Portuguese Carnations Revolution of 1974. It was then stimulated by the fall of the Berlin Wall in 1989 and is said to have reached Southeast Asia in the 1990s. True, some nations not considered democratic have constitutions, but practically all democracies elaborate fundamental charters that spell out the basic political structure. Linz (1997: 117) states that a fundamental condition for a democracy is establishment of a formal state based on the rule of law—which is normally grounded in a constitution.

The organizers of this volume argue that the constitutional practices now sweeping Southeast Asia have had major impact in four critical areas: individual rights and religion; the role of the military; the rule of law, courts, and justice; and the process of constitutional drafting itself (Dressel and Bunte, 2014: 4). In all these areas, much political contestation has been channelled into the emerging constitutional practice, laying a solid foundation on which democratic developments could be built. This chapter takes a close look at one of these areas, the process of drafting in Timor-Leste under the UN administration, since constitution making is one of the most visible arenas for contestation. Of course, drafting a new constitution is a major step in the democratic process, but ‘[f]or constitutionalism to take hold, clearly it will take more than institutional change on paper. Instead, elites and regular citizens alike must come to agreement’ to support the fundamental tenets of the new constitution (Dressel and Bunte, 2014: 4). This chapter argues that there is a significant relationship between how the process of drafting the Timor-Leste constitution was conducted and the ensuing difficulties in engaging both elites and regular citizens to adhere to it.

Two alternative models were put forward early in the process – what I call the ‘new’ and the ‘old’ constitutionalism. The old model emphasizes the need to craft a statement of fundamental issues of political organization that at least some ruling elites can share; it uses conventional means, such as election of an assembly of democratically selected representatives, to accomplish that. However, other currents of thought call for a more broad

approach in order to make a novel constitution emerge from a highly participative process of public consultation and effective engagement of significant numbers of the population at large; the goal is to guarantee that the legal prescriptions correspond to a socially relevant consensus so that the constitution will promptly root itself in everyday practice. Timor-Leste's choice of the more conservative approach may have alienated both significant groups of the elite and other sectors of the population in terms of how social and political life are organized. Although the Constitution of 2002 has been in force ever since independence was proclaimed, and there has been no attempt since to revise it, some major points of friction have emerged that suggest that the relationship between the constitution and the real state for which it was created is not fully established.

The Importance of Process

On 30 August 1999 the people of Timor-Leste voted in a referendum to end the 24-year-long annexation to the Republic of Indonesia. That launched them on the path to statehood. After the referendum, Timor-Leste engaged in two simultaneous political processes: construction of the foundations of a new independent state and definition of institutions and mechanisms for a democratic polity (Tansey, 2009). A constitution was generally accepted as central to both. Recognition of a new political entity is contingent on existence of a legal framework that defines the main institutions and political mechanisms, and democracy cannot thrive without broad consensus on clear rules for the political game. These are elements that are normally enshrined in new constitutions that aspire to embody a real social contract.

As Croissant (pp. ????) states in the present volume, there has long been a link between modes of constitution-making, acceptance of the constitutional provisions by the citizenry, and the democratic quality of the regime that emerges. It follows that one critical variable on which a positive outcome depends is how the institutional process is shaped. Samuels (2006) identified four questions that can be used to analyze the significance of the procedures: (1) Are constitutions imposed top down or do they derive from negotiations among a variety of actors? (2) Is the process inclusive or restricted to only some stakeholders? (3) How well does the process represent the citizenry? and (4) how were citizens allowed to participate in the constitution-drafting?

These considerations frame this attempt to evaluate how Timor-Leste's constitution was drafted. They also relate to the degree of legitimacy the new constitution has achieved. Elster (1997) maintained that constitutional legitimacy may be sustained in three ways: "upstream legitimacy" if the body producing the charter was established in legitimate way; "process legitimacy" if its deliberations were not subject to external pressure or limitation; and "downward legitimacy" if the end product was subject to a referendum or other form of public approval. Scrutinizing the constitution-drafting process in Timor-Leste against these benchmarks can illuminate how a democratic polity emerged in the first new nation of the 21st century.

Samuels' four issues stand out in studying the relationships between constitution-making and democracy. Two of them precede the drafting of a constitution, and are considered in detail in

the survey of the roadmap to independence; the third, which pertains to the essence of that process, is only cursorily addressed here due to the dearth of sources available; and the last applies in assessing the importance of the new charter. This assessment also looks at another four dimensions of the constitution-making process that can only be evaluated *ex post*: the durability of the new constitution; temperance in the balance of powers it enshrines; how it affects performance of the new institutions; and the democratic nature not only of the constitution-making process itself but also of whether the rule of law is sustained. These will be considered in the last section.

Fareed Zakaria (2013) considers the first issue, the timing of constitution drafting, to be critical to the success of democratization. Retrieving a historical argument that postulates that the rule of law developed before adult universal suffrage (although recent developments analyzed by Miller [2013] suggest there are alternative paths), Zakaria puts “paper power” ahead of “people power”, and adds: “It’s crucial that before the first elections, before politicians gain enormous legitimacy through the polls, a system is put in place that limits governmental power and protects individual liberty and the rights of minorities. (...) The focus should be more on constitutions, and less on elections” (Zakaria, 2013: 33). Thus, a central issue becomes the precise differentiation between a process that gains as much substance as it can to bring a plurality of actors to broad consensus and another, more competitive, process that stimulates confrontation, often verging on “winner takes all,” that alienates some groups of stakeholders. Timor-Leste faced this dilemma, as can be seen from the main arguments in the debate discussed below.

The second issue relates to the institutional model that frames the decision-making process. As Garrison has noted, “The degree of legitimacy and public support for a new constitution are critically affected by decisions about the time frame of the constitution building process, about who is to make key decisions, and about what the extent of the political participation will be” (Garrison, 2005. 2-3). Here there are two polarizing models: a classical process approach that is restricted to political elites in which formal institutions (constituent assembly, political parties, etc.) take full responsibility for writing and approval of a new constitution; and a model which Hart has called “new constitutionalism” (2003: 4) that considers it necessary to involve many more sectors of the citizenry through participatory processes. Mixed forms are possible: e.g., submitting the proposed text of a new constitution to a referendum or articulation of a constituent assembly with an institutionalized process of popular consultations. In fact scholars have identified no fewer than 18 alternative constitutional designs (Ginsburg et al., 2009: 205), and still more are conceivable. The relevance of analyzing how constitutions are elaborated has been stressed by Ginsburg, Elkin and Blount (2009: 202, 219): “the conditions under which founders write, deliberate and ratify are consequential” because they postulate the existence of links between processes and outcomes; the authors conclude that there is a close association between “processes that involve the public in the adoption of the constitution and the presence of rights and certain democratic institutions in the resulting document.”

In relation to the third issue, Lijphart (e.g., 2004) has written extensively on “constitutional design for divided societies.” He argues that it is possible to draw generic lessons from the myriad of constitutional experiments the world has seen in recent times. Rather than copy

models – often from former colonial powers – or delve into the extensive catalogue of alternative models, critical elements from successful constitutions should be preferred. However, it may be easier to suggest fundamental principles, such as establishment of power-sharing institutions and mechanisms, or group autonomy, than to pinpoint their precise morphology. Actual drafters are confronted with choices in critical areas, such as government system or electoral model, or in relation to other institutions, such as the judiciary, the military, the police, or the civil service—and what they choose matters: “The relative success of a power-sharing system is contingent upon the specific mechanisms devised to yield the broad representation that constitutes its core [because] it is naïve to expect that minorities condemned to permanent opposition [will] remain loyal, moderate and constructive” (Lijphart, 2004: 98-99). The constitution-drafting process of Timor-Leste addressed those issues, but space does not allow us to consider them in detail.

The fourth issue pertains to what may be labeled “para-constitutional” provisions. It is common for constitutions to demand special treatment for some political issues, such as imposing qualified majorities, which they do not directly provide for, and which must be considered as a special case straddling the constitution and ordinary legislation. On the other hand, as Sartori has noted, beyond the letter of constitutions there are often “material constitutions” that encompass established practices that offer a basis for political action not contemplated in the formal text—what he calls “the real configuration of the system” (1994: 202). This issue will also be addressed in the framework of the Timorese political process, where a gap between the written constitutional word and the actual political frame has appeared in two distinct forms: (1) the constitutional text could not provide responses to all emerging difficulties, so that other sources of legitimation are required; and (2) the written norms required time and resources to be effectively deployed, delaying in practice the application of several constitutional provisions. Both cases call for a notion of “para-constitutional” provisions to fully enlighten the relationships between the constitutional process and the real politics of a living entity.

In brief, throughout the world how a constitution is drafted should be kept in mind in every investigation of the legitimacy and stability of the democratic polity that adopted it. If this process has managed to channel political contestation to the assembly and produce a charter that accommodates the aspirations of the vast majority of stakeholders, the regime that emerges is likely to have solid legitimacy that can keep the polity stable. Failure to produce those results would diminish the capacity of a new regime to sustain peaceful solutions when contestation occurs outside the realm of novel, narrowly defined institutions.

Setting the Frame

The United Nations had a double problem to solve in Timor-Leste: provide humanitarian aid on a scale far beyond anyone's worst expectations, and guarantee the country a way to transition to independence. Security Council (UNSC) Resolution 1272 (October 25) established the UN Transitional Administration of East Timor (UNTAET). Thus began the "UN Kingdom of East Timor" (Chopra, 2000).

Unlike other polities, this one was not intended to last indefinitely, but simply to pave the way for Timorese independence relatively quickly. The main assumption of the UNSC Resolution was that "the East Timorese people expressed their clear wish to begin a process of transition under the authority of the United Nations towards independence", and thus UNTAET was created with the explicit goals of promoting the "development of local democratic institutions" and of "transfer[ring] to these institutions its administrative and public service functions".

The UNSC gave UNTAET "overall responsibility for the administration of East Timor and [...] empowered [it] to exercise all legislative and executive authority, including the administration of justice". The scope of responsibilities entrusted to the Transitional Authority, personalized in the Special Representative of the UN Secretary General, the Brazilian-born UN career official Sergio Vieira de Mello, was the broadest ever in a UN mission (Tansey, 2009). For one thing, the collapse of public administration was much more profound than in any other circumstances, so that the definition of the UN role specified that providing the basic infrastructure of the state was a prerequisite for its operation. However, after acknowledging the collapse of public administration, many international actors drew a false conclusion: that all legitimate power had ceased to exist and that a power vacuum had replaced the ruins of the Indonesian governance. This view, which was to have pervasive effects in how the situation was handled, underestimated both the deep organizational roots of the resistance movement and the persistence of entrenched notions of political legitimacy that sustained a political hierarchy in the country (Hohe, 2002)

How the U.N. powers were configured raised two substantial problems: (1) If development of democratic governance was a major goal of the process, the method chosen ran contrary to the very essence of democracy: it amalgamated in a single individual the whole range of powers that are supposed to be separated and to provide checks and balances on the political system. This method was termed "benevolent autocracy" (Chesterman, 2004), "benevolent despotism" (Beauvais, 2001), and "benevolent dictatorship" (Powell, 2008); the Transitional Administrator was compared to a "pre-constitutional monarch in a sovereign state".(2002).

The stated goal of the intervention was to "support capacity building for self-government". But the initial approach entrusted governance to international personnel. UNSC Resolution 1272 called for setting up a structure with at least two components: "a governance and public administration component, including an international police element, with a strength of up to 1,640 officers" and "a military component with a strength of up to 8,950 troops and up to 200 military observers". That seems to have left little room for the Timorese in the transitional administration. Because some of the goals ascribed to this force derived from the international community's own political agenda and were to be enforced through a strong bureaucratic

apparatus mainly composed of foreigners that would retain the reins of the process, Damien Kingsbury labelled the exercise “benign colonialism” (2009: 77).

To resolve the paradox and deal with the contradiction between ends and means, the UN mission was given two independent goals: in the short term, to build a state apparatus and a public administration that could deliver basic services and prefigure the future independent state’s own structure but be operated by the international personnel; and in the medium term to help the Timorese build their own organization to take over from the UN mission at the time of independence. The two self-contained goals had little in common. Vieira de Mello promulgated Regulation 1999/2 establishing a 15-member National Consultative Council, but in spite of references to ‘decision-making’, section 1.1 stipulates that the Council was to ‘provide advice to the Transitional Administrator’. It was conceived as ‘a joint consultative forum of representatives of the East Timorese people and UNTAET’ that could not ‘prejudice the final authority of the Transitional Administrator’ (section 1.3). The clear distinction between executive capacity, merged with legislative and judicial powers and reserved for UN personnel, and the consultative functions of representatives of Timorese organizations was thus enshrined in the founding regulation of UNTAET.

In this distinction of functions the Timorese leadership felt it was relegated to a mere “advisory” capacity. Vieira de Mello conceded that the increasingly vociferous frustration was firmly grounded and required an evolution in the political structures he had created (Powell, 2008). In July 2000 he redesigned the original council – which had been “a genuine, if largely failed attempt to engage the local population” (Kingsbury, 2009: 84) – as the National Council (NC) “established to act as a forum for all legislative matters” (UNTAET Regulation 2000/24, section 1), with extended responsibilities. He also created “the Cabinet of the Transitional Government” aimed at “effectively governing and administering East Timor during the transitional period, leading to the adoption of a constitution and the establishment of a democratically elected government for East Timor”(UNTAET Regulation 2000/23). The “timorization” process reduced but did not eliminate frustrations and tensions, which were to endure until independence day. Voices from the CNRT (*Conselho Nacional da Resistencia Timorese* / National Council of the Timorese Resistance), the umbrella organization established in 1998 to unify all elements seeking political change, openly criticized the approach.

Pursuing that approach, based on a distinction between current governance and the preparation for independence, Vieira de Mello spelled out the two main tasks of the transitional administration regarding the latter: prepare a constitution, and organize an electoral process whose result would give the new government legitimacy to govern the novel country.

A Controversial Roadmap to Independence

The UNSC Resolutions did not specify how the shift to an independent new nation would occur; nor was there any agreement like those in Cambodia or Afghanistan that defined the bases for the state-building effort (Aucoin & Brandt, 2010). It was necessary to find “a delicate balance between imposing international standards and acknowledging the local historical and political context” (Charlesworth, 2003). The rationale that framed Vieira de Mello’s decisions

bears the marks of a major decision behind the scenes in New York: transfer of the Timorese file from the UN Department of Political Affairs to the UN Department of Peace Keeping Operations (Suhrke, 2001, Garrison, 2005, Kingsbury, 2009). The former had extensive knowledge of the political landscape and relationships with the major figures of the resistance; the latter advocated a standardized blueprint based on neutrality principles to be deployed in post-conflict situations in which rival parts face each other—which was difficult to justify in the case of Timor-Leste. Some do not seem to have realized the conflict was actually over and there was a legitimate winner

Meanwhile, Timorese organizations were active. CNRT convened a conference at Tibar in May 2000 to analyze prospects for the future, and reaffirmed its commitment to a strategic plan for drafting a constitution through a “constitutional convention” with ample public consultation, as had been agreed in April 1999 in Melbourne. According to Aucoin and Brandt (2010), at the Tibar conference, the UNTAET Department of Political Affairs under Peter Galbraith proposed an alternative: “Elections will choose a Constituent Assembly which in turn will write, debate and adopt a constitution.” Vieira de Mello was careful to keep doors open at the CNRT Congress in August, when he stated that both options were legitimate. But when in September he addressed the UNSC, he presented only the plan to hold elections for a Constituent Assembly without reference to an eventual “constitutional convention” or any form of public consultation.

Despite a marked improvement in the engagement of Timorese leaders in matters pertaining to the transition, the sentiment was still that “ownership of the process” was in foreign hands. A substantial number of political actors could not understand why the results of the popular consultation were not translated into actual transfer of power. As relations with UNTAET grew strained, proclamation of Independence emerged as the only way out.

At the end of 2000, the NC discussed a road map to full independence. The Timorese leadership was torn between two conflicting considerations. They recognized the immense difficulty of the tasks ahead and the need for time to lay the foundations of the new state, and were bound by earlier decisions pointing to a transitional period of ten or more years; on the other hand, they felt marginalized by the domineering presence of UNTAET and aspired to assume rapid control over the destiny of their country. Given the limitations that would continue as long as the UN retained control of the situation, designing a road map to full independence was thus a major opportunity to take matters in their own hands by (1) assuming a key role in defining those steps and their timing, and (2) making sure that afterwards local actors would take central stage in crafting the tools required for independence. The lively debate engaged Timorese stakeholders and prominent representatives of the UN apparatus.

Not surprisingly, two major lines of argument were presented: one favored a protracted period of transition to independence that could be associated with an increased role for the Timorese in the process, coupled with an approach centered on a constitutional convention as the instrument to craft the fundamental law of the new nation; the other supported a rapid move and adopted the view that setting up formal democratic institutions and staging competitive

elections for a Constituent Assembly were a prerequisite for independence. The contrast was pronounced.

The first vision was rooted in the history of the Timorese Resistance. Ramos-Horta's speech in Oslo when he accepted the Nobel Peace Prize (1996) proposed a three-stage transitional period from Indonesian rule lasting ten years or more. This was based on the proposal Gusmão put forward before his arrest in 1992, which received scant public attention but was widely accepted by the Resistance. A similar lengthy period was agreed upon when various branches of the opposition to Indonesian rule met in Peniche, Portugal, in April 1998 and formed the new CNRT. The rationale was twofold: it gave Indonesia time to organize eventual withdrawal without turbulence, safeguarding its interests; and it offered the Timorese time to heal the scars of past disputes that had only recently been overcome by the political elites represented in the CNRT. The first argument was overturned by the events that followed the agreement of May 5, 1999, but had remained a central concern of a sizable number of the Timorese leaders. This view was not unanimous.

The most outspoken voice proposing an alternative path was not of any Timorese but rather that of Peter Galbraith, Cabinet Officer in charge of Political Affairs and Timor Sea. He could hardly have been more explicit:

The final phase of Political Transition begins with the election of a Constituent Assembly with a mandate to prepare the constitution for an independent Timor-Leste. UNTAET has an obligation to hold free and fair elections that meet the highest international standards and are open to all political parties and viewpoints. Only in this way can UNTAET be certain that it is turning power over to bona fide representatives of the Timorese people. The Constituent Assembly will have full plenary power. It can decide on the type of constitution, the method of drafting the constitution, the extent of debate on its adoption, and the method of ratification. Both theoretically and practically, it will be impossible for an un-elected National Council and Cabinet to limit the scope of the Constituent Assembly writing authority (ETTA, 2001: 27).

Contrary to those who believed that the process of constitution-drafting should be organized in such a way that it allowed for ample popular participation, Galbraith's view was that there had to be formal guaranteed conditions to facilitate the delegation of power from the people to a handful of members of the elite who would assume the burden of preparing and voting on the new Constitution. All other considerations were overridden by a procedural notion that competitive elections must be organized at all costs because they are prerequisite to the attribution of legitimate status to any sort of polity.

Galbraith and the Timorese who sided with him, like Fretilin, were the winners. Realizing that a price had to be paid to advance self-rule, the NC agreed that elections for a constituent assembly would be held by mid-2001. However, it also took note of objections about the short time allowed for its preparation, the need to foster popular participation in the process, and the call for gradual methods leading up to the final election of that assembly, and issued two further statements: (1) It took upon itself "the responsibility of organizing a National Convention for the purpose of drafting, debating and adopting a Pact of National Unity" (ETTA, 2001: Recommendations, B.1). The pact was drafted and all but two parties running in the

August 2001 election subscribed to it. (2) The NC also decided to “establish a National Constitutional Commission to facilitate the process of consultation throughout the 13 districts of Timor-Leste” (ETTA, 2001: Recommendations, C.1), the results of which were to be given to the constituent assembly upon its election.

It seemed that there had been a compromise on a multi-layered approach that would combine the two methodologies. However, the calendar established actually reduced the chances of the National Constitutional Commission carrying out significant work because so little time was allowed for that. And though through the Pact of National Unity the NC had imposed guidelines that the Constituent Assembly was to respect, these actually limited its powers. Because Gusmão felt uncomfortable with the apparent compromise, which amounted to a substantial defeat of the “new constitutionalism” approach, he resigned as NC chairman in March 2001[[year?]] because of the limitations to the consultation process.

By late February 2001 the road map was completed and it became time to move along the path. For UNTAET, “early adoption of a new constitution would be a benchmark of success for the mission which needed to illustrate results to justify its huge expense” (Aucoin & Brandt, 2010). At the time the success of UN missions in Indochina and the Balkans was being questioned; the chance of obtaining a result that vindicated the general UN approach was too tempting to be allowed to fail. For the Timorese, the coveted prize of independence overshadowed any shortcomings. Just as the elections for the constituent assembly were set in motion, Vieira de Mello disbanded the National Council (UNTAET Directive 2001/8, 14 July) to prevent the coexistence of two bodies vested with legislative powers.

On the Constituent Assembly

Elections for the constituent assembly were scheduled for August 30, 2001. The assembly was given three months, later extended for another three, to complete its gigantic task. This compares with an average of 16 months and a mode of 10 months for a large sample of constitutions (Elkins, Ginsburg & Blount, 2009: 207). The severe time constraints placed on the assembly would have significant effects on the way it was to discharge its function.

Elections were preceded by a few months during which political parties had to register and offer proof of a modicum of support – a period also widely criticized for its brevity, which was deemed to unduly favour the long-established Fretilin and generate substantial obstacles to other currents of opinion that had emerged late in Indonesian domination and were represented informally in CNRT. In brief, the way political parties were to be formalized undermined the likelihood of a wider franchise.

To counteract those effects, UNTAET adopted two devices (Resolution 2001/2): (1) 75 of the 88 seats would be allocated through proportional representation in a “national constituency” (thus allowing minorities who succeeded in forming a party to be represented in the assembly)—a response to the academic consensus on the virtues of proportionality and power-sharing in institutions (Lijphart, 2004). (2) The other 13 seats were to be fought on a

first-past-the-post system in every district, with candidatures limited to persons who resided in the district where they were candidates (section 32.2). These special seats would facilitate election of individuals without party affiliation, in an effort to enlarge the franchise beyond the reaches of political parties. Although “independent” candidates could present themselves in the national constituency, they were unlikely to secure enough votes to win a seat; the district seats would compensate for this bias in favor of established parties.

The result was an assembly in which Fretilin secured 12 of the 13 district seats and 43 of the other 75 and thus dominated the process. However, it fell short of the 60 seats necessary for approval of the Constitution, and was thus compelled to negotiate—from a very strong position—with 11 other parties.

A feature that needs to be stressed is that this assembly offered the elected representatives of the Timorese elite an opportunity to conduct business their own way. In fact, in spite of voicing concerns about some aspects of the assembly’s work and making a number of suggestions, UNTAET and its officials mostly distanced themselves from the substance of the drafting process (Charlesworth, 2003: 328). International advisors made their presence felt in Dili, but they kept a low profile and refrained from actively interfering. Thus the work of the Constituent Assembly reflected as much as possible local ownership of the process. In brief, “Once the constituent assembly model was adopted for drafting and adopting a constitution, political parties became the key decision-makers” (Garrison, 2005: 12). This guaranteed that the process would be controlled by the Timorese elite. However, there were three contentious issues.

First, political parties were far from being effective social actors when the decision was made to move ahead with elections. The time allowed to register officially was short, and beyond bureaucratic compliance with the regulations, parties lacked the capacity to fully express the wealth of public opinion that still generally equated “political parties” with the “divisionism” reminiscent of the traumatic events of 1975. Several key figures, not least Xanana Gusmão, José Ramos-Horta, and influential personalities close to the Catholic Church, preferred to stay out of the fray. As a consequence, the Constituent Assembly, in spite of having allowed for “independent” candidates, suffered from the absence of major stakeholders.

The difference between Fretilin and all the other “parties” was enormous. The historical party had deep roots that the more recent currents of opinion that emerged in the latter years of the resistance did not have. It was not surprising that Fretilin supported early elections; the results vindicated its stance. However, the number of votes required in the House to approve the Constitution had been fixed at 60 out of 88 seats. Fretilin had only 55. But it only had to negotiate with one of the other parties represented in the assembly. In the end, the Constitution was approved with the votes of Fretilin and ASDT; the majority of other parties voted against it. In terms of inclusiveness and consensus, the Constituent Assembly fell short of expectations.

Finally, the Constituent Assembly had the option of extending its own mandate and transforming itself into the first national parliament for five years without fresh elections. A

substantial number of important stakeholders outside the House expressed the view that it was “illegitimate” for an assembly elected for a precise purpose to extend its own mandate without any kind of broad consensus, which was obviously missing (although the possibility was contemplated in the regulation governing the elections). In effect, then, the open political competition for elected posts prescribed in the Constitution would not happen until 2007; in the meantime, political choices were distorted.

Popular Consultations pre-Constitution

As had been generally recommended, and for “the purpose of soliciting the views of the people of East Timor on the future Constitution of an independent and democratic East Timor, in coordination with civil society initiatives,” through UNTAET Directive 2001/3 Vieira de Mello established Constitutional Commissions in all 13 districts (Constitutional Affairs Branch, 2001). Each commission was required to present a report to the CA “reflecting the consolidated views expressed in those hearings.”

Only one month was allowed for this enormous task—earlier proposals had contemplated a full year. Yet 205 public meetings were held between June 18 and July 14, and reports of the proceedings were ceremoniously presented to Vieira de Mello on August 16. He presented them to the Constituent Assembly on September 17, the first day it sat.

The citizens had made epic efforts. “They did wish to participate, and they had plenty of things that they wanted to say” (Lutz, 2003: 3). But the actual process was little more than a mockery of what people like Ramos-Horta had actually suggested. Gathering a crowd of several hundred to discuss in one day more than two dozen topics ranging from the national flag to public health and the organization of social services, religion and the police, official languages and the environment, may be adequate for disseminating the value of having a charter covering all those issues, but it is hardly a sound method to forge consensus or even to capture the views of the people on the basic constitutional text. In fact, many “felt that the consultation process had been United Nations-dominated, too short, and not representative of a genuinely East Timorese process” (Carter Center, 2004: 44).

The reports are detailed as far as “the community’s suggestions or desires to be included in the Constitution” go. However, the Constituent Assembly did not treat them as working documents, and in some cases of great symbolic nature (references to the 1975 proclamation of Independence, the flag, use of the crocodile as symbol of the nation) it openly contradicted them. A few of the issues raised by citizens might have undermined the international standards expected of a modern constitution, but many others expressed views it would have been possible to accommodate, such as the desire to give the president a strong mandate.

Consultations post-Constitution

After the Assembly completed its draft of the Timorese Constitution (February 9, 2002), another process of “consultation and socialization of the constitutional text” was organized.

Teams of deputies were constituted with representatives of different parties and dispatched to the districts with directives to complete the hearings within one week (Baltazar, 2004: 5).

It appears from a survey of the minutes of those meetings that two sorts of interventions were made. Political parties that had presented proposals that the Constituent Assembly rejected appealed to local militants to come before the commission and defend their views. Meanwhile, several issues raised spontaneously were mostly concerned with symbolic matters. The Commission for Systematization and Harmonization selected proposals that, among other criteria, did not call into question “the unity and internal coherence of the draft constitution”. Recommendations from the popular consultations were merged with those received from organizations of “civil society” whose advice had also been sought. Eight recommendations produced by the district consultation process were among the twenty-one amendment proposals the Commission presented to the plenary. The Constituent Assembly adopted only four of the twenty-one (Baltazar, 2004: 6).

The “popular consultation process,” both before and after the drafting of the constitutional text, is important not for the results it eventually yielded but for the tensions it revealed. Those opposed a dominant discourse on the virtues of participatory democracy to the pragmatic options of UNTAET and one Timorese political force, Fretilin, that emphasized the superior legitimacy of the electoral procedures over the “new constitutionalism”. According to Lutz, “many national and international political advisors felt that public consultations [...] would be the most effective tool for integrating East Timorese people in the political and constitutional process” and “were seen as critical for public awareness and public ‘ownership’ of the new nation’s constitution” – but in “neither the first nor the second set of consultations were the suggestions compiled at the village and sub-district level ever seriously considered by the Constituent Assembly.” (Lutz, 2003: 3) Keep in mind that Chesterman had asserted that “local ownership is the intended end of any state-building operation.” However, the Carter Center noticed that the “energetic participation of citizens underscores the fact that the people of East Timor are deeply concerned that their voices be heard in their government bodies.” (Carter Center, 2004: 45)

Ultimately, the consultation process that supposedly permitted wide participation in how constitutional provisions were defined and offered a mechanism for the elected deputies to entertain a dialogue with the society at large was at best perfunctory. Critical decisions and political bargaining were made almost exclusively by the elected members of the CA. According to Aucoin and Brandt (2010), “If constitutions are to serve as a social contract, it is critical that the process be as inclusive as possible.” However, the local elite who were involved in the process were undoubtedly not as frustrated as the rest of the East Timorese.

The Impact of the Constitution-making Process

In assessing the impact of the constitution-making process on the political life of Timor-Leste over the next ten years, expanding on Carey (2009: 156-159), four dimensions are considered: durability, temperance, stability, and democracy—the main goals a constitution may aspire to achieve.

(a) Durability

The CRDTL became effective on Independence Day (May 20, 2002) and has remained in force without amendment. Two presidential and two parliamentary elections have adhered to its requirements, and no candidate has ever run a campaign proposing that it be substantially altered, much less replaced. It appears from interviews with important institutional players (Gusmão, Ramos-Horta, Mari Alkatiri) that the country's leaders generally accept the constitutional text and have deferred substantial revision to a time when its long-term effects can be assessed (Feijó, 2014b). Constitutional revisions of an "extraordinary" nature are permitted at any moment if supported by four-fifths of the members of Parliament (CRDTL section 154-4), and "ordinary" ones requiring only the support of two-thirds could have been made after it had been in force for six years (CRDTL sections 154-2 and 155-1). Neither has happened. This puts the Timorese Constitution's survival above the mode of one year and the median eight years and on the path to the average lifespan of seventeen for all the constitutions in the world since 1789, having surpassed the barrier of ten years at which over half the constitutions have perished (Elkins, Ginsburg and Melton, 2009). Regionally, Timor-Leste has now reached the average Southeast Asian constitutional lifespan of 13 years and surpassed the 10.1-year average for democratic polities (see Croissant in this volume). In these terms, it appears that the CRDTL has managed to rise above the troublesome process of its inception to wide acceptance, at least by the political elite.

(b) Temperance

If constitutional provisions vary from limited and institutional to very broad, encompassing a philosophy of social behaviour, an underlying issue relates to the organization and division of power that in democratic contexts implies the setting-up of checks and balances. Beyond assuring the formal tripartite division of power posited by Montesquieu, such mechanisms guarantee—in the classical formulation of Madison—that no political actor can unilaterally make and enforce decisions. Timor-Leste adopted a model that embodies the division of judicial, legislative, and executive powers and further divided those of the executive in terms of provisions for a semi-presidential regime. Although the exact terms in which presidential powers were crafted may have diverged substantially in the Constituent Assembly, the overarching design of the political institutions provided incentives for inclusive governance (Feijó, 2014a).

The historical pace of development for each of the institutions that are considered to participate in the checks-and-balances system and to exercise horizontal accountability, has been highly variable. As might be expected from the legacy of UNTAET, which had concentrated legislative, executive, and judicial functions in the hands of a single person, the executive branch was far better developed than either of the others and received much more international attention and support. Understandable as this may be considering the dire necessities of the Timorese people at the time, it made construction of a democratic polity quite difficult. The critical feature of democratic rule is the limited function and power of individual entities, which means that there must be other bodies capable of exercising different types of mutual control. In this case those entities were severely underdeveloped. As Smith (2004) remarked, a strong government can be the sign of a weak state (Smith, 2004). Here an active presidency for the Republic, endowed with the institutional and material means

to discharge its functions and capable of exercising some control over the executive branch, seemed to be the pragmatic route to accountability of some sort. Constructing such a presidency was not made easy by a restricted view of the presidential powers inscribed in the CRDTL; but neither of the other branches opposed it. The repeated choice by Timorese citizens of “independent” presidents allowed the presidency to articulate political agendas far beyond those of any political parties, actively engaging Timorese civil society and prominent figures who had found it difficult to express their views through parties. Although there may have been temptations to reinforce the legal responsibilities attributed to presidents, the constitutional provisions have persisted unaltered. The main political actors have adapted their agendas to the constitutional provisions, and these performed their function with the necessary limitation of individual powers.

(c) Stability

Stability is taken here not to signify the endurance of the Constitution but rather its impact on how political institutions perform. Did the Constitution provide incentives for a stable political environment, or is it responsible for the problems that marked the first few years after independence? Here it appears there is scope for a less sunny view of the virtues of the constitutional process.

Timor-Leste suffered a severe political crisis in 2006, when leaders escalated a long-term political rivalry into open confrontation that was only overcome by the resignation of the Prime Minister. From a more institutional point of view, the first National Parliament supported three different governments (Alkatiri 2002-2006; Ramos-Horta, 2006-2007; Estanislau Aleixo da Silva, 2007). Political instability thus characterized the first five years after independence. After the 2007 elections, stability was further challenged on February 11, 2008, when the President of the Republic was shot and the Prime Minister ambushed. The constitutional provisions for dealing with presidential impediments, however, were deployed successfully. The second legislature also proved to be more stable than its predecessor, since there was only one government and it lasted out its full term. However, the political scenario was only stabilized when some para-constitutional restrictions were abolished and a new configuration emerged that allowed for significant changes in individual roles.

In fact, the decision of the Constituent Assembly to skip fresh elections at the end of its mandate and transform itself into a National Parliament for a full five-year term deserves critical attention. This option accorded with the rules under which the assembly was elected, but there was widespread criticism both in the House (the majority of the parties voted against it) and outside (vociferous dissatisfaction was voiced by, among others, Gusmão, Ramos-Horta, and the Roman Catholic bishops). The Fretilin party managed to “freeze” its hold on executive power for five years, avoiding a fresh election that might have produced a National Parliament with a different composition. On the other hand, the only possibility for the charismatic Xanana Gusmão to play an institutional role – for which he was pressured by most international stakeholders – was to engage and control his popular support and discharge the function of President of the Republic, which had been very narrowly defined.

As soon as the para-constitutional constraints on political competition were dismantled in 2007, the political scenario moved significantly. The charismatic legitimacy of the Timorese leader was now superimposed with the electoral legitimacy of the executive power as Xanana became Prime Minister, while the new President was also politically tuned with the new situation. To conserve the constitutional text there had to be a substantial reconfiguration of the party system if the model was to operate smoothly. Thereafter, stability could take root—as it has done.

(d) Democracy

The goal of a constitution in a democratic polity is somewhat tautological: ensure that democracy drives politics and is supported by specific institutional formulations. Here two main issues must be considered: Did the process of constitution-making respect democratic procedures and generate appropriate effects? Did the process actually produce a charter capable of sustaining a democratic state?

The second question is easier to answer. The CRDTL has been consistently judged to meet the requirements of international standards of democracy: separation of powers, limitations on individual power through checks and balances, defence of human rights and civil liberties, an enlarged franchise, and the rule of law. Timor-Leste has consistently been rated as a democracy by such international institutions as Freedom House, Polity IV, and The Economist Intelligence Unit Index of Democracy. Thus, the results of the constitutional process contributed positively to its democratic goal.

However, it would be hasty to conclude that the constitutional process explained political developments and that democracy actually derives from the charter. In many transitions from authoritarian regimes to democracy, negotiations between representatives of the old order and those who challenged it centred on the drafting of a new constitution, which then became the fulcrum of the bargaining process. This did not happen in Timor-Leste. The main bone of contention – independence – was resolved through a referendum, and those who had opposed the move vanished: thenceforth the political scenario was dominated by a pluralistic nationalism. The constitution-making process stemmed from a consensus favouring independence and democracy that was enshrined in a Pact of National Unity incorporating all sectors of the nationalist movement. This very broad consensus did not extend to other aspects of the process, but the hard bargaining dealt mostly with what were then considered “secondary” issues that did not affect the claim to independence. The importance of the Constitution resides not so much in the choice of democracy as an unchallenged abstract concept but rather in the specific institutions that embody it. However, it would not be advisable to minimize the investment all stakeholders made in order to conform the final charter to visions and interests that were naturally divergent and even contradictory. There was considerable potential for acrimony from the use of majority rule to impose solutions that defied consensus.

The issue of the procedures used requires detailed analysis because it impinges on the very notion of democracy. The choice of a Constituent Assembly elected by universal suffrage can legitimately claim to be considered a democratic procedure, although this seems to have been

the chosen way in only 12% of all cases (Elkins et al., 2009: 205). There are alternative methods which base their claims to satisfy democratic principles on involvement of wider sectors of the elite and the population at large through participatory devices.

Assuming the method chosen meets basic democratic credentials, two problems must be addressed: (1) Considering that “the content of constitutions depends on who sits at the table to hammer out their provisions” and that “more inclusive constitutional moments instil a widespread sense of ownership in, and commitment to new constitutions” among citizens and political actors alike (Carey, 2009: 176-177), were all the necessary steps taken to ensure that the main actors among the Timorese political elite were present in the Constituent Assembly?

The answer is no. Emphasizing formal political parties at a time when major independent political figures like Gusmão and Ramos-Horta refused to enter the race, and some significant currents of opinion found it very difficult to register a party and run successful campaigns, Vieira de Mello (assisted by Peter Galbraith) designed a model that was formally impeccable but far from inclusive. Contrary to the lessons of classical political theorists from Rousseau to Hegel, who were sceptical about attempting to implant constitutions in newly formed states by adopting models tested elsewhere and who stressed the need to conceive them as institutions that need to grow locally in dialogue with the people, their assumption seems to have been that constitutions should be judged by their internal coherence and adherence to universal values. Thus, some of the main actors were left out of the assembly. Also, one should recall that the majority of the political parties in the CA actually voted against the final constitutional text. For this reason, doubts can be raised about the end result, for “consensus among the political elites at the moment new political pacts are established are essential to their effectiveness and longevity” (Carey, 2009: 157). In this case, formal procedures were paralleled by the restricted composition of the assembly and rules about the minimum number of votes required for approval of the Constitution that in turn limited consensus among the elite. The ensuing result could not help being rendered fragile by lack of the inclusiveness that should have fostered shared expectations about how politics should function.

Enfranchising the population at large is a positive and necessary step in empowering citizens to exert their rights – and the Timorese responded *en masse* to the opportunity to participate in the decisional process. But the right to participate is not limited to voting. Many international organizations have expressed the view that constitution-making should be a process that engages the largest possible majority of the population so as to ensure that the result is seen as legitimate and the property of all the people (Commonwealth Human Rights Initiative, 1999), and that “participatory processes seem to have empowered the people” (International Institute for Democracy and Electoral Assistance). Carey summarized the argument by stating that more inclusive constitutional moments generate more democratic politics, more constraints on government authority, and stronger and more durable constitutions (2009: 159-160). Similarly, Ginsburg, Elkins, and Blount (2009) identified an association between processes that involve the public and strong democratic credentials in the final charter. A process along these lines, consisting of a combination of elections with a participatory model, was put forward in Timor-Leste but failed to attract the sympathy of UNTAET, which nevertheless accepted the need to pay some tribute to its virtues. However, this was a mere formality that

failed to introduce real external inputs in the process of constitution-drafting, thus reducing the ownership factor to a fraction of the elite. By limiting the scope of inclusiveness and reducing participation to a marginal exercise that failed to generate external contributions to the writing of the Constitution, the model UNTAET adopted contributed to an unnecessarily fragile end result. Formally, the CRDTL responds positively to procedural and substantive claims to democracy. However, the elite consensus embodied in the charter was shallow, and the limited popular participation reduced the sense of ownership on which legitimacy at large reposes.

Conclusion

How a constitution is drafted assumes critical importance not only in the application of what has been termed ‘constitutional policies’ to different domains, ranging from human rights to the place of the military in political life, but also—and primarily—in ensuring that the rules set down on paper actually permeate the workings of the polity and mobilize all the citizens so as to establish sound agreement on the rule of law. Based on this assumption, the UN-supervised process of drafting the Timor-Leste Constitution in 2001–02, based on rules that could easily be recognized as offering formal legitimacy to the actors in the process, deserves a more balanced appraisal than the unqualified eulogy of official propaganda.

The Timorese constitution does enshrine important elements that represent basic tenets of a democratic polity and were in consonance with the consensus that had emerged among the resistance and its several branches about the desirable regime after independence. Ramos-Horta’s Nobel Peace Prize acceptance speech in 1996 prefigured what the Constitution actually accommodated in terms of human rights, civil liberties, and respect for pluralism and diversity. The fact that the main tenets of the Constitution are aligned with the political consensus of the resistance movement before the August 1999 Referendum is central to explaining the degree of its success. The effort of the parliamentarians in those days went far beyond the need to have a minimal document responding to the immediate needs of a country rising literally from the ashes; they adopted measures that offered the country a horizon for institutional development over the next few decades. This can be seen in the provisions for the judicial system or the development of a decentralized form of state, which have constitutional weight but currently in Timor-Leste still lack important basic grounding. The Constitution of 2002 has a utopian element which is a driving force and an inspiration for current policies. It is also a check against some dubious initiatives that governments have been tempted to take. It thus contributes to the formulation of democratic policies (and is sometimes called to curb non-democratic proposals for new legislation as is evidenced by interventions of the Court of Appeals serving as a Constitutional Court)—even if some might regard it as setting too high a threshold for a country that still lacks elementary building blocks. The Timorese Constitution is thus central to the process of rooting “constitutional policies” in a much wider sense.

However, setting aside the failure to mobilize and respond to wider social groups, as was advocated at the time by many who were not heard, the constitutional process was not inclusive even of local elites. The absence of such central political figures as Gusmão and Ramos-Horta is surely evidence that the elected body lacked participation by leading actors and was thus in danger of alienating the allegiance of significant segments of local elites. This

negative element was discernible in detailed constitutional provisions determined primarily by the overwhelming predominance of a single party in the CA, causing the majority of the parties which had won seats to vote against acceptance of the Constitution. In spite of the formalities followed in the election of the CA, the assembly would have benefited from a subtle approach that was clearly lacking. One example is the definition of the powers of the president of the Republic, an area where Fretilin's desire to curb the influence of the first president who escaped their control determined its final shape, in contrast to other voices who claimed that more substantial responsibilities should be vested in the Chief of State. Later, the issue of presidential powers proved to be a theme for contention, one that is not yet resolved. Also the decision of the Constituent Assembly to defer elections for Parliament to 2007, a power play heavily opposed by public opinion, created a para-constitutional barrier to the spread of a consensus on the rules of the political game, which were also postponed. Some of the decisions taken before the CA was elected and others implemented during its mandate, are responsible for some of the difficulties the young Timorese democracy faced, such as the dangerous escalation of conflict that eventually led to the crisis of 2006.

Viewed in this light, the Timorese constitution-drafting process fell short of best practices, and was less than a clear demonstration of recognition of Samuels's critical criteria: the basic document was provided by a single party without significant inclination to negotiate, it excluded important stakeholders from the process, and it was mainly insulated from **[[meaning?]]** the citizens desire to contribute, paying little more than lip service to the proponents of a 'new constitutionalism'. The fact that the CA was conceived in formally democratic terms (and thus had 'upstream legitimacy') and was reasonably free to take decisions (= 'process legitimacy') must not conceal the critical fact that its contents were to a great extent devoid of 'downstream legitimacy' since no substantial effort was made to include citizens in their ratification. The Constitution of 2002 was born unnecessarily fragile.

In this context, the fundamental role of a constitution—to lay a solid foundation for an overarching agreement that brings together elites and other citizens—has emerged more slowly than it would have if certain approaches that were actually spelled out in the critical months preceding the drafting process had been given a chance to leave their imprint. The cost of this course was the disjunction between "constitutional order" and the expression of legitimate dissenting views in the period which culminated in the crisis of 2006 that threatened the survival of the "constitutional republic".

On the other hand, the Timorese Constitution of 2002 is still in force, having outlived the average lifespan of identical charters in the region. Its endurance is to a large extent a paradox, given that the conditions in which it was drafted would have predicted that it would sooner rather than later be deeply contested. In general, this has not been the case. Although Aucoin and Brandt (2010) stressed that criticism of the Constitution has been a 'rallying point' for those who seek to gain favour with the population, which would militate to reduce the legitimacy of the charter, in my opinion it has in fact functioned mostly as a cult object. In fact, even when the Constitution seems to operate against the wishes of those in power (or aspiring to be), no serious attempt has been made to revise it, even though it actually anticipates that possibility. Take, for instance, the fact that when Gusmão was unhappy with the powers

granted to the president, instead of taking advantage of his official position and his immense popularity to press for modification of the Constitution to grant him more power, he adapted himself to its prescriptions and decided to gain power by seeking the job of Prime Minister. More recently, when Prime Minister Gusmão's resignation was being discussed and the idea of a non-elected 'Council of Elders' floated as a possibility to accommodate him and other members of the 'old guard', the fact that such a council was not in the spirit of the Constitution (which reserves formal legislative and executive power to elected officers, as is proper for a democracy) determined a different solution rather than a challenge to the Constitution.

The explanation for this paradox has two elements: the fact that the Constitution enshrines basic elements of a modern democratic polity subscribed to by the citizenry, and the fact that Timorese leaders –above all, the still vastly popular and charismatic Gusmão— opted to accept its terms in spite of the turbulence of the process and the persistence of contentious issues. Also, the fact that para-constitutional measures were put aside in 2007, allowing for open political competition for all the social players, helped to keep the constitutional text at the centre of Timorese political life

The fact that the Constitution has been in force since May 20, 2002, without a single amendment should not obfuscate the difficulties that the consolidation of democracy – one of its major goals – still suffers at the hands of critical choices made under the UN transitional administration. The decision of Gusmão to resign from his position as Prime Minister in order to secure the transition to a younger generation may also allow for a recomposition of the parliamentary basis of the government, which now embodies the sort of “national unity” platform that after the Referendum key political figures proposed, unsuccessfully, as a medium-term alternative to open political competition. Perhaps this means a fresh start to the political game – one that may include revision of certain questionable sections of the Constitution of 2002.

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