



“DEMOCRACY, CONSTITUTIONS & DEALING WITH THE WORLD”

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Session 1: The Relevance of “International Approval” to the Constitution: the Timor-Leste case

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Next year on 22 March 2022, Timor-Leste will mark the 20th anniversary of the adoption of its Constitution. Other countries such as Afghanistan or South Sudan, which also started their political transition and obtained their independence at almost the same time are still struggling or facing ongoing violence. Although these other countries adopted constitutions with the support of the international community, the liberal democratic values enshrined in their constitutions could not be upheld. This paper reflects on the trajectory of Timor-Leste’s constitutional journey.

To answer the question regarding the relevance of international approval to a new constitutions such as Timor Leste’s, one must understand the political transition to nationhood in Timor-Leste, especially from 1999 to its restoration of independence on May 20, 2002. Timor had a long period of struggle against Indonesia’s New Order regime, before the United Nations was finally able to hold a referendum in 1999, allowing the Timorese people to decide their own future as a nation.

1. The Relevance of “International Approval to the Constitution”

The United Nations, through UNAMET, organised a popular consultation on 30 August 1999 in which Timorese people voted overwhelmingly for a transition to independence. Therefore, the UN was in charge of preparing for this transition. Following the referendum, the UN Transitional Administration in East Timor (UNTAET) was mandated to run the political transition phase, including facilitating a constitution-making process.

The fact that the UN was involved directly in the transition demonstrates the obvious relevance of “international approval” of the Timor-Leste Constitution. Previously Timor-Leste (known as Timor Portuguese) had adopted its Constitution when the Fretilin party unilaterally proclaimed independence on 28 November 1975, nine days before the Indonesian invasion. The 55 articles of the 1975 Constitution were adopted on the same day. However, neither the proclamation of independence nor the 1975 Constitution were recognised by the international community or the United Nations, as the territory had not gone through a recognised process of decolonisation. In contrast, the 2002 Constitution was, by and large, “blessed” by the UN through its direct involvement in preparing for the drafting process of the Constitution and assistance to the Constituent Assembly during the drafting process.

The constitution-making process

There have been many academic papers deal with the drafting process of the Timor-Leste Constitution. Most of the academic papers criticise the short period of time provided by the UN for the Timorese to draft the Constitution. Initially, there were different views even among UN personnel

regarding the process for drafting the constitution. It is well-documented however, that the UN's Head of Political Affairs in Timor, Peter Galbraith, favoured a swift and short constitution-drafting process so that UNTAET could hand over responsibility to the national political actors as soon as possible. This view reminds us of the 90-day constitution drafting process in Cambodia in 1993, another constitution which was developed under the aegis of a large UN mission.

On the other hand, the UN Special Representative of the Secretary General (SRSG), Sergio Vieira de Mello, tended to favour a broader consultative process, which was in line with the views of many Timorese civil society groups, including the Catholic Church. Nonetheless, de Mello eventually approved Galbraith's proposal, which was in line with National Council of Timorese Resistance's (CNRT) proposal under Xanana Gusmão's leadership. (Gusmao went on to become the first President of Timor-Leste). Fretilin, as the main political party on the ground, seconded the proposal since they were confident about winning a majority in the first election to govern the country. Thus, UNTAET adopted a Cambodian model of a 90-day process during which the Constituent Assembly deliberated on a draft Constitution. I recalled vividly at the first sitting of the Constituent Assembly joking that: "We had better adopt a 60-article constitution, given the Constituent Assembly will only have sixty effective days in which to debate this draft constitution".

Regarding the drafting period, some members of the US Congress who happened to support Timor-Leste's struggle in the past wrote a letter urging the Constituent Assembly to allow more time to debate some of the more substantive issues in the draft Constitution. Finally, the Constituent Assembly extended its mandate by 3 months, as Timorese civil society and other international institutions appealed for the extension as well.

One important lesson learned from this was that UNTAET, as the pivotal external actor, failed to encourage local and national actors to adopt a more inclusive constitution-making process. This occurred partly due to a lack of understanding about the local culture, on the part of UNTAET actors. They particularly lacked a proper understanding about the resistance movement and how to deal with senior local actors. Secondly, the different views of different UNTAET leaders sent mixed messages to local leaders, who had different agendas amongst themselves. These differences were evident in debates of the National Council, an advisory and legislative review body set up by the SRSG composed of representatives from different group in Timor-Leste society.

The Constitutional Commission setup by UNTAET also had an ambiguous mandate. The Constitutional Commission had the task of conducting public consultations with the Timorese people about the draft Constitution. The results of these consultations were to be handed over to the Constituent Assembly. However, because of a lack of understanding about the dynamics between actors such as Fretilin, the dominant political party on the ground, Xanana Gusmão and some key, minor parties, UNTAET failed to develop a clear and legally binding mechanisms via which the Constitutional Commission related to the Constitutional Assembly. Thus, the Constituent Assembly barely took into account the results of public consultations carried out by the Constitutional Commission. The issue of political legitimacy was also at the centre of this debate, though I am not able to address this issue in this brief paper.

[The substance of the Constitution](#)

UNTAET's role in influencing the substance of the Constitution was more modest than its impact on the process. Its influence was mainly in terms of the Bill of Rights included in the Constitution.¹ The intervention of the UN Office of the High Commissioner for Human Rights, and the Human Rights Unit of UNTAET helped the Constituent Assembly harmonise the draft Bill of Rights in accordance with the principles of international human rights standards. In general, Constituent Assembly members were quite open to this approach to harmonisation in terms of the Bill of Rights.

Members of Constituent Assembly were aware of the importance of international recognition of the Constitution. Thus, the Constitution adopted most international human rights standards into the chapter on the Bill of Rights. This commitment to uphold international principles was motivated by the Timorese struggle for human rights in general; and the right to independence enshrined in the UN Charter. This commitment is reflected in the article 9 of the Constitution on the role of international law in relation to domestic law (which is also relevant to Session 2 of the 2021 Melbourne Forum):

1. The legal system of East Timor shall adopt the general or customary principles of international law.
2. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.
3. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.

This does not mean that international community imposed their will on any major substantive issue in the Constitution, however. For example, most international advisers to the Constituent Assembly argued that a semi-presidential system would create instability and counselled Assembly members not to include a semi-presidential system. In spite of this advice, the Constituent Assembly adopted the semi-presidential system as several proposed drafts Constitutions advocated for that option.

The role of international actors other than UNTAET

The relevance of international approval does not only come from the UN, but also from other international agencies such as UNDP, the Asia Foundation and the Inter-Parliamentary Union. There were short-term experts, for example, funded by The Asia Foundation. These experts visited the Constituent Assembly occasionally and sometimes had brief meetings with individual members of Constituent Assembly from different political parties. They also distributed written advice to members of the Constituent Assembly. However, their influence was modest when the whole constitution-making process is considered. To some extent, they also lacked a knowledge of culture in Timor-Leste, both in terms of local traditions and the country's historical trajectory. The Asia Foundation did however play a more important role in facilitating the consultation process, as well as facilitating public discussions with various civil society groups prior to and during the drafting of the constitution.

2. The role of international actors and principles over time

Timor-Leste had very strong ties to the international community, and particularly with international solidarity groups around the world which supported the struggle. This experience did not vanish when the country regained its independence in 2002. Instead, through the Constitution, the country

¹ See, Adérito J. Soares, 'Forward', in Annemarie Devereux, *Timor-Leste's Bill of Rights: A Preliminary History* (Canberra, ANU Press, 2015).

reaffirmed its commitment to the international community via the adoption of most core international instruments on the first sitting day of its National Parliament. Thus, in the last 20 years, consecutive Timor-Leste governments have been open to applying international standards when it comes to any different interpretation.

The interaction between the Constituent Assembly and these agencies during the drafting process of the Constitution became the basis for a long-term cooperation for future implementation of the Constitution. Consecutive UN Missions in Timor-Leste after the restoration of independence continued to play an important role in the state-building process of the country. Likewise, many other international agencies and intergovernmental organisations were and are collaborating actively with various state institutions to implement the mandate of the 2002 Constitution. In a nutshell, Timor-Leste Constitutional building process was an integral part the international community (UN) agenda, and thus the 'international norms' are the foundations of the country's liberal democracy project.

3. *Current challenges facing the constitutional order*

There have been many constitutional conversations since the Constitution came into force on 20 May 2002. Despite a very brief drafting process for the Constitution, the *Grundnorm* for Timor-Leste as the newest country in the new millennium has been at the centre of political dynamics over the last 20 years of independence.

Timor-Leste is facing a current political deadlock, which is again putting one of the provisions of the 2002 Constitution at the centre of the debate – specifically, the semi-presidential system and the constitutional power of the President. This is leading to the potential for *cohabitation* between the President and Parliament at the moment.²

Since the formation of the 8th Constitutional Government in July 2018, the President of Timor-Leste, Francisco Guterres Lu-Olo, has been reluctant to swear in twelve proposed ministers. According to the Constitution, ministers are proposed by the Prime Minister and nominated and sworn in by the President. Some have argued that President has no constitutional power to reject the ministerial candidates proposed by the Prime Minister. In the past, Lu-Olo's predecessors, President Ramos Horta and President Taur Matan Ruak have both exercised the same power, albeit in a more diplomatic way, in rejecting proposed ministers. The ongoing exercise of this power by President Lu Olo, to some extent debunks the argument from some observers that the President's role, as spelled out in Timor-Leste's Constitution, is merely symbolic.

Different constitutional interpretations of presidential powers have resulted in the current political stalemate. In January 2020, CNRT, the second largest political party in the 8th Constitutional Government, withdrew from the Coalition which resulted in the resignation of Prime Minister Taur Matan Ruak. Thus, under the Constitution, the President had to dismiss the Parliament and call for the formation of a new government. Gusmao's CNRT managed to form a majority coalition with the support of several smaller political parties. They signalled their intention to form a new government, given that Prime Minister Ruak had tabled his letter of resignation with the President. However, instead of approving Gusmao's new coalition, President Lu-Olo approved a new coalition led by Fretilin and PM Taur Matan Ruak (after the PM withdrew his letter of resignation). The Fretilin-PLP led coalition included the Khunto Party, who abandoned Gusmao's coalition. Thus, the 8th Constitutional

² See Rui G. Feijó, 'Timor-Leste – Cohabitation: the tug-of-war continues', available at, <http://presidential-power.com/?p=8613#comment-1193825>

Government continued with the support of the Fretilin Party. This moment of “Constitutional chaos” led some to call the current government a de-facto and illegitimate government.

Today we are witnessing an interesting constitutional dialogue in Timor-Leste between state organs/institutions and also involving civil society and the public at large. Most comments suggest that Timorese political actors have to uphold the democratic values and principles of the 2002 Constitution. However, there are also voices reflecting and arguing about some lacunae or even ambiguity emanating from the Constitution, i.e., the power of President under the semi-presidential system.³ I would argue that since the adoption of the constitution 16 years ago, the Timorese people are still learning about, and in the process of ‘culturising’ the values and principles of the Constitution; and at the same time, identifying the lacunae in this legal document itself.

Biography: Adérito Soares was a member of Timor-Leste’s Constituent Assembly (2001-2002) and was the Inaugural Commissioner of Timor-Leste’s Anti-Corruption Commission (2010-2014). He holds an LLB from Indonesia and an LLM from NYU Law School (2003). He has published on Timor-Leste internationally, including ‘A Social Movement as Antidote to Corruption’, in *A New Era? Timor-Leste after the UN* (ANU E-Press, 2015); ‘Combating Corruption: Avoiding Institutional Ritualism’, in *The Politics of Timor-Leste* (NY, Cornell Uni. Press, 2013); ‘The Parallel and Paradox of Timor-Leste and Western Sahara’, in *Autonomy and Armed Separatist Movement in Southeast Asia* (Singapore, ISEAS, 2012). He is currently finishing his PhD at the ANU, Canberra. He has worked for various NGOs in Timor-Leste and Indonesia and as a consultant for international agencies. He participated in the Melbourne Forum in 2018.

³ See, Adérito J. Soares, ‘Forward’, in Annemarie Devereux, *Timor-Leste’s Bill of Rights: A Preliminary History* (Canberra, ANU Press, 2015).