

REMAKING THE STATE IN TIMOR-LESTE: THE CASE FOR CONSTITUTIONAL REFORM¹

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Introduction

The institutional arrangements established by new states will not by themselves determine their political viability or otherwise. Political viability is determined by a range of political variables from the nature of governing elites to the extent of state resources to the character of the national community. But the institutional system is a significant determinant of the capacity of governing political elites to govern. As a post-conflict state, Timor-Leste at independence was as a particularly vulnerable state. Its state structure increased that vulnerability: it adopted a semi-presidential system that established two, rival power centres: that centred on President Xanana Gusmão and that centred on Prime Minister Marí Alkatiri (Shoesmith, 2003: 232). This rivalry reached its climax in the crisis of 2006 and the forced resignation of the Prime Minister.

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Drawing on the experience of both the Alkatiri Fretilin Government (2002-2007) and its Parliamentary Majority Alliance (AMP) successor (2007 onwards), this paper puts the case for constitutional reform. The argument is based on the need to establish both a more effective and a more democratic system of governance in Timor-Leste. In particular, it is argued that Timor-Leste needs a strengthened legislature, able to exercise scrutiny and oversight of the executive, interrogating ministers and critically reviewing the policy process. In emerging democracies the executive branch tends to dominate the legislature. Morgan (2005) found executive dominance to be typical of the Melanesian parliamentary systems in his comparative study. Typically, new multiparty parliaments lack the experience, the financial and human resources and the confidence to play an autonomous role in the policy process (NDI, 2000: 4). This has been the case in Timor-Leste since independence in 2002. It has created a situation where the political executive, the Council of Ministers, has been tempted to introduce laws (under the Decree Law system) that flout democratic principles and introduce major political changes without reference to the parliament. It is a temptation that both the Fretilin Government and the AMP Government have been unable to resist.

In the Timor-Leste case, it is necessary to understand the executive-legislative relationship in the setting of a semi-presidential system where the first and second presidents of the Democratic Republic of Timor-Leste, Kay Rala Xanana Gusmão and Dr José Ramos-Horta, have been outstanding political figures. The relationship is triangular between president, prime minister and parliament. Timor-Leste does not have a Westminster model of parliamentary democracy. It is a hybrid model where the electorate directly chooses both the parliament and the president.

The key is the nature of the parliament's relationship with the other 'organs of sovereignty', the President and the Government (the political executive). The fourth 'organ of sovereignty', the judiciary, has so far played a very limited role. A Supreme Court has not yet been appointed and the Court of Appeals assumes the Supreme Court's responsibilities set out in the Constitution (Sections 124, 125, 126). This includes oversight of political parties (Section 126 (1: e)) and the electoral process (Section 126 (2: c)).

Does Timor-Leste need a more powerful parliament?

There has now been an experience of parliamentary democracy in Timor-Leste for some six years. This includes the workings of two distinct parliamentary regimes: that of the Fretilin-dominated parliament of the 2002-2007 period and that of the current Parliamentary Majority Alliance (AMP) government. The role of the Council of Ministers and of the Prime Minister in these two periods has changed from a single, highly centralised executive to a multiparty executive drawn from the five AMP member parties.

In terms of democratic government that is participatory and transparent, M Steven Fish's conclusion from his comparative study (2006) is that 'the evidence shows that *the presence of a powerful legislature is an unmixed blessing for democratization*'. Fish found that on his case studies, every country that opted for a strong legislature also scored high on Freedom House scores for political rights and civil liberties. Timor-Leste does not score well on the Freedom House ratings for political rights and civil liberties. Freedom House ranks Timor-Leste as a 'Partly Free' polity. This is based on an assessment of political rights (3 on a scale of 1 to 7 with 7 the highest score) and civil liberties (4 on a scale of 1 to 7).

'Disciplined Governance'

There is, as well as the question of democracy, the question of the *capacity* of the state to assert its authority and perform its role. Where a national political elite attempts to govern a state that lacks the capacity to support effective government then a fundamental condition for democratic governance is missing.

Jamie Mackie put the question this way:

How should East Timor try to combine "disciplined governance and democratic principles"?

The minimum conditions for a successful and democratic polity include at the national political level reasonably cohesive governing elites working in a state system that has the human and financial resources to support government.

In practice, Fretilin attempted to govern by creating a ‘dominant party’ (rather than a multiparty) system. Power was very much centred on the Council of Ministers and, behind this, the Fretilin Central Committee and its powerful National Political Commission. As Prime Minister and as Secretary-General of the party, Marí Alkatiri dominated both. In the event, it is fair to say that this ‘dominant party’ system did not work. What might be called the ‘directed democracy’ model ideologically favoured by the Fretilin leadership failed spectacularly in 2006. It was rejected by four out of five voters in the 2007 parliamentary elections.

While other factors are critical, a stronger parliamentary system and a more open, pluralist political system in the long term can lower the level of political risk. A working parliamentary democracy can create a fund of social capital that supports a culture of mutual obligation and trust between society and the state. Poor levels of political rights and civil liberties contribute to political risk (Fish, 2006). The Timor-Leste experience closely matches the model produced by political risk analysis from largely African case studies. On comparative rankings of political risk, Timor-Leste at independence was above the already high risk average for post-conflict African states (Collier *et al*, 2006; Shoesmith, 2007a). The crisis in 2006 demonstrated that the Fretilin Government was unable to reduce the level of political risk.

The respective roles of the legislature and the executive

The Fretilin Government, like Fretilin as a party, was highly centralised. To a significant extent, parliament was marginalised. The multiparty opposition in parliament was ineffectual. The outcome of the June, 2007 parliamentary elections reversed this order. The Fourth Constitutional Government of Xanana Gusmão is a loose coalition; in opposition, Fretilin has been disciplined and united.

In the best case scenario, the National Parliament now has the opportunity to develop as a more robust and autonomous actor in the political process. With its experience of

government and its party discipline, Fretilin in opposition could use the parliament as a national forum for debate and scrutiny of government policy and of the political executive. Debate in the parliament is indeed more vigorous but the situation has become highly unstable. Rather than strengthening parliamentary democracy, the political struggle between Fretilin and the AMP Government and the instability within the governing coalition itself threaten to make the role of both parliament and the political executive unmanageable.

The Constitutional Framework

Constitutions and state institutions cannot of themselves guarantee democracy or effective government. They can, however, make the task of effective democratic governance easier or more difficult. Constitutions are more than written documents; they accumulate conventions and informal and well as formal political procedures. As the UNDP Strengthening Parliamentary Democracy project document noted the ‘full character of the Timor-Leste’s constitutional system will evolve through *practice* over the coming years’ (UNDP 2006: 9).

By the time the Constituent Assembly adopted a semi-presidential system in 2001, constitution writers had a wide array of constitutional models from which to choose. Newly independent states established following the Second World War, ‘tended simply to copy the basic constitutional rules of their former colonial masters, without seriously considering alternatives’ (Lijphart, 2006). The international consensus by the time the East Timorese came to consider a constitution was that parliamentarianism was a better choice than presidentialism or semi-presidentialism (Fish, 2006). The opportunity to consider a new constitutional framework for the new state was not taken up in 2001 by the Constituent Assembly. Nor was the constitution adopted by the Assembly the outcome of a genuine process of popular consultation and voter education (Shoesmith, 2007 b). Rather, Fretilin, which controlled the Assembly, ensured that a model the party had adopted in 1998 (following the Mozambique and Portuguese constitutions) would be installed.

The experience of the first six years of independence strongly suggests that the current constitutional model is flawed and that there is a case for constitutional

reform. There is a case for a constitutional review (which is allowed for) to make the constitution more relevant to East Timor conditions. This could include reconsideration of the role of the Council of Ministers, of the legislative prerogatives that should be exercised by the parliament and of the relative roles of the president and the prime minister (see Lijphart 2004 on power-sharing arrangements at the executive level). The Timor-Leste legal system is a complex, hybrid system of laws and regulations. A new constitution could clarify and streamline this.

The presidency

Under the constitution, the presidency has limited powers (Shoesmith, 2007b). A key indicator of institutionalised presidential power in a semi-presidential system is the ability (or lack of it) of the president to influence the appointment of cabinet ministers. The president does not have these powers in Timor-Leste. Constitutionally, the president does not play a role in the actual government of the state. The constitutional arrangements may not determine the degree of actual presidential influence in semi-presidential systems; there can be a strong inconsistency between the constitutional powers of the president and the president's effective influence in government.

President Gusmão from the first day of his term acted to test his actual powers and to chastise and challenge the Fretilin Government. In the First Constitutional Government, the semi-presidential system was one of 'conflictual cohabitation' in which the separately elected president and prime minister were divided by ideology and political conviction (Shoesmith, 2007b: 229). The political struggle was resolved in June, 2006, when the President obliged the Prime Minister to resign.

The Constitution designates the president as "Supreme Commander of the Defence Force" but he shares responsibility for security policy with the government and parliament. The 2006 crisis increased the president's influence in this area. President Ramos-Horta has suggested he leans towards a powerful French-style presidency, an 'enlightened autocracy'. By early 2008, an International Crisis Group report concluded that Ramos-Horta was not far from that already (ICG, 2008).

Evidence that President Ramos-Horta's instinct was to increase the powers of the presidency was provided by his move to set up an anti-poverty fund. This was intended to transfer from the National Parliament and the Government to the President budgetary and policy initiatives that were later ruled as unconstitutional by the Court of Appeals (Viegas, 2008).

The separation of powers doctrine

There is a 'separation of powers' doctrine in the Constitution (Section 69) that separates the parliament from the political executive in a way that is markedly different to the Westminster system. The Electoral Law requires members of parliament who are appointed to the government (that is, as ministers) to vacate their seats, to be replaced by the next candidate on their party list. Timor-Leste is by no means unique in this. Norway, Belgium and the Netherlands also require parliamentarians to resign their seats if they are appointed to cabinet (NDI, 2000: 11). These, however, are long-established consolidated democracies. Significant limitations on parliamentary democracy from the outset in a new state have probably vitiated the democratic transition in Timor-Leste.

The Prime Minister is under no obligation to select ministers from elected representatives. Appointments are at the full discretion of the Prime Minister (more like the US presidential system than the Westminster parliamentary system in this respect). This power substantially weakens the parliament's oversight role of the executive. Parliament's access to ministers is reduced and the arrangement widens the gap between the political executive and the legislature that is already made formidable by the power of the Council of Ministers to issue its own Decree Laws.

Decree Laws (Government Laws) and Parliamentary Laws

The Constitution approves a dual system of law-making. Both the legislature and the political executive can make laws. Section 96 of the Constitution states that the National Parliament may authorise the Government (that is, the Council of Ministers) to make laws on a wide range of matters, including among others definitions of crimes, sentences and security measures, definition of civil and criminal procedures,

organisation of the judiciary, rules and regulations for civil servants, the monetary, banking and financial systems, environmental protection and sustainable development, and general rules and regulations for radio and television and other mass media. Section 97 empowers the Government as well as parliament to initiate legislation. Section 98 (1) gives Parliament the power to appraise and amend or terminate statutes ‘other than those approved under the exclusive legislative powers of the Government’.

The Council of Ministers’ autonomy from parliament is strengthened by its power to legislate through Decree Laws. There is some ambiguity in the Constitution concerning what legislation is the preserve of parliament and what can be enacted by the Council of Ministers (the Government). Section 115, Competence of the Government, states that it is incumbent on the Government ‘To submit bills and draft resolutions to the National Parliament’ (115 (2 a)). Further, ‘The Government has exclusive legislative powers on matters concerning its own organisation and functioning, as well as on the direct and indirect management of the State’ (115 (3)). Section 116, Competencies of the Council of Ministers, empowers the Council ‘to approve bills and draft resolutions’ (116 (c)) and ‘To approve statutes, as well as international agreements that are not required to be submitted to the National Parliament’ (116 (d)). It is not made clear what statutes are not required to be submitted to the National Parliament.

The parliament passed an average of about eleven laws a year between 2002 and 2006, the lowest number, four, in the crisis year of 2006. The Council of Ministers issued over eighty decree laws in the same period (*East Timor Law Journal*). While the majority of decree laws were concerned with administrative and regulatory matters, there was a tendency in the year before the 2007 parliamentary elections for the Council to consider legislation with important political consequences. The most controversial of these have been the proposed Penal Code legislation (2006) and the current debate over the proposed National Petroleum Authority Decree Law (2008).

The decree law issue raises basic questions about the legislative authority of the parliament and the need for constitutional clarification regarding the legislative provenance of the Council of Ministers. The attempted Penal Code legislation and the

intention to pass the National Petroleum Authority Decree Law demonstrate that the Council of Ministers, both in a Fretilin government and in the present AMP government, understands its legislative powers in the broadest sense, regardless of the widespread political consequences of the decree laws it enacts. The Penal Code draft bill in 2006 and the current draft National Petroleum Authority bill are examples of the undemocratic risks in the current constitutional arrangements. Both clearly undermine the legislative authority of the parliament.

The Penal Code legislation provides an instructive instance of the assumed power of the Council of Ministers to pass laws without reference to parliament that have major political consequences. The process for passing legislation as a Decree Law involves no public debate. On December 6, 2005 Prime Minister Alkatiri signed an executive decree approving the proposed law (JSMP, 2005; IPI, 2005). It was not sent back to the parliament for any process of endorsement but was directly forwarded to the President for promulgation.

The Penal Code legislation provoked national and international criticism. The provisions in the Penal Code included severe, new penalties for defamation of political leaders and public servants. Critics attacked the legislation as restricting freedom of speech and removing political scrutiny, issues that were properly the exclusive concern of the Parliament. The International Press Institute wrote to President Xanana Gusmão on January 12, 2006, to express its concern

(a)bout plans to introduce a new penal code for East Timor containing harsh criminal penalties for individuals found guilty of defamation The new penal code contains several harsh sections that will have a detrimental impact on journalism within East Timor.

The IPI called on the President to refuse to sign the new penal code and to block ‘a threat to freedom of the press and freedom of expression in East Timor’ (IPI, 2006).

President Gusmão sent the decree back to the cabinet without promulgating it. The Alkatiri government fell before the decree could be reintroduced and the existing

defamation provisions of the Indonesian penal code continued to apply (US Department of State, 2006).

The National Petroleum Authority Decree Law

On June 2, 2008, the Council of Ministers released a draft of the proposed Decree Law to create a National Petroleum Authority (NPA) to replace the Timor Sea Designated Authority (TSDA) for the Joint Petroleum Development Area. The NPA is also intended to regulate all petroleum exploration, production, processing, sales and marketing, on-shore and offshore (La'o Hamutuk, 2008). The Council provided for a week of public consultation, setting 30 June as the deadline for establishing the NPA.

La'o Hamutuk, the East Timorese NGO, submitted a response to the draft law on June 10, expressing its alarm at the 'many omissions and mistakes in the draft that fail to protect the public interest, including concentration of power, vague mandate, lack of transparency and accountability, other dangers of corruption, and ineffective monitoring of petroleum operations'. They made the case that this was a law that should be enacted by the parliament in open debate, 'not a decree-law passed secretly by the Council of Ministers'. The powers of the NPA would compromise the policy-making powers reserved for the Government and the Parliament (La'o Hamutuk, 2008).

The Budget

There is one area of legislative power which is unambiguous. The key area for parliamentary responsibility is the budget. Section 145 (1), 'Competence of the National Parliament', requires that 'The State Budget shall be prepared by the Government and approved by the National Parliament'. When submitted to the parliament the provisions in the budget are debated, amended and finally enacted or, possibly, rejected. Parliament's Committee C Economy and Finance and Anti-Corruption can play a central role in the scrutiny of the Government's budget proposals. Section 95 (2 e)) declares that it is exclusively incumbent upon the National Parliament to monitor the State Budget and this is a continuous role. The

state budget is a political as much as a financial statement. It is not a single event but rather a process that continues from one annual budget sitting to the next. A vigorous and alert parliament can hold the political executive to account and use the budget debates to mobilise public opinion (Eglin, 2003).

When the AMP Government submitted its first budget to parliament in late 2007 it was subjected to intense scrutiny. Outside the parliament, the budget debate aroused widespread public interest. Phillip Adams, who was travelling through the districts in November, reported that ‘everywhere we heard battered radios ... playing the parliamentary broadcasts from Dili’. Across the country people were listening to the budget debates (Adams, 2007). The budget was eventually passed after rigorous scrutiny, a case of the parliament playing a significant role in the formulation of core state policy.

Parliament: An Assessment

The National Parliament has a clear mandate and a working organisational system. By 2006, the unicameral legislature and its staff were functioning, there was a parliamentary committee system in place, laws were enacted and annual budgets approved. It meets regularly and in the 2007 budget process acted expeditiously and effectively. The parliament is growing into its role but the UNDP (2006) assessment identified major weaknesses in its representative and legislative capacities. Public input into the legislative process remains limited. The parties in the AMP Coalition government are mostly new and untried. The legislative capacity of the parliament is extremely limited. The Secretariat does not employ legal advisers. Most laws are initiated by the Government which does have legal advisers. Many MPs lack basic language skills in Portuguese, the language of legislative business. The parliament has ‘extremely limited in-house capacity for proper oversight’ of the executive (UNDP, 2006: 15).

The parliament does not yet adequately perform its oversight functions, holding the political executive to account. The parliament does provide a forum for policy discussion. Public input into the legislative process has been very limited (UNDP,

2006). In-house law-making capacity was low. There were no legal advisers in the Secretariat to assist the members. Legal advice and legislative capacity were concentrated in the government and not the parliament (UNDP, 2006).

On the Fish-Kroenig Parliamentary Powers Index (Fish, 2006), Timor-Leste's score is low. Of the thirty-two criteria for a strong legislature, the National Parliament fails on at least thirteen. Ministers cannot serve simultaneously as members of the legislature; the parliament does not appoint the prime minister; it does not confirm ministerial appointments; the executive can decree legislation that does not require the parliament's approval; individual members of parliament are not supported by personal staff, among others.

The party-list system

The electoral system itself diminishes the representational and accountable character of the parliament. The choice of electoral system is a fundamental issue for new democracies. It determines not only the recruitment of representatives but the subsequent relationship between the parliamentary members and the electorate, defining key functions of representation and accountability. The electoral system in Timor-Leste is a party-list proportional representation system as required by Section 65 (4) of the Constitution. The Law on the Election of the National Parliament, promulgated on 28 December, 2006 (Law 6/2006) sets out that: 'There shall be only one single constituency in the election of the National parliament, corresponding to the entire national territory, headquartered in Dili' (Article 9). Members of parliament are elected through plurinominal lists presented by the political parties with each voting citizen entitled to one single vote in then list (Article 11). East Timorese voters vote for parties, not individual candidates. The 2007 elections used a closed list system where seats were assigned to candidates in the fixed order that their party had chosen (Law 6/2006, Article 12 (2)).

The party-list system has advantages: it can ensure, for example, that candidate lists more equitably represent the population. The proportional representation system used in Timor-Leste's 2007 parliamentary elections includes the requirement that every fourth candidate on the party-lists must be a woman (Law 6/2006 Article 12 (3)),

ensuring a minimum 25 per cent participation by women as candidates and as potential representatives.

The electoral system does not produce a parliament that is genuinely representative and accountable to the electorate. There is no direct accountability between individual Members of Parliament and local constituencies (Norad, 2007: 66). The proportional party-list system means that voters do not decide which candidates they want in individual electorates. Members of Parliament have no compulsion to listen to an electorate; they simply have to persuade the party leaders to place them sufficiently high on the party list to gain a seat. This system disenfranchises the local community and discourages individual members from regularly visiting and consulting and therefore effectively representing local electorates.

The Norad review (2007) found that key political actors were viewed as lacking 'democratic instincts'. Politicians focussed on the interests of their party and on personal relationships with party leaders that gave them their seat in parliament. Parliament 'had limited ability to serve as a forum for public debate, or a channel for the participation and concerns of citizens' (Norad, 2007: 66).

A disloyal opposition

The systemic weaknesses in the parliamentary and electoral regimes are compounded by the intensity of the political struggle between government and opposition. Fretilin rejects the role of a 'loyal opposition'. It is determined to remove a government that it declares 'unconstitutional' and corrupt. Fretilin won twenty-one seats in the election, making it the largest party in the new parliament. It was opposed by Xanana Gusmão's Congresso Nacional de Reconstrução de Timor-Leste (CNRT) with eighteen seats. In the negotiations following the elections Fretilin failed to persuade the other parties to join it in a coalition and President Ramos-Horta, on 6 August, announced the CNRT and four other parties would form government as the Parliamentary Majority Alliance (AMP). The announcement provoked a violent reaction from Fretilin supporters. Alkatiri declared Ramos-Horta's decision 'unconstitutional'. Fretilin has since dismissed the AMP Coalition as a mere 'de facto' government, demanding new elections.

With the installation of the AMP Coalition government led by Prime Minister Xanana Gusmão, parliament assumed a more vigorous role as a forum for national debate. Paradoxically, this has presented a major threat to the viability of the parliamentary system itself. Fretilin in opposition denounces the AMP-led Government as unconstitutional, referring to it as a 'de facto Government'. In August, 2007, Fretilin spokesman José Teixeira announced 'We still consider the current government unlawful and will have no part of it' (Teixeira, 2007). Fretilin leaders called for the Government to step down and for early elections to be held in 2009 (Alkatiri, 2008).

The AMP Coalition is unstable. The five parties share some thirteen ministries (including the Prime Minister and Vice Prime Minister), three vice-ministries and twenty-five secretariats of state. The political executive in the AMP Coalition is undisciplined. The Council of Ministers in the Fretilin government acted slowly and sometimes ineffectively (Norad, 2007: 45) but it was politically united. The AMP Council of Ministers is divided between parties who are not natural allies. Individual ministers have been accused by Fretilin of gross abuse of their positions. The Minister of Agriculture and Fisheries was accused in May, 2008 of approving secret massive land leases to Indonesian companies (Teixeira, 2008).

Conclusion

The constitutional and electoral ground rules in Timor-Leste are in need of reform if the system is to become more democratic and at the same time more capable of delivering more disciplined governance. The case is made, following Fish's study, that in the longer term a strong parliament will contribute to a more open and democratic political system and engender popular respect for the government and the state it represents. This is an essential condition for the development of a confident civil society in Timor-Leste which, in turn, is an essential condition for political stability (among others).

The relationship between the political executive and the legislature in the past has too strongly empowered the executive. The Council of Ministers has wide-ranging legislative powers of its own, ministers do not and cannot sit in parliament and, if the

Prime Minister chooses, may not even be elected to parliament in the first place. This provides the political executive with far too much independence from the people's representatives. Members of Parliament themselves are not elected by specific electorates and, in the party-list system, are not accountable to local communities.

In considering reforms for the parliamentary system, it is suggested that there is a need for constitutional clarification of the respective legislative roles of the Parliament and the Council of Ministers with the direction of reform aimed at giving the Parliament control of legislation that, like the Penal Code law, has significant consequences for the democratic governance of the country. The constitutional provisions for elections and the Electoral Law should be reviewed and either the Party List proportional system replaced by a single electorate system or the adoption of a mixed system of individual electorates for individual candidates as well as some Party List candidates. The work of Parliament should be better supported by the training and appointment of expert advisers on legislative processes, budget and finance. The Secretariat requires a stronger human resource base.

A strong opposition can strengthen parliamentary democracy but there is a need for areas of consensus and cooperation, an agreement to play by the rules. It may be possible to adopt more inclusive strategies to provide the opposition with a greater opportunity to participate in policy making even though the government of the day retains final control over this.

The opposition role in the parliamentary committee system could be developed leading, for instance, to a system of minority committee reports where agreement was not reached. Committees can serve a critical function in both the legislative process and exercising oversight of the ministry. A shadow ministry could be introduced where opposition shadow ministers assumed responsibility for developing an understanding of a specific area of policy, thereby being in a position to offer informed critiques of government decisions while preparing to assume that ministerial authority if a change of government were to occur. It will be difficult to achieve a consensus on what reforms are required and how they are to be implemented. This will take a degree of consensus that is not currently present. But if

parliamentary democracy in Timor-Leste is to be strengthened from its present fragile condition, reform is unavoidable.

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