

Institution building in Timor-Leste: between the UN and national ownership

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Introduction

In this article we will analyse the design of the Timorese liberal state institutions shaping the new independent country. We will focus on the post-conflict scenario and explore how these institutions shape or are the product of a possible power-sharing agreement, how this affected its design and how these choices were and are still perceived. We will briefly analyse the role of the main Timorese competing actors, within the broader context of a UN intervention and present preliminary results of a work in progress, based on the scientific literature and recent fieldwork, namely interviews to relevant Timorese political actors. Our aim is to assess to which extent the institutional design of the new liberal state institutions was perceived as adequate and its effects on post-conflict and stability.

We will seek to demonstrate that, despite strong criticism, the Timorese institutional design has been used with great flexibility by the different political actors and sensibilities, with even unforeseen outcomes, in what seems to be a broad consensus on the adequacy to the Timorese reality.

Independent Timor-Leste: an overview

In Timor-Leste, since the 1999 Popular Consultation for independence, the internal power struggle started to develop. It started to be fought among the institutional lines, in an almost inversion of the Clausewitz clause “war is the continuation of politics by other means”. Whenever there was a breach or a possibility in the institutional design, in many cases an outcome of UN decisions (Goldstone 2004), the main competing sides would use it and try to take advantage of it, sometimes with unforeseen consequences in the concrete case (Freire and Lopes 2013). This can be seen in the electoral outcomes for the Constituent Assembly, the constituent process or the government formation clause as it was used in 2007 and later in 2012.

Although the UN might have wanted to remain neutral, its actions and decisions had deep institutional implications (Ingram 2012, 20–21). Fretilin felt neglected by its initial action, adding to the fact that Xanana was emerging as the UN natural interlocutor (Goldstone 2004, 89). While all Timorese still pay tribute to the UN initial intervention, this is not exempt from criticism. The UN’s excessive bureaucratisation, the top-down approach (Brown 2009; Richmond and Franks 2008), its direct or indirect political influence (Goldstone 2004, 89), or simply the Timorese will for national ownership after decades of foreign occupation (Devereux 2015, 19), may be among the reasons motivating the Timorese will to bypass the UN since very early and to develop their own institutional perspective for the country (Tilman 2015).

Despite great criticism regarding the constituent options made, especially within the academic community (Goldstone 2004; Ingram 2012; Devereux 2015, among others), national competition has indeed been channelled through the institutional design, taking it even further than what seemed to be originally foreseen, in an exercise of institutional flexibility (Reynolds, Reilly, and Ellis 2005, 2). We will illustrate this argument by tracing a brief analysis of the main institutional outcomes in Timor-Leste in three crucial moments: the election for the Constituent Assembly, the Constituent process and the subsequent government formation in 2007 within the internal crisis, somehow repeated in 2012 with a smaller impact.

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From the popular consultation to independence

The 1999 Popular Consultation, which formally led to independence, was carried by the United Nations Mission in East Timor (UNAMET) and deemed successful, with a strong popular participation (Luís 2015, 260). Turnout was 98,6% (446.953 voters) and 78,6% (344.580) voted in favour of independence (A/54/654 1999). According to the Paris Agreements (S/RES/1246 1999), previously entered into between Indonesia and Portugal, under UN facilitation, if independence was chosen, the UN would be granted the full authority over the territory, in order to make the transition. A UN peacekeeping mission was deployed, following also the violent outbreak shortly after the Popular Consultation, coming from the pro-Indonesian militias and army, which led to a wave of destruction.

The United Nations Mission in Timor-Leste (UNTAET) had a broad mandate, including “support capacity-building for self government”, “the development of local democratic institutions (...) and the transfer to these institutions of its administrative and public service functions” (S/RES/1272 1999, 8). Timor-Leste became a mini-state, ran by the UN. To balance this, the East Timor Transitional Administration (ETTA) was created, with arguable degrees of national participation (National Council Member 2015; Pessoa Pinto 2015).

Institutions for the newly born state

Institutionally speaking, at the time of the 1999 Popular Consultation there was a sense of unity in Timor-Leste (Carrascalão 2015). The long struggle for independence had allowed the Timorese to develop an idea of the institutions they would want for the country (Feijó 2014). This determination would eventually contrast with the broad UN presence, with a mandate comprising statebuilding.

Especially within Fretilin, one of the historical parties with an important role in independence and strongly organised, previous constitutional projects continued to adjust and develop (Reis 2015). Following its initial 1975 Constitution, when independence was declared, Fretilin held several conferences, still during the Resistance, where constitutional drafts were approved. Initially, Fretilin would opt for a presidential system for Timor-Leste, on the assumption that Xanana Gusmão could be the president, affiliated with Fretilin. In 2001 the presidential system was referred by the UNSG as “the current consensus” (S/2001/42 2001, 42). However, internal tensions started to emerge, mainly between Fretilin and Xanana Gusmão (Goldstone 2013, 213), with the UN playing a role, and Fretilin started to re-evaluate whether the presidential option would be the most adequate.

The Constituent Assembly and the Constitution

The building of the new liberal state followed under UNTAET (Luís 2015, 243), with a Constituent Assembly to be elected and draft a Constitution. The Constituent Assembly would be crucial and expected to “become the first legislature of the independent State” (S/2001/42 2001, 3), allowing the creation of legitimate national institutions (Reilly 2004, 2). This would meet both the UN and the Timorese leadership preferences, leaving aside other options of broader civil-society processes (Goldstone 2013, 89; Ingram 2012; Devereux 2015, 18–19).

UNTAET designed the electoral system for this election (UNTAET/REG/2001/2 2001). A proportional representative system was adopted, with 88 members. From these, 75 would be elected in a single national constituency, with no threshold, according to the largest remainder formula. The remaining 13 would be elected in single-member constituencies, one per district, in a simple majoritarian system. Candidates could run in party lists, being either party members or independent, but citizens could run independently - a provision that could allow Xanana Gusmão to compete (Senior UN Electoral Officer 2015), despite at the time not affiliated with any political party.

Elections had a very high turnout, with Fretilin achieving an absolute majority, with 55 mandates: 43 at the single national constituency and 12 of the 13 district members². Although district representatives were meant to ensure regional representation, majoritarian circles favoured the most influential party nationwide. This increased Fretilin’s position at the Assembly, despite seeming consensual that it would always be the most voted (Soares 2015; Senior UN Electoral Officer 2015).

² With an exception for Oecusse, due to the 10 minutes late arrival of Fretilin’s candidate to the registration, which generated much debate in the Electoral Commission.

The Constitution approval required the vote of 60 out of its 88 members (UNTAET/REG/2001/2 2001) and Fretilin would still have to negotiate with smaller parties (Guterres 2013), which was seen positive towards social consensus.

Institutional outcomes of the Constituent process

There was a broad agreement regarding the main institutional options for the country and a strong will to take part in it (Luís 2013). Five constitutional drafts were submitted before the Constituent Assembly, although four proposed a semi-presidential system (Feijó 2014, 112). The constitutional discussion was not only centred around institutional aspects, as elements of a more symbolic nature also raised important discussions, namely the flag, the restoration (or not) of independence or the Falintil/(F)FDTL denomination (Lu-Olo 2015), among others.

There was much discussion around the government system and particularly regarding the scope of presidential powers. The Constitution adopted a semi-presidential system, with universal elections for the Parliament and the President of the Republic, both mandates with the same duration, and a proportional representative electoral system for the Parliament, with D'Hondt method (CRDTL 2002). A single national constituency was adopted, thus leaving aside the district representatives previously set by UNTAET (that seemed to favour Fretilin). The Government would be formed according to an alternative clause, with the President of the Republic being decisive (Vasconcelos 2011, 349) in choosing either the most voted party or the majoritarian coalition of parties. This alternative clause was further used in 2007 (and 2012), being at the centre of a very controversial presidential decision, especially for Fretilin supporters, with great social and political impact in the country's stability.

The Constituent Process – critical appraisal

The constituent process in Timor-Leste is often labelled by the literature as non-democratic, arguing it was “elite driven and dominated by one winning faction” (Garrison 2005, 19) or specifically driven group (Wallis 2014, 92), “with a like-minded minor party” (Ingram 2012, 15), among others. This is becoming, however, a narrow perspective, disregarding “the reflections on key issues of power and governance” (Devereux 2015, 6) both at the civil society and within the Constituent Assembly. The Constitution was approved with 72 votes in favour (82%), 14 against (16%), one abstention and one absence (Devereux 2015, 3), clearly exceeding Fretilin's 55 members (62,5%). Furthermore, all members of the Constituent Assembly interviewed considered it an open, democratic and public process, described as fair and inclusive, with Fretilin showing a great openness (Guterres 2013); this was constant for members coming both from smaller parties (Tilman 2015; Guterres 2013; Carrascalão 2015), from Fretilin (Lu-Olo 2015; José Reis 2015), even if no longer close to it (Soares 2015), being also the perception of non Constituent Members not affiliated to Fretilin (Ramos Horta 2015).

The Constitutional Consultations, a UN held popular consultation process (Mendes 2005; Adão 2009; Luís 2015), could have led to a broader social representation of another kind (Ingram 2012, 14-15), despite some technical aspects of the debate (Ramos Horta 2015) and the fact that both the UN and the Timorese ruling elite would favour a rapid transition (Goldstone 2004, 88; Devereux 2015, 3). However, the UN failed to engage Fretilin in this (Soares 2015) and Fretilin perceived it as UN-owned, aimed at antagonising the most voted party (Soares 2015) and neglecting the powers of the popular elected body (Lu-Olo 2015). The UN action would possibly overlap the elected national institution (Tilman 2015; Pessoa 2015; Soares 2015; Lu-Olo 2015; Carrascalão 2015) and its popular legitimacy, meeting some resistance regarding the UN presence in the Constituent Assembly, with the Timorese seeking to leave the UN aside since very early (Tilman 2015).

This could be the product of the much-criticised UN top-down approach (Blanco 2010, 185; Brown 2009; Richmond and Franks 2008, 4) and lack of social engagement, or the UN actually confused the lack of political entities with a lack of politics and correspondent institutional options (Ingram 2012, 6), in a period when the Timorese were eager for national-ownership (Soares 2015), and the UN itself set a 90-day period to adopt a constitution (UNTAET/REG/2001/2 2001). Popular Consultations were not welcomed by the Constituent Assembly (Adão 2009, 154), having a narrow impact in the institutional debate taking place, though fostering popular discussion (Mendes 2005; Luís 2015, 254).

The Constitution was finally adopted on 22 March 2002, presidential elections held on 14 April 2002 (UNTAET Directive 2002/1 2002) and Xanana Gusmão, who constituted itself for the first time as an institutional political actor, became the first elected President of Timor-Leste. Independence was formally declared on 20 May 2002. The Constitution entered into force, the Constituent Assembly transformed itself in the first National Parliament and the first elected President of the Republic took office. The state would have its *de jure* elected institutions in this very precise timeframe (Goldstone 2004, 88). This institutional design would be put to a strong test in 2007, within a climate of widespread instability and internal crisis, with presidential powers and the government formation clause at the centre of a highly sensitive decision making process, with great impact at the internal level.

The internal crisis and the 2007 electoral cycle

In 2006-2007 there was a period of widespread instability, coming from a group of army petitioners, which soon widespread to the whole country. From an institutional perspective, this took place as the 2007 electoral cycle was approaching. As the 2001 and 2002 elections had followed UNTAET's Regulations, a national legal framework for the upcoming electoral cycle was needed. Presidential elections took place on 9 March and 9 April 2007 (two rounds) and Ramos Horta was elected President. Parliamentary elections were held on 30 June, with Fretilin winning the majority of votes and seats but not securing an absolute majority. There was a period of great institutional uncertainty, as if Fretilin would be invited to form a government it might not be able to secure a sufficient majority to, for instance, approve the state budget in the parliament.

There were talks promoted by President José Ramos Horta, aiming at a consensus between parties to secure a stable government (Ramos Horta 2015; José Reis 2015). Although the path is still controversial (Carrascalão 2015), with Fretilin claiming that no further answer was given by Xanana Gusmão to its proposal for "a government of great inclusion" (José Reis 2015), Ramos Horta, argues he "tried everything" and no agreement or support for a Fretilin government was possible (Ramos Horta 2015), which eventually led to a government formed by Xanana Gusmão and the coalition of parties supporting it. There was protest and social unrest, mainly from Fretilin supporters, which never accepted this outcome as legitimate (Leach 2009). They argued this violated the Constitution, as the "coalition" would have to be formed prior to the election – and not after, as it was the case.

Although the government formation clause was drafted in the Constituent Assembly with a Fretilin majority, it was not easy to trace its origin, as it was not in the initial draft proposals. It was introduced during the Constituent debate, allegedly to allow for more flexibility on government formation (Tilman 2015) and the inclusion of smaller parties in the government (Pessoa Pinto 2015). Its concrete application in 2007 generated even considerable surprise (Carrascalão 2015). Many Fretilin supporters argue, nevertheless, this clause would only be applicable to pre-electoral coalitions, with a strong debate around the constitutionality of the government formation. Nevertheless, and despite alleging the decision was unconstitutional, this was never submitted before the Court of Appeal, the relevant institution to address it.

In the 2012 parliamentary elections, Fretilin was not the most voted party for the first time, but rather Xanana's CNRT. From the 23 competing parties, only four passed the 3% threshold. CNRT was invited to form a government, which it did, including all other political parties in the parliament, except Fretilin. Again, there was social unrest, especially in Dili, but much less than in 2007. However, and despite some belief of fraud and manipulation regarding the final results (Tilman 2015), reinforced by the political proximity of the General-Director of STAE to the Prime Minister and the government (Jornal Independente 2012), aided by controversy regarding STAE's refusal to provide CNE with the official forms with the results and to allow a recounting (EUEOM 2012, 10), the electoral results were not formally disputed (EUEOM 2012). Xanana was appointed by the President to form a government, supported by a coalition with parliamentary majority. This decision, following somehow the presidential praxis initiated in 2007 (Luís 2015, 258), seemed to have been more accepted by the population, with much less controversy surrounding it (EUEOM 2012, 3).

Scope of presidential powers

Some authors argue Timorese presidential powers were limited, even comparing to other CPLP constitutions (Ingram 2012, 18), increasing the powers of a Parliament expected to be led by Fretilin. However, the Timorese institutional power sharing is seen as positive by many key-actors, as it allows a balanced division of political intervention and preserves the image of the President (Ramos Horta 2015). The institutional outcome is broadly seen as adequate for the country (Ramos Horta 2015; Guterres 2013) and it has not been changed until the present, nor is it under debate (Babo Soares 2015).

Finally, when carrying fieldwork for the present article, both the government system and the scope of the presidential powers seemed to be highly accepted and consensual. If institutions need to be both strong, but flexible to react to changing circumstances (Reynolds, Reilly, and Ellis 2005, 2) and allow multiple decision processes, even if generating tensions (Reilly 2014, 139), this seems to have been the Timorese case. The initial institutional design and intent seemed to have adapted to subsequent power relations with consequential decisions widely accepted popularly, in a proof of social legitimacy (Chandler 2006, 9).

Conclusion

After a long Timorese struggle for independence, culminating with the 1999 Popular Consultation, internal consensus started to vanish. In the post-conflict scenario a power struggle developed between two very powerful actors, Xanana Gusmão and Fretilin (Goldstone 2013, 213), in which the UN is seen as having played a role. Independence would mean canvassing state institutions, embracing sensitive political options in a specific timeframe (Goldstone 2004, 89). There was a very organised political actor, Fretilin, with cadres also coming from the diaspora, with a clear institutional perspective. The UN presence, through a wide mission, would intertwine, at times colliding, with the national dynamics on institution building. Having drafted the electoral system for the Constituent Assembly, and started a popular constitutional consultation process, the UN was since very early put aside in this debate. In the constituent process Fretilin was the most represented, with smaller parties also presenting their institutional views. Negotiation was inevitable and the process was consensually deemed as open, participatory, transparent and democratic.

Despite potential disagreement with Fretilin options, Xanana Gusmão did not constitute himself as an institutional political actor until the 2002 presidential elections and became the President of the Republic. On 2006-2007 a new crisis emerged, and institutions became the conflict arena. Following the 2007 elections and after political uncertainty and negotiations, the President of the Republic was crucial using the power to appoint a prime minister to form a government. This would be formed by Xanana Gusmão, the one to secure a majoritarian coalition with three other parties, while the most voted party, Fretilin, would not take part. This led to social unrest, especially among Fretilin supporters, arguing this use of presidential powers would be against the Constitution. Despite the widespread controversy, this was never submitted before the Court of Appeal. In 2012 Xanana was again invited to form a government, supported by a majoritarian coalition and controversy was much smaller. There seems to exist a consensus nowadays among the Timorese regarding the adequacy of these institutions to Timor-Leste and its social and political reality. None of the institutional options made in 2001 have been amended until today nor this seems to be at stake. There is a generalised sense of adequacy of the present institutional design, very likely due to the checks and balances and the flexibility it allows for.

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