

# Overview of the Constitution-Making Process in Timor-Leste

From September 2001 until March 2002, an elected Constituent Assembly deliberated on a Constitution for what was to become the Democratic Republic of Timor-Leste. At the time of its functioning, Timor was being governed by the United Nations Transitional Administration in East Timor (UNTAET) pursuant to a Security Council mandate.<sup>1</sup> The United Nations' assumption of power followed an international military intervention to restore peace and security in Timor. It was necessitated by the widespread atrocities that occurred before and after the Popular Consultation of August 1999, in which an overwhelming majority of Timorese voted for independence from Indonesia. By the time the constitutional process was taking place, Timor was a post-conflict country in two senses. Firstly, it was recovering from the immediate events of 1999. Secondly, in a longer-term sense, it was bearing the scars of an ongoing resistance against Indonesian control since 1975 and a civil war in 1974–75 after the withdrawal of the Portuguese colonial powers.<sup>2</sup> Finalisation of a Constitution was viewed as a vital component in order for power to be transferred from the United Nations to Timorese authorities. It was also a process anticipated by Timorese political groupings during the Resistance as a means of delivering the fruits of the struggle for independence. The final text came into force on 20 May 2002, the date which is termed the 'restoration of independence' in Timor-Leste.<sup>3</sup> Incorporating the base rules governing the exercise of power in Timor, the Constitution entrenched within it a wide range of human rights protections.

## Deciding on the shape of the constitutional process

The lead-up to the Assembly reflected both UN and Timorese political leadership imperatives.

For the UN, the drafting and adoption of a Constitution was regarded as a key milestone on the path to Timor-Leste's independence and the transfer of power

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1 SC Resolution 1272 (1999), 4057th meeting, UN Doc S/RES/1272 (25 October 1999), established the United Nations Transitional Administration in East Timor (UNTAET).

2 The history of Timor as a former colony of Portugal from the sixteenth century, the civil war in Timor (1974–1975), and Indonesia's invasion and consolidation of control is well documented in Chapter 3 of the report of the *Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste* (CAVR) available online at [www.cavr-timorleste.org/en/chegaReport.htm](http://www.cavr-timorleste.org/en/chegaReport.htm) (accessed September 2014).

3 The language of the 'restoration of independence' recognises the Unilateral Declaration of Independence by FRETILIN on 28 November 1975, shortly before the Indonesian invasion.

from the UN to the new State's authorities. The Assistant Secretary-General for Peacekeeping, Hedi Annabi, listed this as one of the key benchmarks for the political transition in April 2000, noting that consultations on the type of process to be undertaken were ongoing.<sup>4</sup> As early as May 2000, the Director of UNTAET's Political Affairs Department, Peter Galbraith, was already speaking of a specific model for the process, namely having an elected Constituent Assembly to draft and adopt a Constitution.<sup>5</sup> The Special Representative of the Secretary-General for East Timor (SRSG) and Transitional Administrator, Sergio Vieira de Mello, was less directive in his approach. In August 2000, the SRSG referred to two models for the constitutional process.<sup>6</sup> The first involved an (appointed) Constitutional Commission preparing a draft Constitution after carrying out a constitutional dialogue with the community. The provisional Constitution would be subject to a referendum at the same time as elections for a Constituent Assembly, a body which would be tasked with finalising the Constitution.<sup>7</sup> The second alternative mooted was for an elected Constituent Assembly to itself draft the Constitution. The election of the Constituent Assembly would take place after a broad-based constitutional debate. Consideration of other appropriate models was also encouraged.<sup>8</sup>

This forum for Vieira de Mello's August speech was the National Congress of the National Council for Timorese Resistance (CNRT), an umbrella group of most major political parties, formed in 1998 to bring together parties in the fight for independence.<sup>9</sup> Following Indonesia's withdrawal and the establishment of UNTAET, it became the most powerful political grouping in Timor. Its President was Xanana Gusmão, the charismatic leader of the Resistance, who went on to be later elected Timor-Leste's President, and then Prime Minister. The tenor of the SRSG's prepared remarks at this Congress showed a preference for the first, more expansive model, though within a month, the tide of UN thinking had turned back to the 'one-stop Constituent Assembly' model favoured by

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4 Verbatim Record of the 4133rd meeting, UN SCOR, *The situation in East Timor*, UN Doc S/PV.4133 (27 April 2000) 4. Assisting the East Timorese to develop a Constitution was foreshadowed as one of the functions for a UN Administration in the report to the Security Council leading up to the creation of UNTAET: See *Report of the Secretary-General on the Situation in East Timor*, UN Doc S/1999/1024 (4 October 1999), para 28.

5 Speech of Peter Galbraith, Director of UNTAET's Political, Constitutional and Electoral Affairs Department ('Political Affairs Department') at the Tibar meeting of the CNRT, quoted in L Aucoin and M Brandt, 'East Timor's Constitutional Passage to Independence', in USIP (LE Miller (ed.)), *Framing the State in Times of Transition: Case Studies in Constitution Making* (USIP, 2010) 245, 251.

6 Speech of Sergio Vieira de Mello, SRSG, to the CNRT Congress, 21 August 2000, as annexed to the UNTAET Daily Press Release, 21 August 2000, available online at [www.un.org/en/peacekeeping/missions/past/etimor/DB/DB210800.HTM](http://www.un.org/en/peacekeeping/missions/past/etimor/DB/DB210800.HTM) (accessed September 2014).

7 Ibid para 16.

8 Ibid para 17.

9 The CNRT (whose Portuguese full title was *Conselho Nacional de Resistência Timorense*) was the successor organisation to the *Conselho Nacional de Resistência Maubere* (National Council of Maubere Resistance (CNRM)), formed in 1987.

the UNTAET Political Affairs Department.<sup>10</sup> Galbraith argued that an elected Constituent Assembly would have greater legitimacy in making decisions about a Constitution since ‘all constitutional decisions will be derivative of a founding democratic act, the election of the Constituent Assembly’.<sup>11</sup> Some commentators have referred to underlying pressure from the international community to ‘complete a costly mission as swiftly as possible’ as an equally strong motivating force.<sup>12</sup>

East Timorese opinion was somewhat divided, though the dominant political elite increasingly coalesced in support of a rapid transition to independence. In the aftermath of the Popular Consultation of 1999, some Timorese leaders had considered a five-year transition to independence ideal, whereas others favoured a more abbreviated two- to three-year period.<sup>13</sup> Due to increasing tension between UNTAET and Timorese counterparts, a broadening consensus developed in favour of the quicker transition.<sup>14</sup> In August 2000, the National Congress of the CNRT recommended a two-stage process: with an expert commission engaging in full public consultation; and drafting a Constitution which would be considered and adopted by an elected Constituent Assembly.<sup>15</sup> By December 2000, Gusmão, on behalf of the CNRT, tabled a political timetable to hasten the movement towards independence in the National Council. The National Council was a body created by UNTAET to undertake the function of legislative review. Composed of 36 Timorese members appointed by the UN Transitional Administrator, it was to be the ‘forum for all legislative matters related to the exercise of the legislative authority of the Transitional Administrator’.<sup>16</sup> Amongst its members were representatives of the CNRT, other political parties, the Catholic, Muslim, and Protestant faiths, and civil society together with a representative from each of the 13 Districts and three UNTAET staff. The CNRT timetable foreshadowed an extremely rapid process – with the election of a Constituent Assembly on 30 August 2001 (the anniversary of the Popular Consultation), followed by the Assembly having 90 days to deliberate on a Constitution. The anticipated adoption date for the Constitution was 15 December 2001, after which the Constituent Assembly would be converted into

10 A Goldstone, ‘Building a State and “State-building”: East Timor and the UN, 1999–2012’, in M Berdal and D Zaum, *Political Economy of State Building: Power after Peace* (Routledge, 2013) 209, 217–218; J Wallis, *Constitution Making during State Building* (Cambridge University Press, 2014) 83. See too the remarks of the SRSG to the Security Council during discussion of *The situation in East Timor*, Verbatim Record of the 4203rd meeting, UN SCOR, UN Doc S/PV.4203 (29 September 2000) 5.

11 Peter Galbraith, Cabinet Member for Political Affairs and the Timor Sea, Testimony to the National Council, 20 January 2001, copy on file with the author.

12 S Ingram, ‘Building the wrong peace: Reviewing the United Nations Transitional Administration in East Timor (UNTAET) through a political settlement lens’ (2012) 64(1) *Political Science* 3, 14.

13 A Goldstone, ‘UNTAET with Hindsight: The Peculiarities of Politics in an Incomplete State’ (2004) 10(1) *Global Governance* 83, 88.

14 Ibid.

15 CNRT, *Outcomes of the CNRT National Congress*, 21–30 August 2000, Dili, Commission V, 27–28.

16 UNTAET Regulation No 2000/24 on the Establishment of a National Council, s 1.1.

a National Parliament. Implicit in this proposal was that the Constitution would be adopted by a vote of the Assembly, rather than a referendum. Prior to the elections for the Assembly, there was to be a breathtaking array of activities: the promulgation of an electoral law, the registration of political parties, the signing of a Pact for National Unity, civic and voter education, and community consultation on the Constitution.<sup>17</sup> Whilst there was some dissension within the National Council concerning Gusmão's failure to consult prior to tabling this timetable, the timetable was adopted in principle on 12 December 2000, reportedly following Xanana Gusmão's threat to resign.<sup>18</sup>

The National Council convened a public hearing on the proposed timetable from 14–24 January 2001 in Dili. During this hearing, several prominent human rights NGOs and some political parties argued that the timetable was too limited. Civil society organisations were in the lead in Timor in arguing for a participatory process of constitution-making and had sought input from experts from Thailand and South Africa, in particular, concerning comparative models. Yayasan HAK, one of the leading human rights NGOs in Timor, for instance, suggested having a Constitutional Commission established to consult widely and develop a draft Constitution that would then be considered by an elected Constituent Assembly. This was similar to the first model advanced by Vieira de Mello and was the model incorporated in a draft Regulation proposed by the HAK representative (see further below). The Catholic Church mooted the adoption of a transitional interim constitution. The National Council was not moved. On 23 February 2001, it endorsed the draft Regulation prepared by UNTAET based upon the original CNRT schedule.<sup>19</sup>

This did not totally quell debate. In a further push for a more consultative process, an NGO representative on the National Council, Aniceto Guterres, put forward a draft Regulation which would have established an independent Constitutional Commission.<sup>20</sup> Under the initiative, commissioners were to be inclusive in the sense of having professionals, representatives of youth, women, the church and civil society. The commission was to work for 12 months across the nation, with separate phases including public information, debate, consultation, reporting, and drafting. In this last phase, the commission was seen

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17 For details of the CNRT Proposed Political Timetable for Independence, see Appendix 1, of P Walsh, *East Timor's political parties and groupings: Briefing Notes*, ACFOA Development Issues 9 (ACFOA, 2001) 30.

18 R Garrison, *The Role of Constitution-Building Processes in Democratisation: Case Study: East Timor* (IDEA, 2005) 11–12. Wallis reports that Gusmão relented (from his threat to resign) after the National Council agreed to hold public hearings to generate recommendations: Wallis, above n 10, 81.

19 Goldstone, 'UNTAET with Hindsight', above n 13, 88, has noted there were 'justified suspicions that it [the National Council approval] was in fact shaped by UN imperatives'.

20 Aucoin and Brandt, above n 5, 258–259; M Brandt, *Constitutional Assistance in Post-Conflict Countries: The UN, Experience: Cambodia, East Timor and Afghanistan* (UNDP, 2005) 14.

as assisting the Constituent Assembly with the drafting of the Constitution.<sup>21</sup> This draft Regulation sparked a heated debate. Support was forthcoming from powerful figures like Gusmão (who had become a convert to the cause of greater community consultation), but vigorous opposition emanated from the UNTAET Political Affairs Department and FRETILIN members of the National Council.<sup>22</sup> FRETILIN (which was to become the dominant political party in the Assembly) fundamentally disagreed with this approach – preferring to place primary reliance on the electoral process as the means of public consultation. Eventually the proposal was rejected by the National Council, at which point Gusmão resigned from its ranks.

After the CNRT schedule and the UNTAET Regulation were adopted, the NGO Forum took their concerns direct to the Security Council. In an open letter sent in March 2001, the NGO Forum expressed fears that a three-month Constituent Assembly would mean virtually no additional consultation with the community. The Assembly would be under ‘enormous pressure to deliver the document that will declare the independence of East Timor’<sup>23</sup> and Timorese would be robbed of ‘their right to contribute to the future of their country and ... alienate[d] ... from the very document that should voice their aspirations’. The Forum urged that any Constitution adopted under this process be seen as temporary, an ‘Interim Constitution, allowing more time for broad-based input and consultation’.<sup>24</sup>

The Regulation governing the elections for the Constituent Assembly was approved by the National Council and Cabinet of the Transitional Government and promulgated by the SRSG. Despite the National Council’s rejection of the Constitutional Commission Regulation,<sup>25</sup> a more limited form of Constitutional Commission was established by virtue of a Directive promulgated by the SRSG.<sup>26</sup>

## Regulation 2001/2 governing the election of the Constituent Assembly

Under UNTAET Regulation 2001/2 on the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor of 16 March 2001, human rights were expressed to be one of the primary purposes for drafting a Constitution. Section 1.1 stated:

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21 Details of this proposal are outlined in Aucoin and Brandt, above n 5, 258–260, and Brandt, above n 20, 16.

22 Aucoin and Brandt, above n 5, 259–260.

23 NGO Forum, Letter to members of the Security Council, 17 March 2001, available online at [www.etan.org/news/2001a/03ngoconst.htm](http://www.etan.org/news/2001a/03ngoconst.htm) (accessed September 2014).

24 Ibid.

25 Goldstone, ‘UNTAET with Hindsight’, above n 13, 94. Goldstone recalls that the National Council accepted the argument advanced particularly by FRETILIN that the Constitutional Commissions were ‘an attempt by UNTAET to undermine the autonomy of the Constituent Assembly’: 94.

26 UNTAET Directive 2001/3 on the Establishment of Constitutional Commissions for East Timor.

In order to implement the decision of the people of East Timor in the popular consultation of 30 August 1999 and so as to protect the inalienable human rights of the people of East Timor including freedom of conscience, freedom of expression, freedom of association and freedom from all forms of discrimination, there shall be a Constituent Assembly to prepare a Constitution for an independent and democratic East Timor.

The Assembly was to consist of 88 members: 13 District representatives voted for directly through a 'first past the post' system and 75 national representatives voted for on the basis of proportional representation (ss 3, 36 and 37). Sixty members needed to vote in favour of the Constitution for its adoption (s 2.2). A 90-day period was permitted for deliberations (s 2.3). The Regulation also stipulated that the Assembly was to 'give due consideration' to the views expressed during any Constitutional Commissions (s 2.4). At the same time as drafting the Constitution, the Assembly was charged with approving legislation submitted to it by the Transitional Administrator (s 2.5).

One of the more contested topics discussed was a proposal to embed a quota for female candidates in the electoral law. REDE Feto Timor Lorosae, an umbrella group of 16 women's organisations, proposed that at least 30 per cent of the candidates of political parties be women, and further that they be placed in winnable positions through being named as every third candidate.<sup>27</sup> Although the National Council originally agreed in principle to the inclusion of such a quota, opposition came from both segments of the UN (in particular the UN Electoral Assistance Division, and the Political Affairs Division), political parties and some development partners.<sup>28</sup> In the final form of the Regulation adopted by the National Council, no quota was included. The push for women's representation did, however, result in increased funding for the training of potential female candidates, and the introduction of incentive payments – with parties that included at least 30 per cent women candidates being given extra airtime on UNTAET-run radio and television.<sup>29</sup>

The election for the Constituent Assembly was held on 30 August 2001. The date chosen was hugely symbolic, being the second anniversary of the Popular Consultation in which 78.5 per cent of the population of Timor voted for independence vis-à-vis Indonesia. On election day, there was a turnout of more than 90 per cent.<sup>30</sup> Sixteen political parties participated in the election, with

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27 M Pires, 'East Timor and the Debate on Quotas', Regional Workshop on the Implementation of Quotas: Asian Experiences, Jakarta, September 2002, 2.

28 Ibid 3.

29 Ibid 4.

30 A voter turnout of 91.3 per cent was quoted in the UNTAET Daily Briefing, 5 September 2001, available online at [www.un.org/en/peacekeeping/missions/past/etimor/DB/db050901.htm](http://www.un.org/en/peacekeeping/missions/past/etimor/DB/db050901.htm) (accessed September 2014).

five candidates running as independents. Twelve of the 16 parties garnered sufficient votes to be represented in the national seats. Four parties accounted for over 82 per cent of the vote: FRETILIN (57.37), Democratic Party/PD (8.72), Social Democratic Party/PSD (8.18) and Social Democratic Association of Timor/ASDT (7.84).<sup>31</sup> Twenty-four women (27 per cent) were elected to the Assembly.<sup>32</sup> With FRETILIN also amassing 12 of the 13 District seats, its members constituted an overwhelming majority of the Constituent Assembly – some 55 of the 88 members.

## Community views expressed prior to the Assembly

Whilst the Constituent Assembly began sitting in September 2001, the constitutional dialogue within Timor started much earlier. One could look, for instance, at the discussions leading up to the adoption of draft texts by political parties: for FRETILIN, culminating in the 1998 adoption of a draft Constitution in Melbourne (Australia); for PSD, a conference in Portugal leading to the adoption of a Constitution prepared by Professor Miranda. The fruits of these discussions were reflected in the draft texts put forward in the early stages of the Assembly process. A total of five parties put forward draft texts for the Constitution, with the FRETILIN text often adopted as the base text.

Less well reflected in the Constituent Assembly process were the dialogues within Timor which had taken place in the immediate lead-up to the Assembly process. Two deserve particular attention: the UNTAET-organised Constitutional Commission process and the parallel Yayasan HAK/Fokupers consultation (an NGO initiative).

### (UNTAET) Constitutional Commission process

Prior to the elections, UNTAET organised a two-month Constitutional Commission process to explain the constitutional process and gather information from the community as to its views on a future Constitution. Constitutional Commissions for each District were established by the SRSG on 30 March 2001 under UNTAET Directive 2001/3 on the Establishment of Constitutional Commissions for East Timor. Whilst members of the commissions were appointed by the Transitional Administrator, appointment was on the basis of

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31 Figures from the Independent Electoral Commission quoted in L de Sousa, 'Some Facts and Comments on the East Timor 2001 Constituent Assembly Election' (2001) *Lusotopie* 299 at 307.

32 UNTAET Daily Briefing, 6 September 2001, available online at [www.un.org/en/peacekeeping/missions/past/etimor/DB/db060901.htm](http://www.un.org/en/peacekeeping/missions/past/etimor/DB/db060901.htm) (accessed September 2014).

recommendations received from District Administrators acting in collaboration with the District Advisory Council.<sup>33</sup> Each District Administration submitted a list of 10 candidates to a selection panel. The selection panel consisted of representatives from REDE Feto Timor Lorosae (a network of women's rights organisations), the University of Dili, the Catholic Church, and a youth organisation Presidium Juventude. Candidates for the Constituent Assembly were prohibited from being Constitutional Commissioners.<sup>34</sup> The Constitutional Affairs Branch of the Department of Political Affairs, UNTAET, explained that the concept of the Constitutional Commissions arose because of a belief that it was 'essential that the future Constitution, reflecting the "basic laws of the nation", should incorporate the aspirations of the East Timorese people, what they themselves want and believe is right for East Timor'.<sup>35</sup> The process was not without controversy. The NGO Forum, for instance, refused to nominate persons to act as commissioners or even sit on the selection panel. It wrote to the Director of the Political Department of UNTAET objecting that the timeframe for the commissions was too short to permit meaningful consultations, that the process for nominations, training and guidance for commissioners was inadequate in the timeframe and finally that it was unclear how the commission intended to influence the work of the Assembly.<sup>36</sup>

Constitutional Commissions were required to carry out at least one public hearing in each of the sub-districts of each District, a total of 65 sub-districts.<sup>37</sup> The commissions were asked to consult with local leaders and other prominent persons, the Church, NGOs and community groups.<sup>38</sup> During the period June to July 2001, over 200 public hearings were organised, involving more than 38,000 people.<sup>39</sup>

Whilst this commission process was to be the most extensive consultation process undertaken, and the reports were formally handed over to the Assembly by the SRSG, the results were barely referred to by members of the Assembly. In the author's hearing, the reports of the Constitutional Commission were only referred to once during the debates of the Bill of Rights and thus had

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33 UNTAET Directive 2001/3, s 6.

34 Ibid s 6.4.

35 'A Report on the National Constitutional Consultation in East Timor, June–July 2001', (Report finalised and distributed by the Constitutional Affairs Branch, Department of Political Affairs, UNTAET), September 2001, copy on file with the author, Foreword. The Executive Summary of this report can be found at [www.un.org/peace/etimor/DB/db190901.htm](http://www.un.org/peace/etimor/DB/db190901.htm) (accessed September 2014).

36 Quoted in Brandt, above n 20, 14. Note that Adérito Soares (who was later to be a FRETILIN member of the Constituent Assembly and Chair of the Systematisation and Harmonisation Committee) was a co-signatory of this letter.

37 UNTAET Directive 2001/3, s 9.1.

38 'A Report on the National Constitutional Consultation', above n 35, Foreword.

39 Ibid.



very little tangible effect on the process.<sup>40</sup> Assembly members seem to have regarded the Constitutional Commission process as illegitimate and certainly not determinative, viewing the commission as an UNTAET creation, involving unelected personnel. The Constitutional Commissions were also criticised by civil society groups as operating for too short a time, with inadequate civics education, thereby denying the community the opportunity to provide meaningful input. The International Federation for East Timor, for instance, decried the inadequacy of the commissions having ‘only 45 days to educate a mostly illiterate public on complex constitutional issues and gather input’.<sup>41</sup> Notwithstanding the limitations of the process, it remains interesting to look at community expectations as expressed during these consultations.

The report of the Constitutional Commissions consisted of 13 individual District reports compiled in one document. Looking through these District reports, human rights shine out as a topic regarded as being of particular importance, with protection of most of the internationally recognised human rights being called for by communities. Particular stress was laid on rights connected with equality (equality before the law and equality of opportunity), but a wide range of rights cropped up in discussions. These included access to justice and fair trial rights, rights to life, privacy, education, health, family and an adequate standard of living. Freedoms mentioned included movement, expression, association and worship. Issues around land rights enjoyed some prominence alongside the need to protect the environment. More isolated references were made to the right to use any language as a means of communication, the right to enjoy a fair share of development, and the right to ‘achievement and sport’. Some participants mentioned the importance of prohibiting the death penalty.

Everyday concerns of life were apparent in the specificity with which rights were discussed – such as the right to lease land,<sup>42</sup> the extent of rights over ancestral lands and the need for resolution of land conflicts arising from post-1999 developments.<sup>43</sup> Price control of products to ensure livelihoods was also regarded as desirable, as was State control over Timor’s natural resources and the environment.<sup>44</sup> A concern with moral and social issues was also manifest. In the District of Aileu, for example, feedback included calls for a prohibition on abortion, polygamy or polyandry<sup>45</sup> (a topic raised repeatedly in other Districts);

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40 The one occasion on which the Constitutional Commission Report was referred to in the author’s hearing was in the discussion of s 32, with Jacob Xavier (PPT) making reference to the community’s desire for justice.

41 International Federation for East Timor, ‘Elections in the Context of Nation Building Preliminary Report’, Press Release distributed at a press conference at Yayasan HAK, Dili, 3 September 2001; quoted in Brandt, above n 20, 13.

42 ‘A Report on the National Constitutional Consultation’, above n 35, 23 (Aileu District).

43 Ibid 37–38 (Ainaro District).

44 Ibid 93 (Dili District).

45 Ibid 19–20.

narcotics (including production of morphine), pornography and gambling.<sup>46</sup> In Bobonaro, the dowry system and marriage rights each provoked particular discussion.<sup>47</sup> Issues of religion and culture enjoyed particular prominence. Differing views were expressed as to whether to be open to all religions or recognise Catholicism as the State religion. Some concern was evidenced in several Districts with protecting Timorese culture – both minority cultures within Timor<sup>48</sup> and protection of Timorese culture from foreign influence.<sup>49</sup> Those who had suffered as a result of the struggle for independence – in particular orphaned children, widows, war veterans – were identified as deserving of particular assistance in Ermera.<sup>50</sup> Reference was also made to citizens' duty to help defend the country when under attack.<sup>51</sup> The situation of women, and domestic violence in particular, was raised most explicitly in Oecussi, with calls for the Constitution to outlaw violence against women.<sup>52</sup> Reflecting previous and ongoing divisions within society, the Oecussi consultation report also included the view that all Timorese should enjoy equal rights, and rights of persons should not be limited, even if they were ex-militia or pro-autonomy or former criminals.<sup>53</sup>

## Yayasan HAK/Fokupers consultation

Yayasan HAK (the Law, Human Rights and Justice Foundation) and Fokupers (the Communication Forum for East Timor Women), two of the leading human rights organisations in Timor, organised a parallel consultation with communities across East Timor during the period March–July 2001. Dialogues were held in the 13 Districts, involving some 1,267 people. Invitations were sent to religious and community leaders, political organisations, organisations representing women and youth, traditional leaders and other groups. Of the total number of persons participating, 200 (15.78 per cent) were described as coming from 'organisations including women's groups', 117 (9.23 per cent) 'young people', 88 (6.94 per cent) from political parties, 13 (1.02 per cent) from religious organisations and 839 (66.21 per cent) 'community leaders' and 'common people'.<sup>54</sup> Participants came from different employment backgrounds such as those involved with fishing, teachers, students, traders, journalists, government officials, members of the

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46 Ibid 20.

47 Ibid 67–70.

48 This matter was raised for instance in the Dili District: Ibid 98–99.

49 This matter was raised for instance in Covalima: Ibid 82.

50 Ibid 110–111.

51 Ibid.

52 Ibid 166–168.

53 Ibid 166.

54 Yayasan HAK, 'People's Opinion on Constitution: A Report of Dialogue on Constitution', September 2001, copy on file with the author, 2. Whilst the consultations were carried out by Yayasan HAK in conjunction with Fokupers, the report was published by Yayasan HAK and thus is cited accordingly.

military and police forces. The report also noted that participants ranged from the university educated to persons without formal education.<sup>55</sup> (The figures unfortunately, did not include a gender breakdown of participants.)

At the outset, some concerns were expressed by participants that there was little hope of their views being taken into account, given the lateness of the education and dialogue process. Paulina from Dili, for instance, wondered: 'What guarantee can you give that the ideas and opinions we offer here will make it into the constitution building process? Maybe this is just a formality and there is already a draft constitution prepared for debate.'<sup>56</sup> Similarly, Bonifacio Mondonça of Suai was quoted as saying: 'Who knows, with the time constraint, the political elite have prepared a draft constitution in their drawer to be adopted, and the whole process will become rubbish [wasted] and useless, just for formality.'<sup>57</sup>

The NGO report stated that this was a common view throughout the 13 Districts, being linked also to perceptions that communities had been left unaided during the 24 years of struggle against Indonesian occupation, whilst in 1999 decisions were taken by others (namely the UN). The report stated '[o]ften people were treated as if they know nothing, so everything has to be decided by others.'<sup>58</sup> Calls were made for a consultative process. Hostility was expressed to the adoption of draft texts made by one or two parties, or 'foreign made drafts'<sup>59</sup> and the involvement of foreigners in the drafting process.<sup>60</sup>

There was awareness of the role of the Constitution, and sometimes it was expressed in traditional terms:

People are aware that the Constitution is the fundamental law (*lei inan* or *lei boot*) or the source of all the laws that will be decided in East Timor. The participants of the dialogues realize that the Constitution is also a social contract among all East Timorese people on how the East Timorese people as a whole organize and govern themselves in their life as a nation. The determination and the will of the people to participate in the process are a very good starting point to lay the foundation for a democratic East Timor. It is regrettable if these hopes are broken, as it would not only mean that the aspirations of the people are negated, but it would remove the legitimacy of the Constitution itself. Respecting the will of the people and taking their voices into consideration is the

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55 Ibid.

56 Ibid 3.

57 Ibid 5.

58 Ibid 5.

59 Ibid 7.

60 Ibid.

only way to establish democracy, where people hold the sovereignty, although the legislative authority is in the hands of their representatives in the Constituent Assembly.<sup>61</sup>

Of course, this NGO consultation report was compiled partly as an advocacy document – in particular, to support the case for greater consultation with civil society. Notwithstanding this context, the document does provide a richness of views concerning the constitutional process and key human rights concerns.

The NGO report noted that the issue of human rights was brought up at every meeting, attributing this to the history of abuses experienced:

During the Portuguese colonization and later Indonesian occupation, people have suffered and have been subjected to various forms of human rights violation in many ways. Torture, restrictions on movement from one place to another, arbitrary arrests, unlawful imprisonment, extra-judicial executions, restrictions on freedom of expression and opinion, restriction on freedom of association, and denial of the right to health care.<sup>62</sup>

Support was evidenced for explicitly protecting human rights through adopting the articles of international human rights instruments or formulating new sections with the principles and spirit of those in the instruments, as well as by making sure that other sections of the Constitution would not be interpreted in such a way as to open the way for human rights violations. In the field of civil and political rights, the list comprised freedom from fear, freedom from violent actions and arbitrary action, State guarantees of everyone's freedom of belief, thought, speech, assembly, and the freedom to choose one's spouse. Perceptions of the fragility of the political situation were manifest in a certain wariness concerning political activities. Calls were made for the Constitution to stipulate criteria for the establishment of political parties and to limit 'certain political organizations that clearly pose a threat to the nation's life'.<sup>63</sup>

Economic, social and cultural rights also featured strongly. Calls were made for recognition of the right of all to participate in and enjoy the fruits of development. Practical questions were raised as to how people were to obtain the money to pay for electricity and water.<sup>64</sup> A comprehensive, non-discriminatory education system funded by the government was called for,<sup>65</sup> as well as specific programs to support the education of older persons who had not been able to

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61 Ibid 7.

62 Ibid 28.

63 Ibid 21.

64 Ibid 25.

65 Ibid 24.

access education during the Indonesian era.<sup>66</sup> Some participants specifically recalled revolutionary aspects of the struggle in advocating anti-colonialism, anti-feudalism, egalitarianism and women's participation.<sup>67</sup> One participant called for an education system based on that proposed and practised by Vicente Reis (Sahe);<sup>68</sup> that is, applying 'a participatory egalitarian method which values both teachers and students'.<sup>69</sup> Women's education was also identified as a particular need, given the high illiteracy rate among women. Support was also given to inclusion of a State obligation to protect elderly people, widows, orphans, and adults who had not had the opportunity to be educated as a result of poverty or those who had abandoned their studies due to their involvement in the struggle. The State needed to pay special attention to the former guerilla fighters who were now too old to earn their own living.<sup>70</sup> Health services were also commonly raised. Government was to be required to provide healthcare free of charge.<sup>71</sup> Social security was highlighted, particularly for the victims of war (as per the Constitutional Commission reports).<sup>72</sup> Land issues enjoyed particular prominence, with recognition of the need to unravel the different sources of land rights: from Portuguese colonial laws, Timorese customary laws and Indonesian laws – and the need to fulfil 'people's sense of justice'.<sup>73</sup> It was recognised that this would need considerable study. An immediate measure favoured, however, was to prohibit foreigners from owning land.<sup>74</sup>

The desirability of a strong emphasis on non-discrimination and equality in the Constitution was also clear. Women and men were to be treated equally under the Constitution.<sup>75</sup> The long period of colonialism and oppression was seen as having placed women in the lowest position in the society, such that the Constitution needed to ensure women were 'given the chance to develop themselves and to participate in all aspect[s] of the nation'.<sup>76</sup> Moises from Bazartete, for example, linked equality to the liberation struggle for Timor: 'The principle of our revolution is that women and men have an equal role in the struggle for independence. So, it is desirable that women can also enjoy the result of our struggle.'<sup>77</sup>

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66 Ibid 26.

67 Ibid 25.

68 Vicente Reis (Sahe) was one of the founders of FRETILIN and a resistance fighter against the Indonesian occupation. He was appointed the Minister for Labour and Social Welfare after the Unilateral Declaration of Independence of FRETILIN in 1975.

69 Yayasan HAK, 'People's Opinion on Constitution', above n 54, 25–26.

70 Ibid 29.

71 Ibid 26.

72 Ibid 23–24.

73 Ibid 23.

74 Ibid 24.

75 Ibid 29.

76 Ibid.

77 Ibid.

Issues of social relations (marriage, violence against women) were also raised prominently. The historical context in which polygamy took place was acknowledged (with guerilla fighters getting married again during the struggle). A system of monogamy was preferred (rather than women being treated as 'second wife' or 'third wife') with individuals having a free choice of spouses in the future.<sup>78</sup> The prevalence of violence against women was decried, with calls for the Constitution to mandate the State to take actions to effectively combat violence against women and to implement protection and rehabilitation measures for victims.<sup>79</sup> A reminder was given that many women had been victims of sexual violence during the Indonesian occupation, including some who were forced to become wives of the occupying forces.<sup>80</sup>

Copies of both the reports of the Constitutional Commission and the Yayasan HAK/Fokupers's consultation were handed over during the first week of the Assembly's sittings.

## The operation of the Constituent Assembly

Constituent Assembly members were sworn in on 15 September 2001, with the administration of an oath which included a commitment to uphold human rights.<sup>81</sup> The first substantive sitting day of the Assembly was 17 September, at which time the SRSB handed over the results of the Constitutional Commission to the Assembly. Under its original timetable, the Assembly was to have 90 days only to draft the Constitution. Notwithstanding this time pressure, 21 of the first 90 days were occupied with discussions on presiding officers and how the Assembly should proceed – in particular what rules of procedure should apply.<sup>82</sup> On the first day, a 'Bureau discussion' of the heads of the political parties, together with UNTAET's Political Affairs decided that the SRSB and Transitional Administrator, Sergio Vieira de Mello, should sit as the interim Speaker pending the election of the Assembly's office-holders. Francisco Guterres ('Lú Olo'), a FRETILIN member of Parliament with a distinguished record as a Falantil fighter, was elected unopposed as President of the Assembly. Two Vice-Presidents were elected: Francisco Xavier do Amaral (ASDT)<sup>83</sup> and

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78 Ibid 30.

79 Ibid.

80 Ibid.

81 *Report of the UN High Commissioner for Human Rights on the situation of human rights in East Timor*, UN Doc E/CN.4/2002/39 (1 March 2002) para 45.

82 Brandt, above n 20, 16.

83 Xavier do Amaral had been a founding member of FRETILIN, and was declared as the first President of Timor following FRETILIN's Unilateral Declaration of Independence in 1975.

Arlindo Marçal (PDC). A ‘political Secretariat’ was also elected, tasked with creating a record of proceedings each day. Those elected were all FRETILIN members: António Capeda, Judit Ximenes, and Maria Teresa Hono Lay Correia.

The first day of proceedings also witnessed some tussles, essentially aimed at establishing the Assembly’s power. Thus, for instance, Mari Alkatiri (FRETILIN, Chief Minister of the Second Transitional Government) queried the ceremony planned by the UN Secretariat for a handing over of keys by the *liurai* (traditional leaders) to the Assembly. Alkatiri’s objection centred on there being only one representative of power, namely the Assembly, a body that already included District representatives. There could not be parallel power structures, making any handover ceremony from traditional leaders to the Assembly inappropriate. The issue was not resolved, but left to the following day. The issue quietly lapsed with no such ceremony taking place. Debate also surrounded a UNDP-organised orientation seminar planned without the Assembly’s request. During the course of this debate, Alkatiri pointed out that he had not taken the oath in the swearing-in ceremony because he had not been consulted on its terms. The seminar was put off but proceeded as planned the next day following discussion with representatives of political parties.

In order to draft a set of internal rules of procedure, a seven-member multi-party committee was established.<sup>84</sup> Whilst there appears to have been some internal wrangling within this committee (with Lucia Lobato (PSD) expressing public dissatisfaction with the dominant role of Ana Pessoa (FRETILIN)), the committee presented a draft set of rules to the Assembly for its consideration. Debate continued on these rules from the second to the fourth weeks. At times, debate was quite heated. Minority parties (in particular PD, PSD and UDT) evinced frustration that their suggested amendments were not being given appropriate consideration. After reaching boiling point, closed door discussions took place which resulted in an improved atmosphere and greater consideration of amendments.

In the final Internal Rules and Procedure adopted, a nine-step process was agreed upon:

- (a) Presentation by Members or parliamentary party groups of proposals to systematise the constitutional text [which meant providing draft structures/outlines of the Constitution];
- (b) Designation of a committee to advise on the proposals of systematisation;

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<sup>84</sup> The committee consisted of Adérito Soares (FRETILIN), Lucia Lobato (PSD), Eusébio Guterres (PD), António Ximenes (PDC), Manuel Tilman (KOTA), Isabel Ferreira (UDT), and Ana Pessoa (FRETILIN).

- (c) Approval of the systematic structure of the Constitution and designation of thematic committees for the drafting of each title or chapter of the Constitution;
- (d) General as well as specific debate on each title or chapter of the Constitution based on the proposals presented to this end;
- (e) Establishment of a committee to harmonise the approved proposals and final drafting of the constitutional text;
- (f) Approval of the final [draft] text of the Constitution;
- (g) Following its approval, the final text shall be fully disseminated throughout all sectors of civil society, which shall be invited to make representations within a period of one week;
- (h) Analysis, discussion and debate on the comments received from the public;
- (i) Global and final approval of the Constitution.<sup>85</sup>

This procedure was generally adhered to, though each step did not take an equal amount of time. In reality, the Assembly considered the substance of the text in three major stages:

- (1) Discussions in the thematic committees during the period mid-October to early November 2001.
- (2) Plenary debate from mid December 2001 to late January 2002, culminating in a revised text which was adopted on 9 February 2002<sup>86</sup> and subsequently released for the purpose of the one-week consultation period commencing in late February.
- (3) A brief discussion in the Plenary of the Assembly in mid-March 2002 of the results of the one-week consultation leading to some amendments, with the approval of the final text and the signing ceremony on 22 March 2002.

In between each of these steps, the Systematisation and Harmonisation Committee was active in undertaking further deliberations and revisions of the text.

*Time period:* While the Regulation establishing the Assembly set a 90-day timeframe for the Assembly to produce a Constitution, it was also envisaged

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<sup>85</sup> Section 5(a)-(i) of the Internal Rules and Procedures of the Constituent Assembly, contemporary unofficial translation.

<sup>86</sup> This text was approved 65:0:13 (with 10 absent).



that the Assembly might seek and be granted such extensions of time as proved necessary for it to complete its task.<sup>87</sup> During the Assembly's operations, the impetus for keeping to a tight timeframe came very much from within the Assembly, particularly the President of the Assembly, Lú Olo, and the FRETILIN Bench. From the earliest stages of proceedings, questions were raised about the 90-day framework at various fora – including press conferences, workshops and in petitions to the Assembly. The suggestion made by Father José Antonio of the Catholic Church, and supported by Assembly Watch, was to regard any text produced as an interim text, with an independent commission to function in four–seven years to revise the Constitution.<sup>88</sup> Other calls were made for the Assembly to request an extension of its mandate. However, the official responses maintained the desirability of the existing framework. On 15 November 2001, Lú Olo, for instance, spoke at a press conference about this topic. The official press release records his view that '[t]he CA did not want to ask for extensions now, because having a deadline helped members to focus their energies on the task'. He also expressed confidence that the Assembly would meet its deadline 'because there was a lot of consensus among the members and good debate during the thematic committees' deliberations'.<sup>89</sup> It was not until 13 December 2001, a matter of days before the expiration of the initial 90-day period, that a vote was taken to extend the deliberations. The date chosen was 25 January 2002, bearing in mind the next discussion of the Security Council scheduled for late January. By 21 December, an element of caution had entered into the explanation of Lú Olo about the likelihood of meeting this deadline: 'It was not enough,' he said, 'simply to write the constitution and present it to the people, the CA needed to listen to the different institutions groups and institutions to get their input.'<sup>90</sup> That the Assembly would not complete its deliberations in January became increasingly apparent, and spurred an intervention from eight members of the US Congress expressing concern that 'external pressures' were forcing the Assembly to rush the process. They encouraged the Assembly to extend its sittings by two months.<sup>91</sup> On 21 January 2002, the Assembly resolved to extend the constitution writing period to March.<sup>92</sup>

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87 The Assembly encapsulated this understanding in s 6(1) of its Internal Rules and Procedures which provided that whilst the Assembly would use every effort to meet the three-month deadline, should this not be possible, it would propose to the Transitional Administrator an extension of time.

88 Assembly Watch submission (on Renetil letterhead), Letter to the President of the Constituent Assembly, 29 October 2001 [Tetum]. See too the submission of the NGO Working Group on the Constitution, 'Recommendations to the Constituent Assembly', undated but circa October 2001, also supporting adoption of an Interim Constitution.

89 Summary of the press conference included in the Constituent Assembly Press Release, 15 November 2001.

90 Summary of the press conference included in the Constituent Assembly Press Release, 21 December 2001.

91 Letter from eight Members of the US Congress (Kucinich, Lee, Smith, Weiner, Baldwin, Sanders, Evans and Farr) to the President of the Constituent Assembly, dated 10 January 2002.

92 The decision in January was to extend the Assembly until 9 March; however, this was extended subsequently to 22 March when it became apparent that further time was necessary.

*Voting methods:* UNTAET Regulation 2001/2 provided that the Constitution was to be adopted by an affirmative vote of 60 of the 88 Assembly members. This was interpreted as governing only the vote for the overall adoption of the Constitution. The Internal Rules and Procedures for the Assembly stated that voting on individual sections needed only a simple majority (of those present).<sup>93</sup> On the first day of proceedings, a decision was taken that votes during sessions should be open, rather than secret. Greater disagreement surrounded whether sections should be adopted by vote or by consensus. Minority parties were concerned in particular about the voting bloc of FRETILIN. Given FRETILIN's numbers in the Assembly, they would have a majority sufficient to pass individual sections, even if not sufficient numbers for the global vote on the Constitution. Clementino Amaral (KOTA), supported by Vicente Guterres (UDC/PDC) proposed a new section in the rules to recognise the Assembly's obligation to build consensus. A consensus-based model was portrayed as the Timorese way. Vote taking should only be regarded as a tool of last resort. The proposal was, however, rejected. Most who spoke against the proposal were from FRETILIN. They argued that voting was itself the proper methodology to determine if there was consensus.<sup>94</sup> Voting also had the advantage of offering a speedy and transparent form of decision making. During discussions on the rules, there was a reopening of whether vote taking should be secret or open (again against a background of potentially opening up spaces for more individual decision making rather than party voting). The open vote system was, however, retained.

## Substantive discussions of the Assembly

### The operation of the thematic committees: mid-October–early November 2001

Four thematic committees were established and given the following subject area mandates:

- Thematic Committee I: Duties, Rights and Freedoms; Defence and National Security (the primary committee for human rights issues)
- Thematic Committee II: State organisation; Organisation of Political Parties/ Systems
- Thematic Committee III: Economic, Social and Financial Organisation
- Thematic Committee IV: Fundamental Principles, Final and Transitional Arrangements, Amendments

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<sup>93</sup> Internal Rules and Procedures of the Constituent Assembly, s 57.

<sup>94</sup> Some FRETILIN members also spoke in favour of a consensus model.

Although the rules specified that thematic groups were to be composed of 20 members, the Assembly decided variations from this number were permissible provided the balance of parties was maintained. Thematic Committee I itself comprised 21 members (see Annex II for the full listing of members). Paulo Assis Belo (PD) was elected as President, with two FRETILIN members as Secretary (Adalgisa Soares Ximenes) and Rapporteur (Vicente Soares Faria). Thematic committees were originally given 10 days only to consider the subjects within their areas of competence, though most took longer.

Significant lobbying took place from NGOs to ensure that thematic committees held public hearings.<sup>95</sup> Article 29 of the Internal Rules and Procedures dealt with this subject, and as a result of a PD amendment, the Assembly endorsed the policy that thematic committees ‘shall hold public hearings for interested groups’, though the text of s 29(2) (which appeared to leave hearings to the discretion of committees) remained unaltered. A member of the Assembly’s Technical Committee reported his understanding that thematic committees would hold public hearings, but that committees would determine who was invited. All thematic committees did in fact hold public hearings, though at least one submission from Assembly Watch called upon the Assembly to augment these hearings with public hearings during the plenary debates.<sup>96</sup>

At the end of their deliberations, each thematic committee provided a report containing the draft text which they had adopted, together with a record of the votes for provisions and some detail concerning the methodology employed by the committee.

### Production of a draft text by the Systematisation and Harmonisation Committee

The four reports were then collated and analysed by the Systematisation and Harmonisation Committee with a view to creating a full streamlined text for the Plenary’s consideration. In addition to having meetings with the full membership of the committee over three days, the office holders of the committee met legal experts from Portugal, Mozambique and Cape Verde. As a result of these deliberations, both stylistic and substantive changes were made to the text. Some, but not all, were marked for further consideration by the Plenary of the Constituent Assembly. On 29 November 2001, the Systematisation and

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<sup>95</sup> Note that the NGO Working Group on the Constitution not only called for public hearings by each of the specialist committees, but had also advocated that the committees consider different models of responding to key issues. The Group recommended that committees hear from experts, other members of civil society and members of the public; that the records of the Constitutional Commissions be taken into account, and that there be public hearings of the Assembly itself: ‘Recommendations to the Constituent Assembly’, undated, but circa October 2001.

<sup>96</sup> Assembly Watch submission (on Renetil letterhead), Letter to the President of the Constituent Assembly, 29 October 2001 [Tetum].

Harmonisation Committee submitted a full draft text to the Plenary of the Assembly. The Plenary approved the Portuguese version of this draft on 30 November 2001. Public release of these documents was not automatic, but was the subject of some debate (see further under 'Contemporary access to draft texts'). The eventual decision of the Assembly was that the draft text would be made available to the public.

The Systematisation and Harmonisation Committee played a more major role in shaping the text than their title might suggest.<sup>97</sup> This committee comprised 42 members drawn from 12 political parties.<sup>98</sup> With 24 representatives, FRETILIN was numerically dominant. However, as this committee did not operate on a voting system, the impact of the FRETILIN bloc was not as significant as in other fora.<sup>99</sup> The office holders were to prove particularly influential: namely Adérito Soares (FRETILIN) as President/Chair; Vicente Guterres (UDC/PDC) as Secretary; and Manuel Tilman (KOTA) as Rapporteur. At several stages of the process, the committee made amendments to the text before its presentation to the Plenary. As noted above, this was apparent on the face of the draft text produced by the Systematisation and Harmonisation Committee based upon the thematic committee reports in late November 2001. It was equally evident when the text was revised following the plenary debates. At times, changes were put forward as suggestions, or as bolded text, with explanations provided for the suggested changes. At other times, amendments were simply integrated and justifications provided only if/when the change was queried by a member of the Assembly. As will be apparent in the section-by-section discussion, some of the changes related to streamlining the text or 'technical'/'stylistic' changes, while others were of a more substantive nature.

### The plenary debates: December 2001 – February 2002

The initial pace of the Plenary's deliberations on the draft sections was slow, with separate formal discussions and votes on the title of each section, and then each subsection in turn. Voting of those in favour, against and abstaining was undertaken separately, which led to an average of two sections being passed in a day. Within two weeks of the Assembly commencing discussion on the draft text, it was apparent that this pace would not allow the Assembly to complete its task within its agreed timeframe. At the same time as proposing to extend its deadline to 25 January 2001, the Assembly re-examined its methodology. Following a discussion on 14 December 2001, the President of the Assembly, Lú Olo, announced the streamlined process on 18 December. Henceforth members would vote only on the complete sections, unless there was a specific proposal

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97 The Portuguese title of the Committee was *Comissão de Sistematização e Harmonização*.

98 The Internal Rules and Procedure provided for a membership of 42: 24 members from Fretilin, four from PD, and three each from PSD and ASDT, and the heads of the parliamentary party groups: s 25.

99 See Annex II for the full listing of membership of the Systematisation and Harmonisation Committee.

concerning a subsection. Stricter time limits and restrictions to the numbers of speakers were also introduced, and the hours of deliberations of the Assembly were increased. Under this amended regime, the pace of decision making thereafter rapidly increased.

A solid FRETILIN bloc vote appeared in relation to many of the Assembly's votes. Indeed at times it appeared to observers that a significant number of FRETILIN members voted for or against a proposal based on the attitude demonstrated by the leadership such as Lú Olo (who as President of the Assembly sat facing the membership).<sup>100</sup> Since FRETILIN constituted the majority of the Assembly, such a bloc vote was able to hold sway. Some members of minority parties voiced frustration that their amendments were not genuinely considered (that voting patterns depended on who was proposing the amendment, rather than the merits of the amendment).<sup>101</sup> This led one commentator to conclude that 'ultimately the constitution was not the product of genuine legal and intellectual debate but merely the result of consensus among FRETILIN leaders'.<sup>102</sup> Certainly, in the plenary sessions of the Assembly, a litany of amendments proposed by minority parties failed. Amendments proposed by FRETILIN members or supported by a cross-party selection of members had a greater chance of success. A small number of FRETILIN members notably voiced contrary opinions and voted on an individual basis, siding with minority parties during discussions. On other occasions, hesitation about controversial matters, particularly those touching upon matters of culture or religion, led to significant numbers of members abstaining rather than rejecting particular amendments outright.

### Revision of the text for the public consultation process: early February 2002

Immediately following the end of the plenary debate of the whole draft Constitution, the Systematisation and Harmonisation Committee undertook further editing of the text to produce a revised text. According to its report, its methodology included discussions with the office holders of the four thematic committees, 'jurist members' of the Assembly and 'foreign jurists'. Amendments again included grammatical, stylistic and substantive changes.<sup>103</sup> The title of the

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100 Carter Center, *The East Timor Political and Election Observation Project: Final Project Report* (April 2004) 43. See also D Soares, 'The challenges of drafting a Constitution' in DB Soares, M Maley, J Fox and A Regan, *Elections and Constitution Making in East Timor* (ANU 2003) 25, 29.

101 Ibid. The same view was advanced subsequently in a personal communication between a Constituent Assembly member and the author.

102 Wallis, above n 10, 96. Wallis has quoted one source saying that no more than 12–14 members appeared really across the issues in the Assembly, with the remainder voting according to party lines, though this seems a particularly harsh judgment: 95.

103 The Systematisation and Harmonisation Committee described its methodology in a document entitled 'Report and Script', undated, but postdating its meeting on 19 January 2002. It was included as Annex VIII in a summary of the work of the Constituent Assembly in the Assembly records.

revised text produced indicated that it had been approved by the heads of the parliamentary party groups and the officials of the thematic committees, before being approved by the Plenary. On 9 February 2002, this text was approved as the text to be distributed for the purpose of the consultations.

### The one-week public consultation process in the week of 25 February 2002

Only a one-week period of community consultation had been provided for in the Assembly's Internal Rules and Procedures. Proposals for more lengthy engagement predated, and continued to be agitated for during, the Assembly's deliberations. Baltazar reports that many of the minority parties originally proposed one month's public consultation between March and early April 2002, but that FRETILIN and ASDT favoured a one-week consultation.<sup>104</sup> Similarly, when the methodology for the public consultation was debated, Baltazar reports that a 'scientific formula' for collecting data was proposed by PD, PSD and UDT, but was rejected again by FRETILIN and ASDT, who considered that briefing audiences and questions/answers would be sufficient.<sup>105</sup>

From the FRETILIN side of politics, an often-encountered attitude was that extensive consultation with the community was unnecessary. Assembly members, they argued, had been elected on the basis of their views and as such the Assembly could formulate the Constitution on the basis of that mandate. Stress was laid on the model of representative democracy. Even after the public consultation period was agreed upon, some hesitancy remained. At the press conference on 29 November 2001, for instance, Lú Olo was reported to have said that he was willing to allow organisations to come up with suggestions and ideas which might be incorporated at a later date, such as in one or two years' time. Agreeing that the period of the one-week consultation was short, Lú Olo nonetheless considered that the situation in East Timor was unique:

Other countries took years to complete their constitutional process. The fact that the information campaign would need to take place in the rainy season would also complicate the process, but Lú Olo said Constituent Assembly members would do their best to inform people in the Districts. During the information process members would be going out to the Districts to explain the constitution to the people. They would not only be giving out copies of the text, but would also be listening to the people's comments, so that if necessary changes can be made.<sup>106</sup>

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104 A Baltazar, 'An Overview of the Constitution Drafting Process in East Timor' (2004) *East Timor Law Journal* 9. The minority parties Baltazar lists as preferring the one-month consultation period were KOTA, PD, PSD, PST, UDC, and PDC.

105 Ibid.

106 Constituent Assembly Press Release, 6 December 2001.

In the context of discussing their revised calendar of work (having opted to seek an extension to 25 January), José Reis (FRETILIN) proposed delaying any discussion with the community until after the text was finalised on 25 January, due to pressures of time to complete deliberations on the text. Any recommendations for change arising out of such discussions (which he initially termed 'socialisation') would then be forwarded to the Transitional Administrator or Security Council. Although this proposal was rejected in a vote of 29:22:30, members' interventions displayed ongoing divisions within the Assembly as to the necessity for consultation versus socialisation (explanation) of the text.<sup>107</sup> When bringing the debate to a close, Lú Olo sought to reconcile the two perspectives – arguing that the process of socialisation would also involve seeking feedback, and accepting the importance of bringing the Constitution back to the people.

In a continuing campaign for a more participatory process, the Assembly Watch Team sent a letter to the Constituent Assembly, read out on 4 February 2002, asking the Assembly to extend the information campaign from one week to two months and to allow for two weeks to analyse the results.<sup>108</sup> The Assembly Watch Team also called for people's opinions to be published before the Assembly considered its response. At the press conference on 8 February, Lú Olo was again asked whether a one-week information campaign was sufficient. He affirmed that it was.<sup>109</sup>

The methodology for the consultation was divulged on 28 January 2002. Members were to divide into 13 groups, with each group to spend one week visiting one District each, disseminating the text of the draft and listening to people's views. Whilst the consultation period was scheduled to commence on 23 February, initial days were spent travelling to the Districts. Thus the real consultation occurred between 25 February and 2 March 2002. Copies of the draft Constitution were produced in Portuguese, Tetum, Bahasa and English, but generally were received by communities only a day or so before the consultation.<sup>110</sup> In some cases, copies were received only hours before the consultation meeting.<sup>111</sup> One commentator, Michele Brandt, who was then coordinator of The Asia Foundation's assistance program to the Constituent Assembly, has described in detail the difficulties associated with the consultation and the resulting frustration within some communities. Due to a lack of

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107 The debate took place in the plenary session of 14 December 2001.

108 Letter from the Assembly Watch Team to the President of the Constituent Assembly, 31 January 2002 [Bahasa Indonesian].

109 Constituent Assembly Press Release, 8 February 2002.

110 Joanne Wallis has noted that while a total of 25,500 copies of the draft Constitution in Indonesian, Portuguese and English were distributed on 20 February, the 35,000 copies of the Tetum version were distributed only on 25 February: Wallis, above n 10, 103.

111 UNTAET Daily Press Briefing, 1 March 2002, available online at [www.un.org/en/peacekeeping/missions/past/etimor/DB/db010302.htm](http://www.un.org/en/peacekeeping/missions/past/etimor/DB/db010302.htm) (accessed September 2014).

forward planning, a variety of logistical challenges arose relating to obtaining necessary funds and resources, including cars, helicopters, and communication devices.<sup>112</sup> Whilst these were addressed through UN and The Asia Foundation assistance, Brandt's account highlights how the rushed process impacted on the consultations and the Assembly's later analysis of feedback:

Because of the rush and poor Secretariat planning, many citizens received the drafts the day the Assembly members arrived. In some areas, the public ripped up their copies of the constitution in protest and declared the process a sham because there was no time to read the draft, prepare comments and properly participate.

Each team of Assembly members had a different methodology for holding consultation meetings. Some spent the entire period explaining the draft to the public. Others listened to hundreds of citizens come forward to give their views on the draft. This resulted in a skewed process with only some groups having commentary to report to the Assembly. Even after the one-week consultation period, the CA continued to debate whether the draft would be open to change based on the public's comments.

... The East Timor Constituent Assembly did not decide how to consider the views until they returned to Dili. Some CA members, at least in private, still maintained that the process was an exercise in public relations only. Nonetheless, there was public pressure to consider the views that had been collected.<sup>113</sup>

The shortness of the time period for consultations and the limited information available ahead of time meant that in many Districts, the hearings involved large segments of socialisation rather than consultation.<sup>114</sup> For many attendees at meetings, information may also have come from radio and television coverage of the Assembly, rather than the distribution of its formal documentation. In the report of the consultations, it was apparent that those with the most knowledge of the draft text were affiliated with political parties or NGOs.

Commentators have been particularly scathing about this short period of public consultation.<sup>115</sup> Without doubt, the one-week period and the methodology employed was insufficient for the community to study the proposed text and provide feedback in any detailed fashion. In a televised panel discussion, Bishop Belo spoke of the one-week period as tantamount to 'teasing' the Timorese community. Both the Bishop and Xanana Gusmão made calls for the

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112 Brandt, above n 20, 17.

113 Ibid.

114 See too R Garrison, above n 18, 20.

115 Della-Giacoma, for instance, has characterised the consultations as 'rushed, poorly conceived and executed, peripheral, shallow and tokenistic': quoted in Wallis, above n 10, 105.



Assembly to pursue consultations during the month of March. Xanana Gusmão began to delink the finalisation of the Constitution and looming independence, suggesting that 'a Constitution is the pillar of a nation. It is the mother of law, and it should be properly legitimized by the people.'<sup>116</sup> HAK was similarly critical of the one-week consultation period:

We cannot make mistakes, again and again, by calling consultation what is in effect a ready-made monologue between those that are already making decisions on behalf of the East Timorese people. And we certainly cannot make this mistake when it relates to the constitution, which has to be a living document reflecting how the East Timorese as a people see themselves, relate to themselves, and finally, after many centuries, govern themselves.<sup>117</sup>

### Plenary discussion of the consultations and final debates: 12–22 March 2002

On 12 March 2002, the Systematisation and Harmonisation Committee handed over their report summarising the results of the District consultations, and written submissions received.<sup>118</sup> Their report also included recommendations for changes to some 45 sections, based on the consultations.<sup>119</sup> The Assembly agreed that this report would be considered within parliamentary party groups who would then provide feedback to the Systematisation and Harmonisation Committee, with a view to determining if there was consensus around the proposed amendments. On 15 March, the committee reported back on the results of the discussions. Those matters which already enjoyed consensus were considered adopted. Members were said to be free to raise matters which were not the subject of consensus, or other issues. One member of the Assembly, João Carrascalão (UDT), was particularly vocal in his criticism of the pace of the process and the quality of the summary report of the consultations. According to Carrascalão, there were issues raised during the consultation which were not included in the summary report, and conversely, on occasion, suggestions advanced by only a single individual appeared in the report. He expressed dissatisfaction that a small committee was deciding on these issues, and

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116 Quoted in Brandt, above n 20, 17. The views of Bishop Belo are also discussed in this source.

117 Ibid 24. This was referring to the insufficiency of public hearings on the initial decision making re the constitutional process – i.e. the January 2001 hearing.

118 The submissions listed are relatively limited and number only nine. These were from the Transitional Administrator, Chief Minister (not on human rights matters), Minister for Foreign Affairs, Vice-Minister for Justice, Minister for Health, Haburas Foundation, East Timor Study Group, Asia Foundation and the Timor-Lorosa'e Journalists' Association. It is not clear on what basis submissions were included, but it may have been date of receipt (with these submissions representing those lodged from late February to early March 2002).

119 One recommendation was also inserted concerning the (yet to be adopted) Preamble. The recommendations emanated from the Bench of the Systematisation and Harmonisation Committee.

suggested instead that each point be debated. The President of the Assembly, however, closed down this discussion on the basis that the Systematisation and Harmonisation Committee had been given the authority by the Assembly to undertake this analysis. Adérito Soares, the Chair of the committee, sought to be conciliatory in affirming an intention not to close the doors to anyone who wished to raise issues. In the end, some 60 per cent of recommendations of the Systematisation and Harmonisation Committee were the subject of consensus and were adopted. Although several minority parties urged a full debate on each of the remaining recommendations (and any further recommendations), debate focused primarily on issues of particular symbolic importance, in particular the flag and the national anthem, as well as the Preamble and the relationship between church and State. Only a few additional proposals were put to the floor of the Assembly.

### Final adoption and signing of the Constitution: 22 March 2002

The final vote to adopt the Constitution was 72:14:1 (with 1 absence). This vote was undertaken via a nominal roll count – that is, each member's name was called out, and he/she indicated his/her position. Those represented in the 14 votes against were drawn from the ranks of PD and PSD, with one UDT representative.<sup>120</sup> Aquilino Guterres (PD) and Mariano Sabino Lopes (PD) were amongst those who voted against the text, expressing frustration that the final text did not take sufficient account of the views of people.<sup>121</sup> The dominance of the FRETILIN text was also raised, as was the perception that the text incorporated a FRETILIN view of history. João Carrascalão (UDT) was the member who abstained in the vote, expressing concern about the limited time for popular consultation and the way in which restrictions of time for the drafting process had resulted in limitations in the Constitution itself. By the afternoon, when the signing ceremony took place, all members (including those who had voted against/abstained in relation to the draft text) signed the final text of the constitution.

## An overview of the drafting process concerning human rights in the Constitution

### Thematic Committee I (Duties, Rights and Freedoms; Defence and National Security)

Prior to Thematic Committee I's commencement, the Assembly agreed upon a draft structure of the Constitution, based on the proposal put forward by the

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<sup>120</sup> PD and PSD members voted against the final text, along with Quitéria da Costa (UDT). João Carrascalão abstained in this vote.

<sup>121</sup> Author's contemporary notes.

Systematisation and Harmonisation Committee. It took into account proposals put forward by nine political parties.<sup>122</sup> The draft structure for the Bill of Rights was as follows:

Part II – Fundamental Rights, Duties and Freedoms

Title 1 – General Principles

Title II – Personal Rights, Freedoms and Guarantees

Title III – Economic, Social and Cultural Rights and Duties

Thematic Committee I began its deliberations on 17 October 2001, having been given a notional 10 working days to formulate a draft set of provisions pertaining to its areas of responsibility. Thematic committees were given fairly minimal directions in how to conduct their deliberations from the Internal Rules and Procedures. Thematic Committee I's meetings were generally open, though little information was made publicly available as to how to access meetings.<sup>123</sup> Committee hearings were held in small side conference rooms with limited seating for observers. Discussion took place primarily in Tetum, with no translation available. Proceedings of the committee were not recorded, and no records of the deliberations produced other than the final report which contained the details of the proposals and the voting records.

One of the first actions of Thematic Committee I was to plan its public hearing. This was scheduled for 22 October 2001. Whilst the committee was responsible for both human rights and defence matters, invitees were weighted towards the human rights side of the equation. The attendees were drawn from:

- the Catholic Church (Bishop Belo, Bishop Nascimento and Father José Antonio da Costa received an invitation. The Bishops indicated they were unable to attend but were represented by Father Antonio);
- REDE Feto Timor Lorosae (Jesuina Soares Cabral and Teresinha Cardoso), a network of 16 women's rights organisations;
- Yayasan HAK (Aniceto Guterres and Joaquim Fonseca), a human rights NGO;
- Timor Lorosa'e Journalists' Association (TLJA) (Hugo Fernandes);
- Haburas Foundation (Demetrio Amaral de Carvalho) an environmental NGO;

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122 According to the records of the Systematisation and Harmonisation Committee and Thematic Committee I, there were outlines of this Part from nine parties: FRETILIN, UDT, PSD, PPT, PD, PL, PNT, PST, and KOTA. The FRETILIN, UDT and PSD outlines were the most comprehensive.

123 The Internal Rules and Procedures of the Constituent Assembly left the decision as to whether meetings were open to each committee: s 43(2). The Constituent Assembly's Fact Sheet No. 1, distributed by the Constituent Assembly, noted that all thematic committee meetings were open to the public and accessible provided persons coming to the Assembly brought means of identification.

- UNTAET Human Rights Unit/Working Group on Future Institutions (Annemarie Devereux and Bendito dos Santos); and
- UNICEF (Yoshiteru Uramoto).<sup>124</sup>

The first speaker at the public hearing was Father José Antonio, appearing on behalf of the Catholic Church. Father Antonio referred to the importance of the Constitution as a document of the people, and that, like a tree, it needed to have strong roots. He spoke with particular reference to the rights of the family, speaking in favour of freedom to choose one's spouse and to form a family. Raising issues of procreation, Father Antonio advocated freedom from forced sterilisation, and the desirability of prohibiting abortion. Guarantees with respect to the provision of education, health and social assistance were supported. Father Antonio saw the (Catholic) Church and State operating separately but in coordination, with the State consulting the Church in relation to its social programs. Given the plurality of faiths in Timor, the State should not take on a role of determining a national religion. Some concern was expressed that Timorese culture had been adulterated by the cultures of its colonisers. In the course of his presentation, Father Antonio requested that the Church be given copies of any existing drafts such as those of FRETILIN, KOTA and PSD, so that comments could be provided. That such a request needed to be made in the public hearing reflected the lack of contemporary access to relevant texts.

A representative of the Human Rights Unit of UNTAET (the author) was asked to address the topic of economic, social and cultural rights. Together with another member of the Working Group on Future Human Rights Institutions (Bendito Soares),<sup>125</sup> the Human Rights Unit also addressed the committee on the topic of enforcement of human rights, including through a national human rights commission. UNICEF and the Committee for Child Rights in East Timor's Constitution presented draft provisions for the protection of children's rights, whilst REDE Feto Timor Lorosae and the Gender and Constitution Working Group introduced and spoke about the Women's Charter of Rights in East Timor.<sup>126</sup> Specific attention was focused on the need to address high levels of maternal and infant mortality and domestic violence, as well as the situation of victims of the conflict. Stress was laid upon ensuring equality of rights between spouses. Yayasan HAK referred to the long-standing denial of human rights in

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124 An invitation was also extended to Filomena Reis of the NGO Working Group on the Constitution.

125 The Working Group on Future Human Rights Institutions was a coalition of human rights NGOs and the Human Rights Unit of UNTAET.

126 The Women's Charter of Rights in East Timor had been developed through consultations with Timorese women, led by the Women and the Constitution Working Group (also called the Gender and Constitution Working Group). It was presented to the SRSG in September 2001 and was subsequently presented to the Assembly, supported by over 8,000 signatures.

Timor, and advanced a broad-ranging submission concerning all categories of rights, recalling the indivisibility of all types of rights. HAK also highlighted specific gaps in the FRETILIN party's draft text.

Protection of environmental rights was the focus of the intervention of the Haburas Foundation. Stress was laid on the need for government action: for example, to seek cheap oil, so people would no longer destroy forests for firewood. Draft provisions concerning freedom of expression and information were presented by the Timor Lorosa'e Journalists' Association (TLJA). TLJA stressed the importance of guaranteeing freedom of the press, prohibiting censorship of the press, and ensuring the individual's access to information.

In the course of their interactions with speakers, committee members raised issues such as how to deal with the topic of religious conversion, divorce, abortion, religious cults, and freedom to choose one's spouse. The amalgamation of cultures in Timor (in particular from Portuguese colonial times and from the Indonesian occupation) was mentioned, as were the difficulties faced by street children. In relation to enforcement of rights, there was some discussion of the relationship between a national human rights commission and a court. Several committee members emphasised the need for specific protection of women's rights. With a paucity of documentation concerning Thematic Committee I's deliberations, it is difficult to evaluate the influence of the public hearing on committee members. There is one specific case in which a provision was explicitly linked to the suggestion of an NGO – namely the protection of environmental rights proposed by the Haburas Foundation. Other presentations may have been considered in a background fashion during deliberations. From the existing records, most of the committee's deliberations focused more specifically on textual proposals drawn from existing political parties' drafts.

Deliberations on the individual sections within the Bill of Rights commenced on 18 October 2001 and finished with the production of the committee's report on 7 November 2001.<sup>127</sup> The primary texts that the committee had before it were the draft provisions in the FRETILIN, PSD and KOTA texts. On their second day of deliberations, the committee decided to use the FRETILIN Global Project text as the basis for their discussion.

Over the course of Thematic Committee I's deliberations, six new sections were introduced to the FRETILIN draft,<sup>128</sup> with the majority emanating from PSD and KOTA suggestions. These additional clauses focused on rights of children, rights

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127 Thematic Committee I made an original allocation of time per subject, providing one day for General Principles; three days for Personal Rights, Freedoms and Guarantees; three days for Economic, Social and Cultural Rights and Duties and two days for Defense and National Security.

128 The new sections were known in the 7 November 2001 Thematic Committee text as 17A, 18A, 18B, 21A, 45A, 48A.

of Timorese abroad and of strangers in Timor-Leste, access to courts, rights of consumers and the right to housing. A significant number of amendments were also made to existing FRETILIN clauses, as shown in the section-by-section analysis in Part II of this volume. The alterations had the effect of, for instance:

- bolstering the rights of children;
- providing for the inviolability of life;
- prohibiting the transfer of criminal liability, and ensuring that convicted persons maintained the right to enjoy their fundamental rights;
- extending rights over the processing of personal data;
- securing the special protection of women during pregnancy and after childbirth, including the right to maternity leave;
- providing additional workers' rights;
- recognising a right to social security, and a State duty to support and supervise institutions of social solidarity;
- guaranteeing rights of access to the highest levels of education, scientific investigation and artistic creativity, and rights to culture; and
- providing an explicit right to an environment beneficial to human life.

A majority of these amendments were discussed and voted upon by the committee as a whole. A small number were not voted upon, with the Final Report explaining that such changes were either minor editorial changes, consensual additions or general revisions undertaken centrally. Several of these later alterations emanated from recommendations of the Technical Adviser to the committee. The result was a draft which incorporated some 41 human rights clauses covering a wide range of civil, political, economic, social and cultural rights.<sup>129</sup>

In their report, Thematic Committee I sought to explain influences on their thinking beyond the party texts – referring in particular to the constitutions of other continental countries, including Portugal, the results of the Constitutional Commissions, and the reports of other Assembly committees.<sup>130</sup> The committee opted for a 'minimalist' text rather than a detailed, dense text, fearing that the latter would be difficult for citizens to understand.<sup>131</sup> Likewise, the committee avoided 'advanced principles', particularly in the field of environmental rights and what were described as 'fourth generation rights', which were not regarded

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129 Many provisions at this point, however, applied only to citizens.

130 Thematic Committee I, 'Final Report', 7 November 2001, [Portuguese], 3.

131 Ibid 3–4.

as feasible.<sup>132</sup> Whilst accepting that any Constitutional text must be open to evolve with values and external changes, it was satisfied that the text ‘answered the aspirations of the Timorese people’.<sup>133</sup>

## Revisions by the Systematisation and Harmonisation Committee

In theory the Systematisation and Harmonisation Committee was focused on producing a streamlined text for the Plenary’s consideration. Indeed, once the Committee had the reports of all the thematic committees, it produced a draft version of the full Constitution in late November. In this draft, the Systematisation and Harmonisation Committee also proposed some amendments and, at its own initiative, included a column comparing the provisions of the draft Constitution with the provisions of the Universal Declaration of Human Rights.

Some of the changes made by the Systematisation and Harmonisation Committee to the thematic committee’s text were:

- adding in ‘sexual orientation’ as a ground of prohibited discrimination;
- integrating Thematic Committee IV’s suggested clause on the establishment of a Provedor for Justice;
- prohibiting extradition in cases where the offence under the law of the requesting State was punishable by the death penalty or life imprisonment, or there were grounds to assume that the person might be subjected to torture, and inhuman, degrading and cruel treatment;
- requiring that regulation of freedom of expression and information be ‘based on the imperative of respect for the Constitution and the dignity of the human person’;
- removing the prohibition on ‘fascist’ or ‘totalitarian’ organisations, but extending the prohibition to associations ‘that promote terrorism’;
- decreasing the voting age threshold to 17 years;
- omitting the reference to military service being for a ‘limited period’;
- adding a new section on freedom of the press; and
- requiring that requisitions and expropriation of property be for a public purpose and that fair compensation be paid.<sup>134</sup>

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132 Ibid 4.

133 Ibid.

134 Other changes related to limiting the right to self-defence, and making maternity leave ‘in accordance with the law’.

## Plenary debates of the Constituent Assembly

The Bill of Rights was the subject of debate from 12 December until 22 December 2001, when the Assembly broke for the Christmas period. The initial pace of the Plenary's deliberations on the draft sections was slow. However, as the Assembly was to commence discussion of s 20 (concerning the rights of persons with disabilities), the President of the Assembly, Lú Olo, announced the finalised streamlined process, leading to an increase in the speed of decision-making. Debate also initially diminished, though some minority parties, in particular UDT, PD and Kota, sought to continue a full debate on provisions. Extensive discussion still centred around provisions dealing with the establishment of the Ombudsman (*Provedor de Direitos Humanos e Justiça*), the right to life, detention and legal process rights, the right to marriage and family, freedom of speech and freedom of the press, freedom of assembly and demonstration, and the range of economic and social rights, including education, health and property.

Some of the more significant changes to the draft text which occurred during the plenary debate included:

- deletion of 'sexual orientation' as a ground of non-discrimination, and the addition of 'marital status';
- recognition that all children, regardless of whether they were born in or out of wedlock, would be entitled to equal rights and social protection;
- addition of new sections dealing with the rights of youth and the rights of the elderly;
- deletion of a provision dealing with the rights of foreigners in Timor-Leste;
- inclusion of an alternative section providing for the establishment of the Ombudsman (*Provedor de Direitos Humanos e Justiça*);
- addition of a section establishing a High Authority for the Mass Media;
- addition of a guarantee for an accused to have a right of hearing and defence;
- addition of the right to work, 'regardless of gender', and inclusion of religion as a prohibited ground of dismissal from employment;
- deletion of the requirement to pay fair compensation for requisitioning or expropriation of property;
- addition of a new section dealing with the obligation to pay tax; and
- elimination of a requirement that public education be non-denominational.<sup>135</sup>

Of the amendments passed during the plenary sessions, over half had FRETILIN members as their chief sponsors. Some amendments were successfully proposed by smaller parties, but in those cases cross-party support was vital. FRETILIN's

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<sup>135</sup> Other changes related to requiring written authorisation from judicial authorities before law enforcement officials could enter a home; and recognising a right to social assistance.



dominance may well have had a chilling effect on those considering advancing amendments. On many occasions dissatisfaction with an aspect of an existing clause was expressed without leading to the proposal of a specific amendment.

### Revised text produced for the public consultation process

At the conclusion of the plenary debate, a revised text was prepared by the Systematisation and Harmonisation Committee and approved by the heads of the parliamentary party benches and officials of the thematic committees, before being endorsed by the Assembly. It was this version of the text which was disseminated for the purpose of the consultations.

Changes made to the Bill of Rights during this revision (in addition to changes agreed to by the Plenary) included:

- adding a State duty to promote the protection of disabled citizens;
- requiring that the order of arrest or detention of a person be presented before the judge within the legal timeframe;
- extending several rights to all persons (for example, specific arrest/detention-related rights; the right to compensation for those unjustly convicted, *habeas corpus*; the right to honour and privacy; protection from entry into home; and the right to private property);
- narrowing other rights to apply only to citizens: namely, the right to emigrate freely and return to the country; and the right to social assistance and security;
- deleting the provision establishing a High Authority for the Mass Media;
- guaranteeing the freedom of religious denominations to teach religion;
- reinserting a requirement that compensation be paid for expropriation of property; and
- moving into the Bill of Rights a clause on intellectual property rights.<sup>136</sup>

The Systematisation and Harmonisation Committee explained the genesis of some of these changes in the Portuguese text put to the Plenary. Some were the subject of a specific recommendation advanced by the Centre for Peace and Development, and others were identified as coming from the Timor Lorosa'e Journalists' Association. Most, however, were not attributed to any particular source.

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<sup>136</sup> Other changes related to adding ethnic origin as a field regarding which the non-consensual processing of data was prohibited, and providing that the operation of radio and television stations operate under a licence 'in accordance with the law'.

## Suggestions arising from the public consultation

Notwithstanding the limitations of the formal consultation process, many community members responded to what they heard or read during the constitutional process about the protection of human rights. The section-by-section analysis in Part 2 of this study outlines the areas in which a recommendation about a particular clause arose during the District consultations. While some points were identical to those which had been raised in the Assembly (such as defining the age of children, youth and the elderly), others displayed a greater social conservatism. Key messages from the District consultations included calls for greater recognition of the place of the Catholic Church within Timor and the desirability of protecting Timorese culture. Concern was also raised about divorce and polygamy. Frequently, suggestions were made to delete certain guarantees, or to leave them to ordinary law.

Recommendations concerning the human rights clauses were also to be found in the formal written submissions referred to in the report of the Systematisation and Harmonisation Committee. These included the recommendations of Timorese office holders (such as the Minister for Foreign Affairs, the Vice-Minister for Justice, and the Minister for Health), national NGOs (Haburas, Timor Lorosa'e Journalists' Association, and the East Timor Study Group) or international actors (including the SRSB and Transitional Administrator, and The Asia Foundation). A strong theme from these submissions was to amend clauses to ensure greater consistency with international human rights standards. This included applying all appropriate human rights to all persons (rather than citizens), providing more stringent safeguards in relation to limitations on rights and states of emergency, and bolstering means of enforcement of rights.

After compiling the summary of suggestions from Districts and written submissions received at this time, the Systematisation and Harmonisation Committee made some 13 recommendations for changes to the Bill of Rights, four of which were identified as coming from District consultation suggestions and nine of which were identified as coming from the written submissions. The four coming from the District consultations related to (i) banning polygamy and polyandry; (ii) adding in a requirement of 'fair compensation' in relation to expropriation of property; (iii) strengthening the right to health and recognising an individual duty to defend and promote health; and (iv) strengthening the right to environment.<sup>137</sup> At least one other of the suggestions identified as coming from the written submissions was similarly raised in District consultations – namely, requiring a *habeas corpus* application to be ruled on more quickly than

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<sup>137</sup> During his oral explanation of the changes agreed to by consensus, Adérito Soares, Chair of the Systematisation and Harmonisation Committee, referred to two of these proposals also being supported by the formal written submissions: linking the call for 'fair compensation' for acquisition of property to the SRSB and The Asia Foundation; and the changes to the right to health to the Minister for Health.

eight days. Notwithstanding this, it is apparent that the majority of amendments endorsed by the Systematisation and Harmonisation Committee came from the written submissions.

### Plenary consideration of proposals from the public consultation

Of the 13 recommended changes to the human rights provisions of the Constitution, nine were the subject of political consensus following the public consultation, in particular:

- adding ‘language’ as a prohibited ground of non-discrimination;
- recognising as non-derogable rights: the rights to be free from torture, slavery or servitude, cruel, inhuman or degrading treatment or punishment, and non-discrimination;
- making rights to freedom of expression and information, freedom of assembly and to demonstrate, freedom of association and freedom of movement applicable to all persons rather than all citizens;
- requiring compensation for expropriation of property to be ‘fair’;
- strengthening the language around the right of all persons to health and medical assistance; and
- strengthening the right to environment by removing the qualifying words ‘in accordance with its capacities’.

One commentator, Brandt, has argued that topics considered too political or sensitive were not considered by the Plenary, with only ‘soft’ topics being incorporated into the draft at this point.<sup>138</sup> Yet, from a human rights perspective, not all these changes would be regarded as ‘soft’.

Four of the Systematisation and Harmonisation Committee’s recommendations were not the subject of consensus and so were not adopted; namely, the proposals to:

- amend the language to avoid limiting the rights of persons with disabilities;
- reduce the period in which a court had to decide a *habeas corpus* application from eight days;
- remove a qualification on the right to demonstrate; and
- include a prohibition of polygamy and polyandry, and include language supporting monogamy.

In the relatively brief debate on these and further changes, the Plenary agreed to qualify the obligation to pay taxation ‘in accordance with the law’. Other

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<sup>138</sup> Brandt, above n 20, 17.

suggestions were not accepted, specifically a repeated attempt to remove the same limitation from the right to demonstrate, and a proposal to add recognition of companies' obligation to pay taxes.

With voting finishing on these amendments, the stage was set for the final adoption of the Constitution on 22 March 2002.

## UN and other international involvement in the process

As the administering authority in Timor-Leste in 2001–02, the UN was clearly heavily involved with the constitutional process – in particular in the regulatory framework for the Constituent Assembly and the establishment and functioning of the Constitutional Commissions. At the same time, divergent attitudes were present within the UN administration as to proper roles for the UN vis-à-vis the Constituent Assembly. Concerned to ensure that the Assembly operate, and be seen to operate, independently (given constitution-making's nature as a sovereign act), UNTAET took a relatively low-key approach during the deliberations.<sup>139</sup> Whilst providing key administrative secretariat support, most of the UN Transitional Administration did not make substantive interventions on the substance of the Constitution. In late February 2002, Sergio Vieira de Mello sent a letter to the Constituent Assembly in his capacity as SRSG rather than Transitional Administrator. The significance of the distinction was that as the formal head of the governmental structure, (that is, the Transitional Administrator) Vieira de Mello did not wish to intervene in the process, but as Special Representative of the Secretary-General, he was comfortable with promoting compliance with UN standards.<sup>140</sup>

The Human Rights Unit of the Mission, where the author was situated, considered that technical assistance and advocacy related to the protection of international human rights was a legitimate part of its role. Fortunately, a certain tacit agreement existed within the Mission that human rights stood as one of the key values of the UN, so that support to Assembly members on these topics or support for civil society initiatives in these areas was acceptable.<sup>141</sup> In a public statement to the Security Council, the SRSG included respect for human rights as part of the ground rules for the constitutional process: 'the final say

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139 As to the political sensitivities of governance more broadly in the Transitional Administration, see J Morrow and R White, 'The United Nations in Transitional East Timor: International Standards and the Reality of Governance' (2002) *Australian Yearbook of International Law* 1.

140 More generally as to the involvement of UNTAET in the constitutional process, see A Devereux, 'Searching for Clarity: A case-study of UNTAET's application of international human rights norms' in N White and D Klaasen (eds), UN, *Human Rights and Post Conflict Situations* (Manchester University Press, 2005) 309–311.

141 Note that this process predated the *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes* (2009), which confirms the UN's role in promoting compliance with international human rights norms and standards in Guiding Principle 2.

... will be with the East Timorese; human rights must be adequately protected; and the system adopted must be democratic.’<sup>142</sup> As a result, the Human Rights Unit made available to Assembly members and others its analyses of draft texts, accepted invitations to address thematic committees and provided other forms of technical assistance. At a key point in the debate, use was also made of the Unit’s links with the Office of the High Commissioner for Human Rights, resulting in the High Commissioner making a written intervention. Other UN entities outside the Transitional Administration were actively engaged with the process – including UNICEF, UNIFEM and UNHCR, who variously provided submissions or supported initiatives such as working groups or committees to focus on strengthening the constitutional protection of rights related to their mandates. UNDP also supported the provision of some technical advisers to the Assembly and provided financial support for community awareness programs.

Full-time technical advisers were also provided to the Constituent Assembly by other international sources – in particular the Portuguese Parliament and the Inter-Parliamentary Union. While such advisers undoubtedly provided considerable ongoing assistance on matters of analysis and drafting, there is less in the way of publicly available documentation regarding their role. Fortunately for this study, the international technical adviser for Thematic Committee I specifically identified his recommendations within the committee’s reports, but other more informal advice is rendered invisible in the archival record. A significant number of short-term consultants were also provided by the international NGO The Asia Foundation, whose submissions are reflected in this study.<sup>143</sup>

## Limits to the public information and outreach program of the Assembly

### Late development of a public information strategy

Whether by design or lack of resources, the Assembly initially had no real public information strategy, despite advocacy on the issue from human rights NGOs and UNTAET’s Human Rights Unit. As a result of an agreement between Internews and the Constituent Assembly, daily press releases began to be produced in late October (some six weeks into the process), recording such information as the progress of committees, and global votes for the adoption of sections during the plenary sessions.

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142 Sergio Vieira de Mello (SRSG), during discussion of *The situation in East Timor*, Verbatim Record of the 4165th meeting, UN SCOR, UN Doc S/PV/4165 (27 June 2000) 6.

143 Details of The Asia Foundation’s program of assistance to the Constituent Assembly can be found in Aucoin and Brandt, above n 5, 266–268.

In the early debates about the internal rules of the Assembly, PD sought an amendment requiring the elected (political) Secretariat to take notes of the proceedings and make them available to the public. This was, however, defeated, with most of the discussion related to note taking being a function for the technical secretariat (the officials providing administrative support to the Assembly) rather than the elected Secretariat, who were also members of the Assembly and thus not in a position to take such detailed notes. The Assembly also voted against a proposal that the thematic committees report on a daily basis and that their minutes be accessible not only by Assembly members but the public. Manuel Tilman, for the Technical Committee, argued that the minutes were internal documents, and that until documents went through the Assembly, they would not be made public. The Assembly voted in favour of the technical secretariat taking minutes of plenary sessions and the President reported ongoing discussions as to means of overcoming budgetary constraints to do this. Daily press releases came to be the major form of official public information regarding deliberations (though the information in such releases was necessarily abbreviated). Coverage on radio and television provided broader access to ongoing debates.

The issue of public access and information was the subject of the most vociferous demonstration outside the Constituent Assembly. The Assembly was housed in what is now the Parliament's building – directly opposite a university. In the second week of the Assembly's sitting, the NGO Working Group on the Constitution<sup>144</sup> organised a demonstration to draw attention to the need for the Assembly to develop mechanisms to ensure public participation in the constitution-making process. Several hundred people (mainly university students) took part. The demonstration was repeatedly referred to in the Assembly as a 'youth delegation'. As the crowd amassed and became vocal, approximately 20–25 police members mobilised to guard the Assembly's fences, and riot police with shields and batons were stationed at the end of the street. After discussions in the Assembly, the President agreed to a delegation of Assembly members meeting with the demonstrators' leaders. The President explained that to permit a direct address to the Assembly would be disruptive and premature given that the Assembly had not commenced substantive discussion. Once negotiations continued, however, both the group and the police presence dissipated. When the delegation reported back to the

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144 The NGO Working Group on the Constitution was a coalition of NGOs 'wanting to work towards a legitimate and participatory constitutional process'. Its members included Yayasan HAK, the NGO Forum, Caritas Australia, Fokupers, Haburas, KSI (Kadalak Sulimutuk Institute), Lao Hamutuk, Oxfam Australia, the East Timor Jurists' Association, the Bishop Belo Peace Centre and GFFTL (Grupo Feto Foinsa'e Timor-Leste): NGO Working Group on the Constitution, paper entitled 'Building East Timor's Constitution, together', undated, copy on file with the author.

Assembly, a letter of demand was read out which apologised for the actions of some within the crowd, but reiterated their calls for public consultation and greater accessibility of the Assembly to civil society.<sup>145</sup>

### Contemporary access to draft texts

The first official publicly released draft text from the Assembly did not occur until after the Plenary adopted the full draft text in late November 2001. While thematic committee hearings had been open to the public, so the content of draft clauses being discussed were known by attendees, including members of civil society, the standing order of the Assembly (reiterated by Lú Olo in early November 2001) was that documentation of the committees was internal in nature. This significantly constrained, but did not totally prevent, copies of draft texts from circulating outside the Assembly during and immediately after the thematic committee stage of the process. When the Systematisation and Harmonisation Committee presented the draft text of 29 November 2001 to the Assembly, a debate arose as to whether the document was a public document or an internal document. Some members relied on the Internal Rules and Procedures to argue that the approved text should remain confidential until the Assembly was ready to conduct its consultations. Others supported release of the text to foster public discussion and knowledge of the Assembly's deliberations. After the Assembly accepted the draft in principle, the decision was taken to make the text public on 30 November. Thereafter, the draft texts of the Assembly were disseminated.

### Limits to the level of participatory constitutionalism

As acknowledged above, there were clear limitations in the process carried out in Timor in 2001–02 from the perspective of participatory constitutionalism. A contemporary report of the UN High Commissioner for Human Rights drafted whilst the process was ongoing summed up many of the concerns. By emphasising a representative democratic model of government, the Assembly minimised the right of individuals to participate in political life through contributing to the constitutional process.<sup>146</sup> The High Commissioner highlighted that public hearings by thematic committees, for instance, were of limited duration, held at short notice and involved a small number of invitees. The result was said to be a lack of ownership of the process:

Accordingly, there is a popular perception that, to a large extent, the drafting process has focused on the prepared drafts of political parties, rather than incorporating comments or suggestions from ongoing

<sup>145</sup> See NGO Working Group on the Constitution, 'Clarification', 5 October 2001 [Tetum].

<sup>146</sup> *Report of the UN High Commissioner for Human Rights on the situation of human rights in East Timor*, UN Doc E/CN.4/2002/39 (1 March 2002) 13.

consultations or the public hearings. As a result, there appears to be a limited sense of ownership of the process amongst civil society and already a questioning of the responsiveness of the Assembly to its constituents.<sup>147</sup>

The report of the High Commissioner drew particular attention to the lack of accessible information concerning Assembly proceedings, which undermined real engagement:

Initially, the secretariat of the Assembly lacked resources to ensure adequate dissemination of information. In addition, documents being debated by the Assembly are considered to be internal until they are officially approved by the plenary. This has resulted in the draft Constitution being made available to civil society and UNTAET, *inter alia*, at a very late stage of proceedings, thereby restricting the ability of individuals and groups to provide commentary and analysis and make proposals to the Assembly. While members of the Assembly have repeatedly affirmed the value of public opinions and the need to incorporate them into the constitutional drafting process, it seems that little has actually been done to support a truly consultative process.<sup>148</sup>

Looking back on this contemporaneous judgement, it remains valid. The official one-week consultation period did not serve to remedy the defects, such that community input to the process remained limited.

## Influences in shaping the Bill of Rights

In stressing the role of FRETILIN during the Constituent Assembly, many commentators have either downplayed the role of other influences on the constitutional process, or restricted their gaze to focus on a few high-profile actors. Yet, a close examination of the movements in relation to the Bill of Rights suggests a more nuanced narrative should be considered.

It is not uncommon to read critiques of the Timorese constitutional process that assert that there was no real debate on the draft Constitution; that, instead, there was merely adoption of the FRETILIN party draft because of that party's political dominance. Randall Garrison, for instance, states that '[n]either the team of five international constitutional experts brought in by UNTAET, nor the input from public consultations, nor drafts presented by four other political parties brought any serious modifications of the Fretilin draft'.<sup>149</sup> Anthony Goldstone describes

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147 Ibid.

148 Ibid.

149 Garrison, above n 18, 20.



the Constitution as a 'Fretilin Constitution',<sup>150</sup> whilst Joanne Wallis concludes that the FRETILIN draft (based on Portuguese and Mozambiquan texts) dominated debate, with the result that 'the committee "cut and pasted" from these constitutions, did not take account of "local context" and "occasionally focused on issues that had no relevance" to Timor-Leste'.<sup>151</sup> These commentators have been fairly dismissive of the constitutional process involving any real dialogue or discussion, seeing changes as the result of interventions by a select number of influential individuals or institutions. Goldstone, for instance, recognises changes made to incorporate international human rights and humanitarian law into the Timorese legal system, but attributes them solely to the prompting of then Foreign Minister and Nobel laureate José Ramos Horta.<sup>152</sup> Wallis highlights the effect of submissions from the UN High Commissioner for Human Rights and the Transitional Administrator in persuading the Assembly to amend some of the human rights provisions so that they applied to all persons, regardless of citizenship.<sup>153</sup> A small number of other amendments are ascribed to lobbying by Bishop Belo and the Catholic Church.<sup>154</sup>

One commentator who has provided a broader analysis is William Binchy. Binchy has identified four factors as being influential in relation to the Timorese Constitution: the influence of the Portuguese Constitution; the marks of the recent struggle for independence; the 'cosmopolitanism of its reception of international human rights instruments'; and a 'delicate accommodation with the Catholic Church'.<sup>155</sup> When one reviews the process of considering the Bill of Rights in closer detail, Binchy's analysis with its recognition of a plurality of influences appears preferable. Yet even Binchy's analysis might be usefully augmented by recognising the richness of aspirations being discussed within the Assembly itself, and the influence of civil society actors beyond the Catholic Church.

It is apparent that the draft texts proposed by political parties at an early stage of the Assembly process were central to the Constituent Assembly's deliberations. These texts, often developed by the diaspora during the Resistance struggle, owed much to the Portuguese Constitution and the Constitutions of other lusophone countries. This is not surprising considering Timor's legal and political history. Timor was a Portuguese colony from the sixteenth century until 1974, and Portugal and its former colonies were strong supporters of the Resistance to the Indonesian invasion and control of Timor-Leste. Many influential members

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150 Goldstone, 'Building a State', above n 10, 217.

151 Wallis, above n 10, 93.

152 Goldstone, 'Building a State', above n 10, 218.

153 Wallis, above n 10, 106.

154 Ibid 104.

155 W Binchy, 'The Constitution of Timor-Leste in Comparative Perspective', in W Binchy (ed.), *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Poor* (Clarus Press, 2009) 261, 262.

of the diaspora found refuge in Portugal and other lusophone countries such as Mozambique. During the debates, one could hear strongly the influence of history in another manner – the experience of human rights violations during Indonesian times and the interlinking of the Resistance with human rights values. Whether it be in discussions about the importance of freedom of the press, reining in police powers or providing for economic and social rights, there was a clear identification between human rights and the struggle over the previous 24 years. All agreed that the adoption of strong guarantees was vital for the future of Timor-Leste. Some of the most heated debates concerned the extent to which the Assembly was remaining faithful to this vision, with accusations on occasion that the Assembly was unnecessarily restricting the ambit of rights.

Politically, the FRETILIN party was certainly dominant within the Assembly and a 'bloc vote' was apparent in relation to consideration of many amendments during plenary sessions. However, in acknowledging this, it is important not to render invisible the significant input of minority parties during the constitutional process. During Thematic Committee I's deliberations, for instance, the FRETILIN draft was used as the basis for discussion, but a significant number of amendments were made to this draft, drawn in particular from alternative PSD and KOTA draft texts. The subtle mechanism of the Systematisation and Harmonisation Committee was another important forum for cross-party discussion. Despite their rather innocuous title, the Systematisation and Harmonisation Committee made or suggested a range of changes to the text, often with a view to bolstering the human rights protections in the Constitution. The office holders of that Committee, comprising one FRETILIN member, one UDC/PDC member and one KOTA member, were to prove particularly influential in guiding deliberations. Even if the plenary sessions of the Assembly presented a challenging environment for minority parties, several critical amendments were passed during the plenary sessions at the prompting of minority parties as well as FRETILIN members.

Opportunities for community engagement with the Constituent Assembly were significantly constrained, and suggestions arising directly from the community through the District consultations had less impact than those coming from organised civil society actors. Amongst civil society actors, the views of the Catholic Church certainly enjoyed particular prominence, and Assembly members were wary of provisions which might unduly interfere with Church operations. This did not equate, however, to uncritical acceptance of its views. A clear undercurrent of several plenary debates (for example, on marriage) was the need to ensure a proper separation of Church and State; to guarantee individuals' rights, rather than leave matters to be settled by Church doctrine alone. Other civil society actors were also influential. Specific mention was

made during the debates of views expressed by, for example, Yayasan HAK, REDE Feto Timor Lorosae, the Timor Lorosa'e Journalists' Association, and the environmental NGO Haburas Foundation.

International human rights instruments were referred to sparingly during the debates, though were frequently cited in civil society submissions to the Assembly. The most notable nod to international instruments occurred when the Systematisation and Harmonisation Committee's version of the draft text included a column with comparisons to the Universal Declaration of Human Rights (UDHR). Within the Assembly, there was evident resistance to a wholesale incorporation of rights from international instruments. Stress was laid on the need to ensure that rights adopted were tailored and appropriate to conditions in Timor. Submissions quoting international law were most likely to be considered when expressed at a high level (for example, by the Minister for Foreign Affairs or the UN High Commissioner for Human Rights) or incorporated into revisions advanced by the Systematisation and Harmonisation Committee (for example, extending rights to 'all persons'). Ultimately, whilst the FRETILIN draft remained the dominant textual base for the constitutional process, it is important to acknowledge the contribution of many other actors in shaping the final text, and leaving a legacy of ideas that might be considered in the future.

## Conclusion

Examining in detail the debates within and outside the Assembly concerning the shape of human rights provisions permits a deeper appreciation of the major influences on the Bill of Rights. Insight can be obtained into the perceived meaning of the constitutional text and the nature of aspirations being addressed during the process. This study deliberately surveys successive texts and canvasses views expressed by Assembly members (the traditional legislative history), as well as capturing opinions expressed by the Timorese community, civil society and the international community. It will be for future commentators to evaluate whether the promise offered by the Bill of Rights is being actualised.

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