

it can therefore be delegated in principle.²¹ This understanding of the authority to dispense as executive rather than legislative is one of the major changes effected by the Code of 1983. In theory therefore, the bishop, for example, can delegate the Chancellor, who is not an ordinary, and therefore does not have executive power, to dispense from certain laws of the Church, such as the law to observe canonical form in marriages where at least one of the parties is Catholic.

4. By Virtue of the Law Itself

The authority to dispense, under specified circumstances, is also granted to certain individuals by the law itself, without the intervention of a competent authority. This mechanism of delegation operates automatically, unlike the mechanism of lawful delegation which requires the intervention of the competent authority. C.1079, for example, authorizes the parish priest or the sacred minister properly delegated to officiate at a marriage to dispense from most impediments of marriage established by ecclesiastical law when certain conditions are verified to be present such as when there is danger of death and where it is difficult to reach a competent authority to obtain the necessary dispensations.

C. *The Requisite Reasons to Justify the Grant of a Dispensation*

Cc.87.1 and 88 describe in broad strokes the necessary reason to justify the grant of a dispensation from a law. The first paragraph of C.87 says that whenever he judges that it contributes to their spiritual welfare, the diocesan bishop can dispense the faithful; C.88 repeats this same condition: when the diocesan bishop judges that the dispensation would contribute to the spiritual welfare of the faithful. Two points should be underscored in relation to this. First, the purpose of a dispensation is the spiritual welfare of the persons concerned, not mere convenience, whim or indolence. When a Catholic contracts marriage, whether the other party is Catholic or not, he is bound by law to marry according to canonical form, that is to say in a Catholic ceremony. There may be instances when this would raise difficulties such as when the protestant party would like her father, a pastor, to officiate at her wedding. Dispensation from the obligation to observe the canonical form would contribute to their spiritual welfare. Second, the judgment concerning the spiritual welfare is to be made by the dispensing authority, not by the individuals themselves.

21. C.81 of the Code of 1917 prescribed that only the Roman Pontiff may grant the authority to dispense. The reason for this is that an authority to dispense was legislative in character, and legislative power cannot be delegated by legislators under the Supreme Pontiff.

East Timor and the Protection of Indigenous Peoples' Rights: Cultural Imperatives After Independence*

Elena J. Damaso**

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I. INTRODUCTION

This article accounts for the author's nearly three years' absence from the Philippine scene of indigenous peoples' rights advocacy. That time was spent in another cultural setting, during the transition of Timor Loro Sae from a colonial outpost of Portugal and then Indonesia, to its newly minted status as an independent republic. It gives a capsulated view of the challenges that face East Timor, particularly in the development of policies that would substantiate its unique cultural and historical identities in its bid to become

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an oil-producing modern state of the 21st century. It discusses the problem of land ownership and in the light of returning refugees and the role of custom in the resolution of land dispute issues. It explores the pertinent constitutional provisions aimed at achieving a balance between indigenous people's rights and sustainable development as well as the unique feature of customary law. The article cites the work of two important forerunners in East Timorese research and dissects the solutions proposed for existing issues. Lastly, some suggestions are made for the interface of Philippine-East Timorese advocacy groups that may be pursued by the interested parties.

II. FACTUAL BACKGROUND

As of 2001, there were 794,298 East Timorese occupying half of Timor Island with a total land area of 18,900 sq. km. The country is heterogeneous. In terms of ethno-linguistic groups, Tetum is spoken by 20% of the population and is the national language selected by the Constituent Assembly during the drafting of the Constitution. Other major languages are Mambae, the first language of 23% of the population, Macassae, and twenty-one other local languages. There are still about 70,000 East Timorese refugees in West Timor and other parts of Indonesia.

The Democratic Republic of East Timor officially became a nation on May 20, 2002, twenty-seven years after it formally declared independence from Portuguese rule on November 28, 1975. The Constitution of East Timor established the latter date as the Independence Day. Twenty-seven years ago, not a single nation recognized the sovereignty of East Timor, and Portugal, not willing to internationalize the issue, entered into protracted talks with Indonesia on the issue of self-determination for the territory.¹ Even neighboring Australia committed the error of tacitly siding with Indonesia when it annexed the fledgling State on December 7, 1975. Australia went on to negotiate with the New Order Government of Suharto over the exploitation of the Timor Gap, which was rich in oil and gas, dropping its economically pragmatic position only in 1999 when the United Nations (UN)-sponsored vote became imminent.

The preamble of the Constitution, which was ratified on March 22, 2002, declares that the struggle for self-determination and independence was waged by the Maubere people on three fronts: 1) armed resistance by the FALINTIL; 2) the clandestine movement where East Timorese and non-

1. See JOHN G. TAYLOR, CENTER FOR STRATEGIS & INTERNATIONAL STUDIES JAKARTA, *EAST TIMOR: THE PRICE OF FREEDOM* (1999). Taylor's analysis provides an in-depth look into the events and issues of East Timor's independence struggle from colonial times until the UN-sponsored Referendum of August 1999.

East Timorese risked their lives in support of freedom; and 3) international diplomacy that was helped along the way by influential figures such as Pope John Paul II, who appealed to Indonesia in 1987, "to protect the 'ethnic, religious and cultural character of East Timor.'" The monumental 1996 Nobel Peace Prize awarded jointly to Bishop Carlos Filipe Ximenes Belo and José Ramos Horta was a major push in the campaign for independence. In the same year, UN Secretary General Kofi Annan was convinced to break the impasse between Portugal and Indonesia over talks on the fate of East Timor that has dragged on for twenty years.

From the start, the UN Security Council condemned the Indonesian invasion, while the UN General Assembly kept alive a Resolution calling for "an act of self-determination" to resolve the East Timor issue. In the meantime, the international community, human rights groups, indigenous peoples' advocates, the International Monetary Fund, and the United States of America through the Clinton Administration increased the pressure on the New Order Regime to desist from its illegal occupation. The downfall of Suharto precipitated the referendum on August 30, 1999. Four days later, the United Nations Mission in East Timor (UNAMET) announced that 78% of the East Timorese rejected the autonomy proposal presented by President Habibie. The violence that followed shocked the world and forced a third of East Timor's estimated population of 800,000 to flee to West Timor as refugees. The remaining population scattered in the mountains and far-flung areas. As the vote ended Indonesian rule, it was estimated that the Maubere people lost 200,000 lives during the struggle for independence.

For thirty-two months thereafter, the people took up the extremely difficult task of social and economic reconstruction under the tutelage of the United Nations through the United Nations Transition Administration for East Timor (UNTAET) headed by the Special Representative of the Secretary General, Sergio Vieira de Mello.² It had a wide-ranging mandate that included executive and legislative powers. East Timorese leaders insisted on and exercised a power-sharing arrangement with the UNTAET through the National Civic Council. In May 2002, East Timor was deemed ready to become a full-fledged State. For its unprecedented effort at building the first nation in the third millennium, UN was cited last year for the Nobel Peace Prize.

Those who watched the "Independence Day Celebration" on satellite television on May 19, 2002 would have noted that traditional rituals

2. See Dionisio Babo Soares, *Success, Weakness, and Challenges of the Political Transition in East Timor*, in *PEACE BUILDING AND STATE BUILDING IN EAST TIMOR* 12-38 (2002) [hereinafter Soares, *Success, Weakness, and Challenges*]. See also James J. Fox, Center For Strategic & International Studies Jakarta, *Assessing UNTAET's Role in Building Local Capacities for the Future*, in *PEACE BUILDING AND STATE BUILDING IN EAST TIMOR* 39-58 (2002).

dominated the festivities. Old men from the thirteen districts donned colorful traditional attires and took turns chanting and dancing. They were in fact invoking blessings on Timor Loro Sae, wishing peace, prosperity, and reconciliation for the Maubere motherland. Also, the Timorese origin myth was enacted — a boy being carried by a huge crocodile on its back. It was a celebration on many levels which took place after one generation of languishing in the so-called “forgotten war.” The East Timorese, United Nations and other humanitarian workers, indigenous peoples’ advocates, peace activists, and Timor Gap negotiators had varied reasons to celebrate for the same cause. At last, the voice of the 193rd member of the UN would finally be heard and counted in the expanding family of nations.

III. LAND: A CORE ISSUE TO PEACE AND DEVELOPMENT

Land dispossession is a major problem in the re-integration of returnees. As East Timor refugees returned to their homeland, Timor Loro Sae, a common scenario would be this: an old man and his family returning from three years of exile and finding his field planted with corn by other hands. His wife is worried where they are going to sleep for the night because while they brought a truckload of light shelter materials, the outsiders had erected their own makeshift hut over the remains of their house that was burned down in the mayhem of September 1999. Fortunately, the village elder is alerted on their arrival and starts negotiations immediately to try and resolve the conflicting land claims between the original and opportunistic occupants.³ Most often, the first and last recourse of the claimants are traditional mediation processes presided over by clan leaders or *chefes do suco*.

During the thirty-two months of UNTAET governance, it did not issue regulations on how to decide such cases. Instead, Regulation No. 2000/27 was issued “to prevent any non-East Timor residents entering into transactions over land and property in East Timor that result in a change of ownership (immovable goods) during the transition period.”⁴ Thus, UNTAET postponed the resolution of complex land and property issues for the post-Independence government.

The most recent complaints stem from the post-refugee period, involving squatting over a piece of land or a dwelling by earlier returnees or other displaced persons, thereby dislocating original owners with a time-

3. The observations on repatriates were made by the author during twenty-two months as Field Officer of the United Nations High Commissioner on Refugees in field offices of the UNHCR-East Sector (Baucau) and at the Oecussi Enclave (2000-2002).

4. Dionisio Babo Soares, *Judiciary Development in East Timor*, in PEACE BUILDING AND STATE BUILDING IN EAST TIMOR, *supra* note 2, at 82-83 [hereinafter Soares, *Judiciary Development*].

immemorial possession. If referred to the village elders, negotiations would be initiated with the major objective of obtaining a consensus for the return of said lands. This mechanism would broaden in application, depending on the scope of the territory in dispute. In the Oecussi enclave, for instance, the UN High Commission for Refugees (UNHCR) field office faced a delicate situation where an entire village was dispossessed by members of a neighboring community who cultivated the farms of the “absentees” during their stay as refugees in West Timor.

As the preparations for the repatriation of the more than a hundred returnees were underway, dialogues and rituals were held to rectify the “intrusion.” A traditional “turn-over” ceremony was held which was also called the “opening of the road” ceremony, where animals were ritually sacrificed. The traditional leaders mediated an amicable conclusion, and as a result, the returnees were able to reclaim their lands after the outsiders were treated as “temporary cultivators” and allowed to leave after they harvested their crop.⁵

The operationalization of customary law was based on the social legitimacy of the Lian Nain (narrative experts), Macair Fukun (traditional authority), and Dato Ua’in (great authority).⁶ They were tasked to collectively decide on matters affecting social norms and cultural/historical continuity, and on issues such as land ownership, land use, and other cases involving peace and village harmony. The decisions carried social sanctions that were binding and acceptable not only to the contending parties but also to the community and clan as a whole.

A discussion on “cultural imperatives” inevitably led to customary law and traditional land rights — issues that the newly independent East Timor must face to ensure its future stability. In this context, two sets of imperatives came to mind. The first was contained in the fundamental law of the land, the Constitution, and the second is from related literature. In this specific case, it is relevant to mention that a Dutch customary law expert, Van Den Burg, learned in the 1920s-30s that customary law in the East Timorese

5. It was not strange that UNHCR would sponsor traditional rituals for the “opening of the gate,” “opening of the main path,” “opening of the fence,” and “reconciliation” between refugees and receiving communities. The operation of customary law was a solution that broke down three years of stalemate as the refugees refused to repatriate. Central to this process was the social authority emanating from the Tokoh Adat composed of the Liurai (king) of Oecussi and Council of 18 Sucos or Clan Leaders.

6. Dionisio C.B. Soares, UNTAET Language and Training Unit, *A Brief Overview of the Role of Customary Law in East Timor*, in CULTURAL SENSITIVITY AND CAPACITY BUILDING 20-38 (2000) [hereinafter Soares, *Brief Overview*].

worldview is "deeply rooted in culture," with these concepts as "two sides of the same coin."⁷

III. CONSTITUTIONAL IMPERATIVES

The framers of the Constitution may have thought of the special role of customary law in the daily lives of the people when they wrote in Section 2.4, Sovereignty and Constitutionality, that "the State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law." Aside from recognizing "customary law" and "customs," the Constitution also provides for the protection of "cultural heritage" and East Timorese personality. It also establishes the Oecussi Enclave as a special administrative area, recognizing its cultural distinction and geographic isolation.

The East Timorese Constitution is a product of a revolutionary movement. It is the map that would guide the young nation on its path to a massive and very expensive social reconstruction. There are a total of 170 sections. However, there is no explicit mention of terms that have formed a watershed in the protection of indigenous peoples' rights. There are no express provisions with respect to ancestral domain, ancestral land, cultural integrity, free prior and informed consent, indigenous knowledge and other similar words bravely embossed in the Indigenous People's Rights Act (IPRA).

Nonetheless, while there are no express provisions, the spirit of the law could be relied on. A preliminary scan of the constitutional provisions would indicate that there are positive, negative/restrictive, and neutral provisions. The succeeding analysis uses the cluster of rights incorporated in the United Nations Draft Declaration on the Rights of Indigenous Peoples. It is used as a heuristic device for describing what are perceived to be favorable to the best interest of the indigenous peoples. The categories of rights⁸ contained in the Draft Declaration are the following: (1) the Right to Full and Effective Enjoyment of Human Rights; (2) the Right to Self-Determination and to Survive as a Community; (3) the Right to Life, Liberty and Property; (4) the Right to Cultural Integrity; (5) the Right to Development and to other Social and Economic Rights; and (6) the Right to Social and International Order.

⁷ *Id.* at 22.

⁸ This paper used the comparative analysis of PANLIPI lawyers between the Draft UN Declaration and the Indigenous Peoples' Rights Act, Republic Act No. 8371. See Maria Bernadita Carreon and Ma. Vicenta de Guzman, PANLIPI, *Comparative Study of the United Nations Draft Declaration on the Rights of Indigenous Peoples and the IPRA*, in HORIZONS: BUILDING ROADS TO SELF-DETERMINATION 14 (2000).

The following table presents a quick review of the East Timorese Constitution, insofar as its provisions may apply or affect indigenous peoples' rights. It must be noted that being the fundamental law of the newly independent country, many provisions are not self-executory and require legislative and/or executive actions for implementation. In a manner of speaking, the table is not exhaustive, but can be considered as an initial step towards the formulation of legislative/executive agenda for the protection of traditions, customary law, and IP Rights in East Timor.

IP RIGHTS BASED ON THE DRAFT DECLARATION OF INDIGENOUS PEOPLES' RIGHTS	CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF EAST TIMOR		POSITIVE OR NEGATIVE IMPACT
	SECTION	PROVISIONS APPLICABLE TO PROTECTION OF IP RIGHTS	
The Right to Full and Effective Enjoyment of Human Rights	3.1	Citizenship: There shall be original citizenship and acquired citizenship in the Democratic Republic of East Timor.	Positive
	3.3	Citizenship: Irrespective of being born in a foreign country, children of a Timorese father or mother shall be considered citizens of East Timor	Positive
	6.c	Objectives of the State (entire Sec. 6): To defend and guarantee political democracy and participation of the people in the resolution of national problems.	Positive
	6.j	To create and guarantee the effective equality of opportunities between women and men.	Positive

7.1	<p>Universal Suffrage and multi-party system:</p> <p>The people shall exercise the political power through universal, free, equal, direct, secret and periodic suffrage and through other forms laid down in the Constitution.</p>	Positive
7.2	<p>Universal Suffrage and multi-party system:</p> <p>The State shall value the contribution of political parties for the organized expression of the popular will and for the democratic participation of the citizen in the governance of the country.</p>	Positive
9.2	<p>Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification, or accession by the respective competent organs and after publication in the official gazette.</p>	Positive
17	<p>Equality between women and men:</p> <p>Women and men shall have the same rights and duties in all areas of family, political, economic, social, and cultural life.</p>	Positive
18.2	<p>Child Protection:</p> <p>Children shall enjoy all rights that are universally recognized, as well as all those that are enshrined in international conventions commonly ratified or approved by the State</p>	Positive

23	<p>Interpretation of Fundamental Rights:</p> <p>Fundamental rights enshrined in the Constitution shall not exclude and other rights provided for by the law and shall be interpreted in accordance with the Universal Declaration of Human Rights.</p>	Positive	
162.1	<p>Reconciliation: 9</p> <p>It is incumbent upon the Commission for Reception, Truth and Reconciliation (CRTR) to discharge functions conferred to it by UNTAET Regulation No. 2001/10.</p>	Positive	
The Right to Self-Determination and to Survive as a Community	2.4	<p>Sovereignty and Constitutionality:</p> <p>The State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.</p>	Positive
	4.1	<p>Territory:</p> <p>The territory of East Timor comprises the land surface, the maritime zone and the air space demarcated by the national boundaries that historically comprise the eastern part of Timor Island, the enclave of Oecussi, the island of</p>	Positive

9. This provision legitimizes the creation of the CRTR, a pre-independence body established by the UNTAET having a three-fold purpose: 1) investigate human rights violations between 1974-1999 as to the systematic pattern of abuse, including the roles of foreign governments; 2) restore the human dignity of victims, promote "community reconciliation procedures" where perpetrators, in agreement with their victims, are made "to perform acts of restoration that are meaningful to the survivors and their communities;" and 3) refer cases of serious crimes to the office of the General Prosecutor. See *The Commission for Reception, Truth and Reconciliation: An Overview*, LA'O HAMUTOK BULLETIN, October 2001.

		Atauro and the islet of Jaco	
The Right to Life, Liberty and Property	16.1	Universality and Equality (entire section 16): All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties.	Positive
	16.2	No one shall be discriminated against on grounds of color, race, marital status, gender, ethnic origin, language, social or economic status, political or ideological convictions, education, and physical or mental condition.	Positive
	25.5	State of Exception: In no case shall a declaration of a state of siege affect the right to life, physical integrity, citizenship, non-retroactivity of the criminal law, defense in a criminal case and freedom of conscience and religion, the right not to be subjected to torture, slavery or servitude, the right to be subjected to cruel, inhuman or degrading treatment or punishment, and the guarantee of non-discrimination.	Positive
	28.1	Right to Resistance and Self-Defense: Every citizen has the right to disobey and to resist orders or orders that affect their fundamental rights, freedoms, and guarantees	Positive
	38.3	Protection of Personal Data: The processing of personal data on private life, political and	Positive

		philosophical convictions, religious faith, party or trade union, membership and ethnical origin, without the consent of the interested person, is prohibited.	
The Right to Cultural Integrity	6.g	To assert and value the personality and cultural heritage of the East Timorese people.	Positive
	12.1	State and religious denominations: The State shall recognize and respect the different religious denominations, which are free in their organization and in the exercise of their own activities, to take place in due observance of the Constitution and the law.	Positive
	13.1	Official Languages and National Languages: ¹⁰ Tetum and Portuguese shall be the official languages in the Democratic Republic of East Timor.	Negative
	13.2	Official Languages and National Languages: Tetum and the other National Languages shall be valued and developed by the State	Positive
	20.2	Senior Citizens: The old age policy entails measures of economic, social and cultural nature designed to provide the	Positive

10. See *The 2001 Survey Of Sucos: Initial Analysis And Implications For Poverty Reduction*, DILI, ETTA, ADB, WORLD BANK AND UNDP PUBLICATION, October 2001. The survey revealed that not one in the 498 *sucos* was Portuguese considered as a major language as compared to Bahasa Indonesia, which is widely spoken in five *sucos*. The implication to IP Rights is that the designation of Portuguese as an official language would limit the participation of the non-Portuguese literate population in governance, economy, and other public spheres of the national community life.

		elderly with opportunities for personal achievement through active and dignified participation.	
	54.1	Right to Private Property Every individual has the right to private property and can transfer it during his or her lifetime or on death, in accordance with law.	Positive
	54.2	Private property should not be used to the detriment of its social purpose.	Positive
	54.3	Requisitioning and expropriation of property for public purposes shall only take place following fair compensation.	Positive
	54.4	Only national citizens have the right to ownership of land.	Positive
	59.5	Education and Culture: Everyone has the right to cultural enjoyment and creativity and the duty to preserve, protect, and value cultural heritage.	Positive
	60	Intellectual Property: ¹¹ The State shall guarantee and protect the creation, production and commercialization of literary, scientific and artistic work, including the legal protection of copyrights.	Negative
The Right to Development and other Social and Economic Rights	5.3	Decentralization: Oecussi Ambeno and Atauro shall enjoy special administrative and economic treatment.	Positive

11. This provision is contrary to the protection of community intellectual rights and precludes the recognition of indigenous knowledge, skills, and practices (IKSPS) and may potentially restrict claims for collective rights to oral tradition, traditional medicine, and other creations in the public domain.

	6.d	Objectives of the State: ¹² To guarantee the development of the economy and the progress of science and technology.	Negative
	6.e	To promote the building of a society based on social justice by establishing material and spiritual welfare of the citizens.	Positive
	6.f	To protect the environment and to preserve natural resources.	Positive
	6.i	To promote the harmonious and integrated development of the sectors and regions and the fair distribution of the national product.	Positive
	61.1	Environment: Everyone has the right to a humane, healthy and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations.	Positive
	138	Economic Organization: The economic organization of East Timor shall be based on the combination of community forms with free initiative and business management, as well as on the co-existence of the public sector, the private sector and the co-operative and social sector of ownership of means of production.	Positive

12. This development paradigm emphasizes on modernization, which may create contradictions with the traditional worldview that supports a pervasive subsistence economy and puts the cultural survival of the IPs at risk.

	139.1	Natural Resources: The resources of the soil, the subsoil, the territorial waters, the continental shelf and the exclusive economic zone, which are essential to the economy, shall be owned by the State and shall be used in a fair and equitable manner in accordance with national interests.	Negative ¹³
	141	Land: 14 Ownership, use, and development of land as one of the factors for economic production shall be regulated by law	Negative
The Right to Social and International Order	6.h	To promote the establishment of relations of friendship and co-operation among all Peoples and States.	Positive
	8.1	International Relations: On matters of international relations, the Democratic Republic of East Timor shall govern itself by the principles of national independence, the right of the Peoples to self-determination and independence, the permanent sovereignty of the peoples over their wealth and natural resources, the protection of human rights, the mutual respect for sovereignty, territorial integrity and equality among States and the non-interference in	Positive

13. This presupposes that the "Regalian Doctrine" is the *de facto* system that would govern land ownership, particularly in the alienation and disposal of lands that are traditionally held.

14. The impact on ancestral domains/lands is highly significant in view of the "Regalian Doctrine" that the State would follow.

		domestic affairs of other States.	
	8.4	International Relations: The Democratic Republic of East Timor shall maintain special ties of friendship and co-operation with its neighboring countries and the countries of the region.	Positive
	9.1	International law (entire section 9): The legal system of East Timor shall adopt the general or customary principles of international law.	Positive
	9.3	All rules that are contrary to the provisions of international conventions, treaties, and agreements applied in the internal legal system of East Timor shall be invalid.	Positive
	10.1	Solidarity: The Democratic Republic of East Timor shall extend its solidarity to the struggle of all peoples for national liberation.	Positive

IV. REVIEW OF RELATED LITERATURE ON IMPERATIVES

Considering the infant stage of scholarship on independent East Timor, two authors' bodies of work capture the complexities of the land rights issues. They are East Timorese anthropologist, Dionisio da Costa Babo Soares,¹⁵ and an Australian lawyer, Daniel Fitzpatrick.¹⁶ Soares is a keen observer of his country's

15. A doctoral student at the Department of Anthropology, Division of Social and Environment, Research School of Pacific and Asian Studies, Australian National University, Soares has written three articles relevant to the land rights issues. See Soares, *Success, Weakness, and Challenges*, *supra* note 2, at 59-84; Soares, *Judiciary Development*, *supra* note 4, at 6.

16. Fitzpatrick is also a faculty member of the Australian National University Faculty of Law. He served for three months from November 2000 to February 2001 with the Land and Property Unit of UNTAET and has written two

political culture, and has also written on legal anthropological aspects of East Timorese governance and judiciary.

Being a culture bearer himself, the explanation of Soares on the persistence of customary law in East Timorese culture is quite illuminating. He believes that any (future) government in the territory does not only have the difficult task of adopting an ideal working democracy, it also has to contend with the people's demand to implement customary law, particularly in non-criminal disputes, and especially in the settlement of land conflict. This demand is further reinforced by the fact that 70 percent of the people live in rural areas, where official courts may not be readily accessible. Other limiting factors are the low literacy rate at 56 percent and the grinding poverty.¹⁷

Sodres argues that customary law is a social fact, and is that which holds the social organization together. Likewise, due to the imposition of two colonial legal systems, particularly on land rights, there would arise confusion and greater conflict if the Portuguese or Indonesian laws would prevail.¹⁸ On one hand, under Portuguese law, only one form of land tenure system was recognized—that of full ownership (*propriedade perfeita*). On the other hand, the Indonesian Land Reform Law of 1960 stipulates several land rights such as property rights (*hak milik*) and right to use (*hak pakai*). There are also specific rights for the use of land for business, or building rights, leaseholds or the right to open new land, or to use forest resources, water and fishing rights, and rights to space.

The East Timorese anthropologist summarizes the convex stemming from three historical modalities: Portuguese (1512-1975), Indonesian (1975-1999), and UNTAET (1999-2002):

Three administrations in three consecutive periods have led to 'chaos' in relation to land entitlement. Most of the land in East Timor is not registered. Entitlements to land on the basis of customary practices are still held widely among East Timorese rural communities. During the Portuguese administration, only around 2,843 land titles (*alvara*) were issued, but during the 24 years of Indonesian occupation more than 20,000 entitlements (*Hak Milik*) were issued. Nevertheless, thousands more land titles remain under customary practices.¹⁹

The impending clash of these two exogenous legal systems is inevitable as UNTAET adopted Indonesian Criminal and Civil Codes to be used in courts

articles on the land subject of land. See Daniel Fitzpatrick, *Re-establishing Land Titles and Administration in East Timor*, in *PACIFIC ECONOMIC BULLETIN*, Nov. 2, 2000, at 152-60; Daniel Fitzpatrick, *Land Issues in a Newly Independent East Timor* (Feb. 6, 2001) (Parliamentary Research Service Paper: Research Paper 21 2000-01 on file with the Parliament of Australia).

17. Soares, *Brief Overview*, *supra* note 6, at 37.

18. *Id.* at 29-37.

19. Soares, *Success, Weakness, and Challenges*, *supra* note 2, at 35-36.

and which would more likely be used by post-Independence East Timor. Soares feels that since customary law still plays a major role in everyday life, and was never eradicated by the Portuguese, it should be adopted as part of State law. He concludes:

It is necessary to reactivate the ignored "traditional court system" and, if possible, integrate it into the national legal system in the future. To be able to do this, re-institutionalization of traditional courts, provision of training and education to lawyers and both codification and unification of "customary law" are necessary. Seemingly imperative is the need to establish a national task force whose responsibility is to undertake research and ethnographic studies about local "customary law" and to integrate it into or develop it as part of a legal system.²⁰

Fitzpatrick analyzed land claims in East Timor and offered recommendations how to resolve the dilemma. Like Soares, he noted overlapping systems of land claims based on: 1) traditional rights; 2) Portuguese titles; 3) Indonesian titles; and, 4) non-traditional long-term occupation. He argues that colonial dispossession may have obscured traditional rights but proposes a mixed remedy of restitution, land reform, and zoning. Most importantly, he favors the "re-establishment of the land registry" that would have extensive use of conflict resolution and ample funding and institutional support.²¹ By conflict resolution, he suggests an intermediate scheme where, "traditional processes must be respected, but appropriate bridges must be provided for state institutions to assist and/or intervene" in "intra- and inter-communal disputes."²²

He cautions however, that:

Resolving land claims and re-establishing land administration will not succeed without an effective system of dispute resolution. Policy makers in East Timor should be wary of the Papua New Guinea experience. On paper, that country has highly credible and sophisticated laws to deal with land conflict, particularly in respect of customary land, but in practice these rules are all but meaningless as the relevant institutions lack the capacity, funding and political support to implement them. The obvious lesson, of course, is that land conflict resolution institutions must be self-funding and self-enforcing as possible. This will require that there be as close conformity as possible with existing patterns of dispute resolution.²³

20. Soares, *Brief Overview*, *supra* note 6, at 37.

21. Daniel Fitzpatrick, *Re-establishing Land Titles and Administration in East Timor*, in *PACIFIC ECONOMIC BULLETIN*, Nov. 2, 2000, at 11-15 [hereinafter Fitzpatrick, *Re-establishing Land Titles*]; Daniel Fitzpatrick, *Land Issues in a Newly Independent East Timor* (Feb. 6, 2001) (Parliamentary Research Service Paper: Research Paper 21 2000-01 on file with the Parliament of Australia).

22. Fitzpatrick, *Re-establishing Land Titles*, *supra* note 21, at 15.

23. *Id.* at 14.

He described a failed experiment in land titles and administration in Papua New Guinea where traditional land claims also had to be processed and by doing so, gives an all-familiar caution on similar situations. Land certainty is considered an essential factor of economic development. However, priority should not be placed only on the actual number of traditional land titles issued. The value of conflict resolution processes that peacefully settle disputes should be appreciated, as well as the development of institutional capacity to process overlapping or conflicting claims.

As a final recommendation, both Soares²⁴ and Fitzpatrick proposed the involvement of anthropologists or social scientists in the administration of traditional land titles who could document cases of customary law, aid in the preparation of genealogies, compile social historical accounts, and other related aspects of culture. Fitzpatrick echoes Soares's concern, regarding "the need for anthropological expertise and study," thus:

Building bridges between state institutions and traditional processes begins with detailed knowledge of social structure. The host of questions has a familiar ring to students of traditional/tribal justice. For example, if localized dispute-resolution institutions are to be established, who best performs a dispute resolution role in traditional communities – the liurai or some other institution of customary authority? What is the relationship with church representatives, and CNRT (Council for East Timorese Resistance) and East Timor administration officials? Would dispute resolution institutions based around liurai and East Timor administration officials be effective or viable? To what extent do liurai represent an unacceptable form of feudal authority? How would human rights and non-discriminatory practices be guaranteed? In what circumstances would state law and institutions intervene to modify or overturn traditional determinations?²⁵

Fitzpatrick concludes by strongly urging his government to offer technical assistance by way of helping establish the land registry and applying the Australian approach to conflict resolution.²⁶ He suggests that, corollary to the issue on the suitable mechanism for conflict resolution, cases of land disputes may be brought to the attention of the Commission on Reception, Truth and Reconciliation (CRTR). However, it may not be germane to objectives of the CRTR to mediate on such issues with finality. The situation of the Oecussi enclave is unique in the sense that the liurai is a member of the District CRTR there.²⁷ As mentioned earlier, in recent cases involving returning refugees and local residents, the liurai and the Tokoh Adat (Council of Elders-Chiefes do

24. Soares, *Success, Weakness, and Challenges*, *supra* note 2.

25. Fitzpatrick, *Re-establishing Land Titles*, *supra* note 21, at 157-8.

26. *Id.*

27. The Liurai or Rajah of Oecussi, Antonio Hermenegildo da Costa, is one of three Commissioners of the CRTR in the Enclave.

Suco) peaceably and successfully mediated cases of squatting and other opportunistic land claims.

V. CONCLUSION

The main imperative for the survival of East Timorese culture and personality is the recognition of customary law and the inseparable core issues related to traditional or ancestral land rights. The Constitution, crafted in the 21st century and although revolutionary in character, contains inherent contradictions on development and cultural integrity policies. East Timor is in search of a balance between the preservation of natural resources and the environment, and the exploitation of the same through the conscious advancement of science and technology.

Time will tell if the traditional worldview would accommodate modernization paradigms that would, among others, transplant indigenous knowledge, introduce changes in the social structure, enforce economic and public transactions that are based on foreign or external models. The foregoing review of the East Timorese Constitution, as well as anthropological and legal assessments of land rights and customary laws, is by no means exhaustive.

This paper is an exploratory study intended to encourage Philippine advocates for indigenous peoples rights to look at the East Timorese case where lessons could be gained for the mutual benefit of both societies. The Philippines and East Timor have similar colonial and historical experiences that could help establish dialogue and solidarity on the issue of indigenous peoples' rights and protection of ancestral domains/lands at the official and civil society levels. Members of the international community, like the International Labor Organization and the United Nations Development Programme are present in East Timor. Perhaps regional or comparative projects may be sponsored by them towards the advocacy for affirmative action, and the ratification of ILO Convention 169, or the approval of the Draft Declaration of Indigenous Peoples' Rights. After all, the Constitution articulated this objective of being in solidarity with peoples in pursuit of self-determination and national liberation in several provisions.

It is recommended that further research be undertaken specifically on the interface of customary law with international law, and the Portuguese and Indonesian legal systems with traditional law. Can the East Timorese legal environment evolve into one of legal pluralism? The odds are in favor of the infant nation as it pushes hard for the transformation of its political milieu as a participatory democracy.