Re-establishing land titles and administration in East Timor

Daniel Fitzpatrick
Faculty of Law, The Australian National University

Economic theory increasingly asserts the importance of property rights to economic development. It is now well known that in an age of network economics and globalised financial flows, reliable legal systems—ones that allow confident assertion of property entitlements across time and distance—greatly facilitate complex economic activity and investment by outsiders. This is the basis of much of the current ‘new institutionalist’ debate on law and economics.

Yet, in this debate, it is easy to overlook the fact that land tenure—the most fundamental of property rights—is basic even to the simplest forms of economic activity. This is not simply an issue of providing sufficient certainty to allow planting and harvesting of crops. Nor is it merely to assert, as recent events in the South Pacific have shown so clearly, that land tenure is fundamental to social and political stability. Rather, it suggests that reconstructing a country devastated by violence and colonisation begins, in large part, with resolution of competing land claims. I speak here, of course, about East Timor.

Thus, while four major land issues stand out in East Timor—land claims, land administration, conflict resolution and economic development—the first, land claims, is the key. Many lawyers and economists assume that a system of land administration, being so integral to economic activity, will swiftly and emphatically be established by new post-crisis governments. Experience shows, however, that there is no magic-wand solution to intractable land conflict. Certainty of titles cannot be restored simply through state fiat. Ultimately, as this paper seeks to argue, re-establishing an effective system of tenure in devastated post-colonial environments requires a land-claims process underpinned by sufficient social, political and, above all, institutional support.

The context

East Timor has a land area of approximately 14,600 square kilometres. Some 42 per cent of this is viable agricultural land, of which approximately half is currently cultivated (UNTAET 2000:1). The bulk of agricultural activity is subsistence farming (corn, rice, root crops, vegetables and fruit), although there is some production of coffee, tobacco, cloves, cocoa, vanilla and areca nuts (Metzner 1977:116). Coffee, along with Timor Gap oil revenues, is seen as the most likely potential backbone of future export income. There is also potential for cattle and poultry breeding,
and fisheries activity. Aside from some
mahogany, however, forestry activity is
limited due to severe deforestation, and the
once-thriving sandalwood trade has all but
expired due to over-exploitation (UNTAET
2000:1).

Agricultural activity and settlement
patterns are defined by the rugged
landscape. The north and south coasts are
divided by a dramatic mountain range, with
some peaks over 3,000 m. Overall, the country
is in the dry tropics climatic zone,
experiencing annual wet and dry seasons.
The north coast receives relatively little
annual rainfall on average (50–100 cm)
compared with the mountain areas (250–300
cm) and the south coast (150–200 cm). Most
of the mountain areas are too steep and
deforested for intensive cultivation, and
irrigated cultivation is thus largely confined
either to the south or areas surrounding flood
plains, swamp land or natural springs
(Metzner 1977:116).

Although few surveys have been
conducted, and available information should
be treated with care, mining potential outside
the Timor Gap appears relatively limited.
East Timor certainly does not have the
enormous mineral reserves of West Papua
and Papua New Guinea. There are known
marble and plutonium deposits in Manatuto,
on the north coast, and some gold and other
metals in several sub-districts. There are also
some indications of possible oil and gas
reserves along the south coast, although these
are reportedly relatively small-scale and may
be difficult to exploit (Hak n.d.:1–3). As is
well known, the zone previously shared by
Australia and Indonesian under the Timor
Gap Treaty has recently shown significant
potential, most notably for natural gas.

Culturally and linguistically, the country
is a patchwork of different ethnic groups,
with as many as 30 separate languages. Prior
to the arrival of the Portuguese, East Timor
experienced waves of migration of
Austronesian, Papuan and proto-Malayan
peoples (Aditjondro 1994:55–6). These
groups established numerous small
kingdoms under the hereditary control of a
liurai. The liurai system, and other customary
institutions (macair fukun and dato uain),
retain strong influence in East Timor,
particularly in rural areas, but have also,
inevitably, been disrupted and factionalised
by colonisation and war. The degree of this
disruption is not fully known, but will affect
many of the land issues discussed.

UNTAET and the institutions of
government
On 30 August 1999, almost 80 per cent of
East Timorese voters voted for independence
from Indonesia. The ensuing violence and
destruction by pro-Indonesian militia,
supported and funded by the Indonesian
military, displaced most of the population
and destroyed much of its housing stock. All
government records, including land titles,
were directly targeted and either burnt or
carried off. Being either non-East Timorese
or pro-autonomy supporters, all senior civil
servants including the judiciary, and most
lawyers and public notaries, fled to
Indonesia after the vote. All large-scale
business operations, also controlled by
Indonesians or pro-autonomy supporters,
closed to operate. As a result, economic
activity stopped altogether, unemployment
was almost universal, and the institutions
of government simply ceased to exist.

On 25 October 1999, the United Nations
Security Council passed Resolution 1272,
establishing the United Nations Transitional
Authority in East Timor (UNTAET). Article 1
vested all legislative and executive authority
with respect to East Timor, including the
administration of justice, in the hands of the
UNTAET. Article 8 stressed ‘the need for
UNTAET to consult and co-operate closely
with the East Timorese people...with a view
to developing local democratic institutions
and transfer to these institutions of UNTAET
administration and public service functions.’ The primary political representative of the East Timorese people is the umbrella pro-independence group, the Council of National Resistance for East Timor (CNRT). Although its future is currently uncertain, the CNRT consists of representatives from most pro-independence groups and, most importantly, includes the two largest political groups, UDT (Uniao Democratica Timorense) and Fretilin (Frente Revolucionara de Timor Leste).

UNTAET now proposes to cooperate and consult with the CNRT, and other East Timorese representatives, through a period of co-government with UNTAET in which international and East Timorese ministers would serve together in a cabinet, and East Timorese members would progressively be introduced into management positions within a mixed East Timorese and international East Timor Administration. The current Governance and Public Administration department heads would become senior civil servants under their respective ministers and, again over time, these would also be replaced by East Timorese. Ultimately, through this process, elections would be held to choose a Constituent Assembly that would draft and adopt a constitution. Following this process, the Constituent Assembly would become the East Timorese Parliament, and full independence would become available some time soon thereafter. It is currently hoped that elections will be held between April and November 2001.

Land claims

East Timor’s difficult and complex land claims arise from its unfortunate colonial past. Most colonies only experienced one wave of dispossession, and thus generally have only one category of dispossessed claimant. East Timor has suffered successive waves of dispossession, from Portuguese colonisation through Japanese occupation, to Indonesian invasion. As a result, land in East Timor can now be claimed on four bases—underlying traditional interests, titles issued in both the Portuguese and Indonesian eras, or occupation since the 1999 vote for independence.

Broadly speaking, of the two main political parties, the UDT supports restoration of pre 1975 Portuguese titles, whereas Fretilin desires land justice for traditional and/or dispossessed groups. Xanana Gusmão has also reportedly promised that bona fide Indonesian titles will be respected. It is inevitable, therefore, that competing claims will arise with significant political and economic implications. Australian policymakers should not forget that the brief armed conflict in 1975 between UDT and Fretilin, the two main political parties, was triggered in part by Fretilin’s policies of land reform.

Simple reversion to pre 1975 Portuguese titles has its superficial attractions, particularly given the oppressive nature of Indonesian rule, but it would

- dispossess thousands of bona fide East Timorese landholders who received titles under Indonesian titling programs
- raise enormous practical difficulties of unravelling chains of title, both where Indonesian titles were based on converted Portuguese titles, and where the pre 1975 Portuguese title-holder has died intestate under Portuguese law
- antagonise Indonesia at a time when, for better or worse, good strategic and economic relations are paramount
- probably be politically unacceptable to Fretilin because it boosts UDT interests and entrenches Portuguese dispossession.
Is a compromise possible?

Australia’s interests favour compromise and the avoidance of conflict. Although the issues are unusually complex, an outline of one possible form of compromise.

For traditional claims

- divide the country into zones. Urban areas, economically strategic sites such as plantation land, and public-purpose lands (such as hospitals and schools) would be free of any claim by traditional interests. All other areas could be subject to claim, but this could be over-ridden by *bona fide* Portuguese or Indonesian titles as discussed below. In that event, traditional claimants may receive a right to compensation, substitute lands, or some other form of benefit
- satisfy social demands to redress Portuguese dispossession through a program of land reform or land restitution. Land reform may not necessarily involve fragmenting existing interests, but could be achieved through creation of a land bank, and mediated movement of the dispossessed and landless to lands with suitable infrastructure and fertility. This may be easier to achieve than it seems because war and famine have created surprisingly large tracts of unused and fertile land in East Timor
- satisfy social demands for return of traditional lands taken without due process or adequate compensation under the Indonesian administration.

For Portuguese titles claims

- provide *prima facie* recognition of pre 1975 Portuguese titles, but allow for them to be over-ridden either by *bona fide* holders of Indonesian titles, or (possibly) traditional claimants who can prove rights based on Portuguese dispossession

For Indonesian titles claims

- recognise titles issued under the Indonesian administration in so far as they are now held in good faith by *bona fide* titleholders
- disallow titles issued corruptly to people other than the true owners where the current holder has notice of that corruption, or otherwise holds in bad faith
- disallow titles issued on land taken without due process or adequate compensation, where the current holder has notice of those facts or otherwise holds in bad faith.

For non-traditional long-term occupation claims

- disallow claims based on occupation since 30 August 1999
- recognise claims based on sufficiently long-term occupation (for example, 12 years of continuous possession).

Land administration

A system of land administration must be re-established as an urgent priority. The basic policy choice lies between

- a ‘big bang’ approach where all alleged titleholders must apply afresh for new titles through a process of systematic registration. Systematic registration is just that—a ‘roll out’ of titles registration in designated areas. This process is expensive and time-consuming, but would have the benefit of systematically resolving all land disputes at the same time as all new titles are registered
- a more graduated approach that begins with applicant-driven registration of titles or notification of disputes. In the first stage, only those disputes brought to the Land Claims Commission, as
opposed to those uncovered by a systematic registration process, would be heard and determined. Equally, only those who specifically apply for a new title, as opposed to those living in areas designated for systematic registration, would receive a fresh title certificate. The advantage of this approach is that it requires relatively little institutional capacity and far less funding than systematic registration. Systematic registration could then take place, as a second stage, once the legal framework and institutions of mediation and adjudication have been properly established.

The policy choice is finely balanced. If successful, the first proposal would, in one stroke, solve the issues of land claims and re-establishing the land registry. However, without proper funding and sufficient institutional capacity, embarking on systematic registration at this stage may well overwhelm institutional development with opportunistic claims and intractable conflicts. There is a risk that re-establishment of the land registry will be held hostage to the political Gordian knot of competing Portuguese and Indonesian titles. The first proposal increases that risk because it requires significant funding and institutional capacity. Systematic registration is notoriously slow and expensive and, without sufficient funding, may overload the nascent dispute-resolution and adjudication system. This would be particularly so if the land registration process, to the extent that it is a final and conclusive determination of land claims, throws up a host of opportunistic or long-submerged land disputes.

**The legal status of registered titles**

A related issue requiring resolution is the legal status of any registered titles. In theory, this system reduces costs and enhances certainty by allowing investors to rely with confidence on the legal finality of the titles register. Yet, in truth, there is considerable misinformed comment on the benefits of a Torrens system for developing countries. Experiences in Malaysia and Papua New Guinea, both countries with Torrens systems, show that certain institutional preconditions are necessary for an effective Torrens system. These include:

- a relative absence of fraud, corruption and incompetence, particularly in land titles offices
- a relatively settled and dispute-free system of underlying tenure, so that the register can faithfully reflect community understanding of land ownership
- public confidence in the system and relatively low barriers to entry, so that the public will record subsequent transactions and thus maintain the reliability of the register
- a relatively competent judiciary, so that necessary exceptions to indefeasibility are not widened to such an extent that the register loses its reliability
- a compensation fund to ensure that those who lose their land through fraudulent registration and then bona fide sale can receive a remedy other than land restoration.

It need hardly be said that these conditions do not exist in East Timor, and will not exist for the foreseeable future.

**Extending the land register**

We then come to the related issue of extending the land registry system to previously unregistered areas. This may be dealt with briefly. Economists tend to view land registration as wholly positive, a precondition to land mobilisation, productive agriculture, a market for credit and, ultimately, economic development. In the 1990s, for example, the World Bank
strongly supported land registration programs, and indeed AusAID has funded many land registration programs in our region, including in Indonesia, Thailand, Laos and Papua New Guinea.

As analysts of the South Pacific well know, however, care needs to be taken, particularly in relation to customary lands. Systematic registration of land titles in the developing world is notoriously expensive, and often fails to achieve its objectives of increased certainty and reduced conflict. Too often, means are mistaken for ends, and, as a result, registration programs are incorrectly measured by the number of certificates issued rather than empirical assessments of reduced levels of conflict and uncertainty.

Ultimately, land registration programs must be developed by reference to issues of institutional supply and demand. In terms of supply, project design should consider the capacity and susceptibility to corruption of implementing agencies, the adequacy of supporting laws and regulations, and the provision of post-registration funding and expertise. In terms of institutional demand, project design must consider a whole range of factors, including such issues as

- the nature of existing tenures, agricultural use and land types
- the nature and degree of land disputes
- the degree of public confidence in state institutions
- the degree of awareness by landowners of the purpose and nature of land registration programs
- the degree of demand by outside developers for land certainty
- the nature of informal institutions or dealings already existing over the land
- the nature of any incipient markets for credit and institutional credit providers
- the pressure on customary forms of authority and tenure from individualisation of tenures.

**Conflict resolution**

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

This may seem straightforward. In practice, however, the romantic notion that traditional processes can largely substitute for a state-sponsored system usually yields to the reality of intractable intra and inter-communal disputes over land. Inter-communal land conflict is a particular problem in East Timor because of its history of displacement and migration. Major disputes are ongoing in the districts of Los Palos, Maliana and Viqueque. Inter-communal conflict is also a problem because land is such a basic resource and source of power. In either case, disputes will remain unresolved or suppressed unless there is external dispute-resolution assistance. In short, conflict resolution in traditional societies is a delicate task—traditional processes must be respected, but appropriate bridges must be provided for external institutions to assist and/or intervene.

**The need for anthropological expertise and study**

Building bridges between state institutions and traditional processes begins with detailed knowledge of social structure. The host of questions that must be answered will
have a familiar ring to students of traditional/tribal justice. For example, if localised 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 their relationship with church representatives, and CNRT 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?

**UNTAET’s plans for dispute resolution**

Understandably, UNTAET’s plans in relation to conflict resolution are relatively underdeveloped. In general terms, a three-tier system is proposed: traditional processes, then mediation and, failing that, judicial determination. Specialist mediation of land conflict is increasingly being used in the developing world. It is to be distinguished from traditional processes, even though they also generally require voluntary acceptance of decisions. UNTAET is fortunate enough to have experienced Canadian and Australian mediators who are working on mediation guidelines with East Timorese representatives, including Xanana Gusmão himself.

In terms of judicial resolution of land conflict, there has to date been relatively little capacity building. Although there was some pressure for a specialist Land Court to be created, current proposals are that judges of the District Court will be seconded from time to time to the Land Claims Commission. All other land disputes will fall directly within the jurisdiction of the District Court. The District Court judges have received some training, including a two-day program held by the author in December 1999. Events, however, have illustrated what is all too easy for western lawyers to overlook, namely that an effective judiciary requires not only training and experience but also substantial social and political support. Thus, those lawyers eventually appointed to the Dili District Court have been concerned, often understandably, about personal safety, their position under a future East Timorese government (particularly as there was allegedly little consultation with the CNRT on establishing the District Court), and wages and conditions (particularly vis-à-vis international UNTAET staff members). These concerns have significantly delayed court operations.

**Economic development**

It is hoped that the foregoing analysis has shown that providing sufficient land certainty for economic development is inseparable from all these preceding issues of land claims, land administration and conflict resolution. It will be tempting, particularly for non-lawyers, to argue for a clean slate—to allocate lands and titles afresh, and to facilitate urgently needed investment by legislating away all prior claims. Indeed, there is some talk of nationalising land for this purpose. But post-colonial experience shows that institutional decisions will be ineffective without ground-level support. Reconstruction cannot occur without a stable foundation of property ownership that is accepted by most East Timorese. Ultimately, there is no alternative to a principled, transparent land-claims process.

**Major projects**

One possibility is that a category of ‘major projects’ be established. Such projects would receive a state guarantee of title and all valid
competing claims would, at best, receive alternative remedies of compensation or substitute lands. This is essential for large-scale investment as currently, without a state guarantee, there is no hope for certainty of title until a legal and institutional framework is developed to determine competing land claims. Because of the liability and social unrest risk, however, this state guarantee benefit would only be made available where the project involves a certain level of investment, and employs a minimum number of East Timorese. Australia could help develop this mechanism by assisting with a compensation fund to underpin the ‘major projects’ guarantee.

Sustainable and equitable development

This type of ‘major projects’ approach may only be temporary, and would likely do little, in the longer run, to promote sustainable and equitable development. The perennial challenge of post-colonial countries is to allow participation of poor and traditional groups in economic development. The Indonesian experience itself shows that authoritarian top-down development often lacks sustainability and certainly encourages corruption and environmental destruction. How, then, can a land system be established to promote broad-based sustainable development?

Commonly, in post-colonial countries, legitimate concerns that economic development on traditional lands will lead to landlessness and exploitation have been met by a prohibition on outsiders directly dealing in customary land. Dealings in customary land are thus only valid between members of a customary group. Outsiders can only gain an interest in traditional lands by way of compulsory acquisition by the state. This system works relatively well where the government is democratic and accountable, but fails utterly when state officials are authoritarian and corrupt. In particular, it engenders a vicious cycle where investors eschew paying market price to traditional owners, in favour of acquiring title through corruptly suborning state officials to expropriate the land at below-market values.

One possibility, of course, is to prohibit dealings by outsiders in customary land, and refuse the state any rights to expropriate that land. This, however, is rarely politically acceptable, particularly when the land in question has economic value; and, in any event, prevents traditional landholders from using their land to raise credit or capital for their own uses. Hence, this paper suggests a third way, one increasingly proposed for traditional groups in developing and industrial societies. This way involves allowing direct negotiations between customary landholders and economic investors through mandatory use of template agreements. Such agreements may take many forms, and will differ according to their subject matter (such as mining, timber products or fisheries). In essence, however, the legal framework would have four common elements. It would

- allow customary groups to grant long-term leases over their land to outsiders
- provide that leases and ancillary agreements are to be invalid unless they follow a template form
- facilitate the development of template agreements to provide for community benefit packages, including health, education and infrastructure development, future generations trusts, and methods of distribution of compensation funds
- establish monitoring of such agreements by an independent statutory authority
- provide special credit institutions that allow such leases to be used as security for loans.

Indeed, this template approach may even be used by the customary group itself to raise capital for its own economic purposes. Hence, for example, they may grant a state-
guaranteed lease to itself (as an incorporated body), and such a lease, being free from any underlying disputes within the community as to title, could then be used to obtain credit or obtain outsider joint venture participation. Analysts of Papua New Guinea would be familiar with this ‘lease-leaseback arrangement’.

Conclusion

All this can only be the barest sketch of some land issues in East Timor. Nevertheless, it is hoped that it is sufficient to establish a fundamental point, namely that a major historical opportunity exists to establish a land system that both promotes economic certainty, and avoids the intractable and systemic land conflicts now apparent in parts of the South Pacific.

Note

1 Personal communication with Bob Churcher, Head of the UNTAET Infrastructure Unit, 18 February 2000.

References


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Readers may find an expanded discussion of the issues in a forthcoming Parliamentary Research Service paper entitled ‘Land issues in newly independent East Timor’. Comments are welcome at <Daniel.Fitzpatrick@anu.edu.au>.