

# A Constitution for East Timor

By Justin Young\*

Justin Young reflects on the task facing East Timor's Constituent Assembly in drafting a constitution for the world's newest nation within a 90 day timeframe.

'I do not know a lawyer in the world who would not jump at the chance to draft a Constitution', said Peter Galbraith from behind a desk in the United Nations headquarters in Dili. Galbraith, son of the renowned economist John Kenneth Galbraith, former United States Ambassador to Croatia during the Balkans war and to the United Nations during the bombing of Kosovo, is now United Nations Special Envoy in East Timor. He is also a lawyer.

Between trips to Canberra and Jakarta, where he has been negotiating amendments to the Timor Gap Treaty on behalf of the East Timorese to provide a sustainable income to build an independent East Timor, he has been overseeing the development of its Constitution. For Galbraith, 'overseeing' is probably too strong a word: 'This will be an East Timorese Constitution,' he says.

At the time of writing, the Constituent Assembly in Dili, elected through the country's first free and fair elections in August, is embarked upon the task of drafting a Constitution for the people of East Timor.

It has ninety days to complete the task.

'Not long enough,' is the view often expressed by many involved in the East Timorese constitutional development process. It was the view of the East Timorese Jurists Association, the fledgling 'Law Society' of East Timor, when they decided to withdraw from a formal role in the United Nations' constitutional education process earlier this year. It was the view of many of the overworked (and somewhat shell-shocked) officers, many Australian, of the United Nations Department of Legal Affairs in Dili.

And it was my view, as I arrived in Dili last May, one of the constitutional trainers brought in by the United Nations in my capacity as a member of an Australian non-government organisation ('NGO'), one of the many offering support to the East Timorese people as they rebuild their nation.

I was there as a result of the promulgation on 30 March 2001 of a Directive entitled *On the establishment of constitutional commissions for East Timor*. This was, like all such Directives, promulgated by the Special Representative in East Timor of the Secretary-General of the United Nations, and head of the UN Transitional Administration in East Timor ('UNTAET'), Sergio Vieira de Mello ('the Administrator').

The Directive provides for the setting up, in each of the thirteen provinces of East Timor, of constitutional commissions to conduct public meetings in the period leading up to the elections. The purpose of these meetings was to educate, and elicit the views of, the East Timorese people about their constitutional options. The commissions were charged with the responsibility of reporting the views of the people of each province back to the Constituent Assembly, once elected. The Directive also contemplated some basic training of the constitutional commissioners before the public hearings took place.

The Directive recites UNTAET Regulation 2001/2 of 16 March 2001. This is entitled: *Election of a Constitutional Assembly to prepare a Constitution for an independent and democratic East Timor*. It is this document, also promulgated by the Administrator, that establishes the mechanism for the creation of an independent East Timor. It provides for the election of a body to be known as the Constituent Assembly whose role is to produce, within ninety days,

a Constitution for East Timor that meets the approval of sixty of the eighty-eight members of the Assembly. It further confers power upon the Assembly to transform itself into the country's first parliament if the Constitution it creates so provides.

'Not long enough,' I thought again as I read the Directive sitting in a sparse room of the old Presidential Palace now occupied by UNTAET.

The Directive also recites UNTAET Regulation 1999/1 of 27 November 1999. This Regulation is entitled: *Authority of the Transitional Administration in East Timor*. This is the founding regulation of the transitional administration. It sets out the powers and responsibilities of UNTAET.

Finally, the Directive recites UN Security Council Resolution 1272 (1999) of 25 October 1999; the UN resolution that created the United Nations' mission in East Timor.

It was through the matrix of this and other legislation that East Timor has functioned for two years and will continue to function until UNTAET withdraws. This will be in May 2002 according to a recently announced agreement between UNTAET and the East Timorese leadership to the effect that, after expected presidential elections early next year, the executive authority currently exercised by UNTAET will be handed over to the new constitutional head of state.

Thus, an interesting constitutional situation pertains: the Constituent Assembly, established through democratic elections, is in the process of drafting a Constitution for East Timor that will, some time early next year, be adopted by a vote of that Assembly. That Constitution is likely to make provision for the election of a president by May next year. Of interest is that, notwithstanding the clear mandate given to the Constituent Assembly through the election process, the Assembly nevertheless remains the creature of an UNTAET Regulation and will remain that way until, by way of further promulgation in May next year and in conjunction with the swearing in of the new president, it declares itself defunct. The Constituent Assembly is a body, in effect, created and destroyed by the

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\* The views expressed in this article are the author's alone and not those of any organisation.

pen of one person, the Administrator.

I mused on this at the beginning of my stay. Dili remains a city of charred skeletal buildings, traumatised faces and crowds of refugees packed into Dili's central market. Electricity and water supplies are unreliable. Shops are closed. People in the countryside, their houses burnt, had walked for days to come to Dili where there was some hope of work and safety. But Dili is also a place of UNTAET vehicles rushing around from one dusty building to another and well-dressed UN and NGO officials spending Australian or American dollars and speaking English. The night time vista of central Dili is of a tropical, humid place dominated by the brightly lit and air-conditioned UNTAET headquarters.

The contrast between the world of UNTAET and that of the local people is stark: it is no more obvious than in the presence near the UNTAET headquarters of a new underclass of street kids, dirty, cheeky, approaching passers-by, trying to sell them cigarettes and phone cards or to exchange money. These children are the creatures of a clash of cultures and the poverty of an oppressed and war-ravaged people.

But the process goes on. The Constituent Assembly elections took place in August without incident. The worst fears of the people - that the Indonesian militia would return or that minority political parties disgruntled with the election process would cause bloodshed - proved unfounded. Fretilin, by far the biggest political force in East Timor, polled well but fell short of the sixty members it needed to push its constitutional model through. As a result, a genuine constitutional development process is currently under way. The Assembly has established various working groups, each to consider discrete aspects of the proposed Constitution.

In the meantime, the workings of government in East Timor continue. The Administrator continues to occupy

his position of *de jure* absolute sovereign, promulgating regulations and ensuring East Timor functions on a day-to-day basis. His unfettered power is tempered by a National Council, a body of East Timorese luminaries appointed by the Administrator and with whom he consults. This is the body of which Xanana Gusmao, before he resigned, was part and of which Hose Ramos Horta is 'Foreign Minister.' This Council will cease to exist along with UNTAET's withdrawal.

East Timor's security concerns become smaller and smaller as each day passes. The soldiers of Australia and New Zealand (and, to a lesser extent, other countries) continue to patrol the border with Indonesia and other hot spots. The isolated skirmishes becoming fewer and farther between. The Australian contingent has plans to remain in East Timor until at least 2005, with an objective of promoting a secure environment in which the fledgling state can develop. Quite what mandate it will operate under after the UNTAET withdrawal is not clear.

What type of Constitution East Timor will adopt is an interesting question. Fretilin has had a draft in circulation for some time. It opens with the declaration:

The Democratic Republic of East Timor is a democratic state, sovereign and independent, that is based upon the rule of law, the dignity of the human person and the will of the people.

Although these words are borrowed from the Portuguese Constitution, one cannot help but feel that they will linger long on the lips of the East Timorese, so long deprived of the sentiments they express.

The politics of the Constituent Assembly will play their part. The Australian Section of the International Commission of Jurists is working with interests in East Timor to create a practical workable constitutional model in an environment where the focus of the debate has been on the more general issues of human rights, democracy, the rule of law and the like. Although the full range of constitutional models is available to the Assembly, almost certainly a

presidential system will be adopted. It is equally certain that Xanana Gusmao, now that he has stated he is willing to stand, will be East Timor's first president. He will receive the baton passed to him by the Administrator.

Not long enough? Peter Galbraith does not agree.

It is for the East Timorese to decide. If they would like assistance, we will provide it. But it is their Constitution. Anyway, if they are given a Constitution which they do not own, they will ignore it and if their own Constitution falls short of the mark, they will find a way to make it work.

There are many different views on this subject. The Australian Constitution is a creature of many years' deliberation by people well versed in constitutional and governmental affairs and with a prosperous nation's resources at their command. Many are afraid that a solution for East Timor that is seen by some to be imposed from above and in such a short time frame is a recipe for future instability and chaos.

But all things depend on their contexts. The constitutional development process began at a time when Dili's buildings were still burning. A good number of the UNTAET officers now presiding over the constitutional development process first stepped ashore at Dili Harbour when the only security came out of the barrel of an INTERFET gun. When building a society has to start with putting out the smouldering embers of the society whose place it is taking, time is a commodity to be used sparingly.

The people of East Timor have already experienced instability and chaos far worse than anything that might arise out of defects in a Constitution. They have already endured years of foreign rule far less respectful of their interests than the legislation promulgated by the UNTAET Administrator.

And they have waited long enough for their independence.

'If they are given a Constitution which they do not own, they will ignore it.'