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Building land tenure systems: The political, legal, and institutional struggles of Timor-Leste

Ribeiro de Almeida, B.

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Author: Ribeiro de Almeida B.

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4 | The political environment



'Dezenvoimentu'

'Development'. The headquarters of the Ministry of Finance is, by far, the tallest and most futuristic building in Timor-Leste, but remains surrounded by poor makeshift houses.

4.1 INTRODUCTION

This chapter focuses on the political environment in which the Timorese formal land tenure system has been developed.¹ As prescribed in the framework of analysis established for this book (Chapter 1), the political environment is the first layer of social organization in which one should focus on to understand a land tenure system. The political environment includes ideologies – as broadly defined in Chapter 1 – and the contextual factors that, based on the literature but also my personal experience in Timor-Leste, guide the political debates and actions that inform the development of the formal land tenure system.

The first part of this chapter looks at ideology regarding land tenure, visible in the positions of the main political parties on land tenure; the connections between the concept of development, high-modernistic ideology, infrastructure, and investment; and finally, the post-authoritarianism and the authoritarian temptation that has marked the country since independence. This first part of the chapter shows that, for a number of reasons, the political elite tends to favour strong control of land by the state.²

The second part of the chapter analyses the contextual and interconnected factors that, together with ideology, play a role in the development of the formal land tenure system. Factors such as the weak rule of law; the Indonesian land administration legacy; and corruption, rent-seeking, clientelism, patronage, and elite capture give politicians and state officials little incentive to improve the formal land tenure system. The effects of the ‘resource curse’ further constrain improvements in administrative practices. Difficult dilemmas posed by post-colonial and post-conflict debates, the potential for land tenure to ignite violence, and the resilience and prevalence of customary land tenure systems further disincentivise politicians and state officials from improving the formal land tenure system.

There are two points about the chapter that I would like to make upfront. First, I refer to ‘Government’, ‘politicians’ and ‘state officials’ in a way that should be read carefully; governments are not monolithic institutions, and politicians and state officials are not all the same. The same happens when I refer to ‘political elites’. When I use these expressions, I am referring to a common dynamic among certain groups, but not to every single case from

1 An earlier version of part of this chapter was published in Almeida, 2019.

2 By *political elite* I refer to the group of people that can influence state policies and decisions, by virtue of their positions in political institutions, but also through their social position and economic resources. About this definition see Vel, 2008: 16. The Timorese elite is a diverse group which gained its status from different factors, such as involvement in the Indonesian administration, participation in the guerrilla movement against the occupation, and even advocacy from places of exile during the occupation. These diverse backgrounds are important identity markers that, together with other factors such as local origin and family, play a role in how elite members are perceived and listened to by others. On Timorese elites, see Guterres, 2006; Silva, 2006.

or member of that group. Second, this chapter focuses its analysis at the national level. The study of the political environment can of course go deeper into more localized debates, but such an expansion is beyond the scope of this chapter.

4.2 POLITICAL PARTIES AND LAND TENURE

Political parties are an interesting starting point for the analysis of ideological debates about land tenure. Political science holds that political parties are organized around political theories and visions of the world, and are the institutions where the views and interests of individuals are aggregated, in order to participate in and influence legislative drafting and governance in general (Lindberg, 2007: 218; Ufen, 2008: 328; Ware, quoted by Feijó, 2016: 106). However, analysing Timorese political parties' ideologies is not easy. The Timorese political landscape is still relatively young, with a high number of new parties running in each election, many of whom disappear soon after.³ Furthermore, many parties do not have a political manifesto or official ideological line, and are mostly developed around local figures (Shoesmith, 2013: 125).⁴ To limit and simplify the analysis of Timorese political parties, this section centres on the views on land tenure of FRETILIN and CNRT, the two main political parties that have been able to form governments in Timor-Leste since independence.⁵

4.2.1 FRETILIN – Revolutionary Front for an Independent East Timor

FRETILIN (Revolutionary Front for an Independent East Timor or *Frente Revolucionária de Timor-Leste Independente* in Portuguese) was formed in 1974 and is currently the oldest political party with parliamentary representation.

3 For instance, 21 different parties ran in the 2012 and 2017 parliamentary elections, with six and five new parties, respectively. Information about elections can be found at <http://www.cne.tl/> and <https://www.laohamutuk.org/>

4 Even the two main political parties, CNRT and FRETILIN, do not have updated manifestos (at least they are not available online), nor webpages through which they can share such documents. Based on a web search, I could find only a FRETILIN political program from 1975 available in archives, and a mention by Arthur, 2019: 193 of a CNRT party manifesto from 2012, which is also not available online. However, parties are active on social media, using platforms like Facebook to campaign and connect with supporters.

5 International organizations and donor agencies contributed to the main overarching ideologies that orient these Timorese parties and politics in general. Ideas such as democracy, the free market and liberalism were adopted in the country as a result of the internal views of political elites, but were also promoted by external influences and pressure from donor agencies and international organizations (Kingsbury, 2009: 109, 133; Cummis, 2010: 904; Shoesmith, 2012: 37; Arthur, 2019: 174).

FRETILIN's initial ideology is a source of long debate. Some people defined the party at the time of its formation as Marxist-Leninist, a classification that was actually used by Indonesia to, in part, justify the 1975 invasion (Shoesmith, 2013: 123; Dovert & Durand, 2016: 334, 338). Others argue that FRETILIN was an anti-colonialist party, oriented by social-democratic views, but that it was never Marxist (Kingsbury, 2009: 52; see also Hoadley, 1976: 413). The internal divisions between social-democratic moderates and Marxist radicals remained one main characteristic of the party (Hoadley, 1976: 414; Beuman, 2013: 64; Kammen, 2016: 131). However, the more extremist faction of the party prevailed in the years following its formation, which explains the distinctly Marxist ideas about land tenure proposed then by the party (Nixon, 2012: 53; Shoesmith, 2012: 36). FRETILIN remained internally divided during the Indonesian occupation. In general terms, those members that sought refuge in Mozambique are regarded by academic authors as having strong Marxist ideologies, influenced by the Mozambican political party Frelimo, while other factions in the party are viewed as more moderate (Kingsbury, 2009: 105; Shoesmith, 2012: 36; Scott, 2005: 84).

The Manual and Political Program of FRETILIN from December 1974 established a number of key policies on land tenure. First, cooperatives would be the basis of the economic and social life of Timor-Leste. Second, the private farms and plantations which had previously been communal land would be expropriated through agrarian reform and redistributed to the people, to be farmed in cooperatives. Third, unfarmed agricultural land would also be redistributed to the people to be farmed in cooperatives, or alternatively to be used by state-owned farms. Finally, the program determined a shift away from crops for export, such as coffee, to a more diversified production for domestic consumption (FRETILIN, 1974: 11, 29; Hoadley, 1976: 413).⁶

After the 1999 referendum, this more-radical faction of FRETILIN, led by Mari Alkatiri, managed to obtain key political positions in the UNTAET administration and later in the first Timorese Government, with Alkatiri assuming the role of Prime Minister. The control of the party and the Government by this faction of FRETILIN earned it the nickname the '*Maputo group*', a reference to their time in the Mozambican capital during the Indonesian occupation and the influences they brought with them on their return (Smith, 2004: 280; Kingsbury, 2009: 105). While this faction of FRETILIN had adopted free-market economy ideas by then, they retained highly top-down, centralized, and authoritarian views of the role of the Government, which was the cause of

6 These ideas directly clashed with the views of UDT, FRETILIN's main rival party in 1974/75. UDT wanted a recognition of private property, but with the possibility of expropriation in cases of national interest. They also wanted to recognize ownership rights to all land occupied by Timorese; vacant land should be considered property of the state until it was occupied; and use rights instead of ownership rights could be given to foreigners (UDT, 1975: 10).

much criticism by the opposition parties (Saldanha, 2006: 71; Kingsbury, 2009: 141; see more below).

In regard to land tenure, the FRETILIN Government abandoned, at least in part, the ideas of agrarian reform, nationalisation of large plantations, and land exploitation under cooperatives (Silva *et al.*, 2009: 10). Nevertheless, their view was that the state should retain strong control over land, which became clear in Law 1/2003 (Fitzpatrick *et al.*, 2013: 10). Furthermore, the members of this Government regarded customary norms and institutions as backward and strongly opposed giving them any legal recognition – a position that led to the rejection of a draft land law in 2005 (Hohe & Nixon, 2003: 41; Fitzpatrick *et al.*, 2013: 102; Grenfell, 2013: 204).⁷ Moreover, the FRETILIN Government took an ‘economic development first’ approach, in which democratization – including more-democratic land administration – was not on the agenda (Kingsbury, 2009: 141; see more below). Moreover, addressing the land-related problems inherited from previous administrations was not a priority of the FRETILIN Government, which proved to be a serious mistake when land-related disputes became one of the strongest fuels of the 2006 crisis (Elderton, 2002: 14; Nixon, 2012: 137; see Chapter 3). Nevertheless, the view that the state should retain strong control of land and prevail over individual rights remains to this day among FRETILIN’s leadership, even after the party lost control of Government since 2007 (with a short hiatus in 2017). These views became clear, for instance, in the positions that FRETILIN representatives took during the debate of the Land Law Package (SAPO24 13/01/2017), and in the way Alkatiri and other FRETILIN members have been dealing with land-related issues in Oecusse (Almeida, 2017a).

4.2.2 CNRT – National Congress for Timorese Reconstruction

After the 2006 crisis and during the lead-up to the 2007 election, the National Congress for Timorese Reconstruction (*Congresso Nacional da Reconstrução Timorense*, or CNRT) was formed and immediately became one of the country’s main political parties.⁸ Xanana Gusmão, the charismatic leader of the Timorese resistance, was at the time finishing his term as President, and CNRT was created as a vehicle for him to achieve the much more hands-on position of

7 Ana Pessoa, at the time Minister of Justice, is reported to have dismissed the use of customary law by saying that ‘we’re not savages and we won’t use customary law’ (interview reported by Nixon, 2012: 192).

8 The party was cunningly named in order to make its acronym match the previous National Council of Timorese Resistance (initially Maubere National Council), an umbrella organization that gathered Timorese organizations and individuals against the Indonesian occupation (1986-2001). See Kingsbury, 2009: 163.

Prime Minister, with real executive power (Schoesmith, 2012: 38).⁹ The political identity of the party remains to this day centred around Gusmão, with economic development, expansion of public infrastructures, increasing social expenditures, and expansion of the oil and gas industries as his main flagship policies (Shoesmith, 2012: 45; ICG, 2013: 2; see below and Chapter 9). While CNRT can be regarded as a free-market liberal party, it is the figure of Gusmão more than any specific ideology that orients the party and the governments that he has led or controlled since 2007 (Shoesmith, 2013: 132; Anderson, 2013: 229; Aspinall *et al.*, 2018: 160).¹⁰ The party is so dependent on the figure of Gusmão that his resignation as President of CNRT after the electoral defeat in 2017 was not accepted by the party (Tatoli 06/08/2017; Diário de Notícias 04/11/2017).

Regarding land tenure, Gusmão has repeatedly show that his main priority is quick and cheap access to land by the state for the implementation of infrastructure projects (see below, and also Chapter 9). While, to my knowledge, in comparison with FRETILIN, Gusmão's views on land tenure are more open to some recognition of customary land rights and formalization of land rights, it has never been his priority to create a formal land tenure system that can provide the Timorese with more tenure security and restrain state-led dispossession. For instance, Gusmão did not use his leverage over CNRT's MPs to promote the approval of the Land Law Package during the years that it was awaiting debate in Parliament, and at some point he even requested that its approval process be delayed (see Chapter 5). And although he supported the SNC project on land registration, his active involvement quickly faded once the contract was signed (see Chapter 3). This does not mean that Gusmão actively opposes the development of the formal land tenure system; for instance, the Land Law Package was drafted under his Government and approved under a CNRT majority in Parliament. But the formal land tenure system is not Gusmão's priority and, as exemplified in Chapter 9, protective measures that interfere too much with his infrastructure projects have often received Gusmão's push-back.

Therefore, it becomes clear that, although coming from different backgrounds, the two main political parties both favour strong control of land and access to land by the state. As described in the following section, a vague concept of 'development' is the main justification for these positions.

⁹ Gusmão started his political career in FRETILIN, but he abandoned the party in 1988 due to disagreements with hard-liners of the party and his conviction that the fight for independence should be detached from political loyalties (Gusmão, 2000: xiv; Niner, 2011: 137).

¹⁰ Although Gusmão resigned from the position of Prime Minister in 2015 to make room for a new generation of politicians, he has continued to have a substantial influence on subsequent governments, with the exception of the brief 2017 FRETILIN government (Aspinall *et al.*, 2018, 158). See also *The Diplomat* 24/05/2016 and Niner's very interesting article published on *Inside Story* 17/02/2016.

4.3 'DEVELOPMENT', HIGH-MODERNISM, INFRASTRUCTURE, AND INVESTMENT

'Development' has been a key word in the Timorese political environment. What 'development' means is, however, unclear. As argued in the literature, in recent decades the concept of development has become, for many policy-makers around the world, synonymous with trade and economic growth, guided by neoliberal views of the world, and with a strong bias towards a more urban and 'modern' economy (Crewe & Axelby, 2013: 157, 161; Dirlik, 2014: 31). As debated in Chapter 2, under these views, aims to increase the role of land in economic production prevail over all other roles that land can have in public policies. But 'development' is also what David Mosse calls an 'enrolment concept': an expression with a broad meaning, which can be used in vague terms with the objective of bringing together – or 'enrolling' – various stakeholders with very different, and even contradictory, views and agendas (Mosse, 2005: 35). Everyone welcomes development, but only few would agree on what that really means.

These two points about development are quite visible in Timor-Leste. On the one hand, a vague concept of development is often used by politicians and state officials to gather support for state projects and activities, and to condemn detractors of their plans as enemies of development (see for instance Timor Post 11/11/2014; Tatoli 18/10/2018). For many Timorese development may mean something quite different from the grandiose projects and activities envisioned by politicians, but by evoking 'development' they can keep the debate vague, and therefore more difficult to contest. On the other hand, and following the global trend mentioned above, state policies for development in Timor-Leste have been mostly directed at economic growth, focusing on two areas from which Timorese politicians hope that economic development will come: *infrastructure* and *private investment*. These two areas, which have a strong impact on the way the formal land tenure system has been developed, are analysed in the following sections.

4.3.1 Infrastructure

As described in Chapter 3, the end of the Indonesian administration was marked by massive destruction of the country's infrastructure. Since independence, the need to improve and expand basic infrastructure such as roads, electricity, and the water supply has been constantly mentioned by politicians and the Timorese in general as one of the country's main priorities (see, for instance, GoTL, 2010a: 15). However, especially since 2007 when the economic windfall from oil and gas revenues started (see below), the focus on infrastructure has grown exponentially and shifted from the much-needed basic

infrastructure, to large-scale, multi-million dollar projects labelled as ‘mega-projects’ (World Bank, 2015: 1; Bovensiepen & Yoder, 2018: 382).¹¹

The Strategic Development Plan 2011-2030 (SDP) approved by Gusmão’s first Government (2007-2012) became the paradigmatic example of the visions and approaches that have guided the planning and implementation of infrastructure in Timor-Leste. For many observers, the SDP is more of a ‘wish-list’ than a realistic roadmap for development, and raises many concerns about the need, the economic viability, and the real benefits of many infrastructure projects foreseen in it (Peake, 2013: chapter 8; Scheiner, 2015: 86; Scambray, 2017: 271).¹² Besides listing basic infrastructure, it also includes a myriad of many, much-larger projects such as new sea ports, airports, and the Tasi Mane Project, Gusmão’s visionary project of an oil and gas industry corridor on the south coast of the country (see Chapter 9). Additionally, in 2014 the Special Economic Zone of Social Market Economy of Oecusse (*Zona Especial de Economia Social de Mercado de Oe-Cusse Ambeno* – ZEESM in its Portuguese acronym), headed by FRETILIN’s leader Mari Alkatiri, was added to the list of mega-projects.¹³ Megaprojects became the flagship of ‘development’ for the two top leaders of Timor-Leste, Gusmão with the Tasi Mane Project, and Alkatiri with ZEESM. Moreover, the megaprojects became a new arena for political competition, with these leaders and their supporters promising prosperity through their project and pointing out the failures of the rival in theirs.¹⁴ Despite some progress, much-needed basic infrastructure lost the attention of high-level politicians amidst this fervour around megaprojects, and the implementation of infrastructure projects in general has been marked by poor quality, faulty

11 Referring to Indonesia, Davidson talks about the ‘mesmerizing effects’ of megaprojects (Davidson, 2015: 5). Flyvbjerg talks about the ‘four sublimes of megaprojects’: technological, political, economic, and aesthetic sublimes (Flyvbjerg, 2017: 7). These concepts are quite applicable in Timor-Leste. The development of infrastructure has been further facilitated by the creation of the Infrastructure Fund, which finances multi-year infrastructure projects, avoiding the need for annual approval of expenses in the national budget.

12 See also <http://www.laohamutuk.org/econ/SDP/10SDPindex.htm>

13 The ZEESM is presented as a radical transformation of the poor and neglected exclave Oecusse into a new regional hub for industry, trade, and tourism. The construction of several state-led infrastructure projects such as roads, an international airport, and a hotel are a central part of ZEESM. This project was approved amidst a short-lived climate of consensus and mutual support between the government of Gusmão and FRETILIN, and was seen by many observers as a strategy by Gusmão to shut down political opposition (Feijó, 2016a: 7; Aspinall *et al.*, 2018, 158). About ZEESM, see among others Yoder, 2015; Yoder, 2016; Rose, 2016; Almeida, 2018a; Yoder, 2018.

14 As pointed out by Nygaard-Christensen, this vision of development based on modernist infrastructure closely resembles the political imagery used during the Indonesian New Order (Nygaard-Christensen, 2013: 432). The Indonesian legacy is further debated below.

procurement, and lack of oversight (Scamبارy, 2015: 285; World Bank, 2015: iv).¹⁵

The way in which these megaprojects are designed and implemented incorporates some characteristics of the *high-modernism ideology* identified by Scott (1998). These megaprojects also intend to radically change the physical areas of intervention, cutting ties with the past and tradition and building a new, 'modern' future. The urban landscape is completely redesigned, with a new grid of large avenues carved over the old city, and new, big, shiny, and futuristic buildings marking the skyline. The state assumes the role of the main motor of these megaprojects, providing the vision, the bureaucracy, and, if necessary, the muscle to implement them. The promoters often mention private investors, but they are a small piece of a bigger puzzle designed by the state.¹⁶ The same happens with the general population, whose role in both the Tasi Mane Project and ZEESM was designed for them (see Kammen, 2018: 41). They should follow without questioning and be aware that they will have to make sacrifices and accept that these sacrifices are for the good of the country (see Chapter 9; Almeida, 2018a). In both of these projects there is little space, opportunity, or even faith in a more organic development created by the people on the ground.¹⁷

The developmentalistic ideology and the authoritarian temptation that marks the top national leaders (see below), in combination with the current economic windfall, provide the right ingredients to further fuel these high-modernistic ideas (Scott, 1998: Part 2). However, and contrary to high-modernism ideologies, these megaprojects are not based on a belief in science, but rather derive from the vision of strong leaders. Technical experts such as

15 The national budget provides a good example of the focus on infrastructure. For instance, from the almost 1.4 billion USD of the 2017 state budget, 22 million were for agriculture, 128 million USD for education, and 73 million USD for health care. For the ZEESM and the Tasi Mane Project alone, 250 million USD were allocated (see <http://www.laohamutuk.org/econ/OGE17/LHSubPNOJE2017-7Nov16en.pdf>; Doraisami, 2018). The focus on megaprojects is especially concerning when considering what has been called 'the iron law of megaprojects: over budget, over time, under benefits, over and over again' (Flyvbjerg, 2017: 13). Even countries with much stronger planning and control institutions systematically fail to keep these projects on budget, time and benefits. See the table 'Projects with calamitous over budget costs' in Flyvbjerg, 2017: 11.

16 Despite the Tasi Mane Project and the ZEESM being in part justified as kick-start infrastructure to attract investors, so far no big investor has been announced. I noticed that often politicians and state officials confuse investors with construction companies, especially when these companies have to provide financial guarantees as part of their contracts. On more than one occasion, I heard government representatives proudly saying that a certain construction company had agreed to invest a certain amount in the country, only to later find out that the 'investment' was a financial guarantee. An adviser to the Ministry of Finance I interviewed for my research confirmed that this was a fairly common confusion.

17 While these projects are now the main flags of the elite's visions of development, many other smaller-scale examples of modernistic projects can also be found. See below and, for instance, Kammen, 2009.

engineers and planners are involved in the creation process, but more as enablers of these visions than their creators.¹⁸

Basic infrastructure projects need land to be implemented; these high-modernistic megaprojects need even larger tracts of land. The lack of a formal land tenure system that can provide certainty about land rights and legal and administrative tools for land acquisition by the state has been a double-edged sword for infrastructure projects. On the one hand, this lack of legal and administrative mechanisms deprives politicians and state officials of any guidance on land acquisition, raising questions such as when the state can expropriate land, what process to follow, and who should be compensated. On the other hand, this uncertainty regarding land rights, the land acquisition process, and limits for expropriation can be used to the state's advantage. If politicians are willing to move land acquisition processes forward without a clear legal path, then uncertainty can be used to pressure the people affected to leave the land without compensation or to accept whatever minimal compensation is offered to them.

Since independence, the use of arbitrary administrative processes and exploitation of uncertainty for land acquisition by the state has been the common practice of state authorities.¹⁹ Although the outcomes of land acquisition by the state vary, depending on factors such as the people to be evicted and the promotor of the project, the implementation of infrastructure projects has always taken priority over the development of a formal land tenure system that could allow an adequate and transparent process. Moreover, without an adequate judicial system where this arbitrary approach can be challenged and punished (see below), there is little incentive to develop a formal land tenure system that can protect people's land rights and curb the actions of the state.

4.3.2 Private investment

Private investment is another key factor of development mentioned by politicians. Creating a formal land tenure system that provides investors with legal tenure security and allows land owners to obtain bank credit has been declared

18 In the beginning of ZEESM, Alkatiri attempted to create a certain scientific image of his concept of social market economy, by saying that it was a synthesis between the two failed models of communism and capitalism (personal Facebook post from 23/12/2013). This scientific image seems to have since been abandoned, and for instance in 2017 he told *The Guardian* that he used his feelings instead of Excel to manage ZEESM project (*The Guardian*, 25/05/2017).

19 See Chapters 7 and 9. See also, among others, Silva & Furusawa, 2014; Cryan, 2015a; Yoder, 2015; Almeida, 2017; Almeida, 2018a; Almeida, 2019. As reported by Davidson, a similar approach was taken by Suharto's regime (Davidson, 2015: 133).

by politicians as a priority for the country since the UNTAET administration.²⁰ While politicians have exaggerated the potential benefits of private investment and relied too heavily on land registration as the tool to tenure security (see the wrong assumptions debated in Chapter 2), the reality is that some degree of tenure security is necessary to attract investment. The very unclear legal framework, and the impossibility of determining who has which land rights over specific plots of land, makes Timor-Leste a difficult place for investors, especially for those with weak knowledge of the informal systems on the ground.²¹ During my work with MoJ I saw this first-hand, with potential investors becoming doubtful about the feasibility of their projects after I gave them a brief explanation of land tenure in the country.

However, as also happens with infrastructure, politicians' focus on investment has been quite selective, and strongly influenced by the high-modernism ideology (see above), corruption, rent-seeking, clientelism and patronage (see below), and the weak institutional capacity (see Chapter 7). Since independence, little has been done to create transparent, fair, and safe mechanisms for investors to access land. Instead, governments have taken a case-by-case approach, in which proposals of some investors receive political support and move forward, and others do not.²² The investors with the right contacts, willing to provide the right 'incentives', and promising large-scale investments in skyscrapers, large plantations and futuristic ideas are in general well received by politicians, and the state bureaucracy is put in place to support them.²³ The investors that do not fulfil these requisites have to fend for themselves. The uncertainty of the formal land tenure system turns politicians and state officials into gatekeepers of investment.

20 See, for instance, Timor Post 17/05/2014; Timor Post 28/06/2014; Timor Post 10/01/2015. See also UNDP, 2002: 68; Elderton, 2002: 3.

21 Timor-Leste ranked 175th out of 190 countries in the 2017 *Doing Business Report* of the World Bank (World Bank, 2017: 245). In the category of 'registering property', Timor-Leste has consistently figured among the last positions. Regarding land tenure security for investments in Timor-Leste, see for instance Nixon, 2007: 110.

22 Therefore, personal status, contacts, and partnerships are important, if not paramount, for obtaining support of state authorities. For instance, stating the claim, sometimes untrue, that Gusmão supports an investment project is a common way for investors to open the right doors. Having a group of war veterans or a veterans' association involved in the investment project also helps.

23 Actually, large skyscrapers are often pointed to by Timorese politicians as one key symbol of modernity and development, and the construction of several of them by public institutions and private investors is announced every now and then (see, for instance, Tatoli 28/04/2017, Kammen, 2009: 393), although so far only the headquarters of the Ministry of Finance has been built. I was once in a meeting where a Minister, not responsible for land governance, explained how the government should not authorize an international organization to redesign and reconstruct its headquarters as a 12 storey building located on state land. The organization's headquarters were not renovated and the 12-storey building was not built.

The leases of state land are the clearest example of this bias towards the 'right' investors and investments. While the lease of state land is currently the safest way to legally obtain access to land, the rules to get a lease contract with the state, and the clauses of these contracts, are less than clear, and the few that exist are often ignored.²⁴ For instance, the law demands that in the case of medium- and large-scale investments, the lease of state land must be preceded by a public tender, but this rule is systematically ignored. Also, the regulations with criteria for rent prices were never approved, and state officials use wide discretion in setting the terms of contracts (Almeida, 2016: 19). In practice, the 'right' investor is prioritised before any other and can obtain a contract with optimal clauses. The 'right' investor can even benefit from the wide discretionary declaration of land as state land and have people evicted from the targeted land (see Chapter 6). Also, the uncertainty about land rights and a broad interpretation of the power of the state to expropriate land can be made available to the 'right' investor. While the avenues to become the 'right' investor are not clear nor straight-forward, and support from one key political figure or state official can find opposition from others, the general rule is that an investor with a small project and no personal contacts will be in a much worse position to obtain a favourable lease with the state than a well-connected investor with grandiose visions.²⁵

I recall one case that exemplifies well all of the above. One day I was asked by DNTPSC to help draft a lease contract for a large-scale agricultural investor, which was requesting an area equivalent to one percent of the country's entire area, including also a large water source. I raised serious concerns about this contract; the land to be leased was obviously claimed and used by customary groups, although a DNTPSC report based on a short visit claimed that the area was state land because it appeared to be empty. Furthermore, the conditions proposed for the contract were outrageously unfavourable to the state, and the company's investment plan was not more than a printout of a PowerPoint, with photos of crops and sophisticated agricultural machinery. After writing a legal opinion recommending to not progress with the contract, the case disappeared for a few months. One day, the lawyer of the company appeared again, this time in a role as a Government adviser. He was again asking DNTPSC

24 The higher security of lease contracts with the state is based on the assumption that state institutions act according to the law and will enforce their authority against third parties if necessary, which normally happens, but not always. I recall a Timorese man that recurrently came to DNTPSC because the land parcel that was leased to him by the state, and for which he was paying rent, was occupied by others and he could not use it. A solution for the problem was finally reached when, after a couple of visits, he claimed to be a war veteran and said that he was considering the use of violence if the problem was not quickly solved.

25 This lack of transparent processes also has an impact on the quality of investments and investors. Investors that follow good practices are less keen to invest in Timor-Leste and open the way for those that are comfortable with shady business practices (see also Fitzpatrick, 2002: 19).

to prepare this lease, which he claimed was a top priority for Prime Minister Gusmão. I advised again against this contract, even going beyond my legal adviser role and pointing out the obvious social impacts of the contract, the danger of leaving such a vast area of fertile land in the hands of a single company, the lack of any economic reasoning and accreditation of the investor, among other problems. Despite that, the Government investment agency kept scheduling meetings with DNTPSC to force the quick signing of this contract, to the point that DNTPSC staff told me that they were quite uncomfortable with this process. They also told me that it was untrue that Prime Minister Gusmão supported this investment, and its main promoters were actually other political figures. There was no clear end to this process when I left MoJ at the end of 2014, but DNTPSC staff told that the pressure to sign the contract continued.

In conclusion, politicians often claim that private investment is one of the main avenues for developing the country. However, in practice, the support for investment is quite biased towards high-modernistic projects and those investors with the right contacts and the right 'incentives' to offer state officials and politicians. For these investors, the cumbersome state bureaucracy and uncertainty regarding land rights can even be helpful. On the other hand, smaller investors, without the right contacts and unwilling to participate in shady practices, have a much more difficult experience. Politicians and state officials become, in practice, gatekeepers of investment. Investment is one of those examples where ideology mixes and clashes with personal interests.

4.4 POST-AUTHORITARIANISM AND THE AUTHORITARIAN TEMPTATION

All too often, the literature about Timor-Leste overlooks the fact that the country lived for most of the twentieth century under two authoritarian regimes and is therefore a post-authoritarian – not only a post-conflict – state (ICG, 2013: 43).²⁶ For a considerable part of the Timorese adult population, including many politicians and state officials, democracy – especially the Western-style democracy adopted in Timor-Leste – is still a relatively new experience (Shoesmith, 2013: 126, 128; Feijó, 2016: 99; Arthur, 2019: 176). As a result, there is still no clear understanding in society of key matters such as the limits of governance, the rule of law, constitutional rights, mechanisms of contestation, and the power of politicians. Arguably, democratization is further complicated by the fact that the norms and procedures of the Western-like democracy implemented in the country do not always align with those of the

26 Even the brief rule of FRETILIN in 1975 is regarded by many authors as non-democratic, starting with the fact that the party declared itself as the only legitimate representative of the Timorese people, without any elections to legitimize such a claim (FRETILIN, 1974: 9, 25; Lawless, 1976: 950; Kingsbury, 2009: 165; Nixon, 2012: 54; Shoesmith, 2012: 41).

customary systems deeply rooted in Timorese society (Nixon, 2006: 81).²⁷ Classism, masculine authority, and hierarchical leadership are common features of many Timorese customary structures, and they influence the way the formal democratic norms and procedures are perceived and enforced (Leach, 2017: 201).

Much has been done since independence to create a democratic country, with various successes being achieved, such as several rounds of elections regarded as free, fair, and peaceful (Aspinall *et al.*, 2018: 153). In fact, Timor-Leste has scored relatively highly in the main rankings of freedom and democracy, and during recent years has been considered the most democratic country of Southeast Asia (The Diplomat, 19/07/2017).²⁸ Nevertheless, an authoritarian temptation has been a constant presence since independence.

A look at the two top political figures in the country, Gusmão and Alkatiri, illustrates this authoritarian temptation well.²⁹ The first Government of Alkatiri was described by many authors as arrogant and authoritarian, showing little interest in public debates, and reacting strongly against dissenting opinions.³⁰ Probably inspired by the Mozambican experience of many of its members, including Alkatiri himself, his Government was known for its strong-government mentality, trying to implement a 'dominant party' system, and for putting economic development ahead of democratization (see here Elderton, 2002: 1). Some authors go so far as to claim that Alkatiri's Government managed to hijack the democratic structures and was converting them into mechanisms of repression (Simonsen, 2006; Siapo, 2006; Richmond & Franks, 2009: 95). Land tenure administration reflected this mentality, which was visible, for instance, in the draconian rules for quick and unprotected evictions established in Law 1/2003, approved by Alkatiri's Government (Soares, 2007: 198; see Chapter 6). In some cases land tenure administration also became a tool of repression. For instance, after reporting a number of famine deaths, the newspaper *Suara Timor Lorosae* was threatened by Alkatiri's Government with the discontinuation of the lease contract of their headquarters, and a boycott on the Government's advertising in the newspaper was declared (The New Internationalist 01/05/2005; Reporters Without Borders 03/05/2005;

27 Cummins describes how many Timorese navigate daily through the customary and formal worlds, and how the formal democratic system as implemented in Timor-Leste at times fails to incorporate the values and roles of the customary systems (Cummins, 2010).

28 See also <http://timor-leste.gov.tl/?p=17298&lang=en> In the Freedom House ranking from 2017 Timor-Leste scored 3 out of 7 (with 7 being the least free) and was considered 'partially free' (Free House, 2017: 24). Regarding a critical view of this kind of rankings, see Merry, 2011.

29 The rivalry and tensions between these two political leaders mark a considerable part of the modern Timorese history. Beuman (2013) provides a good summary of several relevant episodes.

30 Among others, see here Soares, 2003: 301; Smith 2004: 293; Gorjão, 2004: 1054; Saldanha, 2006: 78; Kingsbury. 2007: 364, 371, Kingsbury 2009: 107; Richmond & Franks, 2009: 98; Psychas, 2010: 48; Shoesmith, 2012: 37; Shoesmith, 2013: 125; Arthur, 2019: 146.

Freedom House, 2006: 92; Saldanha, 2006: 78). An authoritarian approach to land tenure administration by Alkatiri's inner circle continued with the ZEESM in Oecusse (Yoder, 2015; PDHJ, 2016; Rose, 2016; Almeida, 2018a).

In comparison with Alkatiri, Gusmão, the historical leader of the resistance against the Indonesian invasion, is described as more willing to integrate dissenting voices in his governments (Gorjão, 2004: 1054). His role in the resistance movement, unquestionable charisma, and political savviness have made him the predominant political figure of the country, with unparalleled authority over traditional leaders, war veterans, and the population in general (Arthur, 2019: 144). However, as argued by Feijó, a 'charismatic leadership' can lead to authoritarian solutions, with the debate and contestation of the charismatic leader's decisions being crushed by his superior authority (Feijó, 2016: 104). Furthermore, the leadership of the guerrilla movement in which Gusmão gained his authority was not, and could not, be democratic. Gusmão brought the same guerrilla leadership style to his governments, which resulted in a number of undemocratic episodes (Kingsbury, 2009: 23; ICG, 2013: 38; Scambary, 2017: 268). To further complicate this matter, the extraordinary increase in public spending under Gusmão's governments further increased his network of 'clients' and supporters, decreasing the space for contestation against his decisions (Shoesmith, 2012: 48; Scambary, 2015: 284; Arthur, 2019: 147). Gusmão's semi-god status allows him to say and do things that no common democratic leader would dare to do – ranging from farcical stunts such as jumping out of his official car to direct the traffic, to strong-man demonstrations such as interrogating suspects of drug-trafficking himself, to seriously authoritarian acts such as giving 48 hours' notice to a number of international judges to leave the country (see below).³¹ There are also a number of episodes where Gusmão publicly humiliated members of his own cabinet (Shoesmith, 2013: 132). Executive-style authority is for Gusmão a normal style of governing, and his decisions are put under little scrutiny (Scambary, 2015: 296). Land tenure administration is one of the many areas where this type of leadership trumps all kinds of rules and processes.³²

This authoritarian temptation and the attraction for strong, top-down leadership is not exclusive to top leaders, and can also be found among mid-level politicians, civil servants, and to a certain extent, the general population (Soares, 2013: 89; Shepherd, 2014: 236). One example that marked my view on this matter was a comment I often heard from state officials and mid-level politicians about people's mobility. Despite the right of movement being

31 See here *Tempo Semanal*, 23/10/2012; IPAC, 2015: 4; Greenfeld, 2015: 277, and <https://www.facebook.com/moises.dasilva.3591/videos/2507213009504723/> See also the 2019 interview with Major General Lere Anan Timur, the top official of F-FDTL, in which he says that he considers Gusmão sacred (*lulik* in Tetum) and therefore cannot criticize him, at <https://www.youtube.com/watch?v=kA4z2sOugJY>

32 See, for instance, the case of Hotel Resende described in Almeida, 2017, where Gusmão's decision trumped all due process regarding the contested ownership of the building.

explicitly established in the Constitution, they often expressed exasperation with the fact that nowadays, and contrary to Portuguese and Indonesian times, people were free to move inside the country and relocate in Dili, without having to request authorization from any state official.

While there is no doubt that Timor-Leste is a democracy and much has been done to strengthen it, the influences of past authoritarianism and inexperience with democratic rule, combined with the strong leadership styles of top leaders, make the authoritarian temptation a constant presence, with an inevitable impact on land administration. For instance, it allows that draconian laws such as Law 1/2003 can be proposed and approved with little political scrutiny and public outcry. It also allows top leaders to take decisions on evictions and 'expropriations' against or in absence of law. This authoritarian temptation goes hand-in-hand with the weak rule of law, which is debated in the following section.

4.5 WEAK RULE OF LAW

The weak rule of law that exists in Timor-Leste is another central factor of the political environment that shapes the Timorese formal land tenure system, as it is both a cause and a consequence of all the other factors debated in this chapter.

The definition of rule of law is debated in the literature and ranges from broad and strict definitions to thinner and less demanding ones (Bedner, 2010: 54).³³ Regarding land tenure in Timor-Leste, even under a thin definition that limits rule of law to the obedience of the state to its own rules, it is possible to identify a number of problems that compromise the success of the country's formal land tenure system. As extensively exemplified throughout this book, it is not uncommon for state institutions, politicians and state officials to act without the support of, and even against, the country's legislation. As stated by Bedner, 'a state not following its own rules is not a rule of law state' (Bedner, 2010: 56).

Institutional weaknesses of the administrative and judicial state institutions can in part explain the problems with the rule of law in Timor-Leste. I debate here the limitations of the judicial system, and leave the administrative institutions, in particular DNTFSC, to Chapter 7. The Portuguese and Indonesian administrations left almost no legacy in the Timorese judicial system.³⁴ Upon

³³ See also the concept of 'autonomy of law' debated in Bedner, 2016a.

³⁴ During Portuguese colonial rule the formal judicial system was mostly used for civil cases between colonial elites and for punishment of serious criminal cases, such as murders and rebellions (Hohe & Nixon, 2003: 7, 26; Figueiredo, 2011: 172, 174; IPAC, 2015: 2; Simões, 2015: 382). During the Indonesian occupation the Timorese were in practice banned from any legal professions and the courts were perceived by the population as corrupt and untrustworthy (Strohmeier, 2001: 53; Hohe & Nixon, 2003: 7, 27, 43; Chesterman, 2005:

the withdrawal of the Indonesian administration, in practice the formal judicial system ceased to exist: court buildings were burned down, office equipment was destroyed, and all the Indonesian legal professionals that staffed the formal judicial system left the country (Strohmeier, 2001: 50, 53; Chesterman, 2005: 84; see also Chapter 3). While the rebuilding and refurbishing of the courts and other judicial infrastructure in the years following the 1999 referendum was a complex logistical enterprise, the selection and training of Timorese judges and prosecutors with adequate professional experience to replace international judicial personnel has been an even more difficult task (Strohmeier, 2001: 51, 53; IPAC, 2015: 3).³⁵ Despite UNTAET's efforts, the formal judicial system left in place was of little use to the great majority of Timorese, who continued to recur to their customary systems (Hohe & Nixon, 2003: 37).³⁶

Current data about the judicial system show some progress since its reconstruction started, but also many limitations.³⁷ Currently, four district courts serve the 13 districts of the country, together with a program of mobile courts (JSMP, 2014: 21; IPAC, 2015: 8). The Supreme Court of Justice and other courts instituted by the constitution have not yet been established. The number of judicial system staff has consistently risen, reaching 292 at the end of 2014: 40 judges, 40 prosecutors, 36 public defenders, 113 justice officials (bailiffs), 9 translators and 54 administration staff (JSMP, 2014: 25).³⁸ At the end of 2014

85; IPAC, 2015: 2). During the Indonesian occupation, formal village councils were introduced and had several roles, including dispute resolution, but those had limited permanent impact in replacing customary systems, especially after independence (Hohe & Nixon, 2003: 27; IPAC, 2015: 2).

35 The search for Timorese with law degrees who could be trained and integrated into the formal judicial system was first made by word-of-mouth, radio announcements, and dropping leaflets from airplanes (Strohmeier, 2001: 54; Chesterman 2005: 85). The first Timorese judges and prosecutors were appointed in January 2000 by an independent judicial commission (Strohmeier, 2001: 52, 54). UNTET established an interim training program, which was replaced in 2004 by the Legal Training Centre (Strohmeier, 2001: 55; IPAC, 2015: 3). However, in 2004 all Timorese members of the judiciary appointed by UNTAET were called to a controversial and politicized exam, in which all failed (Marriott, 2013: 107; IPAC, 2015: 3).

36 The incorporation of structures and mechanisms of the customary systems in the formal judiciary system was studied and proposed by UNTAET, but the idea was strongly opposed by part of the Timorese political elite that saw customary systems as backwards, and eventually the concept of a strictly formal system prevailed (Hohe & Nixon, 2003: 38, 67).

37 The comprehensive 2017 study from CES-OPJ and CRL provides a very interesting overview of the Timorese judicial system (CES-OPJ & CRL, 2017).

38 IPAC reports a lower numbers of prosecutors (35) and judges (34) at the end of 2015 (IPAC, 2015: 8, 9). This lower number is probably due to the termination of contracts of international staff. Until October 2014 the Timorese judicial system employed several Portuguese-speaking international staff members working as judges, prosecutors, public defenders, investigators and justice officials. The government of Gusmão, with support of Parliament, alleged wrongdoings of these staff and called for the termination of their contracts. The President of the Court of Appeal refused to terminate the judges' contracts and in response,

there were 2917 pending cases – 2162 criminal cases and 755 civil cases – but the trend has been a growing number of pending cases (JSMP, 2014: 62; see also CES-OPJ & CRL, 2017: 236). In February 2015 there were 84 lawyers registered, many of them international lawyers working with international private law firms established in Timor-Leste and not residing in the country (IPAC, 2015: 13).³⁹ The Public Defender's Office is responsible for providing legal aid to those who cannot afford a private lawyer, but has only 36 public defenders, spread throughout the four district offices, which raises concerns about the quality of their legal assistance (JSMP, 2014: 25; IPAC, 2015: 19; CES-OPJ & CRL, 2017: 195). The judicial system is still far from providing an ideal service to the Timorese due to its low coverage, difficult access, delays and poor quality of court decisions (Marriott, 2013; Almeida, 2017a: 185).⁴⁰

The weaknesses of the judicial system have a clear impact on the political environment that surrounds the development of the formal land tenure system. The limited access to, and the quality of, the judicial system provide the Timorese with very limited avenues to challenge illegal land-related decisions and practices of politicians and state officials, who as a result have little incentive to improve their practices.⁴¹ During my work with the MoJ I saw first-hand the consequences of the limitations of the judicial system. In five years working with the MoJ, I do not recall more than a handful of land-related court cases filed against the state. The majority of people contest wrongful decisions and practices of the administration through letters and requests for meetings with directors, ministers, and MPs, but very rarely do people recur to courts.⁴² Although this informal approach sometimes works, it is quite

the government revoked the visas of some of the judges, prosecutors and investigators, and gave them 48 hours to leave the country. Some of the judges and prosecutors expelled were working on the prosecution of eminent politicians, which raised serious concerns about political interference in the judiciary. For a detailed explanation of the expelling of Portuguese judges and prosecutors, see IPAC, 2015: 4 and JSMP 2014a.

- 39 On the role of legal professionals, especially lawyers, in promoting political liberalism in different countries see Halliday *et al.*, 2007.
- 40 A number of court decisions on land-related cases are analysed in Chapter 6. It is worth noting that, of the 70 court decisions analysed for this study, only seven referred to land disputes outside Dili.
- 41 Customary systems are by far preferred by the Timorese and used far more often for conflict resolution. The lack of legal recognition of customary systems further alienates the large majority of Timorese from the courts (Marriott, 2013: 100; see Chapter 8). However, the customary systems are of little use when the conflict is between private citizens and the state. When paths such as negotiation and protest do not address disputes with the state, the solution left is to challenge wrongdoings of state institutions through the courts, but as described in this section, access to courts is very limited.
- 42 The great majority of cases in the Timorese courts are criminal cases. For instance, in 2016 less than 10 percent of the cases started at the district courts were civil cases (CES-OPJ & CRL, 2017: 167). Among the civil cases there are number of land-related ones, but the court system is still foreign for the majority of Timorese (CES-OPJ & CRL, 2017: 210; see Chapter 8).

arbitrary – contacts, social and political position are key factors – and this very imbalanced dispute-resolution approach leaves law to a secondary role. Furthermore, in those few cases that are taken to court, poorly drafted court petitions and weak legal reasoning give the claimants very limited possibility of success against the state. In the end, these court cases against the state result in no meaningful lesson for DNTPSC, ministers, and other state institutions.

However, the weaknesses of the judicial system are not the only explanation for the weak rule of law; other factors further contribute to it. Personal interests, corruption, rent-seeking, clientelism, and patronage are only one part of the explanation (see below). Difficult dilemmas caused by bad legislation (see Chapter 6), lack of legal knowledge, weak administrative procedures (see Chapter 7), and political pressures further explain why state institutions at times do not follow the law.

The weak rule of law does not mean that land tenure is lawless; despite several gaps, the state institutions try to follow the law, and informal practices, informal customary systems, mechanisms of contestation, and good sense often compensate for the flaws of the formal system. But as this book extensively exemplifies, there are many situations in which this weak rule of law is a cause of arbitrariness, injustice, and uncertainty.

4.6 INDONESIAN LEGACY IN LAND ADMINISTRATION

The legacy of the Indonesian land administration has strongly influenced the development of the formal land tenure system in Timor-Leste since independence.⁴³ As pointed out by Peake *et al.*, authors have been analysing Timor-Leste through the post-conflict lens, but often forget the very strong legacy left in the country by the 24 years of Indonesian rule (Peake *et al.*, 2014: 2). Under this conflict paradigm, analysis of the country easily gets trapped in a number of pitfalls, such as portraying the Timorese only as ‘victims’ and the Indonesian period as only negative, focusing too much on the state, and seeing the country as a ‘tabula rasa’ that only started its history after the 1999 referendum (Bexley, 2009: 9; Peake *et al.*, 2014: 2). The legacy of the Indonesian administration is in general quite influential among politicians, state officials, and most Timorese adults, and it is important to understand this Indonesian legacy in order to grasp their practices, expectations, and political views (Blunt, 2009: 90; Richmond & Frank, 2009: 90; Nygaard-Christensen, 2013).

The integration of Timor-Leste as an Indonesian province was fast. Eleven days after the full-scale invasion in 1975, a provisional Government was es-

43 In my research I found many fewer traces of the Portuguese administration (see also Leigh, 2006). One obvious reason is the time frame. Another reason is that many more Timorese worked directly with the Indonesian administration than with the Portuguese one.

established until the approval of the integration law in 1976 (CAVR, 2005: part 4, 37). Government agencies, as well as provincial administrative structures and their links with the central Government were quickly put in place (Weatherbee, 1981: 10; Gunn, 2007: 40). While senior positions in the administration were mostly occupied by Indonesians, thousands of lower-level positions were filled by Timorese (Gunn, 2007: 42; CAVR, 2005: part 04, 48). In 1997 there were more than 33,600 civil servants, almost twice the national ratio of civil servants in relation to the population in the rest of Indonesia (CAVR, 2005: part 04, 48; see also Cliffe, 2003: 238; Tidey, 2012: 40). Many Timorese were trained at universities and provincial offices throughout Indonesia, before being integrated into the Indonesian civil service in Timor-Leste (Gunn, 2007: 50).⁴⁴ Integration was not just at the administrative level: schools were established and thousands of students joined the Indonesian educational system; Indonesian media was widespread all over the territory, while Portuguese media was banned;⁴⁵ and the migration of people from other parts of Indonesia to Timor-Leste and their integration into Timorese society was promoted, and in the 1990s around 16 percent of the population in Timor-Leste were Indonesians from other provinces (Gunn, 2007: 50, 54; Psychas, 2010: 77). Timorese society became familiar with Indonesian systems, practices, and culture, and despite the past occupation and conflict, the relationship of Timorese with Indonesia is today far from antagonistic (Bexley, 2009: 10; Scambary, 2017: 268).

As in other areas of state administration, the Indonesian administration of Timor-Leste left an indisputable imprint on the way the rules and roles of a formal land tenure system are perceived by politicians, state officials, and the population in general (Elderton, 2002: 2). When I first started working with the MoJ, I encountered practices, opinions, and expectations regarding the formal land tenure system that I simply could not understand. Why were state officials so confident conducting administrative practices that had no legal support in Timorese law? Why were politicians so convinced of the unlimited power of the state to expropriate land? Why would people line up for hours at Government offices to talk with state officials instead of sending their cases to court? The answers to these questions became much clearer when I started to understand the Indonesian legacy.

The Indonesian legacy is quite visible at DNTPSC. The Indonesian land agency, BPN, was also established in Timor-Leste, although at a slower pace when compared with other Indonesian institutions, and the Timorese branch was eventually upgraded to a full provincial BPN office (see Chapter 3). In 1982 a special course to train 60 Timorese land surveyors was created, and some of the participants continued their university studies and internships

44 Obtaining Indonesian nationality was a pre-condition for integrating into the civil service (CAVR, 2005: part 04, 41).

45 Even nowadays Indonesian television channels and other media sources are followed by many Timorese. See UNMIT, 2011.

around Indonesia, before being integrated into the Timorese provincial BPN office. While the Indonesian natives remained the senior staff of BPN in Timor-Leste, the Timorese slowly climbed the hierarchy of the institution. These experiences naturally had a profound impact on the way DNTPSC senior staff sees land tenure administration to this day. Belonging to the initial group trained by BPN and having studied in Indonesia is a clear distinctive mark of prestige and knowledge in DNTPSC, and it is invoked from time to time as a sign of authority.⁴⁶ The current structure of DNTPSC was designed with the Indonesian BPN in mind (see Chapter 7). References to Indonesian times are often used by DNTPSC staff as a guide for administrative practices. For instance, the fact that INR staff were following survey methods and standards different from those learned by DNTPSC staff during Indonesian administration became a point of great controversy (see Chapters 3 and 7).

Unfortunately, the track record of Indonesian BPN is not great, especially during Suharto's rule. A 2003 report from the World Bank describes BPN as 'over-centralized, secretive and unresponsive to landholders; it has been used by the prevailing political and bureaucratic establishment for personal and political gains' (World Bank, 2003: 45). A 2007 survey found BPN to be one of the public institutions in Indonesia with least integrity among 30 institutions surveyed (as cited in Reerink, 2011: 97). Corruption and request for bribes was a common practice in the institution, which was nicknamed as part of the 'wet sector' (Fitzpatrick, 2002: 104; Reerink, 2011: 106). Discretionary and selective use of law, and lack of detailed administrative processes were common practices in cases such as land acquisition (see Chapter 3). For all of these reasons, BPN is not the best role model of land administration, especially during the years of the Timorese occupation, but nevertheless it is the model that prevails at DNTPSC. Individually, DNTPSC staff are at times critical of specific BPN practices, but in general the institution is still regarded as a model to follow.

The influence of the Indonesian legacy on land administration is not only relevant at DNTPSC, but also has an impact on the expectations, visions, and demands of politicians educated under the Indonesian regime (Nygaard-Christensen, 2013). Suharto's New Order was based on a 'state-centrist developmentalism', oriented towards market expansion and capital-intensive development, where infrastructure and technology were used as symbols of a powerful and developed state.⁴⁷ In short, the state and the market were above any individual interest, and land tenure administration was designed to deliver the visions of the country's leader. This was visible, for instance, in the very limited legal recognition of customary-based land rights when land was

46 Interestingly, I did not find that professional experience with UNTAET's Land and Property Unit was a source of authority or prestige.

47 Bachriadi *et al.*, 2013: sec. 10; Warren & Lucas 2013: sec. 3; Nygaard-Christensen, 2013: 432. About developmental states, see Anderson, 2013: 219.

required for state or private infrastructure projects. The rhetoric around the 'social function of the land' and the 'national interest' were used loosely during Suharto's rule to justify the dispossession of millions of hectares held in customary tenure (Lucas & Warren, 2013: 6). As colonial states had done before, uncultivated land was classified as state land, and if necessary the state would recur to military intimidation for land clearance, with reduced or no compensation nor prior notice (Reerink, 2011: 164; Lucas & Warren 2013: 6; Davidson, 2015: 42).⁴⁸ Furthermore, in a strongly militarized administration like the one in Timor-Leste during the occupation, the involvement of high-ranking military officials in private enterprises resulted in the dispossession of valuable agricultural land (Fitzpatrick, 2002: 116; Gunn, 2007: 48; see also Davidson, 2015: 112).

This legacy of 'state-centrist developmentalism', where the state is above individual interests, is visible in the broad position of many Timorese politicians that the state should keep tight control over land and that the state has almost unlimited power to expropriate land. Some of my interviewees went so far as to say, maybe with some exaggeration, that land acquisition by the state was less respectful of people's rights after independence than during the Indonesian occupation.⁴⁹ One clear example of this very broad vision of the power to expropriate is the fact that, when I debated land expropriation with interviewees (mostly state officials and politicians), the right to receive compensation and negotiate land values was mentioned by them, but not a single interviewee referred to the power of individuals and communities to challenge the reasons for the state to expropriate land.

Finally, the Indonesian legacy can even be found in the land lexicon used by the Timorese. For instance, politicians, state officials and people in general frequently use the Indonesian expression *ganti rugi* to refer to compensation for land acquisition.⁵⁰ Customary land in rural areas is often referred as *adat* land (*rai adat* in Tetum) and *Agraria* is used to refer to DNTPSC.

In summary, the strong Indonesian legacy in land administration impacts the development of the Timorese formal land tenure system by providing a model that is far from ideal, based on arbitrary administrative practices, and open to abuses by the state. This model not only normalises current practices, but also provides politicians and state officials with little incentive to develop the formal land tenure system, and dissuades people who have never experienced different practices from demanding for something better. By pointing

48 As a consequence of these policies, land conflicts with the state were the biggest cause of conflict in Indonesia during the last years of the New Order (Lucas & Warren, 2013: 9).

49 As mentioned in Chapter 3, there was an effort of the Indonesians authorities to change the image of its violent and militarized administration, especially during the 1990s. This effort included also a more cautious approach to land acquisitions by the state.

50 While still used in Indonesia, the expression '*ganti rugi*' is connected with the poor compensations for land acquisition payed by the state during Suharto's regime (Reerink 2011: 171; Davidson, 2015: 136).

out this Indonesian influence I do not mean that it impacts everyone equally, nor that those who lived through this administration are not sometimes critical of its flaws. Nevertheless, this influence is notable, and it is not possible to understand the development of the Timorese formal land tenure system without understanding the Indonesian land administration system during occupation as its main source of inspiration.

4.7 CORRUPTION, RENT-SEEKING, CLIENTELISM, PATRONAGE, AND ELITE CAPTURE

As already hinted at above, corruption, rent-seeking, clientelism, patronage, and elite capture are also contextual factors that influence the development of the Timorese formal land tenure system. Some authors point out that these are not new problems, that they are in part a legacy from the Portuguese and Indonesian administrations and even from the Mozambican experience that some Timorese politicians had during the Indonesian occupation (Blunt, 2009: 90; Psychas, 2010: 398, Scambary, 2015: 287). Nevertheless, these problems began to be visible soon after independence and have been present ever since, fuelled by the oil and gas revenues and other factors considered in this chapter.⁵¹ Furthermore, and especially in light of the concentration of power in strong Government figures, authors have raised concerns about the formation of a neo-patrimonial state, where state resources are used by patrons to obtain the loyalty and support of their clients and the population in general, albeit masked behind discourses, laws, and institutions that create an appearance of a normal, functioning bureaucracy (Shoesmith, 2012: 48; Scambary, 2015: 8; Feijó, 2016a: 12).⁵² Measures to fight these problems have been taken, such as creating an Anti-Corruption Commission, but results are still far from ideal. Timor-Leste currently ranks 101 out of 176 countries in the Index of Perceived Corruption from Transparency International, with a score of 33 out of 100 (Transparency International, 2016).

While debating the reasons for corruption, rent-seeking, clientelism, and patronage is outside the scope of this book, it is important to stress that – in a society shaped by kinship and clandestine resistance ties, strongly marked by reciprocal relationships – it can be difficult for politicians and state officials

51 See, among others, World Bank, 2006; Lundahl & Sjöholm, 2008: 75; USAID, 2009; ICG, 2013: 5, 35; Soares: 2013; Scambary, 2015: 287; The Diplomat 17/04/2017.

52 One illustrative example of how a neo-patrimonial state is forming in Timor-Leste is the systematic use of single-source procurement (Scambary, 2015: 300). A report from the Chamber of Auditors found that four of the six most-expensive contracts signed by the government in 2013, which includes the SNC contract, were single-sourced, with the other two following a public international tender because the Asian Development Bank (ADB) was involved (Proc. n.º /2014/AUDIT- S/CC: 45, 53. About the Chamber of Auditors see more below).

to refuse requests for illegal favours from family members or other social connections (Butterworth, 2010: 3; Scambary, 2015: 288, 21).⁵³ The knowledge about what constitutes a legal or illegal activity under the Western laws imported into the country is also limited (Soares, 2013: 88). Moreover, unclear laws and administrative practices make the distinction between irregular and illegal practices more difficult to define. I must also stress that corruption and other illegal practices also exist among the internationals that work with Timorese institutions, including Government advisers.⁵⁴ While the case of Bobby Boye, a Nigerian-American tax adviser that defrauded the Timorese Government, is perhaps the most famous case of criminal activity by internationals, it is well known among expats that some international advisers are facilitators of shady businesses.⁵⁵

The formal land tenure system is a fertile landscape for corruption, rent-seeking, clientelism, and patronage. Authors have mentioned allegations of rent-seeking in the land sector, including by people I worked with, and a number of stories were also reported to me by various people (Fitzpatrick, *et al.*, 2013: 104; IPAC, 2015: 17). While I recall many examples, one was particularly illustrative not only of such illegal practices, but also the difficulties in fighting them. In 2010, a friend requested my advice regarding a land-related problem that the local CSO she was working for was facing. For many years, the CSO had been pressured by DNTPSC to either sign a lease contract or leave their headquarters, which DNTPSC considered to be state land. The CSO did not agree with this assessment and remained on the land. Now, one DNTPSC staff member was requesting money to survey their land and issue some unclear documentation that would supposedly secure their tenure. The CSO paid this official for the service, for which he handed over a personal handwritten receipt, but the CSO was feeling tricked and unsure about what to do next. I told my friend that the procedure and documentation offered had no legal basis and that the personal payment was clearly illegal, and I recommended to raise the issue with the MoJ's Office of Inspection and Auditing. However, when the CSO followed my recommendation, this Office told them that of course they would have to pay for this official's work and simply could not understand what the problem was. Sure, they argued, the process and payment were not in the law, but it has been a common practice and the official needed to be compensated for his time and expenses. The case was simply dismissed by this Office and the illegal actions of that DNTPSC staff were never punished.⁵⁶

53 A similar conclusion about state officials in West Timor (Indonesia) can be found in Tidey, 2012: 9.

54 See here USAID, 2006: 30.

55 About this case, see for instance <http://laohamutuk.blogspot.nl/2015/10/bobby-boye-sentenced-to-six-years-in.html>

56 About other illegal payments see for instance Leigh & Nixon, 2005: 10.

Finally – and in part connected with corruption, rent-seeking, clientelism, and patronage – is the problem of elite capture, which refers to the use of the formal land tenure system by elites to unfairly appropriate land. Elite capture of land in Timor-Leste happens in many ways, such as very favourable leases of state land; occupation of state land without any sanction from state authorities; issuing documentation to strengthen a land claim; and the granting of privileges and illegal advantages in land registration processes. A number of my interviewees and informants claimed that the lack of progress in approving legislation to clarify tenure rights was because political elites were taking advantage of the unclear legal situation to appropriate land (see also Cryan, 2015: 8). Furthermore, and while there is no conclusive study on this particular case yet, approaches such as the reckless land registration conducted by SNC can further promote elite capture. As argued by a number of authors, when there are significant differences between the educational levels of the population, and access to state administration is unequal, a process like land registration can be unfairly manipulated by the elite in order to appropriate land (Atwood, 1990: 663; Platteau, 1996: 43; Lund, 2000:19). Elites' capture of land is a clear example of how formal systems can be a double-edged sword: they can promote more equality and prevent conflict, but can also be another tool for elites to keep and obtain more power.

As this section shows, the opaque formal land tenure system gives wide opportunities for politicians and state officials to yield personal benefits through corruption, rent-seeking, clientelism, patronage, and elite capture. Therefore, this factor further disincentivises improvements in the formal land tenure system.

4.8 NATURAL RESOURCES' WINDFALL, OIL DEPENDENCY, AND THE RESOURCE CURSE

The current windfall of revenue from natural resources, oil dependency, and the resource curse are three other factors that deeply influence the way the Timorese formal land tenure system has been developed. Economically, Timor-Leste has for centuries been a poor territory. The Portuguese colonial administration brought minimal economic development to the territory, and despite the heavily subsidized expansion of the public sector during the Indonesian administration, the changes were minimal. In 1999 Timor-Leste remained one of the poorest provinces of Indonesia, with no modern private sector and with widespread poverty, illiteracy and an average life expectancy of just 55 years (Duun, 1996: 41; Hill & Saldanha, 2001: 7; Lundahl & Sjöholm, 2005: 6; Cliffe, 2003: 238). The destruction that followed the 1999 referendum only further complicated the economic situation of the country (see Chapter 3). The reconstruction promoted by international aid led to a period of economic revival, but at the end of UNTAET's administration the domestic revenue collection was

still very low (UNDP, 2002: 58). The first years of Timor-Leste's independence were marked by minimal state budgets and enormous dependency on international aid (Cotton, 2005: 187).

After 2004, when oil and gas revenues from the Timor Sea started to flow and the boom in oil prices greatly increased profits, the situation changed considerably (Scheiner, 2017: 3). With this new source of income, state expenditure increased rampantly. In 2002 the annual state budget was 56 million USD; by 2009 it was 902 million USD; and in 2015 it was around 1.5 billion USD. Timor-Leste is now one of the most oil-dependent countries in the world, with oil and gas revenues providing around 76 percent of the national Gross Domestic Product (GDP) in 2013, and 93 percent of state revenues in 2014 (Scheiner, 2015: 2, 73). Additionally, a considerable part of the 24 percent of non-oil GDP is dependent on state expenditure, with agriculture and manufacturing representing only 4.7 percent of the country's GDP. Excluding the petroleum sector, the trade deficit in 2013 was close to 2 billion, as a result of extreme dependency on imports, including basic goods such as rice and eggs (Scheiner, 2015: 76; IMF, 2017: 25).

Inspired by the Norwegian experience, the Timorese Petroleum Fund was created in 2005 to safeguard the oil and gas revenues for future generations (Barma, 2012: 347; Doraisami, 2018: 251). The fund retains these revenues and invests them in bonds and stocks. An Estimated Sustainable Income (ESI) benchmark is calculated annually, in order to limit how much can be withdrawn from the fund to finance the state annual budget without compromising the fund's sustainability. However, since 2008, and with the only exception of 2013, annual withdrawals have exceeded the ESI, with a high percentage of these withdrawn funds being used for infrastructure developments (Scheiner, 2015: 80; Doraisami, 2018: 252). With oil and gas revenues now decreasing, the fund reached its peak of around 17 billion USD in 2015 and has since slowly started to decline (Scheiner, 2017: 2). The country's hydrocarbon dependency and growing expenses are a source of concern for observers, especially considering that the unexploited reserves are estimated to be relatively small (Scheiner, 2015: 88). The massive increase in state expenditure has done little to improve the private sector, and the Petroleum Fund is expected to be depleted within 15 to 30 years (Scheiner, 2017: 3; Doraisami, 2018: 252; see also *Petroleum Economist* 28/02/2013).

The access to this relatively large amount of oil and gas revenues for such a small country has raised the problem of the resource curse. The expression 'resource curse' or 'paradox of plenty' refers to the paradox experienced by a number of countries in which the exploitation of natural resources contributes to the decline of economic indicators and the population's standard of living, instead of increasing the country's prosperity (Kolstad & Wiig, 2009: 5317; Castree *et al.*, 2013; Costa & Santos, 2013: 788). In short, the resource curse is economically explained by factors such as an excessive focus on the resource sector and disinvestment in manufacturing, inflation, and increasing imports

(Ross, 2012). However, the resource curse is not just an economic, but also an institutional, phenomenon. Authors argue that the exploitation of these resources erodes the quality of governance and administrative and institutional capacity, and contributes to an increase of corruption and rent-seeking (Lundahl & Sjöholm, 2008: 73; Kolstad & Wiig, 2009: 5318; Barma, 2012: 333; Costa & Santos, 2013: 789). Among other factors and effects, authors point out that flows of income shift the focus of politicians and state officials to rent-seeking opportunities, and remove incentives for more efficient and rigorous planning and functioning of state institutions.

The signs of the resource curse in Timorese state institutions have been identified by several authors (Lundahl & Sjöholm, 2008; Barma, 2012; Neves, 2013; Scheiner, 2015).⁵⁷ The country's expensive and poorly planned infrastructure projects, the difficulty in executing state budgets, the exponential growth in the number of civil servants, and the low accountability of public expenditure are some examples of the effect of the resource curse in Timorese state institutions (GoTL & World Bank, 2013: 15; World Bank ICG, 2013: 29; Aspinall *et al.*, 2018: 158). Furthermore, while legal and administrative mechanisms to prevent the resource curse were put in place in Timor-Leste, many have been undermined (Brama, 2012: 345). The constant withdrawals from the Petroleum Fund above the ESI are one obvious example, but regulatory changes to the Chamber of Auditors are, for me, the most paradigmatic illustration of the institutional effects of the resource curse. The Chamber of Auditors was created in 2011 to supervise public finances, a role that included the prior verification of contracts with a value above USD\$500,000 between state institutions and private companies. When the Chamber started its work, many contracts were cancelled and delayed because they did not respect the minimum requisites established by law. I especially recall accounts of cases in which private contractors started and even finished the construction of infrastructure for the state without any contract having been signed by the

57 A symbolic example of this resource curse is the scandal involving the Timorese national football team. Despite football being one of the national sports, the success of the national team in international competitions had been understandably low, considering the lack of a professional football industry in the country. Suddenly in 2015, the national team was playing much better and winning games, but supporters were infuriated. The Timorese Football Federation, through which some Timorese politicians had been enhancing their own public profiles, was allegedly paying a dozen Brazilian players, who had no connection to the country, to be naturalized as Timorese nationals and play for the national team. These players were not even playing in national clubs nor training with the Timorese players at the national team and helping them to improve; they were simply showing up to play the international games. As stated by a supporter, 'we'd rather lose games with our own talents than win games with foreign players' (New York Times, 01/10/2015). The scheme has resulted in punishment by FIFA (International Federation of Association Football) and criminal investigations for the issuing of passports (BBC, 20/07/2017). Like in many other cases, money allowed the purchase of a quick solution, but did not necessarily fix the underlying problem.

two parties (see also GoTL, 2012). Besides the problems of corruption and patronage raised by these practices, they showed a clear lack of state institutions' capacity for procuring contracts according to the law. In light of this problem, instead of taking measures to improve the procurement procedures of state institutions, the Government increased the value above which contracts must be checked by the Chamber of Auditors to 5 million USD – ten times the previous threshold. In this case, rather than simply being pushed aside, these control mechanisms were reconfigured to give politicians and state officials the room to continue to operate unchecked, while maintaining the appearance of accountability.

As in other parts of state administration, the current natural resources windfall, oil dependency, and the resource curse have a clear impact on the development of the Timorese formal land tenure system in a number of ways.⁵⁸ First, the easy access to oil and gas revenues removes Government's incentive to promote other sources of revenue. As described in Chapter 2, one of the roles of land is economic production, and formal land tenure systems are pointed to, sometimes exaggeratedly, as necessary tools for increasing investment, economic production, and state revenues through property taxation. As discussed above, despite the political rhetoric about the importance of developing the formal land tenure system to promote investment and claims about the need to develop land-related taxes, the actions (or inaction) of the political elite have shown that the topic is not a strong priority. Together with other factors mentioned in this chapter, the current availability of oil and gas in part explains this disinterest of using the formal land tenure system to generate state revenue. The same lack of pressure to use land as a source of income happens at the administrative level. The budget of DNTPSC is part of the MoJ's budget, and is not dependent on any performance standard or independent source of income, such as collection of rents for the use of state land. Therefore, income generation is also not an incentive to develop the administrative practices of DNTPSC. The fact that the new Land Law was approved months after the Petroleum Fund had started to decline and the oil fields under exploitation gave the first signs of depletion further strengthens the argument that easy access to oil and gas revenues diverted attention from using the formal land tenure system as a way of obtaining revenues for the state. These factors served, at least in part, as a wake-up call for politicians about the need to use land as another source of state revenue.

Second, the availability of oil and gas revenues gives politicians more options to address land-related issues, but also allows them to mask these problems with some expensive, short-term, and even inadequate solutions. Advice and oversight by experts and international organizations is easier to dismiss when the Government is not dependent on their funds (Psychas, 2010:

58 The effects of the resource curse in the land sector are common to many other countries. See, for instance, Herbertson, 2012 in regard to Uganda.

348). As observed by Scheiner, 'When a decision-maker has access to money, it seems like the solution for every problem' (Scheiner, 2015: 87). Moreover, with the money coming from the Petroleum Fund, and with almost no tax levied on the majority of the population, the demand for accountability is low (Neves, 2013: 7; Scheiner, 2015: 86). In the land sector, the hiring of SNC to do a full-scale land registration is the most paradigmatic example of these wasteful, short-term and inadequate solutions, without a prior needs assessment nor cost/benefit analysis (see Chapter 3 and 7).⁵⁹

In summary, the access to large amounts of money through the exploitation of natural resources has been a blessing for Timor-Leste, but also a curse with real negative consequences on the functioning of state institutions and the state's problem-solving approach. Furthermore, the access to oil and gas revenues has facilitated the high-modernist projects mentioned above. These factors have a clear impact on the development of the formal land tenure system by making its role in providing state revenues secondary, removing incentives for improving institutional capacity and administrative practices, and allowing ill-suited solutions such as SNC.

4.9 POST-COLONIALISM DEBATES

The problems left by the colonial rule of Portuguese and Indonesian authorities are another contextual factor influencing the political environment in which the Timorese formal land tenure system is developed. As detailed in Chapter 3, during these administrations there were several episodes of state-led dispossession through violence, intimidation, and legal disempowerment, and formal land rights given to individuals were at times tainted by corruption, discrimination, and usurpation. How to address past injustices and distinguish abuses from fair land administration has been a controversial topic for both the Timorese political elite and society in general since independence.

The arguments about how to deal with the colonial legacy have not changed much since independence, and the common positions vary between two extremes.⁶⁰ Some people go so far as to claim that land rights should go back to the time before the Portuguese arrived in Timor-Leste. Proponents of this view argue that all formal land rights are the product of colonialism and occupation, and therefore should be erased. I recall one public meeting where, after a participant made this claim, a senior Timorese member of a

⁵⁹ Although there is not enough public information about SNC for a full cost/benefit analysis, a comparison with average costs of land administration systems is enough to show the wastefulness of this project. See Burns & Fairlie, 2018.

⁶⁰ My knowledge about these debates comes primarily from my work experience with the MoJ, which includes many workshops, public meetings, parliamentary debates, and presentations about land issues in which I participated, but also from my literature review and research interviews (see, for instance, Fitzpatrick, 2002).

local CSO asked him about the feasibility of such a solution, and if he was aware of, and willing to go back to, a time where there were local kings, serfs, and slaves. Others have a more moderate position, claiming that only some formal land rights should be recognized. A very common claim is that the rights of powerful families with large tracts of land, such as the Carrascalão, Alkatiri, and Albano families, should not be legally recognized. A more subtle position is that only 'good-faith' or 'fair' rights should be recognized, but the details on these definitions are difficult to reach.⁶¹ In debates in which I participated, land reform was at times mentioned, but people were unclear about what such land reform would entail. Not surprisingly, the elites that obtained formal land rights during previous administrations are more in favour of retaining their legal recognition, basing their position on the fact that those rights were legitimately acquired through the legal system that existed at the time and that their formal rights are protected by international law regarding succession of states.

Some cases are especially sensitive. For instance, the Catholic Church is reported to be one of the largest land owners in Timor-Leste (Fitzpatrick, 2002: 150), but since independence a number of disputes between individuals, communities, and the state against the Church, and even disputes inside the Church, have been reported.⁶² A good case in point was described to me by an interviewee, who recounted several cases in which people gave land to the Church in order to avoid its confiscation by the Indonesian authorities, but after independence the Church was not willing to give them the land back. However, addressing these disputes is especially sensitive in a strongly Catholic country. I was involved in a number of debates where land ownership by the Church was at stake. I recall politicians and state officials speaking with a certain bravado about the need of curbing the Church's vast possessions, to only quickly backtrack on these statements once in the presence of Church representatives.

From these debates, one can conclude that post-colonialism brings dilemmas for which there are no clear and unproblematic answers. Naturally, the personal situations shape individual positions in the debate, and finding a consensual solution is simply impossible. Moreover, from all land-related debates in which I participated and the interviews I conducted, it became clear that politicians, state officials, and society in general often did not have a clear overview of the complexity and extent of these problems, which is a symptom

61 Similar positions can be found in Matadalan ba Rai & Haburas Foundation, 2010.

62 According to Indonesian records, the Catholic Church owns at least 4,000 hectares of land, which includes coffee plantations, agricultural fields, urban buildings, and missions in rural areas (Fitzpatrick, 2002: 150). Because these numbers only referred to registered land, and informal land donations of individuals and communities to the Church are a common practice, it is very likely that the Church claims a much larger area (see Suara Timor Lorosae 21/10/2010; *Jornal Nacional Diário* 22/06/2016). Regarding disputes, see Timor Post 26/08/2011; Timor Post 05/10/2011; Timor Post 08/04/2013.

of not enough public debate about these issues. This complexity and lack of consensus makes advances in the formal land tenure system difficult to achieve. Nevertheless, as shown in Chapter 6, the 2017 Land Law took a position on many of these questions, although – due to lack of implementation – the solutions established in this law have not yet been tested.

4.10 POST-CONFLICT DEBATES AND POTENTIAL FOR VIOLENCE

Post-conflict debates and the potential for land-related violence also play a role in the political environment in which the formal land tenure system is developed. As detailed in Chapter 3, violence caused several waves of dispossession and displacement, which became complex problems to which there is no simple solution. Once, in conversation with an international judge working in the Timorese courts, he told me how he was struggling with a case that illustrates the complexity of these problems. A woman was claiming in court the ownership and restitution of a house that was being occupied by another woman. The occupant did not deny the formal land rights of the claimant. However, she argued that the claimant's husband, now away in Indonesia, had burned down her house in 1999, and she would only return the house under dispute once proper compensation was paid. The judge could see some reason in both sides, and there was no clear legal or moral solution for this case.

Also regarding problems caused by post-conflict, I could identify that, in land-related debates, the positions of Timorese politicians and society vary between two extremes. On one side, there are people who support strong protections for land occupants and, for instance, during the debates of the Land Law, would claim that a special adverse possession mechanism should give rights to those that occupied land even after the 1999 violence.⁶³ On the other side, people claim that no occupation, before or after independence, should ever be protected, and that even long-term occupants should be evicted and returned to their place of origin with no compensation. Some people go so far as to say that occupants had been lucky to have lived on occupied land for free for so long. During the debates of the Land Law in 2012, I recall one MP evoking the Christianity of the Timorese to justify evictions of densely populated areas such as Comoro. He argued (and I paraphrase) that 'we are all Christians, we should give each thing to its own rightful owner, and God blessed us with oil money to build social housing for these people.' The 2017 Land Law also took a position regarding the dilemmas caused by forced

63 One argument at times used to legitimise or delegitimise occupations of land is to make a distinction between people that left the country during the Indonesian occupation and those that remained fighting for the country (Elderton, 2002: 4; while not directly about land, see this debate in Silva, 2006: 186).

displacement and occupation, by establishing a hierarchy between different land rights (see Chapter 6), but for now its solutions remain untested.

Besides these dilemmas, the post-conflict experience also provides the Timorese – politicians and the population in general – with first-hand knowledge of what conflict looks like, both during past administrations and after independence. Especially in 2006, the role of land disputes in sparking and fuelling conflict became quite evident for everyone (see Chapter 3), and people are very aware of the potential that land tenure can have in sparking conflict. This first-hand experience with violence, and the potential for land-related interventions to cause more conflict, can in part explain why politicians are generally so reluctant to debate and approve legislation about land. It is true that the same argument could be used the other way around: because people know what violence looks like, they could be keen to address the problem. But in my experience, fear prompted paralysis rather than action.

4.11 RESILIENCE AND PREVALENCE OF CUSTOMARY LAND TENURE SYSTEMS

As debated in Chapters 3 and 8, customary land tenure systems have been quite resilient and remain a prevalent mechanism of social ordering in Timor-Leste, despite having received limited legal recognition by the different administrations. The resilience and prevalence of customary land tenure systems in Timor-Leste are a further relevant factor of the political environment in which the Timorese formal land tenure system has evolved.

Making a very broad generalization, we can find the more traditional and ancestral customary land tenure systems in rural areas. These systems are part of complex arrangements of social ordering and are organized around principles of origin, common derivation, and first possession of land (Hohe & Nixon, 2003: 14; Fitzpatrick & Barnes, 2010: 212; Fitzpatrick *et al.*, 2013: 25). One's 'house of origin' (*uma lisan* in Tetum), both through birth and marriage, is a fundamental part of social and communal identity and a source of rights and obligations (Leach *et al.*, 2012: 6; Cryan, 2015b: 148). The traditional social organization which binds the various cultural groups of Timor-Leste together is based on a complex network of hierarchies and alliances of different *uma lisan*. Customary land tenure systems – including norms for land allocation, rights and obligations of use and exclusion, rules of inheritance, and share of crops – are established through each group's norms and agreements with allies and neighbours, and are under the rule of customary authorities, usually the senior lineages of the group of origin (Fitzpatrick *et al.*, 2013: 32). In general these systems work quite independently of the formal land tenure system, but at times their paths intersect; for instance, in the case of land tenure disputes that families and customary authorities are not able to address (see

Chapter 8), or when norms of the formal system are evoked to change customary practices.⁶⁴

However, customary systems are neither exclusive to rural areas, nor based only on ancestral practices. Also in more-urban areas, customary norms, practices and institutions regulate access to and use of land.⁶⁵ Generally speaking, these systems coexist more with formal and semi-formal land tenure systems and incorporate more of their elements, but these customary systems exist nevertheless. For instance, people often request permission from suco chiefs to access land that is considered state land.⁶⁶ Under the formal land tenure system, the authority to manage state land belongs to DNTPSC, suco chiefs do not have this role, but in practice they are often the authority that the people recur to.

The prevalence of customary land tenure systems in Timor-Leste – and their proven capacity to provide social ordering regarding access to and avail of land, and to adapt to changes and interferences – is well known by Timorese politicians. For legal advisers (like myself) and international organizations focused on investment and the rule of law, the development of a formal land tenure system seems much more urgent and dramatic than for someone who has always lived with this coexistence of formal and informal systems. Timorese politicians know that stalling the development and territorialisation of the formal land tenure system can cause some problems, but will not collapse the country, because the customary systems, despite their problems and limitations, will continue to fill that gap.

Furthermore, while land-related issues are a problem, they are not the main concern of the majority of Timorese (CISR, 2016: 16; The Asia Foundation, 2016: 36).⁶⁷ While people complain about land issues that their customary systems

64 Timorese customary systems have proven to be quite resilient and have managed to bounce back after the external interference of Portuguese and Indonesian administrations (Fitzpatrick & Barnes, 2010). However, the level of disturbance as well as the capacity to recover were not equal in all communities. Empirical and anecdotal evidence shows that, in general, the more remote or economically unattractive areas have been able to re-establish their traditional land governance systems and remain relatively untouched by formal state mechanisms, whereas urban and highly productive agricultural areas are experiencing to a greater degree the clash between weakened customary structures and attempts to implement formal state mechanisms of land governance (Fitzpatrick & Barnes, 2010: 233).

65 Interestingly, there is much less anthropological work about these systems in urban areas.

66 As detailed in Chapter 3, suco chiefs are elected local leaders that, in theory, represent the sucos. Another recurrent practice in which suco chiefs take a role in land administration is the issue of declarations attesting to people's ownership of land and overseeing sales and other transactions (CES-OPJ & CRL, 2017: 226). These declarations are a source of rent-seeking and disputes, their legal value is none, and their factual accuracy is often dubious, and it is not uncommon that declarations attest to the ownership of more than one owner to a single parcel of land.

67 According to the CISR survey, the number of Timorese considering a land law as the most important issue of the country has been consistently around 2 percent. The Asia Foundation found that 7 percent of the Timorese consider land issues the biggest problem at national

cannot address, problems such as access to clean water and good roads are considered much higher priorities. Therefore, social pressure to improve the formal system is not strong, and action only happens when an urgency emerges.

4.12 CONCLUSION

This chapter shows how the political environment that marked Timor-Leste since its independence has not been favourable to the development of a formal land tenure system in general, but especially not to one that can effectively protect people and communities' land tenure. Although some progress has been made since independence – for instance, with the approval or more protective legislation (see Chapter 6) – improving the formal land tenure system is not a priority of the Timorese political elite. A number of interconnected ideological and contextual factors that mark the Timorese political environment explain this conclusion.

While coming from different backgrounds, the two main political parties do not see the protection of people and communities' land rights as a priority, and advocate instead for strong control of land by the state. The visions of development of political elites – centred on high-modernistic, state-led infrastructure projects for which large tracts of land are necessary – are especially influential and prevail over the land rights of local populations. Quick and cheap access to land is a priority, and local people are expected to bear the sacrifices of these ambitious national visions. From the perspective of those promoting these visions, a formal land tenure system that could curb the state's access to land would only be an unnecessary obstacle.

Although rhetorically a formal land tenure system that can promote private investment is another part of these visions of development, much less effort has been put into creating it. Instead, politicians and state officials have been the gate-keepers that help investors navigate the very uncertain waters of land rights in the country. A formal land tenure system that can be navigated without 'support' is of little interest to those that benefit from the current chaos.

The post-authoritarian experience, the authoritarian temptation of top political leaders, and cultural features that favour top-down and strong-state approaches further shape interventions in the land sector and limit a more-democratic development of the formal land tenure system. While more-pragmatic, ad hoc land acquisition approaches for basic infrastructure were understandable just after independence, the current paths of land acquisition are at odds with a democratic, rule of law country that effectively protects its people's rights.

A number of contextual factors further undermine improvements in the formal land tenure system. The weak rule of law caused by weaknesses of the judicial system, bad legislation, and lack of administrative processes gives little room for judicial contestation of state actions, and limits legal debates and judicial interpretation of the legal framework. Without contestation, state institutions have no incentive to follow the law and improve administrative practices. This lack of incentive to improve the formal land tenure system is further influenced by the Indonesian legacy on land administration. The Indonesian model normalises arbitrary practices, provides politicians and state officials with little incentive to develop the formal land tenure system, and dissuades people that never experienced different practices to demand for better practices. Opportunities for corruption, rent-seeking, clientelism, patronage, and elite capture further dissuade politicians and state officials from improving the formal land tenure system. Additionally, the resource curse caused by the windfall of oil and gas revenues removes the need to obtain state revenues through the formal land tenure system and further affects the quality of governance, including land tenure.

Moreover, other contextual factors bring dilemmas that promote inaction regarding the development of the formal land tenure system. Colonialism and conflict left a number of dilemmas to which it is not possible to find consensual solutions, and the fear of land-related violence further scares politicians away from trying to improve the formal land tenure system. Finally, the resilience and efficiency of customary systems even in urban areas, and the fact that land tenure issues are not the main priority for most Timorese, further remove pressure from politicians to address the problems of the formal land tenure system. The conclusion to be drawn from this scenario is that there are few incentives in the Timorese political environment to seriously improve the Timorese formal land tenure system.

