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Article

The Law and Its Limits: Land Grievances, Wicked Problems, and Transitional Justice in Timor-Leste

Bernardo Almeida *

ABSTRACT

This article discusses the inherent limitations of law in transitional justice processes regarding land grievances. Through analysis of the case of Timor-Leste (East Timor), a country marked by post-colonialism, post-authoritarianism, and post-conflict. The article shows how complex transitional justice regarding land grievances can be, and argues that a legalist perspective gives a limited view of these grievances, both for studying and finding solutions to them. The article employs the concept of 'wicked problems' to overcome the limitations of law. First, it shows how these grievances should be studied through a multi-disciplinary approach instead of a purely legal one. Second, it argues that transitional justice regarding land grievances is primarily a political issue, and creating adequate arenas for political negotiation should be prioritized. Finally, the article shows that, due to its complexity and political nature, transitional justice for land grievances is ultimately a search for acceptable, rather than optimal, solutions.

KEYWORDS: Land rights, law, Timor-Leste, transitional justice, wicked problems

INTRODUCTION

This article uses the case of Timor-Leste (East Timor) to discuss the limitations of law in transitional justice processes, both for understanding land grievances and providing a path to address them. In contexts of post-colonialism, post-authoritarianism and post-conflict, land rights are often a sore issue for transitional justice.[1] Victims of biased formal land tenure systems, occupation and destruction of property and forced dispossession expect and demand restitution of land and payment of compensation.

One common feature of most processes of transitional justice is the central position that is given to law. Politicians, international institutions and the public rely

* Post-doctoral researcher, Van Vollenhoven Institute for Law, Governance and Society, Leiden University, Netherlands. Email: b.ribeiro.de.almeida@law.leidenuniv.nl

1 Roger Duthie, 'Transitional Justice and Displacement,' *The International Journal of Transitional Justice* 5 (2011): 241–261; Jon Unruh and Rhodri Williams, 'Lessons Learned in Land Tenure and Natural Resource Management in Post-Conflict Societies,,' in *Land and Post-Conflict Peacebuilding*, ed. Jon Unruh and Rhodri Williams (Routledge, 2013); Yaël Ronen, *Transition from Illegal Regimes under International law* (Cambridge Books Online, 2013).

on existing national and international laws, or the approval of new legislation, to lead the transitional process regarding land grievances.[2] However, these actors often fail to acknowledge the intrinsic limitations of law for assessing the complexity of land-related grievances and providing solutions for transitional justice. They also often overlook the difficulty of developing new laws and processes for transitional justice in a less-than-ideal context.

The case of Timor-Leste is a paradigmatic example of the inherent limitations of law. The country's history is marked by colonialism, occupation, authoritarianism and violent conflict. Almost 20 years after independence (2002), and despite significant foreign and national investment in the land sector and two peace, truth and reconciliation commissions, the country still grapples with finding a solution for land issues caused by Portuguese colonial rule (17th century to 1975), the violent Indonesian occupation (1975–1999), the UN administration of the territory (1999–2002) and various hesitations and attempts to address the problem since independence.

This socio-legal study draws on the author's five years of work as a government land advisor and legal drafter in Timor-Leste (2010–2014) and subsequent doctoral research. It argues that, for effective transitional justice regarding land grievances, the inherent limitations of law must be acknowledged both in the study of these grievances and in the design of solutions to them. To address these limitations of law, the article employs the concept of 'wicked problems.'[3] This concept highlights the value of multi-disciplinarily approaches when dealing with deeply complex and multi-layered issues and provides guidance on how to approach them. In summary, this article shows that transitional justice regarding land grievances, more than a legal matter, is primarily a political issue, and political debate is the starting point to address it. Finally, due to its complexity, transitional justice for land grievances is ultimately a search for acceptable, rather than optimal, solutions.

The following section examines the limits of law in transitional justice and elaborates on the concept of 'wicked problems.' Next, the article describes land-related grievances in Timor-Leste, and the role of law in addressing but also causing them. The conclusions reflect on the lessons that can be taken from the Timorese case for the broader picture of transitional justice regarding land-related grievances.

LAND, LAW, TRANSITIONAL JUSTICE AND WICKED PROBLEMS

While there is no clear consensus on the definition of transitional justice, the expression is commonly used to refer to attempts to address violations of human rights and grievances connected with past regimes, in societies undergoing some kind of political transition.[4] While the concept of transitional justice was originally used in the

2 Jon Unruh, 'Humanitarian Approaches to Conflict and Post-Conflict Legal Pluralism in Land Tenure,,' in *Uncharted Territory: Land, Conflict and Humanitarian Action*, ed. S. Pantuliano (Practical Action Publishing, 2009).

3 Horst Rittel and Melvin Webber, 'Dilemmas in a General Theory of Planning,' *Policy Sciences* 4 (1973): 155–169.

4 Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field",' *international Journal of Transitional Justice* 3 (2009): 5–27; Bernadette Atuahene, 'Property and Transitional Justice,' *UCLA Law Review* 58 (2010): 65–93.

realm of penal law,[5] regarding demands for accountability of the perpetrators of violence and reparation to their victims, it has expanded to encompass other issues such as grievances regarding land. In these cases transitional justice refers primarily to the creation of processes and criteria for restitution of land to those that were unfairly dispossessed of it, and to the payment of compensation.[6] Therefore, transitional justice differs from more conventional reforms on a land tenure system, although in practice they are often bundled together.

The law is a key element of transitional justice processes. The characteristics of universality and equity of the law,[7] especially when combined with the democratic push that accompanies transitional justice processes,[8] give law a strong legitimacy to establish criteria for transitional justice and regulate the process for providing it. Even when other mechanisms such as peace, truth and reconciliation commissions are put in place, the approval of legislation that can guide the content and format of the transitional justice process is still a key step taken by governments and promoted by international organizations. Also, various legal instruments established in international law provide a legal ground on which to base transitional processes.[9]

However, as argued by McEvoy, transitional justice is a field dominated by legalism,[10] a narrow perspective that strictly adheres to the law, separating legal analysis from the social context in which the law exists.[11] While the critique of legalism raised by McEvoy and other authors focuses on the penal elements of transitional justice, the very same critique is also relevant to land-related grievances. Too often for those involved in transitional justice, but especially legal scholars and practitioners, the law – and only the law – is considered in the study and design of solutions for these problems.

McEvoy provides a number of explanations about why this legalistic perspective is recurrent among those involved in transitional justice.[12] The comfort of staying within the 'closed thinking' system of the law, the acritical use of human rights discourses that ignore the complexity of the issues on the ground and the temptation of simplifying complex issues to be processed by the state give law this central role in transitional justice. Despite some progress in moving away from an overly legalist perspective, transitional justice remains a highly legalized field,[13] generally unaware of the inherent limitations of law.

5 Louise Arbour, 'Economic and Social Justice for Societies in Transition,,' *international Law and Politics* 40(1) (2007).

6 Rhodri Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice* (International Center for Transitional Justice, 2007).

7 Adriaan Bedner, 'Autonomy of Law in Indonesia,' *Recht der Werkelijkheid* (37)3 (2016): 10–36.

8 Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31(2) (2009): 321–367; Duthie, supra n 1.

9 UN Secretary General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (2004).

10 Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,' *Journal of Law and Society* 34(4) (2007): 411–440; Arbour, supra n 5.

11 Judith Shklar, *Legalism – Law, Morals, and Political Trials* (Harvard University Press, 1986).

12 McEvoy, supra n 10.

13 D. Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,,' *international Journal of Transitional Justice* 9 (2015): 150–169.

The limitations of law are especially visible in the case of transitional justice regarding land-related grievances. International law provides only a few principles for addressing land issues caused by previous regimes, and in practice some of these principles are themselves a source of grievances. For instance, the right to private property established in the Universal Declaration of Human Rights (UDHR) can create grievances if the laws that recognize those property rights favour some groups over others. Legal interpretation provides room for some adaptation,[14] but often not enough to solve specific cases. The same happens with principles that regulate states' succession.[15] For instance, the principle that private property should not be affected by a succession of states can perpetuate colonial injustices.[16] Even the principles of restitution and compensation established in international documents such as the Housing and Property Restitution for Refugees and Displaced Persons (the 'Pinheiro Principles') and the UN Guiding Principles on Internal Displacement can be problematic in practice.[17] For instance, to whom should land be returned in cases where dispossession and new occupations cut across generations, and where more than one person has a valid claim over the same parcel of land? Moreover, international legislation stays away from issues such as economic and social inequality caused by previous regimes, which authors have highlighted as the missing link of transitional justice, and in which land plays a central role.[18]

National legal frameworks are also a source of problems and dilemmas. First, transitional periods are often marked by high levels of legal ambiguity, for instance due to contested legitimacy of a legislature or doubts regarding which legal framework is applicable.[19] Second, national laws often provide a limited, if not skewed, understanding of land grievances and a path to deal with them. In many cases, continuing to apply the laws of previous regimes will only perpetuate grievances that such laws caused, such as unfair dispossession. On the other hand, ignoring the law of previous regimes might cause new grievances for those who lawfully and in good faith obtained land rights through it. Moreover, disregarding formal rights obtained through legislation of a previous regime has the potential to spark new conflicts,

14 Bernardo Almeida, 'Expropriation or Plunder? Property Rights and Infrastructure Development in Oecusse,,' in *The Promise of Prosperity: Visions of the Future in Timor-Leste*, ed. J. Bovensiepen (ANU Press, 2018); Arbour, supra 5.

15 L. Ederington, 'Property as a Natural Institution: The Separation of Property from Sovereignty in International Law,' *American University International Law Review* 13(2) (1997): Article 1; Ronen, supra n 1.

16 Daniel Fitzpatrick, *Land Claims in East Timor* (Asia Pacific Press, 2002).

17 Liz Wily, 'Tackling Land Tenure in the Emergency to Development Transition in Post-Conflict States: From Restitution to Reform,' in *Uncharted Territory: Land, Conflict and Humanitarian Action*, ed. S. Pantuliano (Practical Action Publishing, 2009); S. Elhawary and S. Pantuliano, 'Land Issues in Post-Conflict Return and Recovery,' in *Land and Post-Conflict Peacebuilding*, ed. Jon Unruh and Rhodri Williams (Routledge, 2013); Sandra Joireman and Laura Yoder, 'A Long Time Gone: Post-Conflict Rural Property Restitution under Customary Law,' *Development and Change* 47(3) (2016): 563–585.

18 Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic",' *International Journal of Transitional Justice* 2 (2008): 266–291; Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence,' *International Journal of Transitional Justice* 3 (2009): 28–48; Lauren Balasco, 'Locating Transformative Justice: Prism or Schism in Transitional Justice?,' *International Journal of Transitional Justice* 12 (2018): 368–378; Arbour, supra n 5.

19 Unruh and Williams, supra n 1.

especially in states that are already grappling with a difficult political transition. Third, national frameworks are designed for periods of normality and often lack the solutions that extraordinary times demand. In many cases, approving new laws that establish processes and criteria to address past land grievances might be the only path to make national law a useful tool, but in contexts of scarce human and financial resources, competing priorities, political turbulence and weak institutions, approving new legislation can be particularly complicated.[20] The law alone is not enough to understand or tackle this problem, and a broader perspective is needed.[21]

The concept of 'wicked problems' offers an important analytical tool to deal with the limitations of law. Rittel and Webber define *wicked* problems in opposition to *tame* problems, which are those problems for which 'an exhaustive formulation can be stated containing all the information the problem-solver needs.'[22] Conversely, wicked problems are ill-defined, meaning that their resolution depends on political judgement and 'the information needed to *understand* the problem depends upon one's idea for *solving* it.'[23] Also, wicked problems keep evolving over time and have no definitive solution; they need to be constantly resolved. Moreover, they do not have a set of potential solutions; their solutions cannot be divided into right or wrong, there is no ultimate test for the adequacy of a solution and each attempt to address these problems is a 'one-shot' operation that leaves lasting consequences and triggers a set of new problems.[24] Also, every wicked problem is unique, and can be considered a symptom of another problem.[25] In other words, wicked problems combine *complexity*, *uncertainty* and *divergence about values*.[26] As the example from Timor-Leste below shows, land grievances, especially in periods of transition, neatly fulfil these characteristics.

While the concept of wicked problems has been used in several fields such as peacebuilding and state-building,[27] it is mostly absent from the literature on transitional justice. However, framing transitional justice regarding land grievances as a wicked problem can be useful both for better understanding land grievances and finding solutions to them. First, if framed as a multi-layered, complex issue – a wicked problem – it becomes clearer how this issue needs to be studied. Wicked problems require not the linear thinking of a legalistic approach, but rather a holistic approach that can show the big picture.[28] Transitional justice regarding land-related grievances needs accurate knowledge and careful consideration of the situation on

20 Ibid.; Duthie, supra n 1.

21 Bell, supra n 4.

22 Rittel and Webber, supra n 3. For instance, a mathematical problem is a tame problem. It is clearly defined, and even if complex and dependent on research, the information to solve it can be detailed in a number of steps.

23 Ibid.

24 Ibid.; Jeff Conklin, 'Building Shared Understanding of Wicked Problems,' *Rotman Magazine* (2009); Brian Head, 'Wicked Problems in Public Policy,' *Public Policy* 3(2) (2008): 101–118.

25 Ibid.

26 Ibid.

27 Among others, see Erin McCandless, 'Wicked Problems in Peacebuilding and Statebuilding: Making Progress in Measuring Progress through the New Deal,' *Global Governance* 19 (2013): 227–248; Franklin Kramer, 'Irregular Conflict and the Wicked Problem Dilemma – Strategies of Imperfection,' *PRISM* 2(3) (2013): 75–100.

28 Ibid.

the ground, and adaptation to it.[29] This broader perspective can only be obtained if the study of the law is combined with insights from disciplines such as anthropology, history and political science.[30]

Second, the concept of wicked problems points to paths through which these land grievances can start to be tackled. As a wicked problem, the solution for these grievances depends more on political judgment than on technical solutions. The grievances are primarily a political and social problem that can use the law as a tool but must deal with its limitations. What should be done, for instance, when several people think they have a legitimate claim over the same piece of land? And who defines what a legitimate claim is, and how? While it is easy to claim the need for 'justice for the victims,' it is much more difficult to determine who the victims are and what justice looks like in practice. These are eminently political questions. Tackling these grievances can only come from 'shared understandings about possible solutions,'[31] and therefore broad political negotiation is key to starting to address them. Conflicting interests between stakeholders makes collaboration between them especially difficult,[32] but promoting political negotiation is essential.

Third, the concept of wicked problems tames expectations of transitional justice processes. Wicked problems are not solved but managed; they continue to evolve and no silver bullet fixes them definitively, but inaction also comes at a price. Therefore, a long-term perspective and an iteration of solutions are needed and long-term commitments are essential. Also, as a wicked problem, transitional justice regarding land grievances is often a search for acceptable, rather than optimal, solutions. Usually no single solution pleases all parties and, therefore, compromises must be made. Moreover, the windows of opportunity for the political negotiation mentioned above are limited. In this complex scenario, ideas such as transformative justice,[33] while important for pushing the boundaries of how transitional justice regarding land grievances is framed, tend to clash with this need for pragmatism and compromise. If strategically used, ideas of transformative justice might improve the political debate, but if blindly imposed they can also prevent any conciliation.

Finally, advocating that these transitional justice issues need to be studied through a broader perspective than just the law does not mean that the law should be disregarded. Being part of the problem, the law needs to be studied, and its characteristics of universality and equity are fundamental to giving consistency and predictability to a transitional process, and to preventing arbitrariness and abuses.[34] Nevertheless,

29 Jon Unruh, 'Toward Sustainable Livelihoods after War: Reconstituting Rural Land Tenure Systems,' *Natural Resources Forum* 32 (2008): 103–115.

30 Bell, supra n 4.

31 Conklin, supra n 24; Brian Head and John Alford, 'Wicked Problems: Implications for Public Policy and Management,' *Administration & Society* 47(6) (2015): 711–739.

32 Ibid.

33 Miller, supra n 18; Balasco, supra n 18; Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing, 2017).

34 Williams, supra 6; Terence Halliday et al., 'The Legal Complex in Struggles for Political Liberalism,' in *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, ed. Malcolm Feeley, Terence Halliday and Lucien Karpik (Hart Publishing Ltd., 2007); Edward P. Thompson, *Whigs & Hunters – The Origin of the Black Act* (Breviary Stuff Publications, 2013); Bedner, supra n 7.

academics, politicians and practitioners need to be aware of the inherent limitations of law in order to adequately understand and address land grievances.

The case of Timor-Leste described below provides a clear example of these limitations, and how the concept of wicked problems can help to frame and tackle these issues. Interestingly, the literature on land-related issues in Timor-Leste rarely engages with literature on transitional justice (see various references below), while the transitional justice literature on Timor-Leste rarely looks into land-related grievances.[35]

LAND GRIEVANCES IN TIMOR-LESTE

Land grievances in Timor-Leste are intimately connected with the colonialism, authoritarianism and conflict that mark the country's history. This section is divided according to major periods of Timorese history, and analyses the country's several layers of land-related grievances and the role that law has played in addressing but also causing them. It also shows how these grievances neatly match the concept of wicked problems, which can be useful both for understanding and finding solutions to these problems.

Portuguese Colonial Rule (17th Century to 1975)

The first Portuguese contact with the island of Timor occurred in 1515, but it was only at the end of the 19th century that, motivated by a strong push to transform the colony's economy, the Portuguese colonial authorities attempted to gain tighter political control over the territory, in order to obtain access to the land.[36]

Portuguese colonial laws regarding land tenure were a source of grievances that are still visible today. As in other colonial ventures, the colonial administration in Timor-Leste had to deal with the land rights of the local populations. Despite some concerns of the administration in legally recognizing the land rights of local populations,[37] this recognition had to compete with the main objective of accessing land for economic exploitation. A review of the various pieces of legislation approved throughout the first part of the 20th century make the regime's priorities clear.[38] For instance, different laws affirmed the state's ownership of all land not privately owned and recognized some land rights of local people. Yet, the way in which the land of local people was defined in law was limited to residential and cultivated areas, and did not consider the social, spiritual and political roles of land, therefore excluding most land from any legal protection (e.g., forestry land, sacred areas, reserve areas).[39] In fact, communal control of land, in which major decisions about it are taken

35 See for instance James Rae, *Peacebuilding and Transitional Justice in East Timor* (FirstForumPress, 2009); Geoffrey Robinson, *"If You Leave Us Here, We Will Die," How Genocide Was Stopped in East Timor* (Princeton University Press, 2009). See also Duthie, supra n 1.

36 John Taylor, *East Timor: The Price of Freedom* (Zed Books Ltd, 1999); Laura Yoder, 'Genealogy of Colonial Land Registration and State Land in Portuguese Timor,' *The European Legacy* (2020).

37 Bárbara Direito, 'African Access to Land in Early 20th Century Portuguese Colonial Thought,' in *Property Rights, Land and Territory in the European Overseas Empires*, ed. José Vicente Serrão, Bárbara Direito, Eugénia Rodrigues and Susana Miranda (CEHC-IUL, 2014).

38 Bárbara Direito, 'Terra e africanos no pensamento colonial português, c. 1920–c. 1945,' *Análise Social* 213 XLIX(4) (2014): 768–793; Yoder, supra n 28.

39 Direito, supra n 37.

through community institutions, was seen by the administration as primitive, and laws were designed to progressively promote the individualization of land rights.[40] Furthermore, the recognition of local people's land rights was also dependent on administrative procedures that most people were unaware of, and did not have the means to follow.

Notwithstanding the Portuguese authorities' efforts to expand land administration services, only around 3,000 formal land rights were ever issued, representing a relatively small percentage of Timor-Leste's total area.[41] Most beneficiaries of these rights were people with links to the Portuguese administration, business interests or the Catholic Church, as well as some foreigners, although some local Timorese also had access to them.[42] The great majority of the country, however, continued to be managed by customary systems and had limited or no contact with the formal one.[43]

Despite their limited success, colonial land laws resulted in a number of land-related grievances for which, as mentioned above in the definition of wicked problems, there is no right or wrong solution. For instance, the legitimacy of formal rights issued by the Portuguese administration is still debated today.[44] Some Timorese, usually beneficiaries of these rights, claim that their rights were fairly obtained through the rules that existed at the time and are therefore legitimate. Others, mostly those who did not have access to formal rights, consider them an instrument of colonialism and argue that these rights should not be legally recognized. Through a legalist perspective, one can argue that the local population had a path to formalize their land rights during the Portuguese administration, and those who did not should have done so. However, an historical and anthropological analysis reveals the social, legal and practical limitations to this course of action, and the unfairness of such a claim. The solutions for these grievances are eminently political, not technical. Another grievance is regarding state land. The broad legal definition of state land introduced by the Portuguese legislation interfered with the existing customary systems. Even today, communities complain about land being taken from them by the Portuguese authorities for public projects and given as concessions to companies, individuals and the church.[45] However, these grievances are not visible through a purely legalistic

40 Laura Yoder, 'Custom, Codification, Collaboration: Integrating the Legacies of Land and Forest Authorities in Oecusse Enclave, East Timor' (PhD diss., Yale University, 2005).

41 Ibid.; Rod Nixon, *Non-Customary Primary Industry Land Survey: Landholdings and Management Considerations* (USAID/ARD Inc., 2005).

42 George Aditjondro, *In the Shadow of Mount Ramelau – The Impact of the Occupation of East Timor* (Indoc, 1994); Jean Du Plessis and Scott Leckie, *Housing, Property and Land Rights in East Timor: Proposals for an Effective Dispute Resolution and Claim Verification Mechanism* (UN Habitat, 2000); Daniel Fitzpatrick et al., *Property and Social Resilience in Times of Conflict: Land, Custom and Law in East Timor* (Ashgate Pub Co, 2013).

43 Customary system means here a land tenure system that is based on norms, institutions and practices developed outside state systems but nevertheless recognized and followed by a group of people. See Bernardo Almeida, 'Building Land Tenure Systems: The Political, Legal, and Institutional Struggles of Timor-Leste' (PhD diss., Leiden University, 2020).

44 Ibid.

45 Matadalan ba Rai and Haburas Foundation, *Community Voices on the Land: Results of the Consultation by Matadalan ba Rai* (Matadalan ba Rai, Haburas Foundation, UNDP, Trocaire and Oxfam, 2010); Fernando Figueiredo, *Timor – A Presença Portuguesa (1769–1945)* (Centro de Estudos Históricos da Universidade Nova de Lisboa, 2011).

perspective, but rather rely on historical knowledge and anthropological understanding of the affected communities and their land.

The Indonesian Occupation (1975–1999)

The 1974 Carnation Revolution ended 41 years of dictatorship in Portugal and triggered the decolonization process of all Portuguese colonies. However, only nine days after declaring independence from Portugal, Timor-Leste was invaded by its neighbour, Indonesia, which prompted a long-running guerrilla insurgence by the Timorese resistance. Starvation, illness, death and misery were widespread during the early years of the Indonesian occupation.[46]

Authoritarianism, corruption, suppression of political opposition and centralization of power were the main markers of Suharto's New Order, which was reflected in the way land tenure was managed by the Indonesian authorities. The Indonesian Agrarian Law of 1960 (Law 5/1960) gave the state a central and dominant position in land administration,[47] through which formal rights could be easily terminated by the state authorities and the recognition of customary (*adat*) rights was very restricted. Furthermore, land administration was characterized by discretion, with the law being used selectively by state authorities when deemed necessary to justify their actions, and ignored when its application was inconvenient.[48]

Besides these problems, the implementation of the Indonesian formal land tenure system in Timor-Leste had to deal with the transition from the Portuguese system, but legal certainty was not a priority for the Indonesian authorities. Only in 1991 was Government Regulation 18/1991 approved, which converted Portuguese formal land rights into Indonesian ones, but it was controversial and poorly implemented and created even more uncertainty regarding the legal value of Portuguese formal land rights.[49]

Despite these complications, the Indonesian authorities were more efficient than their Portuguese predecessors in formalizing land rights in Timor-Leste. It is estimated that around 44,000 formal rights, covering roughly 10 percent of the country's area, were issued throughout the occupation.[50] However, access to land titles was often dependent on the payment of bribes and 'incentives,' and was used as a mechanism to reward the regime's cronies and punish its detractors.[51]

If the legal protection of land rights was weak, in practice the situation was often worse. Dispossession through intimidation and violence, especially by the army,

46 CAVR – Commission for Reception, Truth and Reconciliation in East Timor, *Chega! Full report* (2005).

47 Adriaan Bedner, 'Indonesian Land Law: Integration at Last? And for Whom?,' in *Land and Development in Indonesia: Searching for the People's Sovereignty*, ed. John McCarthy and Kathryn Robinson (ISEAS-Yusof Ishak Institute, 2016).

48 Ibid.

49 Some Portuguese formal rights were converted into weaker Indonesian equivalents, the land rights of entities such as the Catholic Church were weakened and those people that had fled the country would lose their rights. See Anonymous author, 'Winner Takes All – East Timorese Convert to Indonesian Land Certificates,' *Inside Indonesia – Bulletin of the Indonesia Resources and Information Programme* 26 (1991): 9–11; Fitzpatrick, supra n 16; Yoder, supra n 40; Bernardo Almeida, *Land Tenure Legislation in Timor-Leste* (The Asia Foundation, 2016).

50 Fitzpatrick, supra n 16.

51 Aditjondro, supra n 42; Fitzpatrick, supra n 16.

combined with a broad interpretation of the definition of state land and state power to expropriate, were used to obtain land for private concessions, to forcibly resettle displaced populations and to implement state infrastructure projects.[52] In many cases little or no compensation was paid for these acquisitions, and individuals and communities had few or no mechanisms to safely dispute them.[53]

Consequently, the Indonesian administration and its laws created a large number of complex land grievances that a legalistic approach cannot fully grasp or solve. As a wicked problem, these grievances are complex and multi-layered, with no certain path to solve them, and with divergent values at play. For instance, the legitimacy of Indonesian formal land titles is controversial in Timorese society: while they were a source of corruption and a way of benefiting cronies of the regime, they were also the only path to legally secure land rights for the local population, and in many cases such rights were obtained legitimately. A legalistic approach cannot grasp the complexity of these grievances; other disciplines such as anthropology, sociology and political science must be part of the analysis.

A legalistic approach also has limitations in solving such grievances. For instance, displacements during this period were not all equal: some people displaced were compensated for the land lost, while others received little or no compensation; some displacements were conducted through (semi-) legal processes, while others were conducted by force; and while part of the land captured was used for private interests, in some cases land was also used for public purposes, such as schools, roads and the relocation of entire communities. In many cases it is very difficult to determine the legality of displacement, and overarching principles such as restitution clash with the complexity of the situation on the ground. As further argued below, political negotiation and compromise are fundamental to start untangling these wicked problems.

UN Administration (1999–2002)

In 1999, after Suharto's resignation and as a result of increasing domestic and international pressure, a referendum on the independence of Timor-Leste was announced by Indonesia's new president, Habibie. The Timorese overwhelmingly voted for independence, and in response pro-Indonesia militia, in collaboration with the Indonesian military, unleashed widespread destruction, death and displacement that was only halted by a United Nations peacekeeping mission. The country was in disarray. The United Nations Transitional Administration in East Timor (UNTAET) was established to provisionally manage the territory and prepare the ground for an independent Timor-Leste.

Land-related grievances were one of the most difficult issues that UNTAET faced.[54] Out of a population of approximately 900,000 people in 1999, around 450,000 were internally displaced and 250,000 fled or were forcibly taken to

52 Ibid.; CAVR, supra n 46; Nixon, supra n 41.

53 Aditjondro, supra n 42; Daniel Fitzpatrick et al., supra n 42.

54 Anthony Goldstone, 'UNTAET with Hindsight: The Peculiarities of Politics in an Incomplete State,' *Global Governance* 10(1) (2004): 83–98.

Indonesian West Timor.[55] The return of these displaced people resulted in a massive wave of land occupation, especially in the capital, Dili.[56] Any house or ruin was occupied, and in some cases people took control of several houses, expecting to rent them, sell them or receive compensation for vacating them.[57] Furthermore, long-term refugees returned to claim land they abandoned in 1975, and people and communities started to reclaim and repossess land taken from them by the Indonesian administration.[58] The need for land for public administration activities, the arrival of investors and the influx of thousands of foreign development workers further increased competition for, and the price of, land.[59]

UNTAET created the Land and Property Unit, but this unit lacked the mechanisms to deal with land problems. UNTAET opted for incorporating the Indonesian legislation,[60] but this legislation was poorly understood by UNTAET staff and did not provide solutions for most problems UNTAET was facing.[61] Indonesian laws lacked provisions to deal with overlapping land claims and gave minimal protection to customary land rights, therefore excluding the majority of Timorese from having a formal right. Additionally, many Timorese considered the Indonesian laws as illegitimate.[62]

Furthermore, the land registry had been mostly destroyed during the violence that followed the referendum, making it impossible to confirm who had which formal land rights, or if land occupants were the legitimate owners.[63] The loss of land and personal documentation, and the various fraudulent documents circulating, further complicated any recognition of formal rights. Additionally, re-establishing the Indonesian formal land tenure system was politically unacceptable for many Timorese Cabinet members of UNTAET, given the recent events.[64] Finally, humanitarian concerns, the transitory and foreign nature of the UN administration and the potential to provoke conflict made the enforcement of laws on land – for instance, through coercive payments of rents and evictions – a difficult and sensitive matter. While in theory the Indonesian legislation remained in place, in practice it ceased to be applied.[65]

55 Daniel Fitzpatrick, 'Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor,' *Working paper N° 58* (UNHCR, 2002); CAVR, supra n 46.

56 Mark Marquardt et al., *Land Policy and Administration: Assessment of the Current Situation and Future Prospects in East Timor – Final Report* (USAID, 2002).

57 Du Plessis and Leckie, supra 42; Fitzpatrick, supra 55; Annemarie Devereux, *Timor Leste's Bill of Rights: A Preliminary History* (ANU Press, 2015).

58 See for instance Bernardo Almeida, 'Navigating Without a Compass: State Transition in Timor-Leste's Formal Land Tenure System,' in *Transformations in Independent Timor-Leste*, ed. R. Feijó and S. Viegas (Routledge, 2017).

59 Daniel Fitzpatrick and Rebecca Monson, 'Balancing Rights and Norms: Property Programming in East Timor, the Solomon Islands and Bougainville,' in *Housing, Land and Property Rights in Post-Conflict United Nations and other Peace Operations: A Comparative Survey and Proposal for Reform*, ed. S. Leckie (Cambridge University Press, 2009).

60 Almeida, supra n 49.

61 Nigel Thomson, 'Towards Sunrise – East Timor, the United Nations and the Administration of Public and Private Abandoned Land in the Post-Conflict Environment' (Master diss., University of Queensland, 2003).

62 Fitzpatrick, supra n 16.

63 Ibid.; Thomson, supra n 61.

64 Ibid.

65 Ibid.

UNTAET staff and many observers identified the need to change the legal framework and establish a land commission or a special court as a priority for transitional justice, conflict prevention and state development.[66] However, attempts to start debates about, and draft legislation on, land issues were halted by strong opposition from the Timorese political elite involved in the UNTAET Cabinet. They argued that a subject as delicate as land rights should be left to a Timorese-elected government, and that approving legislation with such lasting impacts was outside UNTAET's legislative mandate.[67] Trapped in the dilemma of legislating about this urgent issue or following the demands of this Timorese elite, UNTAET opted for the latter, deferring any decisions on land grievances to an elected government. Even UNTAET's strong recommendation of recognizing customary-based land rights in the draft Constitution was ignored by the politicians.[68]

Without an adequate legal framework or political leverage to approve legislation, UNTAET abandoned the idea of transitional justice in the land sector, and its work became mostly reactive, based on internal guidelines and pragmatism instead of the law. However, this informal approach also raised problems of consistency, legitimacy and transparency.[69]

While the lack of state mechanisms to address land grievances opened the way for customary mechanisms to take over some reconciliation processes regarding land,[70] many other grievances only became more complicated over time. For instance, those who occupied land on their return and used their resources to (re)build a house felt more entitled to that land, or at least to compensation. Also, despite being formally forbidden, many people took the opportunity to buy formal land rights from Indonesians who left the country. Even the leases issued by UNTAET became a source of grievances because some people saw them as a mechanism to formalize inequalities generated by the 1999 violence.[71]

The period of UNTAET's administration became a paradigmatic example of the role and limitations of law in addressing land grievances caused by past administrations. On the one hand, the existing laws did not provide UNTAET with adequate legal solutions for land grievances, but on the other hand UNTAET was not allowed to develop new ones. While from a democratic point of view it made sense to leave decisions about land-related grievances to an elected government, the opposition of Timorese politicians prevented a national dialogue that should have preceded any decision on the topic. Moreover, the lack of action on these matters during the UNTAET administration added a new layer of issues to an already-complex scenario of land grievances. Moreover, as a wicked problem, land grievances kept evolving quickly, and the solutions implemented such as the temporary leases or the internal

66 Ibid.

67 Ibid.; Fitzpatrick, supra n 16.

68 Tanja Hohe and Rod Nixon, *Reconciling Justice – 'Traditional' Law and State Judiciary in East Timor – Final Report* (United States Institute of Peace, 2003).

69 Thomson, supra n 61; Fitzpatrick and Monson, supra n 59.

70 Hohe and Nixon, supra n 68; Fitzpatrick et al., supra n 42.

71 Du Plessis and Leckie, supra n 42; Andrew Harrington, 'Ethnicity, Violence, and Property Disputes in Timor-Leste' (LL.B./MA diss., University of Ottawa, 2006).

guidelines created new grievances. Ultimately, UNTAET failed to create a political arena where land grievances could be debated.

Land Grievances after Independence

From May 2002 onwards, it became the responsibility of the elected Timorese government to provide answers to the land-related problems and dilemmas that UNTAET was not able or allowed to address. The questions and their complexity were overwhelming. For instance: Which should be the legal basis of the Timorese formal land tenure system? What should be the legal validity of formal land rights issued by previous administrations? How should situations be addressed where formal rights issued by Portugal and Indonesia overlap, or in cases of rights obtained through nepotism, corruption or forced displacement? Should customary land tenure systems and rights have legal recognition? Should people forcibly settled on other people's customary land return to their original place, or remain where they have lived for many years? How to deal with the land occupations that occurred after the referendum for independence? How to overcome the loss of land registry documentation, as well as forged documentation? And how could all of these questions be answered with very limited financial resources and administrative capacity? How could these issues be dealt with in a timely manner, considering that sales, leases, occupations and (re)constructions were continuing informally? And how could the need to address past land-related grievances be balanced with other priorities such as maintaining peace; providing for people's basic needs; normalizing the country's diplomatic and economic relationship with Indonesia; and promoting 'development' and tackling past economic and social inequalities?[72] In sum, bringing justice to land-related grievances posed a very complex set of problems and dilemmas to the newly independent Timor-Leste.

This section summarizes the efforts of Timorese governments to develop and approve laws and processes to address land grievances from the past, and the consequences of the approaches taken. The section is divided into three periods, broadly corresponding to three different governments: (1) 2002–2007; (2) 2007–2012; and (3) 2012–2017.

1) 2002–2007 Period: Law 1/2003

The drafting of the Timorese Constitution was the first opportunity to legislate on past land-related grievances. However, despite holding some general debates on the issue, the Constitutional Assembly opted to only briefly mention the topic in the final Constitution and defer any definitive solution to further legislation.[73] The Constitution was also an opportunity to bridge the gaps between the formal land tenure system and the informal customary ones that de facto rule most of the country's area, but the Constitutional Assembly opted instead for a vague provision that states that customary norms are valid if not in contradiction of the Constitution (article 2.4).

72 Answering these questions is outside the scope of this article, but on this topic see Almeida supra n 43 and n 49.

73 Article 161; Devereux, supra n 57.

The first main action taken by the newly elected Timorese government was the approval of Law 1/2003, which proved to be problematic.[74] A lack of background studies and minimal public consultation created no meaningful space for political debate. Moreover, weak legal drafting and a strong state-centric view resulted in a law with poor legal solutions, mostly focused on strengthening state claims to land and both implicitly and explicitly allowing for state-led dispossession. The three main characteristics of this law – very much in line with past administrations' practices – were a broad definition of state land, an unclear recognition of formal rights issued by previous administrations and no recognition of customary rights. Under Law 1/2003 the great majority of Timorese were at risk of dispossession by seeing their land classified as state land.[75]

This law also established the first formal process for people to claim their land rights, but this process had several problems: it left unclear which rights could be claimed,[76] and by demanding documentation it implicitly excluded customary rights; it did not account for prior loss of documents, especially during the events of 1999; and it was a poorly publicized process that required people to submit claims within one year of the law's entry into force, leading to low participation.[77] Finally, the outcomes of this land-claims process were deferred to subsequent legislation that was never approved, leaving the collected claims in a 'legal limbo' that created even more legal uncertainty. In summary, Law 1/2003 mostly strengthened the state's power over land, causing new problems instead of addressing past grievances.

The 2005 report of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR in its Portuguese acronym) did little to change this situation. The report included a specific section about dispossession resulting from the Indonesian occupation and recommendations for restitution and compensation.[78] However, Parliament never debated or approved the report, and its recommendations regarding restitution and compensation were never formally acknowledged by Timorese institutions. Moreover, Indonesian authorities always refused any accountability for their actions in Timor-Leste, and CAVR's careful documentation of the atrocities committed in the country did not persuade Indonesia to pay any compensation to the dispossessed. The vague recommendations of the 2005 Commission of Truth and Friendship, a controversial bilateral commission established between Timor-Leste and Indonesia, also did not lead to any initiative regarding land restitution or payment of compensations.[79]

The political crisis of 2006 seriously shook the newly independent Timor-Leste. Protests against army promotions by disgruntled soldiers quickly escalated into widespread violence and civil unrest and raised many doubts about the Timorese

74 Almeida, supra n 43.

75 Bernardo Almeida and Todd Wassel, *Survey on Access to Land, Tenure Security and Land Conflicts in Timor-Leste* (Van Vollenhoven Institute and The Asia Foundation, 2016).

76 Almeida, supra n 43.

77 Edwin Urresta and Rod Nixon, *Report on Research Findings, Policy Options and Recommendations for a Law on Land Rights and Title Restitution* (USAID, 2004).

78 CAVR, supra n 46; Duthie, supra n 1.

79 Megan Hirst, *An Unfinished Truth: An Analysis of the Commission of Truth and Friendship's Final Report on the 1999 Atrocities in East Timor* (International Center of Transitional Justice, 2009).

state-building process.[80] The crisis had three main effects regarding land-related grievances. First, it highlighted the potential of land disputes to fuel conflict, as the breakdown of law and order gave room for violence and retaliation connected with past land grievances. Second, it exposed the government's difficulties in dealing with land tenure issues,[81] and demonstrated the price of inaction in dealing with this multi-layered wicked problem. Third, the conflict resulted in a new wave of destruction, displacement and occupation.[82] While the numbers are disputed, the 2006 events resulted in as many as 200 deaths, 150,000 people displaced and the destruction of 6,000 buildings.[83] As a wicked problem, land grievances continued to evolve quickly, and the aftermath of the 2006 crisis added a new layer of problems to existing ones.

1) 2007–2012 Period: Ita Nia Rai and the Beginning of the Land Law

The 2006 crisis showed Timorese politicians the need to address past land grievances and establish a land administration system that could prevent further land-related conflict. Upon request from Prime Minister Horta, USAID started a new project in 2007 that came to be known as *Ita Nia Rai* (INR, or 'Our Land' in Tetum). INR's two main objectives were to, in close collaboration with the Ministry of Justice (MoJ): (1) develop a process for the systematic collection of land claims; and (2) approve a legal framework with criteria to solve past land grievances, and to legitimize and regulate the systematic collection of land claims.

The systematic collection of land claims focused on the urban areas of Timor-Leste's 13 district capitals. INR wanted to prioritize more densely populated areas and with more individualized rights, disputes and possible land markets, and avoid the complex customary arrangements prevalent in rural areas.[84] Therefore, the methodology developed was designed for urban areas, although communal land claims were also accepted. INR's process was supported by a strong focus on public information and corruption prevention, and it was fairly simple and transparent.[85] The main premise was that everyone – individuals, groups, legal entities, communities and the state – that considered themselves to own land in an area under survey by INR was entitled to claim that land for free, regardless of whether they possessed a formal right issued by a previous administration or any other documentation proving

80 James Scambary, 'In Search of White Elephants: Political Economy of Resource Expenditure in East Timor,' *Critical Asian Studies* 47(2) (2015): 283–308.

81 Cynthia Brady and David Timberman, *The Crisis in Timor-Leste: Causes Consequences and Options for Conflict Management and Mitigation* (USAID, 2006); Andrew McWilliam, 'East and West in Timor-Leste: Is There an Ethnic Divide?,' in *The Crisis in Timor-Leste: Understanding the Past, Imagining the Future*, ed. Dennis Shoesmith (Charles Darwin University Press, 2007).

82 Ibere Lopes, 'Land and Displacement in Timor-Leste,' *Humanitarian Exchange* 43 (2009): 12–14; International Crisis Group, 'Managing Land Conflict in Timor-Leste,' *Asia Briefing* N° 110 (International Crisis Group, 2010).

83 Scambary, supra n 80.

84 Haburas Foundation and Rede ba Rai, *Land Registration and Land Justice in Timor-Leste* (Haburas Foundation and Rede ba Rai, 2013).

85 Timothy Fella and Karol Boudreaux, *An Evaluation of the Strengthening Property Rights in Timor-Leste Project (SPRTL)* (USAID, 2011); UNMIT, *Timor-Leste Communication and Media Survey* (UNMIT, 2011).

their claim. This approach, less based on legal considerations, stimulated local debate about land rights and allowed people to claim land according to their own perception of justice, rather than imposing prerequisites that would exclude many past grievances. Between 2008 and 2012, INR collected more than 50,000 land claims in the urban areas of district capitals.

However, INR's results were overshadowed by legislative and institutional problems. The draft Land Law that would give legal basis to the claims process and clarify which land claims would receive formal rights remained undebated by Parliament for many years, only to be vetoed by the President after its approval in 2012 (see more below).[86] This was in part mitigated by the approval of Decree-Law 27/2011 that allowed the registration of land rights over undisputed parcels and left the resolution of disputed ones to the Land Law, but the implementation of this decree-law was also problematic.[87]

At the end of the project in 2012, USAID and the MoJ had not yet agreed on a plan about the future of INR. The MoJ hired some of the project's staff, but without a clear institutional framework or budget and management structure, and in the face of strong opposition from the National Directorate of Land Property and Cadastral Services, INR's activities almost stopped. The record of land claims became inaccessible to the public and ceased to be updated. While the approach taken by INR empowered people to present their land claims and provided mediation to various disputes, ultimately little was achieved in providing formal closure to past land grievances. Ultimately, the lack of political agreement prevented the success of this technical solution.

3) 2012–2017 Period: SNC and the Approval of the Land Law

With the change of government in mid-2012, two main questions regarding land administration and past land grievances needed to be addressed. The first was what to do with the INR project, by then under MoJ administration but mostly paralysed. The second was what to do with the vetoed Land Law. Ten years had passed since independence, land was continuing to be informally sold, leased and inherited, new houses were being built, informal mediation of conflicts was ongoing, but there was still no formal solution for the land-related grievances of the past. As a wicked problem, land grievances kept mutating, and the solutions initially studied were by then outdated.

Regarding INR, the solution adopted by the new government was very controversial. In 2013, through a sole-sourced six-year contract of around US$57 million, the government awarded the continuation of the land claims process developed by INR to a Timorese-Portuguese joint venture, with close ties to power and no previous experience in land registration. The project was called the National Cadastre System (SNC in its Portuguese acronym). Its terms of reference were never made public,

86 In summary, the reasons for the veto were disagreements with some of the policy options, a number of unclear articles and the lack of national consensus about the law. Accounts of the political debates that surrounded this law can be found in Meabh Cryan, 'The Long Haul: Citizen Participation in Timor-Leste Land Policy,' *SSGM Discussion Paper* 2015/13 (2015); and Almeida, supra n 43.

87 Ibid.

but the government claimed that SNC was going to register *all* land parcels in the country.

Conceptually, the idea of re-starting land registration by massively expanding it throughout the country into the more-rural areas without adequate legislation and administrative systems in place goes against all research and best-practice recommendations on land registration.[88] A study from Rede ba Rai, a network of local NGOs focused on land issues, further highlighted various problems in SNC's work,[89] including poor and inaccurate public information; illegal requisites imposed on participants; registration of communal land in one individual's name; no mechanism for updating land claims; and secrecy regarding the project's methodology and data. SNC's approach was so worrying that in 2019 the UN Special Rapporteur on the Rights of Indigenous Peoples recommended the temporary suspension of SNC's work.[90] The project ended in early 2020 and, as happened with INR, the land claims it collected remain privately stored and untouched.

The second main question that the new government had to address was what to do with the vetoed Land Law. The law had gone through one of the largest public consultations in the country, but its solutions for past grievances were still controversial.[91] The decision was to revise the draft law, conduct further public consultation and re-start the approval process. After many delays, the law was approved in 2017. Its main features can be summarised as follows: (1) it clarifies the legal recognition of formal rights issued by past administrations; (2) it gives legal recognition to customary land rights, both individual and collective, as well as long-term possession of land; (3) it gives a more precise and restrictive definition of state land that excludes land owned customarily; (4) it creates a complex hierarchy between different types of land rights and who is in possession of land; (5) it establishes a right to be compensated in the case that, through the established hierarchy of rights, a legitimate claimant does not retain the land; and (6) it creates a Land Commission to deal with conflicting claims, in order to prevent flooding the courts with land disputes.[92]

In summary, this law moved away from a strict legalist view of past land grievances. Instead of simply considering those who had formal land rights before, the law takes into account the historical and social dimensions of land tenure in the country, and acknowledges the political, legal and practical problems of past systems. When compared with Law 1/2003, the more systematic and participatory process through which the law was drafted, although far from perfect, opened an arena for some political negotiation, brought various perspectives about these grievances to the debate and promoted some compromises.[93] The combination of restitution of land,

88 Among others, John Bruce et al., 'The Findings and Their Policy Implications: Institutional Adaptation or Replacement,' in *Searching for Land Tenure Security in Africa*, ed. John Bruce and Shem Migot-Adholla (The World Bank, 1994); Unruh and Williams, supra n 1; Stig Enemark et al., *Fit-for-Purpose Land Administration* (FIG and Word Bank, 2014).

89 Rede ba Rai, *Land Registration in Timor-Leste: Impact Analysis on the National Cadastral System (SNC)* (Rede ba Rai, 2019).

90 Human Rights Council, *Visit to Timor-Leste – Report of the Special Rapporteur on the Rights of Indigenous Peoples* (UN General Assembly, 2019).

91 Cryan, supra n 86.

92 A detailed analysis of this law can be found in Almeida, supra n 43.

93 Ibid.

compensation for lost rights and legal recognition of previously unrecognised rights breaks away from basic principles of property law such as the *nemo dat* rule and forces some compromises, but it was the only way of making this law a tool of transitional justice.

However, as happened with wicked problems, the long-awaited approval of the Land Law far from solved past land grievances. The law brings new legal problems, as well as huge implementation challenges, such as approval of all the required complementary regulations, training of the public administration staff and creation of internal administrative procedures. Moreover, it is questionable whether some solutions, designed almost 10 years before the approval of the law, remain relevant. Despite much waiting and anticipation, the law addressed some legal issues but exposed a new set of legal problems, and the SNC's problematic land registration introduces yet another layer of confusion and uncertainty regarding land rights. The Land Law is a clear example of the need to compromise. For instance, although it still leaves around a quarter of the capital's population at risk of eviction,[94] it is nevertheless an important step away from the very draconian Law 1/2003. The Timorese formal land tenure system is still very far from addressing past land grievances.

Finally, it is important to note that, for many Timorese, the problems of approving laws and processes to address past land grievances are a distant reality. Many Timorese live under customary land tenure systems and have little expectation that the formal system will solve their land-related grievances. In fact, these self-organized customary systems have proved to be quite resilient despite so much outside interference and,[95] for better or worse, have provided their own processes of transitional justice regarding land grievances, at times even incentivised by state institutions.[96] However, the resilience of these systems is not a given, and irresponsible state interference such as by SNC can seriously endanger it.

CONCLUSION

Through the analysis of land grievances in Timor-Leste, this article discusses the inherent limitations of law as an analytical tool to understand these grievances and to provide solutions during transitional justice processes. The Timorese case shows that the law can be the source of grievances, as the biased Portuguese legislation exemplifies; that the legitimacy of law can be contested, as happened with the Indonesian legal framework; and that the legality of land rights can be very difficult to determine, as occurred with state-led expropriations during this period. Moreover, the Timorese case shows that sometimes the law simply does not have answers for conflicting land grievances, and approving new laws can be incredibly difficult, as the UNTAET administration experienced. Also, new laws are no silver bullet; transitional justice might not be taken into consideration in a new law, as was the case with Law 1/2003, or the legal solutions adopted might not be implemented, as occurred with the 2017 Land Law.

94 Almeida and Wassel, supra n 75.

95 Fitzpatrick et al., supra n 42.

96 Naori Miyazawa, 'Customary Law and Community-Based Natural Resource Management in Post-Conflict Timor-Leste,' in *Land and Post-Conflict Peacebuilding*, ed. J. Unruh and R.C. Williams (Routledge, 2013); Joireman and Yoder, supra n 18; Hohe and Nixon, supra n 68.

These limitations show that a legalistic perspective that focuses solely on the law to understand and engage with land grievances overlooks the discriminatory nature of past legislation; the historical, political and social context in which law was applied; and the disconnection between the law in the books, the work of the public administration and the practices on the ground. While the law and lawyers play a role in transitional justice regarding land-related grievances, this is a multi-dimensional issue that needs to be approached as such.

The analysis of land grievances in Timor-Leste shows how the concept of *wicked problems* offers an analytical tool to overcome the limitations of law, both to understand and provide paths to deal with these grievances. First, the concept of wicked problems shows that multi-layered, ill-defined problems such as land-related grievances cannot be understood only through the linear thinking of the law. The combined work of lawyers, anthropologists, historians and political scientists is essential to building a more holistic and structured picture of the various layers of unresolved land-related grievances that transitional justice has to engage with. A lesson to be taken by politicians, practitioners, organizations and academics working on transitional justice in similar cases is that a multi-disciplinary approach is key to grasp these land grievances.[97]

Second, the concept of wicked problems points to the paths through which these land grievances can be addressed. As the conflicting land claims in Timor-Leste show, these land grievances cannot be divided into right or wrong. They are ill-defined problems that depend primarily on political judgment, and technical solutions such as overarching principles of restitution frequently clash with the complexity of these problems in practice. Even when possible, restoring past land tenure situations would bring back old inequalities, and therefore transitional justice must aim instead at changing the order of things.[98] Being primarily a political issue,[99] these grievances must be first debated in existing arenas of political negotiation. The mending of wicked problems can only come from 'shared understandings about possible solutions.'[100] As the Timorese case shows, while the law plays a role, expecting that the law alone can solve these problems is not realistic.

Under these circumstances politicians, practitioners and others working on such issues must prioritize the creation of arenas of political negotiation in which the complexity of these problems can be understood and negotiated by stakeholders. For instance, the topic can be made more prominent, and more-concrete steps forward debated, in peace, truth and reconciliation commissions such as CAVR.[101] If carefully conducted, a participatory process of lawmaking such as the Timorese Land Law can be an important arena to stimulate the necessary political dialogue, but the failure to develop an inclusive process can create new grievances, as happened with Law 1/2003.[102] Legislatures and donor organizations play an important role in

97 Lambourne, supra n 18.
98 Wily, supra n 17.
99 Mani Rama, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press, 2002).
100 Conklin, supra n 24.
101 Miller, supra n 18; Arbour, supra n 5.
102 The Mozambican Land Law is an even better example of how, when carefully designed, the lawmaking process can become a good arena for necessary political debate. See Chris Tanner, 'Law Making in an African Context: the 1997 Mozambican Land Law,' *FAO Legal Papers Online* 26 (2002).

promoting lawmaking processes where the political element of land grievances does not get tangled and masked by legal language and technicalities and is instead truly debated.[103] The characteristics of universality and equity of the law play a role in addressing these issues, but these grievances cannot be solved before finding a minimum of political consensus.

Finally, the concept of wicked problems tames expectations about a process of transitional justice regarding land grievances. First, participants in these processes must be aware that a long-term perspective and an ongoing iteration of solutions is necessary, and no solution adopted to deal with these grievances guarantees success, as the Timorese Land Law well illustrates. Second, while periods of transition can enable substantial societal changes and it is legitimate to use the opportunity to aim at a broad transformative justice instead of simply trying to repair past injustices,[104] the ideal of justice must be paired with pragmatism. As a primarily political issue, such transformations will only work once the national and local political environment is ready for them, and therefore work on this front is needed. Moreover, once confronted with the complexity of the Timorese case, one must ask how realistic it is to aim at an even more ambitious process of transformation. One key lesson from Timor-Leste is that governments and their partners must prioritize areas where state intervention is most needed and design state systems that work with non-state systems that are already solving problems on the ground,[105] instead of undermining their work. While the law undoubtedly plays a role in addressing past land grievances, waiting for the perfect law (or a non-legal technical solution) can be a subterfuge to postpone difficult decisions, maintain the status quo and perpetuate injustices.

103 Almeida, supra n 43.

104 Lamborne, supra n 18; Balasco, supra n 18.

105 Unruh, supra n 29 and n 2; Joireman and Yoder, supra n 17.