

Lessons from East Timor: Emergency, Sovereignty, Self-Determination

Ian Hunter

Centre for the History of European Discourses, University of Queensland

Anything said about events unfolding as rapidly as they are in East Timor must be treated as provisional and highly likely to be revised. Further, in drawing political lessons from a situation of great suffering, one must try to avoid turning the victims into more grist for the journalistic and academic mills. There is an obligation to face the reality of the situation as clearly and dispassionately as possible, yet without disguising the fact that one is using it as a teaching and learning exercise. What then can we learn from the fact that on 30 May 2006, acting in his capacity East Timor's President and head of state, Xanana Gusmao declared a state of emergency, assuming sole direction of the country's armed forces and police, with the power to restrict freedom of assembly and movement? (Even this declaration remains shrouded in ambiguity, however, as the President also characterised it as a 'state of grave crisis', prelude to a 'state of siege', while at the time of writing the Prime Minister, Mari Alkatiri, continues to claim co-direction of the security forces).

At the most general level this event shows the problematic nature of the relation between democratic 'self-determination' and the exercise of state sovereignty. According to the dominant forms of modern European political thought, the state exists in order to realise the virtues of a moral community or to execute the rational will of the people. These doctrines, which find expression in Catholic-Aristotelian conceptions of the community state and in Protestant-Kantian conceptions of the rational state, are also contained in the East Timorese Constitution (www.etan.org/etanpdf/pdf2/constfnen.pdf) (sections 6, 62), perhaps reflecting the fact that the Constitution was drawn up by Fretilin party intellectuals who modelled it on the Portuguese Constitution of 1989 and the Mozambique Constitution of 1990. Such doctrines provide a powerful way of framing Fretilin's armed resistance to the Indonesian annexation of East Timor, and for understanding the fact that in August 1999 the majority of the East Timorese population

voted against becoming an autonomous Indonesian province, hence in favour of independent statehood. The equation of democratic self-determination and state sovereignty is challenged, however, by the fact that sections 25 ('State of Exception') and 85(g) of the Constitution give the President the exclusive power to declare a state of emergency in which fundamental rights and liberties may be suspended for a prescribed period in order to deal with internal disorder and external threats to the state. Rather than expressing a moral nature or moral will attributable to the 'people', it would appear that the President's assumption of sovereign powers is governed by a quite different kind of political objective: the establishment of social peace through the preservation of the state as the supreme agency of political decision and coercive force in the territory.

More specifically, Gusmao's actions pose in a particularly stark manner the question of the character and location of sovereignty. Section 2.1 of the Constitution states that 'Sovereignty rests with the people, who shall exercise it in the manner and form laid down in the Constitution'. This poses the conundrum of where sovereignty resides when the four 'organs' responsible for its exercise — 'the President, the National Parliament, the Government and the courts' — disagree as to the nature of the people's will. Some commentators have pointed out that this multiplication of the organs of sovereignty creates the conditions for a constitutional impasse. They have not considered, though, that it might also call into question the notion that sovereignty resides in a unitary popular will. But the stand-off between the President and the Prime Minister over who controls the police and military should lead us to reconsider the question of who is sovereign. In declaring a state of emergency and assuming political power against the will of the governing political party — normally treated as the 'will of the people' — Gusmao gives force to Carl Schmitt's famous dictum that 'Sovereign is he who decides on the exception'. Schmitt's argument is that even though a constitution can determine who is to take this decision, and the general conditions of peril warranting it, no legal norm can determine the decision itself. This must be made by an agent or agency facing the concrete facts of a particular situation and possessing the political means to enforce its decision.

During the period of political confusion immediately preceding the declaration of a state of emergency, the question of who was sovereign remained unclear. This period was marked by clashes between police and military forces divided in their allegiances between the President and the Prime Minister, and between the east and west of the country. It also witnessed the massacre of disarmed police by defence forces whose loyalty remains unclear. Following these killings, though, and the Prime Minister's acceptance of intervention by the Australian state and its military, it was the President who exercised sovereignty. He did so by declaring a state of emergency and invoking constitutional powers above and beyond those arising from laws understood as expressing the will of the people and protecting their human rights. The notion that in bypassing a democratically elected legislature the President is nonetheless executing the will of the people or the rule of law is an illusion designed to obscure the fact that states exist to maintain security through the exercise of coercive force. Some Australian commentators have insisted in the face of Gusmao's actions that East Timor's Constitution prevents it being a presidential republic and that the President has no constitutional power to unilaterally dismiss the Prime Minister. Given, though, that Gusmao's actions appear to have already exceeded his constitutionally defined powers — section 85(g) states that the President can only declare a state of emergency 'following authorisation of the National Parliament, after consultation with the Council of State and the Supreme Council of Defence and Security, under authorisation of the National Parliament' — there is little reason to think that the exercise of sovereignty can be controlled by constitutional norms. We have good reason then to recall the dictum that a constitution is only a group of people in a room talking about a constitution, in this case a group of people dominated by the Fretilin political party.

The President's declaration of a state of emergency thus raises critical problems regarding the standing of human rights in the context of a sovereign territorial state. According to the two main natural law traditions — Catholic-Aristotelian and Protestant-Kantian — human rights trump state laws, as the former are the means of expressing a moral or rational nature that makes us human, while the latter are restricted to the horizon of particular political interests and objectives. Moreover, section 9 of the Constitution

provides that international human rights agreements become domestic law as soon as they have been ratified and gazetted. By invoking the power to suspend such rights as freedom of assembly and movement — enshrined in the Universal Declaration of Human Rights — the presidential declaration of a state of emergency induces a crisis in the standard understanding of human rights, posing a dilemma for human rights advocates. Either the advocates can reject the declaration, on the grounds that rather than saving democracy and the rule of law, the suspension of rights actually destroys them. (This has been a common response to the UK and Australian governments' anti-terrorism laws). Or they can accept the emergency suspension of rights, citing its constitutionality. But then it becomes difficult, if not impossible to maintain the pre-eminence of 'human' rights over state laws and positive rights, because it would appear that whatever rights citizens may enjoy are subordinate to and contingent on the state's political capacity to provide security. This is a pointer to the fact that the philosophical and theological (natural-law) underpinnings of the concept of human rights render it unsuited to negotiating the historical reality of states as security machines.

In the event, the President's reliance on the Australian military in order to marginalise the Prime Minister's forces and enforce social peace is a sign that the East Timorese state is not currently in a position to exercise sovereignty. In order to satisfy the exchange of protection for obedience to which it is party with its citizens, a state must be able to exercise an unchallengeable capacity for political decision and political coercion. This qualifying condition of sovereignty is necessary to protect a state's citizens from each other and from neighbouring states. In supplying this capacity to the President as head of state, the Australian government is playing the role of regional hegemon and might even end up exercising a kind of suzerainty over East Timor. The fact that Australia has supported Gusmao against Alkatiri can be given a constitutional gloss — in terms of Gusmao's role as head of state — but is also susceptible of a political explanation. Gusmao's political faction, the former guerrilla organisation Falintil, has co-operated with Australia, while Alkatiri's Fretilin is a socialist party with Marxist leanings, and appears opposed to Australian hegemony. Australia's hegemonic intervention is a high-

stakes game, however, as it risks alienating both a significant faction within East Timor and Australia's partner/rival hegemon, Indonesia.

Finally, the present situation illustrates the extraordinary political ambivalence of movements for national 'self-determination' and 'national liberation'. Section 10.1 of the Constitution commits the state of East Timor to extending its 'solidarity to the struggle of the peoples for national liberation'. In treating 'nations' as collective individuals requiring a state structure in order to achieve moral realisation, Catholic-Aristotelian and Protestant-Kantian political philosophy provide powerful moral justifications for minority secession movements. Such justifications though are flawed, self-serving, and sometimes dangerously irresponsible. On the one hand, proto-national populations never behave as collective individuals seeking self-determination. The unity of 'national liberation' movements comes from the ideologies that they embrace and the powers of charisma and coercion used to enforce them. In the case of East Timor, it would appear that the unity of the anti-Indonesian secession movement came from a mix of Christian (Catholic), secular, and Marxist ideologies, leaving the post-secession political culture divided between rival ideological elites. The Constitution itself goes so far as to include a section on 'Valorisation of Resistance' (section 11), in which the 'secular resistance of the Maubere People' is acknowledged alongside 'the participation of the Catholic Church'. On the other hand, we have already argued that states do not come into existence in order to achieve the moral realisation of their populations, but to provide them with domestic peace and external security. There will thus be times when it is justified for territorial states to suppress nationalist secession movements, if this is necessary for social peace and can be done in a manner consistent with long-term good governance. (The Canadian government's suppression of the Quebec Liberation Front during the 1970s would be an example of this). We may conjecture that the acquiescence of successive Australian governments in the Indonesian annexation of East Timor was based on this kind of calculation. Similarly, we may guess that the Howard government's eventual intervention in East Timor was triggered by the failure of the Indonesian state to achieve stable and peaceful rule. This forced Australia to support the secessionist movement as the lesser of two evils, in the hope that peace and political stability might come via this other route.

Like all such political decisions, this was an attempt to react to a concrete situation with a strategic judgment, the success of which now lies in the balance.

Not only does the attribution of self-determining sovereignty to the people fail to determine the actual exercise of sovereignty, but the ‘people’ as a constitutional ideal scarcely touches the reality of the armed gangs and militias, the religiously, ethnically and linguistically divided social groups, and the opportunistic looters who also compose the people of East Timor. Given the reality of self-determination in East Timor, those Australian groups advocating independence for Papua — particularly the religious groups promoting Christian nationhood and the Leftist networks advocating ‘national liberation’ — should reflect on their advocacy with the greatest possible detachment and realism. It seems likely that the best they could achieve would be to launch another unstable ideological state, accompanied by conflict and suffering, and confronted by extraordinary problems of political instability and underdevelopment. At worst, they might contribute to the further destabilisation of the Indonesian state, which would generate a toxic political fallout for Australia.