Possession, Order and Violent Conflict: Property Rights in a Fragile State

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ABSTRACT. Lawyers trained in stable socio-political contexts tend to overlook or underestimate the importance of social order in considering fundamental concepts of property such as possession. This article argues that there are correlations between social order and the interpretive complexity of possessory rules. Efficiency-oriented theories of property suggest a preference for bright-line rules of possession as interpretive simplicity reduces the costs of information transmission to a broad property audience. An alternative approach explains rule complexity by reference to concerns for social justice, including relief against dispossession. The article suggests that the sources of rule complexity in property systems may lie not only in contemporary considerations of efficiency or equity but in historical concerns for social ordering, particularly in circumstances of competitive racing for control over resources. The argument is illustrated by reference to the conflict-affected circumstances of East Timor.

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INTRODUCTION

Contemporary peace-building efforts in countries such as Iraq, Afghanistan and Sudan involve fragile states and influential tribal systems. State-building requires strategies of accommodation or co-option relating to custom, including customary systems for the governance of land. Yet property systems in fragile states can fall into chronic instability as claims of possession and abandonment interact with entrenched patterns of ethno-political conflict. Historical cycles of war and population displacement create endemic disputes over the possession of land, which entangle with longstanding tribal conflicts, which then merge with post-conflict races for political authority. In these circumstances, the accommodation of custom may crystallize tensions over the property implications of possession and undermine the attempt at peace-building itself.

This article explores the relationship between possession and social order by reference to the conflict-affected circumstances of East Timor. In property terms principles of respect for possession are said to provide an easily understood response to the potential for disorderly resource competition. The oft-cited example is that of the first car to enter a one-way bridge: it has the right of way as any other rule would be highly productive of social disorder. Most

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2 JOHN BRAITHWAITE, SINCLAIR DINNEN, MATTHEW ALLEN, VALERIE BRAITHWAITE AND HILARY CHARLESWORTH, PILLARS AND SHADOWS: STATEBUILDING AS PEACEBUILDING IN SOLOMON ISLANDS 103, 113-116 (2010) (discussing political networks based on kinship relations in post-conflict Solomon Islands – so called ‘wantokism’ - as both “a problem” and “a cultural resource for tackling governance challenges”. ‘Wantokism’ is closely related to land disputes, which were a root cause of the armed conflict from 1999 to 2001, and remain a constraint in building both peace and state capacity). See also Roger Mac Ginty, Hybrid Peace: The Interaction Between Top-Down and Bottom-Up Peace, 41 SECURITY DIALOGUE 391, 404-405 (2010) (discussing the relationship between global and local actor cooperation and stability in post-conflict states such as Afghanistan and East Timor); Roy, supra n. 1, at 174-5 (discussing US policy on Afghan warlords in the context of state-building and legitimacy); El Zain, supra n. 1, at 528 (discussing the state’s cooption of ‘tribal’ forms of legitimacy). In relation to land see Conor Foley, Housing, Land and Property Restitution Rights in Afghanistan, in HOUSING, LAND, AND PROPERTY RIGHTS IN POST-CONFLICT UNITED NATIONS AND OTHER PEACE OPERATIONS; A COMPARATIVE SURVEY AND PROPOSAL FOR REFORM 141, 162-6 (Scott Leckie ed., 2009) (discussing the legitimacy of customary law and its role in land disputes in Afghanistan).

3 See e.g. Liz Wily, Land Rights in Crisis, Restoring Tenure Security in Afghanistan, AFGHANISTAN RESEARCH AND EVALUATION UNIT, 61-2 (2003) (myriad warlords, militias and tribal groups have gained, lost and regained territory as result of chronic war, regime change and population displacement in Afghanistan).

animals appear to resolve territorial conflicts through principles of respect for prior possession. There seems to be a basic human understanding that first possession is connected to entitlements. Even where there is no possession, some economists claim that a rule of first possession can discourage disorderly racing for rights to resources when potential claimants choose not to race because they acknowledge one party as the most likely to obtain possession.

Game theory suggests that social order can emerge autonomously from spreading patterns of respect for possessory claims, without a necessary need for interpretation or enforcement from sources of public authority. Possessory norms develop as a result of mutually reinforcing expectations of respect for possession. Yet possession of itself cannot be a basis for social ordering without acts that are interpreted as possessory by other prospective users, or a system of authority that ascribes the character of possession to certain acts of resource use and control. Possessory rules may have a range of effects on social ordering, not only because of the interpretive nature of possession, but because possessory claimants have a natural tendency to affiliate with sources of public authority. In unstable socio-political contexts the relationship between possession of land and competition for political authority, in circumstances of racing for control of resources, may result in chronic disorder rather than spontaneous forms of social ordering.

The structural characteristics of possessory rules will affect the relationship between possession, property and social order. There are different types of possessory rules with different degrees of bright-line or 'fuzzy' characteristics. For example, a rule that ownership follows actual possession is relatively easy to interpret and administer because it involves enquiry into current acts of resource use and control alone. However, this bright-line rule will encourage disorderly racing for resource control, as the rewards of obtaining possession encourage violent acts of dispossession. The more common formulations of possessory rules elevate first possession over actual possession, and thus provide remedies for dispossession, or allow for abandonment and

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6 Krier, supra n. 5, at 154-55 (discussing Sugden’s application to the human context of evolutionary explanations for the relationship between first possession and expectations of entitlement).
8 Sugden, Spontaneous Order, supra n. 4; SUGDEN, THE ECONOMICS OF RIGHTS, supra n. 4, at 62; McDowell, Spontaneous Order, supra n. 4, at 796 (discussing Sugden's argument that self-enforcing rules of property can evolve in a state of nature without any formal laws or system of government).
9 See infra Part I (noting the relationship between Fredrick Hayek’s work on social norms and game-theoretic explanations for social ordering). This approach to rules of first possession allows little room for analysis of the possessory rule itself, or its relationship with sources of interpretive or enforcement authority.
11 See Alice Tay, The Concept of Possession in the Common Law: Foundations for a New Approach (1964) 4 MELB. UNIV. LAW REV. 476-97 (possession describes a physical fact, which is subject to interpretation, while also operating as a conclusion of entitlement from a source of adjudicatory authority). See also Kevin Gray, LAND LAW (2006), 90 (possession as a conclusion of law defining a particular relationship of control).
12 See Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577 (1988) [hereinafter Rose, Crystals and Mud] (discussing different examples of 'crystal' and 'mud' rules of property).
13 See e.g. Krier, supra n. 5, at 155-56 (noting that under game-theoretic conditions resource claimants will engage in violent acts of dispossession when the rewards of obtaining possession exceed the costs of violence).
deemed transfer of possession. These rules require a greater degree of specialized enquiry, including complex distinctions between actual and legal possession. While a preference for bright-line rules of possession reduces the information costs of property - a major concern of recent law and economics scholarship - the case-studies in this article suggests that bright-line rules may not emerge because of social ordering considerations in circumstances of competitive racing for property rights, or political economy considerations relating to the balancing of competing interest groups.

Part I of the article reviews law and economics literature on the relationship between possession and social order. Game theorists argue that rules of first possession were important to circumstances of order without law in the Californian goldfields as they provided bright-line signals of likely success in the event of competition for a mining claim. However, the Californian first possession rules had fuzzy elements because they allowed the possibility of abandonment based on failure to meet work requirements. The rules had a social ordering imperative: they sought to maintain cooperative first-comer/latecomer relations by meeting the demands of new entrants for rights to unworked claims.

The article argues that rule complexity in California evolved to promote social order, in circumstances of competitive racing for rights to resources, while also sowing the seeds of future disorder because competing claims of dispossession and abandonment, involving contested interpretations of ambiguous work requirements, led to a proliferation of disputes over mining entitlements. The system of order without law created by the mining associations did not last long before it dissolved in part under the weight of disputation over the interpretation of the complex possessory rule itself. The implication that fuzzy possessory rules may correlate with concerns for social order, at least in circumstances of feared disorder, has the potential to qualify Ellickson's hypothesis that in close-knit community contexts more complex rules may emerge where the increased costs of their interpretation are outweighed by increased gains from trade. Examples from East Timor

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14 In the common law a prior possessor has a cause of action against a dispossessor even in the absence of title: see Kevin Gray, supra, n. 11 at 95. See also the discussion in Jesse Dukeminier & James E. Krier, Property 103-21 (3d ed. 1993). For well known case examples see Pierson v. Post 3 Cai. R. 175, 2 Am. Dec. 264 N.Y. 1805 (hunter in hot pursuit assumed to have rights against an interloper who took possession of the fox’s carcass if the hunter had prior possession of the fox); Swift v. Gifford, 23 F. Cas. 558, 559 (D. Mass. 1872) (No. 13, 696), (under the “fast-fish/loose-fish” rule a whaling ship loses possessory rights should the harpoon line to a killed or captured whale become unattached.) Where a possessor obtained title to land by virtue of possession, that title could not be extinguished by abandonment – the mere loss of possession in fact and in intention – but by effluxion of time and the intrusion of another possessor under doctrines of adverse possession: see James E. Penner, The IDEA OF PROPERTY IN LAW, 148 (1997).
16 See Andrea McDowell, Spontaneous Order, supra n. 4, at 771, 772 (“Claim jumping was not antisocial in itself and did not carry a stigma; it was the normal way to acquire a claim. One of the main purposes of the local mining terms was to specify when a claim became "jumpable.").
17 From 1851 onwards there was increasing resort to the courts, and then the system of mining licenses established by the General Mining Law of 1872: see infra Section I.A.
suggest that rule complexity may have a broader canvas than gains from trade, and involve the reproduction of social order in environments where there are risks of competitive racing for control over resources. In East Timor complex norms of ancestral first possession have evolved in response to fears of social conflict, in a context of population mobility, rather than as a direct response to potential gains from trade in agricultural products. While complex rules that promote social order also allow rewards for resource use efforts, the East Timor case suggests that insecure socio-political environments may produce different simplicity/complexity trade-offs in rule formation than stable environments. Simple rules that would emerge in stable environments may fail to develop in unstable environments. Moreover, where simple rules do develop in unstable environments, they have greater potential to create social disorder when they deny the claims of groups engaged in competitive racing for control over resources.

Part 1 tests the hypothesized relationship between possessory rules and social order by reference to chronic possessory conflicts in East Timor. These conflicts highlight one aspect of the rule simplicity/complexity trade-off in unstable environments, namely the potential for simple rules of possession to contribute to chronic social disorder in historical circumstances of regime change and forced population displacement. In customary areas there are complex principles of ancestral first possession, where relationships with land are determined by reference to descent and proximity to a mythical first settler. In some areas of rural East Timor, the opening of new land under colonial supervision limited the influence of customary authority and led some land claims to be based not on ancestral first possession principles, but on histories of actual possessory acts involving clearing land and digging irrigation channels. These types of possessory claim are affiliated with state rather than customary authority, which has made them vulnerable to regime change and forced displacement in the turbulent history of East Timor. Part I illustrates cycles of dispossession, grievance and re-possession in a fragile state context with reference to a number of land disputes lodged for mediation with the Land and Property Directorate of the Government of East Timor.

Part II considers whether the hypothesis of a relationship between social order, and the interpretive complexity of possessory rules, applies when possessory rules move beyond a close-knit community context. Henry Smith suggests an information cost approach to custom and law: where complex customs are recognized by law, either the process of communicating property information is made more costly for remote third parties, or standardization is required to strip the custom of its informational complexity. Comparatively simple default rules, such as rules of first possession, have a "gravitational pull" once property information moves beyond a close-knit community context. Yet, while bright-line legal formulations of custom may reduce information costs, they may also crystallize latent conflicts at the local level, particularly when norms in a close-knit community context. While there were no net social returns to accelerated resource extraction, there were net benefits to members of the norm-generating community. Nevertheless, the focus on social ordering in this article highlights trade-offs for rule complexity that owe more to issues of social authority and avoidance of violent conflict than context-specific techniques for efficient resource use efforts. This argument is developed by reference to complex ancestral first possession norms in East Timor: see further infra Section I.C.

19 See further infra Section I.C.


21 Id. at 27.
they deny the claims of powerful groups. Legal rules relating to private property will also trend towards complexity because of the political economy demands of state-strengthening in a fragile state environment. Part II argues that, while private law complexity or ambiguity provides rent-seeking opportunities in fragile state contexts, it also avoids bright-line measures that may provoke further outbreaks of destructive social conflict.

Part II illustrates these arguments by reference to a number of unsuccessful attempts at drafting a new land law for the independent state of East Timor. In the various legislative drafts there has been a noticeable trend towards complexity, including a partial move from restitution of pre-independence rights to qualified recognition of rights based on possession. While this complexity will challenge, if not overwhelm, the interpretive capacities of state agencies, it does reflect compromises among international advisers and state actors that in part are aimed at avoiding bright-line measures that would destabilize or de-legitimize the state. However, bright-line characteristics remain in the draft law as a result of the application of possessory principles to areas of ancestral customary domain. This bright-line measure is likely to cause conflict between tribal groups and displaced peoples who have been in long-term occupation of customary land. Part II argues that the dynamics of state fragility, including the prominent role of international legal advisers, have created a focus on state-strengthening but not necessarily on social ordering in customary districts.

The article concludes that legacy relationships between possession and social order deserve greater attention in the literature on rules and standards in property regulation. Efficiency-oriented theories of property suggest a preference for bright-line rules as interpretive simplicity reduces the costs of information transmission to a broad property audience. In this conception, rule complexity is justified when increases in efficiency of resource use outweigh the increased costs of rule interpretation and enforcement. An alternative approach suggests that rule complexity emerges in response to concerns for equity, including in particular relief against unjust dispossession. Common law examples include equitable doctrines of constructive notice and relief against forfeiture. This article suggests that the sources of rule complexity in property systems may lie not only in contemporary considerations of efficiency or equity but in

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22 North American scholarship on rules and standards has been heavily influenced by Duncan Kennedy’s groundbreaking analysis in 1976, which set out a basic dichotomy between individualist preferences for bright-line rules, and altruistic preferences for fuzzy standards: Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976). The ensuing rules/standards debate has not incorporated basic questions of social order (although there has been some consideration of the relationship between fuzzy rules and cooperative behaviour: see e.g. Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade, 104 YALE L.J. 1027, 1034-35 (1995).

23 See e.g. Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DUKE L.J. 557 (1992). See further the discussion of Robert Elickson’s work on whaling customs infra Section I.B.

24 See Rose, Crystals and Mud, supra n. 12, at 597-604 (considerations of equity and relief against disproportionate loss are a cause of trends towards complexity or ambiguity in property rule formulation); see also Kennedy & Michelman, Are Property and Contract Efficient?, 8 HOFFSTRA L. REV. 711, 717-20 (1980) (discussing the important role of fuzzy standards, rather than bright-line rules, for responses to fraud and sharp practice).

historical concerns for social ordering, particularly in circumstances of potential competitive racing for control over resources.\footnote{It may be that some elements of interpretive complexity in the common law of property, commonly justified on grounds of equity, have legacy relations with earlier concerns for social order. The common law principle that a finder is vested with possessory rights, which are good against all save those with a better title, has been justified on conflict-minimising grounds, namely that without rights of possession "lost property would be subject to a free-for-all in which the physically weakest would go to the wall": per Donaldson J in Parker v. British Airways Board [1982] QB 1004, 1009C. In historical environments where there were large numbers of undocumented tenancies, and social tensions over indebtedness, equitable doctrines that provided protection of rights in possession may also have had a social ordering provenance. For a discussion that highlights the pragmatic nature of the common law’s protection and recognition of rights in possession, see Gray, supra n. 11 at 91-7.} I. The Ordering Effects of Possession and Custom

Game theory suggests a causality of possessory norms and social order by reference to stylized hypothetical encounters between two property claimants. Each party is not sure whether the other will adopt an aggressive approach (a "hawk" strategy), or a passive approach (a "dove" strategy). Where expectations of success are symmetrical, the two parties will settle into a war of attrition in which they both attempt aggressive hawk strategies in a calculated effort to test the endurance of the other party, while leaving open the option of surrendering to the other claimant at any stage of the resource competition.\footnote{See Sugden, The Economics of Rights, supra n. 4, at 62; Sugden applies the evolutionary analysis of Maynard Smith to the human context. Maynard Smith noted that, where there are net costs to conflict, animals may adopt a strategy based on a rule of thumb: if possessor play hawk; if intruder played dove. For a discussion see Krier, supra n. 5, at 152.} Whenever there is an asymmetry of confidence, the parties will move to adopt hawk and dove strategies that reflect their mutual perceptions of likely success. Competing claimants are likely to surrender in order of confidence in their claim. The greater the prominence of the asymmetry the more likely respective hawk-dove strategies will emerge early in the prospective war of attrition.\footnote{See Krier, supra n. 5, at 152-3 (noting the importance of shared and unambiguous perceptions of asymmetry); Sugden, The Economics of Rights, supra n. 4, at 65-86; see also Richard McAdams, A Focal Point Theory of Expressive Law 86 Virginia Law Review 1683 (2000) (legal rules can shape expectations by assigning a priori roles).} Moreover, because wars of attrition can be costly in net terms, both parties would prefer a property rule that assigns the roles of dove and hawk a priori, particularly if the rule means that each player good chance of winning in at least half their confrontations.\footnote{McDowell, Spontaneous Order, supra n. 4, at 795 (“Both would prefer a rules that allows them to predict the role that the other will play…”).} Possessory principles are said to lend themselves to asymmetrical understandings of likelihoods of success, because possession provides a clear and understandable sign of an ongoing connection with a resource.\footnote{See Sugden, The Economics of Rights, supra n. 4, at 83-86, 97; Krier, supra n. 5, at 155 (“Possession is… usually unambiguous, and thus provides a clear indication of the status of any claimant”).} Those who have incurred costs to obtain possession may be expected to assert their possessory relationship with a resource more fiercely than those who
simply wish to obtain possession.\textsuperscript{31} This leads to mutually reinforcing expectations of relative success, with first possessors more likely to defend their claims with confidence and aggression, and other claimants more likely to forego their own claims in order to search for possessory claims elsewhere. Property rules favoring possession thus provide the parties with a shortcut to avoid a war of attrition, particularly when there is uncertainty as to respective prospects of success in the game of resource competition.\textsuperscript{32} Once both parties expect the other to follow a possessory rule, there is a natural tendency towards cooperation as it is costly to break the cooperative pattern.\textsuperscript{33} This argument owes much to Hayekian notions of spontaneous order, which posit that social order can emerge autonomously through decentralised expectations of behaviour rather than imposition of state-based law and authority.\textsuperscript{34}

\textbf{A. Possession and Order in the Californian Goldfields}

An iconic example of Hayekian ordering is said to be the development of order without law in the Californian goldfields between 1848 and 1849.\textsuperscript{35} The 19th-century Californian gold rush involved large numbers of miners entering an area that had recently been annexed by the United States from Mexico.\textsuperscript{36} There were no courts, police or jails, and only a small military force.\textsuperscript{37} Mexican law did not apply as from February 12 1848, and there was no US federal mining law

\textsuperscript{31} See Herbert Gintis, \textit{The Evolution of Private Property}, 64 J. ECON. BEHAV. & ORG. 1, (2007); Sugden, \textit{The Economics of Rights}, supra n. 4, at 100-01.

\textsuperscript{32} Zerbe and Anderson, supra n. 15, at 134 (analyzing the first possession rule in the Californian goldfields).


\textsuperscript{35} Karen Clay and Gavin Wright, \textit{Order without law? Property rights during the California gold rush 42 Explorations in Economic History} 155, 177 (2005). ("The mining districts of the California gold rush have long [been] celebrated as remarkable examples of orderly institution-formation in the absence of formal legal authority"); McDowell, \textit{Spontaneous Order}, supra n. 4, at 771("This article seeks to explain the stability of a mining claim system in the early years of the California gold rush, a system developed and administered by the miners themselves in the absence of any formal law or government"); John D. Leshey, \textit{The Mining Law: A Study in Perpetual Motion} 11 (1987) (no generally applicable mining law in California in 1848 and no authority stemming from a higher government); Andrew P. Morriss, \textit{Hayek & Cowboys: Customary Law in the American West 1 NYU J. L. & Liberty} 35 (2005) [hereinafter Morriss, \textit{Hayek & Cowboys}] (applying Hayek's legal theory \textit{inter alia} to mining associations in the American West).

\textsuperscript{36} Gold was first discovered at Sutter’s Mill in California in January 1848. On February 2 1848, the United States and Mexico signed the treaty of Guadalupe Hidalgo, which ended the so-called Mexican War and ceded California to the United States: see Clay and Wright, supra n. 35, at 159-69; In June 1848 there were around 5000 people working in the gold mines. By December 1849 there were approximately 40,000, and by 1852 100,000, gold miners in California: see Clay and Wright supra n. 35, at 158; Morriss, \textit{Hayek & Cowboys}, supra n. 35, at 47-8; Zerbe and Anderson, supra n. 15, at 114.

\textsuperscript{37} McDowell, \textit{Spontaneous Order}, supra n. 4, at 771 ("when gold was discovered on January 24, 1848, the territory had none of the usual legal institutions such as a legislature, courts, police, or jails"); Morriss, \textit{Hayek & Cowboys}, supra n. 35, at 47("the small military force present was unable to provide law for the massive influx of people"); Andrew P. Morriss, \textit{Miners, Vigilantes, & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law}, 33 LAND & WATER L. REV. 581 (1998) ("Unfortunately, the military government proved unequal to the task of establishing, let alone enforcing, law and order. It simply did not have the manpower").
until 1852. Then, throughout 1849 American miners developed mining codes that established a high degree of order despite the absence of legal order and the competitive nature of the rush for gold itself.

Umbeck argues that mining code order was underpinned by violence or the threat of violence, particularly in the form of widespread gun ownership. McDowell, and Zerbe and Anderson, take a different view: they contend that the mining conditions of relative order had little to do with sanctions and were examples of spontaneous ordering. According to McDowell, the mining rules did not require internalization as norms, or enforcement by implicit sanction. They were simply "rules of the game", created and if necessary cast off as items of convenience in a game of resource competition. Zerbe and Anderson similarly assert that American cultural norms of fairness and democracy, including Lockean notions of reward for possessory efforts, provided focal points that guided initial patterns of behavior and predictions of behavior, which then serve to establish cooperative alternative to costly resource conflict. Focal points are norms, beliefs or expectations shared by resource claimants prior to commencement of a competitive game, which allow mutual predictions of likely outcomes in the event of conflict.

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38 The Senate deleted Article X, which guaranteed the protection of Mexican land grants, when it ratified the treaty of Guadalupe Hidalgo on March 10 1848. Article V established the border between the US and Mexico: see the Treaty of Guadalupe-Hidalgo [Exchange copy], February 2, 1848; Perfected Treaties, 1778-1945; Record Group 11; General Records of the United States Government, 1778-1992; National Archives. See also Clay and Wright, supra n. 35, at 159-160 ("No federal mining law was in existence at the time gold was discovered... [T]he federal government abandoned all administrative apparatus and enforcement machinery pertaining to minerals on the public domain in 1846"). Congress passed a General Mining Law on 10 May 1872.

39 See Clay and Wright, supra n. 35, at 160 (describing the race westward of thousands of fortune-seekers "in the belief that gold was free for the taking, subject neither to government control nor to private landownership"); Andrea McDowell, From Commons to Claims: Property Rights in the California Gold Rush, 14 YALE JOURNAL OF LAW AND HUMANITIES 1, 4-5 (2002) [hereinafter McDowell, Commons to Claims] (the miners "managed without private property rights in land during 1848, the first year of the gold rush, when the mining region remained a commons"); Morriss, Hayek & Cowboys, supra n. 35, at 47–48 ("[a]s California's population grew from a few thousand... to more than 100,000 between 1848 and 1849, the new arrivals were forced to secure law and order themselves").

40 See e.g. McDowell, Commons to Claims, supra n. 39, at 4-5 ("[I]n the first months of 1849 ‘the miners developed and codified rules that...[included] strict limits on claim size, notice and work requirements, and, in many cases, prohibitions against holding more than one claim at a time’"); McDowell, Spontaneous Order, supra, n. 4, at 771 ("When diggings looked promising... those who were on the spot held a meeting to pass a more detailed mining code for that particular area...[they] chose a chairman, appointed a committee to draft a code, and a short time later, approved it by majority vote").

41 See J, UMBECK, A THEORY OF PROPERTY RIGHTS WITH APPLICATION TO THE CALIFORNIA GOLD RUSH (1981).

42 See McDowell, Spontaneous Order, supra n. 4, at 773 (The mining rules "were largely self-enforcing, as in Robert Sugden's game theory of "spontaneous order"); Zerbe and Anderson, supra n. 15, at 114, 115 (Applying game theory to argue that cultural norms better explain the miners' behavior than Umbeck's theory of sanctions supported by widespread gun ownership).

43 See McDowell, Spontaneous Order, supra n. 4, at 801 (The miners did not need to internalize any norms of property; and in fact, the variation in the rules from camp to camp suggests that property rules were adopted and cast off as readily as the rules of a game").

44 Zerbe and Anderson, supra n. 15, at 115-6, 128.

45 Id., at 115-6 (‘A focal point provides a coordination mechanism that, prior to the play of the game, has mutual significance to the players based on their common past experiences. These experiences, socially or culturally
The shared nature of the basis for predictions encourages one claimant to forego the option of conflict based on assessment that he or she is likely to lose a game of resource competition.

Almost all the Californian mining codes had a rule of first possession that granted rights to the first person to dig a hole and stake a claim. The claim extended to an area surrounding the hole, and was maintained by leaving tools in the hole, or meeting requirements to continue working the claim. The right to jump claims was also defined by reference to loss of possessory entitlements, including various types of failure to meet work requirements. Zerbe and Anderson characterize the first possession rule as a game-theoretic focal point because American miners shared cultural beliefs in reward for labor and the merits of associative democracy. McDowell also adopts game-theoretic analysis to suggest that the first possession rule created asymmetrical expectations of success in the event of competition, while providing new entrants with the option of obtaining new rights by digging a claim elsewhere.

Neither McDowell nor Zerbe and Anderson examine the interpretive content of first possession rules in the Californian goldfields. Yet it is significant that the rules did not lead to rights of private property in perpetuity, but to possessory entitlements that were subject to rules of abandonment. The norm had fuzzy elements as it required determination of failure to meet work requirements. An alternative bright-line rule in the goldfields, involving rights in perpetuity rather than the possibility of abandonment, may have slowed the process of extraction, as claims were left unworked, but would not have reduced the total gains from extraction of a finite resource. Clay and Wright persuasively argue that the inclusion of rules to legitimize claim-jumping was a response to the competitive racing nature of the gold mining activity itself. Each miner quickly worked a site to determine its potential, before digging new holes elsewhere in...

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See also Sugden, *The Economics of Rights*, supra n. 4, at 70-1; Sugden, *Spontaneous Order*, supra n. 4, at 88-90.

46 McDowell, *Commons to Claims*, supra n. 39, at 27-8 ("The first arrivals ... had the first choice of claims, while the others were allowed to make their selections in the order of the date of their arrival"); Zerbe and Anderson, *supra* n. 15, at 133-5 ("First-come, first-served procedures were used by the California miners in establishing the choice of claims").

47 McDowell, *Commons to Claims*, supra n. 39, at 15 (By late 1849 "it was generally recognized that a miner could have a 'claim', that is, exclusive use of a certain portion of ground for mining purposes... and that tools left on the ground constituted sufficient notice that it was claimed").

48 McDowell, *Spontaneous Order*, supra n. 4, at 778-779 ("The restrictions on claim holders also defined the rights of claim jumpers, since a miner who held too large a claim, or failed to provide notice, or did not meet the work requirements could be dispossessed by anyone"); Zerbe and Anderson, *supra* n.15, at 132 ("Agreements among miners in a district provided restrictions on the number of days a miner could leave a claim or requirements for the minimum number of days a miner had to work the claim"); Clay and Wright, *supra* n. 35, at 164 (In a sample of 52 early mining codes the existence of work requirements was 'nearly universal').

49 Zerbe and Anderson, *supra* n. 15, at 133 (Zerbe and Anderson state that “[f]irst-come, first-served procedures can serve as focal points to avoid conflict because they appear to be fair.”).

50 See McDowell, *Spontaneous Order*, supra n. 4, at 796.

51 Clay and Wright, *supra* n. 35, at 177.

52 Clay and Wright, *supra* n. 35, at 157 ("Because miners were continually looking for new and better sites even as they worked their present holding, mining district rules were as much concerned with procedures for abandonment and repossessing of claims as they were with protection of the rights of existing claimholders"); see also McDowell, *Spontaneous Order*, supra n. 4, at 779 ("Claim jumping was not a criminal offence offense; it was a routine feature of gold digging...").
search of a more productive site. As new entrants filled the mining camps, the right to work unworked claims became a major flashpoint for potential social disorder. The need to minimize newcomer/latecomer conflict provided the basis for rules that allowed new entrants to obtain rights to unworked claims.

Clay and Wright conclude that the mining codes of California provided order, in the sense that they minimized conflict, but failed to provide secure forms of property rights. The requirements to maintain the working of a claim were complex and ambiguous. They compelled mining associations, and later the courts, both to define "work" and to identify legitimate reasons for non-work, which served to generate a high level of disputes and litigation from 1851 onwards. The rules relating to possession and abandonment were not necessarily enforced by the miners themselves, who were reluctant to intervene in *inter partes* conflicts. The mining associations dissolved in circumstances of disputation relating to the possessory rule, and its application to claims of abandonment. Somewhat ironically, the system of order without law in California led to a degree of disorder, not only because of the increased numbers and heterogeneity of miners, but because of the fuzzy nature of the rule on which order was initially based.

**B. Possession and Efficiency: The Development of Complexity in Whaling Norms of Capture**

The Californian goldfields example suggests a relationship between fuzzy possessory norms, involving complex determinations of abandonment, and social ordering in circumstances of competitive racing for resources. Robert Ellickson explores the development of complex or ambiguous norms in different terms: fuzzy norms may develop in close-knit community contexts to exploit potential gains from trade. His examples include 19th century British and American

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53 Clay and Wright, *supra* n. 35, at 157 (“[M]iners were in a ‘race’ to discover a limited number of high-yield, non-renewable deposits in the Sierra”).
54 Id., at 162-3 (analyzing the relationship between “standard procedure for entry into gold mining” – through the jumping of claims – and the high turnover competitive racing conditions of gold-mining.”).
55 Id., at 178 (“The mining codes… may be said to have established order, where far worse scenarios may readily be imagined. But ‘order’ is not synonymous with secure property rights”).
56 Id., at 162- 164 (2005). (“Work rules in gold mining associations compelled districts (and later the courts) to define ‘work’, and to identify legitimate reasons for non-work (such as illness and lack of water), thereby generating an endless stream of disputes and litigation... on the spectrum between secure property rights and use-it-or-lose it, the mining codes were at an extreme end in favor of the latter”).
57 Id., at 168 (“In a sense all miners had an interest in rule enforcement, and one might have expected that informal methods could be effective, even where formal mechanisms did not. But third-party enforcement was essentially a public good, and suffered from classic problems of under-supply and free-riding”).
58 McDowell, *Spontaneous Order, supra* n. 4, at 801 (“In later years, the amount of litigation exploded… a letter published in the *Sonora Herald* in 1852 indeed said that the conditions set on holding a claim practically invited litigation because they were so fuzzy.”).
59 Clay and Wright, *supra* n. 35, at 178 (2005). (“[T] he claim system codified by the mining districts also institutionalized claim jumping, and by so doing fostered insecure rights and chronic litigation, which spilled into the courts very early in the process”).
60 Id. at 157-59.
61 Ellickson developed his theory of norms and their evolutionary correlation with wealth-maximization in a series of influential publications: see ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) [hereinafter ELICKSON, ORDER WITHOUT LAW]; Robert C. Ellickson, Of Coase and Cattle: Dispute
whaling communities, which developed different norms to govern the acquisition of property rights in particular types of whale.\(^{62}\) While all these norms were based on notions of first possession, they differed significantly both as to the interpretation of capture - when first possession was deemed to arise - and as to the determination of loss or abandonment of possessory entitlements. Ellickson hypothesizes that, in close-knit circumstances, the development of more complex norms, involving greater transaction costs in the form of interpretive specialization and potential for disputation, ordinarily takes place if these increases in the costs of transacting are outweighed by reductions in deadweight losses arising from failures to exploit potential gains from trade.\(^{63}\) Norms trend towards wealth-maximization by reducing the objective sum of transaction costs, including the costs of rule interpretation, and losses caused by under-rewarded resource use efforts.\(^{64}\)

Prior to 1800 British whalers operating in the Greenland fishery developed a “fast-fish/loose-fish” rule, in which a claimant owned a whale so long as the whale was fastened by line to the claimant’s boat. As long as the harpoon held fast to the whale and remained connected by a line to the boat, the owner of the boat had exclusive ownership of the whale. If the whale was to break free, dead or alive, it was treated as a loose-fish and was again free to be claimed.\(^{65}\) The fast-fish/loose-fish rule was relatively bright-line in nature: it created an easily understandable commencement point for a property claim, based on the visible and ascertainable nature of a connecting line between the whale and the boat.\(^{66}\) Property entitlements were acquired, and lost, by reference to this clear possessory act. The rule also encouraged resource use efficiency as it rewarded the first whaler to lodge a harpoon, which was "the hardest part of the hunt", while allowing for loss of possession (i.e. loss of the connecting line), which rewarded those who expended effort on finding unattached dead whales.\(^{67}\)

In American fisheries, where the sperm whale predominated, local whalers developed a “iron-holds-the-whale” rule. While this rule also conferred a right of property on the whaler to first harpoon a whale, it did not require the line to remain connected to the boat. The property entitlement would subsist so long as the claimant remained in fresh pursuit of the harpoon-

\(^{62}\) Ellickson, Wealth-Maximizing Norms, supra n. 18.
\(^{63}\) Id. at 84. Ellickson is careful to limit his hypothesis of wealth maximizing norms to close-knit community circumstances (see Ellickson, ORDER WITHOUT LAW, supra n. 61, at 167). Moreover, the maximization of wealth applies to community members but not necessarily to community outsiders: Id. at 169
\(^{64}\) Ellickson, Wealth-Maximizing Norms, supra n. 18 at 87.
\(^{66}\) While the bright-line nature of the rule could create unfairness – e.g. if a dead whale broke loose in a storm – it avoided difficult questions of retention of legal possession notwithstanding loss of actual control. On the issue of bright-line signaling, it is interesting to note that a whaleboat and its mother ship each hoisted a flag to signal the harpooning of a whale: see Deal, supra n. 65, at 201.
\(^{67}\) Ellickson, Wealth-Maximizing Norms, supra n. 18, at 89-90. Ellickson also discusses whaling norms in Ellickson, ORDER WITHOUT LAW, supra n. 61, at 191-206.
bearing animal. The entitlement could be lost if the whaler were no longer in fresh pursuit, or another whaler had begun to “cut into” the captured carcass.\textsuperscript{68} Ellickson suggests that the difference in possessory norms, as between British and American whalers, may be explained by the fact that the right whales hunted by British whalers off Greenland were relatively slow and docile compared to the sperm whales hunted by the Americans. The American “iron-holds-the-whale” rule responded to the increased likelihood that the harpoon line would have to be cut in order to save the boat from sinking under pressure from a fast-moving sperm whale. The rule increased the relative efficiency of resource use by reducing the risks of death or injury to sailors, and damage to the boat.\textsuperscript{69} 

The “iron-holds-the-whale” rule provided American whalers with the incentive to make the first strike on a sperm whale, while encouraging innovations such as drogues (floats separated from the boat and attached to the whale by line) and waifs (poles planted into dead whales to signify ownership and collected later). At the same time, the norm required determinations of “freshness of pursuit” and therefore was more complex and open to interpretive contestation than the fast-fish/loose-fish rule.\textsuperscript{70} Consistent with his hypothesis of wealth-maximizing norms, Ellickson suggests that the "iron-holds-per-whale" rule developed in American fisheries because its advantages in terms of greater efficiencies of resource use, including reduction of risks and encouragement of innovation, outweighed the disadvantages of increased ambiguity and potential for disputation. Close-knit communities of whalers - the primary audience for property norms relating to captured whales - were able to understand and apply relatively complex rules of possession because they were expert in matters relating to whaling, and were subject to informal sanctions in the form of reputational loss or ostracism.\textsuperscript{71} Even beachcombers, happening upon the beached carcass of sperm whales, could understand and follow whaling rules of capture because of their own links with local groups of whalers.

C. Possessory Customs and Social Order in Traditional Timorese Culture

Social ordering considerations are implicit in Ellickson's analysis because social order allows reward for resource use efforts, which may then serve to outweigh the increased costs of rule complexity.\textsuperscript{72} However, Ellickson's focus on rule complexity and potential gains from trade does not necessarily explain the development of complex principles of ancestral origin in East Timor. There are no markets for land or goods in the subsistence economies of customary parts of East Timor.\textsuperscript{73} Complex norms of ancestral first possession have evolved in response to fears of social

\begin{footnotesize}
\begin{enumerate}
\item Ellickson, \textit{Wealth-Maximizing Norms}, supra n. 18, at 90.
\item Id. at 91.
\item Id. at 91-2.
\item Id. at 94.
\item See, e.g., Ellickson’s description of a “good neighbor” norm in Shasta County, California, which suggests an underlying relationship between norms and social order: \textit{ELLIICKSON, ORDER WITHOUT LAW}, supra n. 61, at 52-62).
\end{enumerate}
\end{footnotesize}
conflict, in a context of regular in-migration, rather than as a direct response to potential gains from trade in agricultural products.\textsuperscript{74} The East Timor example suggests that, viewed from a historical perspective of property rights evolution across different stages of economic complexity, the cost/benefit calculus of norm complexity has a broader canvas than gains from trade, and includes issues relating to reproduction of public authority and social precedence.\textsuperscript{75}

The origin groups of East Timor are kin-based structures with a high degree of member homogeneity, repeat interaction and access to information on resource use activity.\textsuperscript{76} Internalized norms of co-operation are supported by sanctions such as shaming, ostracism and – most powerfully – fear of sickness arising from lack of respect for ancestral spirits and the spirits of the land.\textsuperscript{77} Origin groups have complex mythologies of ancestral first possession, where authority over land is claimed by lineages or “houses” that trace descent to a founding ancestor and a common source of identity.\textsuperscript{78} Typically, there is a ‘lord of the land’ that is a designated elder of the senior lineage (or ‘source house’) of the origin group. Direct descent from mythical ancestor-settlers provides spiritual and ritual authority relating to land, which may devolve and fragment in complex context-specific circumstances among representatives of less senior, but politically powerful, lineages.\textsuperscript{79} Subsequent settlers receive rights to land according to their relationship with origin authority, particularly as a result of alliances created through inter-marriage with origin lineages.\textsuperscript{80} This cultural mechanism for "bringing the outsider in" through

\textsuperscript{74} Fitzpatrick and Barnes, \textit{The Relative Resilience of Property: First Possession and Order Without Law in East Timor} [hereinafter “Fitzpatrick and Barnes, Relateive Resilience of Property”], 44 L. & SOC. REV. 205 (2010).

\textsuperscript{75} Krier makes a related argument: he hypothesizes that property rights first emerged among early humans as a product of game-theoretic processes of deference to possession, rather than as a product of authoritative allocation through institutional design. As resource values rose - and became worth fighting for - autonomous property processes were no longer sufficient to maintain social order, and governance mechanisms formed to allocate property rights through a process of "intelligent design": \textit{see} Krier \textit{supra} n. 5, at 157-59.


\textsuperscript{77} The close-knit nature of East Timor's customary systems meets Ellickson's criteria for successful social ordering without the necessity of recourse to law: \textit{see} Ellickson, \textit{Order Without Law}, \textit{supra} n. 61, at 192-204 (whaling norms), 115-20 (cattle farming in Shasta Country); \textit{see also} Robert Ellickson, \textit{Property in Land}, 102 YALE L. J. 1336-44 (1993).

\textsuperscript{78} Fitzpatrick & Barnes, \textit{Relative Resilience of Property}, \textit{supra} n. 74, at 206 (summarizing ethnographic literature on origin houses in East Timor).


marriage-based alliances has acted as an institutional technique to manage in-migration in historical circumstances of population mobility and tribal warfare.  

Shifting or swidden cultivation remains the predominant form of resource use in rural East Timor.  

Swidden cultivation requires the assertion of control over a relatively large area, to allow movement of plots, and hence tends to be associated with common rather than private property systems.  

Ancestral first possession norms in East Timor support socio-political control over relatively large areas of ancestral domain, which then serves to support swidden cultivation techniques. But there is limited direct correlation between complex aspects of first possession norms in East Timor and gains from trade, or incentives for innovation, in relation to swidden cultivation. In remote customary districts there is no cash economy, no markets in rights to land, and no practises of bartering agricultural surpluses with other groups. In these circumstances, the consequences of rule complexity may be an orderly environment to undertake mobile cultivation techniques, but the longstanding driver of complexity is a desire to reproduce authority and maintain orderly social relations in circumstances of in-migration, exogamous marriage relations, and tribal warfare.  

The customary groups of East Timor could have developed a simple rule of possession, which would grant rights to in-migrants that engaged in clearing and cultivation, without the need for agreement from origin group elders, or inter-marriage with an origin group lineage. Of itself a simple rule of possession would not create conflict with possessory claimants from the local origin group because land is not scarce in remote customary districts. Outsiders could claim land without impinging on the actual or prospective plots of origin group members. By comparison with complex principles of origin, a simple rule of possession would reduce the transaction costs of rule interpretation while allowing the same marginal rates of output from shifting cultivation. So why did a simple rule of possession not evolve in the customary societies of East Timor? The


81 Fitzpatrick & Barnes, Relative Resilience of Property, supra n. 74, at 218-26 (discussing in-migration and cultural incorporation techniques in the village of Babulo, Lautem District); James J. Fox, Installing the ‘Outsider’ Inside: An Exploration of an Austronesian Cultural Theme and its Social Significance (1997) [unpublished manuscript, on file with author] (Exploring cultural techniques and metaphors for incorporating in-migrants into customary group hierarchy); Andrew R. McWilliam Customary Claims and the Public Interest: On Fataluku resource entitlements in Lautem, in EAST TIMOR: BEYOND INDEPENDENCE, 165 (D Kingsbury & M Leach eds., 2007) (exploring in-migrations and customary notions of precedence on the Eastern district of Lautem).

82 For a discussion of shifting cultivation in East Timor, see Joachim Metzner, Man and Environment in Eastern Timor, AUSTRALIAN NATIONAL UNIVERSITY DEVELOPMENT STUDIES CENTRE MONOGRAPH No. 8 (1977).


84 For examples of subsistence arrangements in East Timor, see Brigitte Renard-Clamagirand, The Social Organization of the Ena of Timor, 231, in J.J. Fox (ed.), THE FLOW OF LIFE: ESSAYS ON EASTERN INDONESIA, (Harvard University Press 1980); Shepherd Forman, Descent, alliance and exchange ideology among the Makassae of East Timor, in THE FLOW OF LIFE: ESSAYS ON EASTERN INDONESIA, (Harvard University Press 1980); David Hicks, TETUM GHOSTS AND KIN: FIELDWORK IN AN INDONESIAN COMMUNITY, (Mayfield 1976); Metzer, supra, n. 82; Elizabeth Traube, COSMOLOGY AND SOCIAL LIFE: RITUAL EXCHANGE AMONG THE MAMBAI OF EAST TIMOR, (University of Chicago Press 1986).

85 See Fitzpatrick & Barnes, Relative Resilience of Property, supra n. 74, at 222-3.
answer seems to be that complex principles of origin serve to reproduce social authority, in the absence of a State or law, and provide a system of allegiance to mobilise forces in circumstances of regular tribal warfare. Rule complexity allows the community to remain close-knit, which is a question of social order, in ways that could not be achieved by a simple rule of possession.

The East Timor example suggests that, prior to the emergence of markets, the development of rule complexity has a degree of correlation with the reproduction of social order, particularly in circumstances of potential disorder. This suggestion does not necessarily contradict Ellickson’s hypothesis of efficiency-oriented trade-offs between rule complexity and simplicity. Among the whaling communities of North America, complex rules of first possession minimized risks to life and limb, and facilitated an environment that allowed increased rewards for resource use efforts. In the Californian goldfields, complex rules of first possession reduced the potential for wasteful conflicts over rights to mining claims. The significant implication from East Timor is that there may be different rule complexity/simplicity trade-offs in different circumstances of social ordering. Just as a simple rule of possession may have promoted efficient resource extraction in California, in the absence of concerns relating to competitive racing for mining rights, so too a simple rule of possession in East Timor would encourage efficient agricultural production in the absence of concerns relating to migration and warfare. Rules that would have a degree of simplicity in stable environments may thus trend towards complexity in unstable contexts. Moreover, as the following section suggests, if there is no trend towards complexity bright-line rules of property may exacerbate underlying conditions of socio-political instability.

D. Chronic Possessory Conflicts on the Coastal Plains of Viqueque

Where there is instability in the enforcement environment, attempts to impose a bright-line mechanism for property allocation - such as a simple rule of possession - may serve to channel claimants into extra-legal attempts at dispossession, which may elevate disputes over entitlements to land into conflicts over the underlying socio-political authority to make determinations relating to land.86 The possibility that bright-line rules of possession may increase the risks of social disorder, even though their application in stable environments would produce net gains from trade, is illustrated by the existence of chronic possessory conflicts in a number of rural districts of East Timor. The following description of land conflicts in the north-eastern district of Viqueque in East Timor illustrate cycles of property instability as a result of competitive racing for possession in a context of war and regime change. The description is based on 21 case files, prepared by the Land and Property Directorate of the Government of Timor Leste in Viqueque.87

Most land disputes lodged with the Land and Property Directorate of Viqueque district in East Timor involve claims of possession and dispossession resulting from the clearing of the coastal

86 Unlike bright-line rules of contract, which allow parties to opt out of law and create increased complexity through agreement, bright-line rules of property apply to all parties in a property system. In the absence of regulatory carveouts for specific forms or land all land uses, the doctrine of numerus clausus restricts the capacity of resource users to generate their own forms of rule complexity. For a discussion see Lehavi, supra n. 25, at 25; see also Nestor Davidson, Standardization and Pluralism in Property Law, 61 Vand. L. Rev. 1597, 1599 (2008).

87 Copies of these case files are held on file with the author.
land under colonial supervision. Beginning in 1938, and gathering pace in the 1950s, the Portuguese authorities instructed the heads of two upland villages - Afalocai and Uitame - to gather their people and clear land for rice cultivation on the Uato Lari coastal plain. The land was cleared and planted for irrigated rice cultivation. Working with hamlet heads, the village heads mapped and divided the land among those who took part in the clearing and cultivation efforts. Those who occupied the rice fields developed under village government supervision still seem to have acknowledged the overarching ritual and spiritual authority of elders from the local origin group known as Vessoru-Uitame. But the acknowledgement of customary land stewardship did not necessarily extend to recognition of authority over the use or generational transfer of land. The rice-fields are claimed on the basis of heritable individual rights, notwithstanding that these rights were never translated into documentary rights of statutory ownership.

In 1959 the head of Afalocai village took part in a rebellion against Portuguese rule. The rebellion was centered in Viqueque district and included a number of other village heads with kinship ties to a senior customary leader affiliated with the Japanese during World War II. The rebel leaders were the subject to claims of association with pro-Japanese collaborators. The rebellion was defeated by Portuguese forces, with the assistance of pro-Portuguese Timorese militia from other districts. The militia burnt houses and seized livestock, and the people of Afalocai fled to the nearby Matebian Mountains. The village head of Afalocai and his family were imprisoned in Angola. Between 1960 and 1962 the administrator of Uato Lari sub-district allocated the vacant rice fields to the pro-Portuguese militia, who had not otherwise received any pay from the colonial regime. The allocation also served as a tactic to secure Uato Lari as an area under Portuguese control. The new possessors undertook repair of damaged infrastructure.

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88 Susana Barnes, Field notes on Uato Lari March 2006 (copy on file with author). While the land fell within the claimed ancestral domain of the Vessoru-Uitame customary group, much of it had been used at most for hunting and fishing and the Vessoru-Uitame elders were not directly involved in the allocation of land cleared and cultivated by the villagers of Afalocai and Uitame.
89 Id.
91 See case notes: Case 1, Soares and Others v. Sipain and Others; Case 6, Umakiik Vesoru Uaitama village v. Monteiro; Case 9, Fernandes v. Sipain and others; Case 10, Claim by Menezes; Case 11, Ribeiro v Menezes; Case 12 Claim by Ribeiro; Case 13, do Rosario v. Soares; Case 14, Claim by Magalhaes; Case 15, da Costa v. Kaidawala & Kaidawalari; Case 17, Claim by Napoleon Menezes; Case 20, Menezes v. Soares; Case 20, Menezes v. Soares; Case 21, Menezes v. Lekui and others; Case 21, Menezes v. Lekui and others; Case 25, Claim by Amaral and others. Gunter, supra n. 90, at 34; see also 10, Claim by Menezes; Case 13, do Rosario v. Soares; Case 16, Soares v. Adelino and others.
92 Some pro-Portuguese militia invited family members to occupy the Afalocai rice fields. In one case, and pro-Portuguese militia reportedly demanded the sale of coastal land, and seized the land with support from Portuguese authorities when the sale was refused. See case notes: Case 1, Soares and Others v. Sipain and Others; Case 2, Claim by de Costa; Case 6, Umakiik Vesoru Uaitama village v. Monteiro; Case 7, Claim by Freitas and others, Claim by da Silva, Claim by da Costa; Case 9, Fernandes v. Sipain and others; Case 10, Claim by Menezes; Case 11, Ribeiro v Menezes; Case 12 Claim by Ribeiro; Case 14, Claim by Magalhaes; Case 16, Soares v. Adelino and others; Case 18, Dacoate Afalocai village farmers v. Amaral; Case 20, Menezes v. Soares; Case 21, Menezes v. Lekui and others; Case 23, Menezes v. Caiboro and others; Case 24 Claim by Ribeiro; Case 25, Claim by Amaral and others.
and a further round of clearing and planting land.\textsuperscript{94} They also did not receive documentary proof of title from the colonial administration.

In 1972 the head of Afalocai village, who by then had been released from prison in Angola, lodged a claim with the Uato Lari sub-district administrator for the return of some land to Afalocai village members. This claim was granted.\textsuperscript{95} The remainder of the land seized after the 1958 rebellion was left in the possession of pro-Portuguese forces and their descendants, who continued to improve the irrigation and infrastructure of the rice fields. In 1980, during the period of Indonesian occupation, the dispossessed people of Afalocai made another claim to local forms of government authority. By this time a number of customary leaders from Afalocai had prominent roles in the Indonesian administration.\textsuperscript{96} This appeal resulted in a gathering of hamlet heads from Uitame village who decided that some land should be returned to the pre-1959 possessors.\textsuperscript{97} Other land was returned by order of the Indonesian-appointed sub-district head of Uato Lari and, in one case, by an Indonesian court.\textsuperscript{98} According to some pro-Portuguese claimants, some of the land subject to restitution orders included areas first cleared and cultivated by their forebears after 1962.\textsuperscript{99} Some Afalocai claimants also allege that some land was never returned, notwithstanding acts of first clearing and cultivation before 1958.\textsuperscript{100}

In 1999, a vote for independence by the people of East Timor triggered an outbreak of violence by pro-Indonesian militia, instigated and supported by the Indonesian military, that displaced most of the population. Indonesian forces departed as an Australian-led international force restored order in November and December 1999. In early 2000, a number of descendants of pro-Portuguese militia took advantage of the Indonesian withdrawal to claim or take possession of Uato Lari land held by their forebears from 1962 to 1980. Some of the land was vacant as a result of the 1999 displacement.\textsuperscript{101} Other areas of land were seized by force.\textsuperscript{102} Those re-

\textsuperscript{94} See case notes: Case 1, Soares and Others v. Sipain and Others; Case 2, Claim by de Costa; Case 6, Umakiik Vesoru Uaitama village v. Monteiro; Case 7, Claim by Freitas and others, Claim by da Silva, Claim by da Costa; Case 9, Fernandes v. Sipain and others; Case 10, Claim by Menezes; Case 11, Ribeiro v Menezes; Case 12 Claim by Ribeiro; Case 14, Claim by Magalhaes; Case 16, Soares v. Adelino and others; Case 18, Dacoate Afalocai village farmers v. Amaral; Case 20, Menezes v. Soares; Case 21, Menezes v. Lekui and others; Case 23, Menezes v. Caiboro and others; Case 24 Claim by Ribeiro; Case 25, Claim by Amaral and others.

\textsuperscript{95} See case notes: Case 11, Ribeiro v Menezes.

\textsuperscript{96} Gunter, \textit{supra} n. 90, at 35; The Afalocai claim was based not on legal rights and remedies to recover possession, but on the basis that as security in the area is now maintained by the Indonesian military, there was no longer a need for the pro-Portuguese militia to occupy the land.

\textsuperscript{97} See case notes: Case 1, Soares and Others v. Sipain and Others; Case 7, Claim by Freitas and Others; Case 7, Claim by Freitas and Others, Claim by da Silva, Claim by da Costa; The meeting was convened by the sub-district head Mr. Eugenio da Costa Soares in Waitame village and involved four village heads, one hamlet head, two community leaders and one customary leader. The village heads were also all customary leaders. Six rice fields were returned to their previous owners.

\textsuperscript{98} See case notes: Case 2, Claim by de Costa Case 3, Pinto v. Vicente; Case 6, Umakiik Vesoru Uaitama village v. Monteiro; Case 17, Claim by Napoleon Menezes; Case 25, Claim by Amaral and others.

\textsuperscript{99} See case notes: Case 4, Gusmao v. da Silva; Case 7, Claim by Freitas and others, Claim by da Silva, Claim by da Costa.

\textsuperscript{100} See case notes: Case 23, Menezes v. Caiboro and others; Case 18, Dacoate Afalocai village farmers v. Amaral.

\textsuperscript{101} See case notes: Case 1, Soares and Others v. Sipain and Others; Case 3, Pinto v. Vicente; Case 11, Ribeiro v Menezes Case 16, Soares v. Adelino and others; Case 24 Claim by Ribeiro.
occupying the land alleged Afalocai collaboration with the Indonesian occupiers, while associating themselves with the pro-independence Timorese resistance movement. In circumstances of regime change favoring the re-occupiers, the dispossessed Afalocai did not engage in large-scale confrontations to recover their possession, although there was a great deal of social tension and some outbreaks of violence.

In June 2000 a team from the UN transitional administration in East Timor (UNTAET) visited Uato Lari sub-district to mediate possessory disputes involving the people of Afalocai. Based on training from Canadian experts, the mediators focus on obtaining interim agreements that the disputants not engage in violence, while the dispute awaited hearings before the new courts of East Timor. This limited approach achieved a degree of success in terms of forestalling further violence. However, the National Parliament has yet to pass a law to resolve competing claims to land in East Timor. There are 21 unresolved cases documented in the Land and Property Directorate archives of Viqueque district, and most Uato Lari claimants appear to be waiting for the proposed new land law of the independent state of Timor Leste before determining their next property claim steps. If the government were to apply a bright-line rule that ownership follows possession, as discussed in Part II, there will be significant risks of further breakdowns in order as a result of vicious cycle of possession and dispossession on the coastal plains of Viqueque.

II. Possession and Order in a Legal Context

Does the hypothesis of a relationship between rule complexity and social order apply outside a close-knit community context, when resource governance falls within the realm of law and state titles to land? Henry Smith elaborates on Ellickson's hypothesis of efficiency-oriented trade-offs involving rule complexity and simplicity in relation to the legal treatment of custom. He suggests that the relationship between custom and law reflects a concern with the informational demands of custom once it travels beyond a close-knit originating community. There is a communicative trade-off between the efficiency of information flows, and the potential efficiency of local customs. As a general rule, custom can be adopted without a great deal of standardization when the audience is limited, or there are low informational demands on the prospective audience. However, in cases of customs relating to property, the potential

102 See case notes: Case 2, Claim by de Costa Case 8, Sarmento v. Duarte; Case 10, Claim by Menezes; Case 12 Claim by Ribeiro; Case 13, do Rosario v. Soares; Case 14, Claim by Magalhaes; Case 15, da Costa v. Kaidawala & Kaidawalari; Case 19, Patricio v. Soares; Case 20, Menezes v. Soares; Case 21, Menezes v. Lekui and others
103 Gunter, supra n. 90, at 37.
104 Id.
106 Id.; see infra Section II. C.
107 See Smith, Community and Custom, supra n. 20.
108 Id. at 5-6.
109 Id. at 13, 30 (citing legal treatment of mining custom as an example of adoption without significant change) and at 21 (“Custom that impacts only community members is easier to incorporate into property law than equivalent customs that would require processing by third parties”).
audience is often extensive as those interested in purchasing, valuing or using resources can extend far beyond the members of a local community, and can include state interests in taxation or the provision of services or infrastructure. This broad audience will incur significant costs in identifying property interests under customary regimes. According to Smith, where efficient but information-rich customs are recognized by law, either the process of communicating property information is made more costly for remote third parties, or the custom must be stripped of its informational complexity through a process of modification and standardization.

Smith's illustrations of the relationship between custom and law include the legal treatment of customary mining rules in the United States. The 19th century Californian mining rule of first possession was adopted by the US courts as the doctrine of *pedis possessio*, which applies to mining exploration before discovery of minerals and acquisition of a patent under the General Mining Law of 1872. As with its customary predecessor, the *pedis possessio* doctrine includes the possibility of abandonment: possessory rights are lost once a prospector stops work and moves to another claim, at which point another prospector may obtain a property interests through the taking of possession. This aspect of mining custom has been criticized on the basis that under modern mining conditions there are benefits in multiple exploration of claims, and significant costs that prevent simultaneous exploration of those claims. Nevertheless, in *Geomet Exploration, Limited v. Lucky Mc Uranium Corporation*, the Supreme Court of Arizona applied the *pedis possessio* rule to recognize rights to claim the workings of a mining company that had moved on to another exploration area. Smith suggests that the court did not relax the customary requirements for ongoing work of a claim during the exploration phase, because in circumstances of absence of the possessor the informational demands of ascertaining property entitlements were too great for prospective users to bear. A rule modification allowing for abandonment would create greater information costs because possession would not set the visible and measurable limits of entitlement, in circumstances where there was no other low cost mechanism for ascertaining entitlement (such as a register for mining exploration claims).

Whaling customs provide a similar example of legal adoption of possessory customs without a significant degree of standardization or change. The whaling rules of capture were relatively

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110 Judges, bureaucrats and other sources of interpretive authority will also face informational costs in the process of ascertaining and interpreting localized custom: *id.* at 21-2 (discussing the information costs of legal enforcers and duty-holders).
111 *Id.* at 23-4. This argument is an application of a key aspect of Smith’s wider scholarship, namely that law is generally subject to an informational trade-off, involving complex communication to a close audience (as in contract) and standardized or formalized communication to a broad audience (typical of property), see Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).
112 *See Smith, Community and Custom, supra n. 20, at 32-3.*
114 *Id.*, at 1036-7.
116 *Smith, Community and Custom, supra n. 20, at 34. (This approach has the advantage of ease of communication to more extensive audiences).*
117 The fast-fish/loose-fish rule was adopted by the English Courts from the 18th century onwards, Deal, *supra* n. 65, at 207 (discussing *Littledale v. Scaith*, 1 Taunt. 241, 243 (1788)). However, Deal also notes a later trend away from
settled and the applicable audience remained whalers and at times beachcombers only. Unlike the case of land, remote third parties were not generally interested in determining ownership rights to dead or captured whales. In Henry Smith’s terms, the informational demands of whaling customs, in the light of their prospective audience, were not such as to require their modification and standardization through law. In other circumstances the US courts have modified or replaced custom in order to reduce informational costs for community outsiders. For example, in the fox-hunting case of *Pierson v. Post* the court declined to follow the hunting custom favoring the first hunter to find and pursue a fox. The majority formulated a possessory rule that granted rights to the first hunter to take possession of the carcass. Rose suggest that the adoption of a rule of capture, rather than the norm of fresh pursuit, arose from the majority’s preference for a “clear rule” that also provided reward for labor in most cases. While hunting custom may have rewarded in all cases the hunter who expended effort on finding the fox, and engaged in fresh pursuit, the interpretive costs of judicial determination of fresh pursuit, and the relative simplicity of the alternative possessory rule, outweighed the reward for effort incentives of the adoption of custom.

These US examples suggest a number of information-based principles for the design of property laws relating to custom. Custom may not require modification either when the prospective audience remains small and close-knit, the modification would serve to increase informational complexity, or the custom itself has a high degree of invariance to context. Custom may require modification where it is rich in contextual complexity, and the prospective audience extends beyond the originating community. If custom is not modified, in these circumstances, there will be increased costs of information transmission to remote third parties. Where custom does require modification to reduce information costs, Smith argues that relatively simple default rules, such as bright-line principles of possession, have a “gravitational pull” once the audience for property information extends beyond a community of connected resource users. This preference for bright-line rules of possession arises from their characteristics as lower cost mechanisms for the transmission of property information.

All else being equal, relatively bright-line rules of possession will reduce net aggregate information costs across a broad property audience. Yet, as discussed below in relation to land law development in East Timor, bright-line rules may not emerge in relation to private property because of the nature of the resource and its histories of occupation and claim, or because of political economy considerations relating to the balancing of competing interest groups. This inability to develop bright-line rules of private property is often the paradox of land policy in a

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118 Smith, *Community and Custom*, supra n. 20, at 27-9
120 Rose, *Possession*, supra n. 10, at 77. See also Krier, supra n. 5, at n. 77 (the majority in *Pierson v. Post* preferred a rule of capture of a rule of hot pursuit “for the sake of certainty”).
121 Smith, *Community and Custom*, supra n. 20, at 27-8 (describing informational efficiency of general defaults such as the first possession rule in whaling custom (i.e. the “fast-fish/loose-fish” rule), and trespass exclusion rules in cases of straying cattle).
fragile state environment. While bright-line rules of possession may reduce information costs once property information moves beyond a close-knit interpretive context, the political and social ordering implications of rule-making may result in interpretable 'fuzzy' rules that stabilize the State through compromises among interest groups. These compromises may have negative aspects, particularly by enhancing opportunities for rent-seeking by powerful state-connected actors. However, their net effect is a degree of rule complexity that may not arise in more stable socio-political environments.

In fragile sociopolitical environments, different types of possessory rules will have different effects on competitive racing for rights or authority relating to land. While complex laws will increase opportunities for rent-seeking by state actors, they may also serve to channel claimants away from violent contests over land. A possessory rule that incorporates the possibility of abandonment may reduce the risks of physical conflict between prospective claimants, because it offers the prospect of success through resort to adjudicative institutions and claims of lost legal possession. In contrast, simple rules may limit the pathways for interpretive claim and leave disgruntled claimants with the alternative of violent action, either against persons in possession, or against institutions claiming authority over the interpretation of rules. As with close-knit systems, therefore, complex legal rules of property may develop in order to increase the prospects for social order. While complex rules may contribute to competitive racing in relation to land, through pathways of rent-seeking activity, they may also channel racing activity into forms of interpretive contestation rather than violent acts of possessory conflict.  

A. Rule Formation and the Dynamics of State Stabilization

Fragile states tend to form what North, Wallis and Weingast call "limited access orders", where dominant state-affiliated coalitions restrict access to sources of rents, including control over natural resources. The imperative to stabilize the state leads to co-option of actors who could otherwise destabilize or de-legitimize the state. The co-option process is facilitated by

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122 See e.g. DOUGLASS NORTH & JOSEPH WALLIS & BARRY WEINGAST, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY 77-78 (2009) [hereinafter NORTH ET AL., VIOLENCE AND SOCIAL ORDERS] (“Clear property rights make land more valuable, but they may also reduce the ability to use land as a tool to structure elite… in fragile natural states, the flexible redistribution of landownership and control can be used as a tool to balance interests within the [dominant] coalition, especially as the balance of power shifts among prominent members.”). See infra Section II.A for further discussion on the relationship between state fragility and the development of fuzzy roles of property.

123 John Braithwaite argues that, in complex regulatory environments standards or principles are more likely to produce legal certainty than bright-line rules, because rules are more susceptible to game playing in processes of implementation and compliance. This process of game playing, which often favors the rich or knowledgeable, can lead to a proliferation of bright-line rules, and selective application of particular rules, to respond to loopholes and other failures to achieve legal objects: John Braithwaite, Rules and Principles: A Theory of Legal Certainty, 27 AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY 47-82 (2002) [hereinafter, “Braithwaite, Rules and Principles”]. Carol Rose has made a similar point in a property context: crystalline rules may become muddy if they are over-populated - if the system implementing the rule is subject to overuse, as where the bright-line benefits of recording property interests creates a proliferation of recorded interests: see Rose, Crystals and Mud, supra n. 12, at 596-97.

124 Douglass North & Joseph Wallis & Barry Weingast, Violence and the rise of Open-Access Orders, 20 JOURNAL OF DEMOCRACY 55, 59 (2009) (“Individuals and groups with access to violence form a dominant coalition, granting one another special privileges. These privileges— including limited access to organizations, valuable activities, and
inducements based on control over the machinery of the state. Co-opted members of dominant coalitions have incentives to deliver state largesse to their sources of non-state authority, including patron-client networks that provide them with the capacity to exercise or threaten violence. In these circumstances, the sovereign state assumptions of land law will suit coalition members engaged in races to extract rents from state control over resources. High levels of interpretive discretion relating to private property also allow state-connected actors greater opportunities for rent-seeking behavior. Hence the political economy of rule formulation in fragile states may result in bright-line rules of state title to public land and fuzzy rules of possessory rights to private land. This result complicates transitions from custom to law because state claims to land can overlay customary claims, creating contests over possessory entitlements in strong custom/weak state contexts.

The following sections explore this argument by reference to the development of land law in post-conflict East Timor, including unsuccessful attempts at introducing laws in 2002, 2005 and 2006. The discussion does not seek to provide a comprehensive theory of property formation in a state-building context, or an account of all actors and interests involved in land law for East Timor. The rejection of successive draft laws has occurred at the governmental rather than Parliamentary level, and a number of interest groups - including local government officials and customary leaders - have had little or no involvement in the formulation of draft bills. At the stage of Parliamentary approval, and subsequent implementation and interpretation, there will be cost/benefit calculations and interest group considerations affecting the relative complexity of the law. At the current state of land law development in East Timor, the development of rule complexity primarily reflects an implicit process of bargaining among legal advisers that was informed by an emerging awareness of the risks of promoting bright-line solutions in a fragile post-conflict environment.

assets—create rents. By limiting access to these privileges, members of the dominant coalition create credible incentives to cooperate rather than fight among themselves.").

125 Id. at 108 ("In a natural state, each non military elite either controls or enjoys privileged access to a vital function, such as religion, production, resources, trade, education, or the administration of justice. Because of their positions, privileges, and rents, the individual elites in the dominant coalition depend on the regime to keep entry limited.").

126 NORTH ET AL., VIOLENCE AND SOCIAL ORDERS, supra n. 122, at 42 ("Patron-client networks dominate the organizations within fragile natural states, and they are usually networks capable of using violence.").

127 Id., at 77 ("Land is the primary asset in agrarian societies. Access, use, and the ability to derive income from land therefore provide a rich set of tools with which to structure a dominant coalition and its relationship to the wider economy.").

128 Fitzpatrick, Evolution and Chaos, supra n. 83 (discussing the development of contested forms of access to land in pluralist Third World contexts). For further comparative analyses of incomplete or hybridised transitions from custom to law see Michael J. Trebilcock, Communal Property Rights: The Papua New Guinean Experience, 34 U. TORONTO L.J. 388-90 (1984) (noting that while there will be less reliance on customary structures as alternative insurance or security arrangements evolve, the patterns of substitution and future relationships of custom, market and state are difficult to predict). See also Robert D. Cooter, Inventing Market Property: The Land Courts of Papua New Guinea, 25 LAW & SOCIETY REVIEW 771-80 (1991) (analysing evolution of customary property arrangements without recourse to law, and noting the failure of legislative mechanisms for the conversion of customary rights to freehold in Papua New Guinea).

129 For excellent discussions of these public choice elements of property transitions see Stuart Banner, Transitions Between Property Regimes, 31 J. LEGAL STUD. S359, S361 (2002); Katrina Miriam Wyman, From Fur to Fish: Reconsidering the Evolution of Private Property, 80 N.Y.U. L. REV. 117 (2005).
B. The Draft UN Regulation of 2000: Restitution of Pre-Displacement Titles

On 25 October 1999, as the pro-Indonesian militia rampaged after the vote for East Timor's independence, the United Nations Security Council passed Resolution No. 1272, which established the United Nations Transitional Authority in East Timor (UNTAET). Article I vested all legislative and executive authority with respect to East Timor, including the administration of justice, in the hands of UNTAET. UNTAET Regulation No. 1 established a governing law for East Timor that maintained the law of the previous regime, namely Indonesia, as modified by certain international human rights standards. By adopting "the laws of the previous regime" the drafters of UNTAET Regulation No. 1 were careful not to suggest that Indonesia had been the sovereign authority of East Timor. The decision to adopt Indonesian law was motivated by practical considerations - to maintain a degree of legal continuity - and was not informed by arguments that Portugal, as the colonial power until 1974, retained sovereign authority over East Timor because Indonesia had a status as a belligerent occupier following its invasion in 1975.

In June 2000 the Land and Property Unit of UNTAET formulated a draft regulation to establish a land commission. The regulation was prepared by lawyers from Australia and Canada, who at that time predominated in the Land and Property Unit. The regulation provided that applications for the registration of land rights, where there was no objection, were to be determined by reference to UNTAET Regulation No. 1, subject to obligations to reject an application where the right had not been acquired in good faith. The reference to UNTAET Regulation No. 1 favored claims based on Indonesian titles, with the qualification that land commission officers were to observe the international human rights standards set out in UNTAET Regulation No. 1. Proponents of the draft regulation noted that Indonesian law recognized and converted pre-1975 Portuguese titles in East Timor, which meant that Indonesian law would not necessarily prejudice claims based on Portuguese titles. In theory, therefore, the result was a relatively

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130 For an overview, see FITZPATRICK, LAND CLAIMS, in EAST TIMOR, 5-6 (2003).
134 Id., at 59. It seems clear that Indonesia had the status of a belligerent occupier, and sovereignty remained vested in the state of Portugal throughout the period of Indonesian occupation, FITZPATRICK, LAND CLAIMS, supra n. 130, at 44-76.
135 A copy of this draft regulation is on file with the author.
136 Draft UNTAET Regulation 2000, s.12(d).
bright-line approach based on restitution of pre-displacement titles to land.  

The 2005 United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the "Pinheiro Principles") provide that "states shall demonstrably prioritize the right to restitution as the preferred remedy for displacement, and as an essential element of restorative justice", and that refugees and displaced persons have a right to restitution where they were "arbitrarily or unlawfully" deprived of housing, land and/or property. With a somewhat different emphasis, the 1998 United Nations Guiding Principles on Internal Displacement require competent authorities to protect property lost through displacement against illegal appropriation, occupation or use, and to establish the conditions and means to allow internally displaced persons to return voluntarily and safely to their homes, or else to resettle voluntarily in another part of the country.

On its face, restitution of property rights provides a relatively bright-line response to the problem of population displacement. There is no great interpretive complexity to a rule providing that those who were displaced should go home. Yet East Timor offers a paradigmatic case of potential social disorder arising from a bright-line restitutionary approach. Some restorative programs are directed at reversing "ethnic cleansing" or systematic racial discrimination. Examples include Bosnia-Herzegovina, Kosovo and South Africa, where broadly there is a single category of displaced restitutionary claimant. In East Timor there are multiple categories of potential claimants, including customary groups displaced by the Portuguese, Portuguese era title-holders dispossessed by the Indonesian administration, and Indonesian era

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138 In practice this bright-line approach would most likely have taken on a high degree of operational complexity because of chronic under-capacity in the agencies of the state. The possibility that bright-line rules may turn "muddy" in their implementation is not considered in this article. For a discussion, see Braithwaite, Rules and Principles, supra n. 123 at 47-52; Rose, Crystals and Mud, supra n. 12 at 596-97.


title-holders displaced as a result of independence for East Timor. While the law could focus on the most recent event of nation-wide displacement - in 1999 when the pro-Indonesian militia embarked on its campaign of violence - this restitutionary focus would restore titles to Indonesian citizens and pro-Indonesian East Timorese, and thus restore a basic cause of conflict. It would also challenge state capacity to implement a restitutionary program because of the large numbers of post-1999 occupiers of land who did not hold titles to that land in the Indonesian era. In the event, these considerations led to rejection of the draft regulation by the United Nations Transitional Administrator in September 2001.

C. Law Number 1 of 2003: The Bright-Line Rule of State Title to Land

East Timor became an independent state in March 2002. In 2003 the National Parliament of East Timor approved Law No. 1 of 2003 on the regulation of state land and abandoned land. This law is most significant for its definition of state land. The law defines land held under the "private domain" of the state to include unclaimed private land without an identifiable owner. This provision provides a bright-line default: the burden of proving private title lies with the claimant. It seems that there was no trend towards complexity in the definition of state land because the interests of key regulatory agents - political actors, government officials and international legal advisers - converged on the need to strengthen the state.

Land laws that strengthen the State are consistent with donor objectives relating to international security and development. Land law can be central to the territorialization of state power as it

144 For a discussion and overview, FITZPATRICK, LAND CLAIMS, supra n. 130, at 1-21.
148 Law 1/2003, s.12(3). It also provides for temporary state administration of abandoned land, including the grant of leases to land defined as abandoned.
149 The definition of state land in East Timor provides a contrasting perspective to the literature on rent-seeking, which correlates fuzzy rules with enhanced opportunities to capture rents: see Rose, Crystals and Mud, supra n. 12, at 591 (citing J. Buchanan, Rent Seeking and Profit Seeking, in J. BUCHANAN, R. TOLLISON, & G. TULLOCK, TOWARD A THEORY OF THE RENT SEEKING SOCIETY, 3, 8-11 (1980)). In circumstances of minoritarian control of the state, they bright-line default rule of state ownership of land may enhance official rent-seeking opportunities by increasing the scope for determinations that land slated for leasing to investors is state rather than privately owned land.
150 See Patrick McAuslan, Making law work: restructuring land relations in Africa, 29 DEVELOPMENT AND CHANGE 525, 525-7 (1998) (discussing the seminal importance of land reform to donors and from within recipient countries, wherein the reform of land law cohabitates seamlessly with ‘good governance’).
includes certain projections and assumptions of state sovereign authority. In James Scott's well-known expression government officials "see like a state" and interpret complex social relations with land through a legal lens of abstraction and objectification, as rights enforceable in autonomous terms, without the necessity of reference to cultural context or originating systems of authority. In similar vein, international legal advisers may also "look for a state" to facilitate strategies of exit and the achievement of program outputs. The East Timor example suggests that the resulting focus on state-strengthening, including presumptive views of sovereign control over land, can interact with oligarchic processes of state-formation to produce relatively well-defined forms of public property and more complex or vague rules of private property.

Default presumptions of state ownership lie within orthodox common and civil law conceptual frameworks. Yet, in post-conflict circumstances of competitive racing for control over resources, there are considerable incentives and opportunities for government officials to claim large areas as unowned land to facilitate rent extraction from the grant of state land leases. There will likely be widespread uncertainties of private ownership because of population displacement, destruction of records, and undocumented forms of land holding. There may be investor interest in agribusiness developments. There will be economic pressures to generate employment and investment. In all these circumstances, a bright-line rule on state land may provide a low-cost interpretive pathway for government actors to obtain rents and grant land concessions to investors, who would otherwise face uncertain negotiations with purported groups of private landowners. Law No. 1 of 2003 allows this result as officials from the Land and Property Directorate may determine that an area of land lacks an identifiable owner and is therefore, subject to proof of ownership by a private claimant (under yet-to-be-legislated laws on private ownership), available for grant to an outside investor.

D. The 2005 Draft Law on Private Land: Restitution and Recognition of Custom

In September 2005 international legal consultants prepared a draft law on private land ownership, under the auspices of a USAID technical assistance program, and in consultation

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152 See, e.g., Debra McDougall, The Unintended Consequences of Clarification: Development, Disputing, and the Dynamics of Community in Ranongga, Solomon Islands, 52 ETHNOHISTORY 81, 83 (2005) (“The legal articulation of property rights in the Solomons... aims to transform complex, crosscutting, localized relationships into rights that are commensurable, predictable, and knowable to outsiders. It is an endeavor that has made little headway in the Solomons.”).

153 See, e.g., JOHN BRAITHWAITE, SINCLAIR DINNEN, MATTHEW ALLEN, VALERIE BRAITHWAITE AND HILARY CHARLESWORTH, PILLARS AND SHADOWS: STATEBUILDING AS PEACEBUILDING IN SOLOMON ISLANDS 6 (2010) (“[The] focus has been on rebuilding the core pillars of the central state to the comparative neglect of the specific factors that fuelled conflict.”).

154 This suggestion is put forward as a hypothesis that needs to be tested in other post-conflict contexts. At this stage the hypothesis is not a comprehensive theory of property rule formation in fragile state contexts as it does not include public choice considerations relating to the formation of coalitions to drive the property transition in question: see, supra n. 130 and accompanying text. Issues will include the development of coalitions, free riding and other questions of public choice in property transitions.

155 For an example see infra Section II.B.7. For a discussion of contested state claims to customary land in Third World circumstances: see Fitzpatrick, Evolution and Chaos, supra n. 83, at 996.
with the Ministry of Justice. The primary drafter was a lawyer from Brazil, one of a number of Portuguese-speaking advisers that, after the departure of UNTAET, became the most influential international advisory group in the Ministry of Justice. In general terms, the 2005 law continued the restitutonary approach of the UNTAET draft regulation. While the 2005 draft limited restitution to ownership titles issued under the Portuguese or Indonesian administrations, it provided for limited term Portuguese or Indonesian titles to act as evidence for claims to "first adjudication" of ownership.

Unlike the UNTAET draft regulation, the 2005 draft law allowed for first adjudication of ownership based on "possession and customary rights of ownership", provided there was no applicable Portuguese or Indonesian title claim. This basis for claim did not establish a bright-line possessory rule, as it required proof of occupation for at least 20 years following "the practices of the community", and was subject to "no well-founded opposition from the community". The draft also allowed communities to hold collective title to land and apply customary rules in administering their land, while respecting the principles of equality established in the law. These provisions arose from increased awareness among international legal advisers of the social reality of customary landholdings in rural East Timor. They provided the first substantive legislative reference to possession, albeit in a customary context. Outside customary areas, the private law framework remained restitutonary in nature.


East Timor's Council of Ministers rejected the 2005 draft law prepared under the USAID technical assistance program. It seems the qualified recognition of custom and communal titles to land inhibited the potential scope of state-owned land, and thus undercut the government's plans for agribusiness projects in rural districts. The government commissioned a further draft in 2006, not long before the outbreak of violent conflict in May 2006, which was prepared with the assistance of another Brazilian lawyer. The 2006 draft law provided much weaker recognition of customary relationships with land, as a result of explicit drafting instructions from the Prime Minister. While the law provided for registration of community property in rural areas, the registered community held a communal right of use only and the land fell within the public domain of the State. The draft law further provided that traditional institutions had a right of

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157 Draft Land Law 2005, article 16. Most titles issued by the Portuguese and Indonesians took the form of limited term rather than ownership interests: see FITZPATRICK, LAND CLAIMS, supra n. 130, at 88-9, 158-60. Eligible ownership titles must also have been the subject of registered claim by 10 March 2004, pursuant to Law No. 2003, and also have "evidence of legitimacy" (articles 28, 43).
158 Draft Land Law 2005, article 29(3).
159 Id. Article 51(1). The draft law contemplated gradual extension of a government land administration system to all areas of East Timor. Until then, "communities" could continue to resort to customary rules provided they did not conflict with the Constitution and the law (article 3 (5)).
161 Interview, Nigel Thomson, supra n. 156.
162 Interview, Ibere Lopez, Legal Adviser, USAID Strengthening Property Rights in Timor-Leste Project.
163 Draft Land Law 2006, Article 9(2).
participation - but by implication no right of veto - relating to natural resource exploitation.\textsuperscript{164}

As with the 2005 draft, the 2006 draft law provided for the restitution of ownership titles issued by the Portuguese or Indonesian administrations.\textsuperscript{165} However, the law stated that restitution would not take place if there was a third party in possession of the claimed property, who had exercised peaceful possession for at least 10 years or peaceful and undisputed possession in good faith for at least 5 years.\textsuperscript{166} For the first time, then, the 2006 draft law privileged some possessory claims over restitution of Portuguese or Indonesian ownership titles. This change in approach reflected the emerging belief of the lead Brazilian legal adviser, in particular, that the state lacked the capacity to engage in large-scale urban evictions in order to implement a restitutionary program.\textsuperscript{167} This belief proved somewhat prescient given the violent conflict over urban housing in 2006-07.

In 2006 political conflict between the Prime Minister and the President degenerated into circumstances of temporary state failure, as elements of the police and army engaged in armed combat, and latent tensions over land occupations after the militia violence of 1999 escalated into large-scale house burning and evictions in the capital city of Dili.\textsuperscript{168} These tragic events highlighted the fragility of the East Timorese state, and the relationship between state stability and post-displacement disputes over the possession of land and housing.\textsuperscript{169} There was increased appreciation among legal advisers of the risks of disorder if the state attempted mass evictions as part of a restitutionary program. As a result, the draft land law of 2009 replaced restitution of titles with recognition of rights based on possession. The 2010 amendments to the draft then reintroduced an element of restitution, largely as a result of compromises among international legal advisers, while retaining a primary focus on recognition of possession.\textsuperscript{170}


The violence of 2006-07 led to the fall of the Fretilin government and its replacement by a coalition government headed by Prime Minister Xanana Gusmao (the former President). The new government is oriented strongly towards economic development.\textsuperscript{171} There have been

\textsuperscript{164} Id., article 9.
\textsuperscript{165} Id., article 41. Those who acquired land from the holder of a Portuguese or Indonesian ownership title were also eligible for restitution, although this process was to "privilege" those who acquired in good faith (\textit{Id.}, article 39).
\textsuperscript{166} Id., article 47.
\textsuperscript{167} Interview, Ibere Lopez, \textit{supra} n. 161.
\textsuperscript{168} For an overview that focuses on land and housing aspects of the crisis, see Andrew Harrington, \textit{Ethnicity, Violence, \& Land and Property Disputes in Timor-Leste} 2 \textit{EAST TIMOR LAW JOURNAL} (2007). While there is legitimate debate on the precise meaning of state fragility, on any measure East Timor was a fragile state in 2006-07 as a result of armed conflict between elements of the police and military, and breakdowns in law and order in the capital city of Dili: see generally Ashraf Ghani and Clare Lockhart, \textit{FIXING FAILED STATES: A FRAMEWORK FOR REBUILDING A FRACTURED WORLD}, 3, 23.
\textsuperscript{169} Harrington, \textit{supra} note 168.
\textsuperscript{170} Copies of the 2009 and 2010 draft regulations are held on file with the author.
\textsuperscript{171} The Government’s Strategic Development Plan 2011-2030 includes a proposal to resettle 5000 families in 8 rural districts to enable irrigated rice cultivation \textit{OFFICE OF THE PRIME MINISTER, ON THE ROAD TO PEACE AND PROSPERITY: TIMOR LESTE’S STRATEGIC DEVELOPMENT PLAN 2011-2030}, 4-197 to 4-201. (April 7, 2010). It also
significant increases in rural land allocations to investors notwithstanding the continuing absence of a legal framework to determine ownership of private land. For example, in January 2009, the Ministry of Agriculture purported to allocate over 100,000 ha of rural land for bio-fuel developments under Memorandums of Understanding with foreign investors. While there are discussions among East Timorese of rent-seeking explanations for these allocations, it seems they also form part of a rush to establish "facts on the ground" in advance of the proposed law on land.

The current coalition government rejected the draft 2006 land law prepared by the Fretilin government, and commissioned a further draft under the auspices of a second USAID technical assistance project, which again worked in conjunction with the Ministry of Justice. Ironically, the lead drafter was the Brazilian lawyer who had worked on the 2006 Fretilin draft. The first version of the current draft law was issued in June 2009. It did not allow for restitution of Portuguese or Indonesian titles at all, and provided for ownership based on long-term possession alone. A claimant would receive an ownership right if she peacefully took possession of a vacant property before 26 April 2006, without the authority of the previous possessor; and maintained possession in good faith for at least 5 consecutive years. While the removal of restitutionary elements reduced the interpretive complexity of the law, the reliance on possession as the basis for ownership incorporated a number of fuzzy elements. In particular, the draft law established a distinction between actual and legal possession that is common to civil and common law contexts. Under the 2009 draft, "mere occupants" cannot acquire ownership rights to land by means of long-term possession. Mere occupants are defined to include people using land with no intention of acting as owners, people "who took advantage of the tolerance of legitimate possessors", and representatives and agents of the legal possessor.

In early 2010, the Minister of Justice commissioned Portuguese lawyers to review the 2009 draft law. The Portuguese legal advisers highlighted the importance of state fragility concerns, noting that the attribution of ownership to long-term possessors "avoids mass dispossessions (and therefore the social tensions that could arise)". However, the advisers also noted the importance of meeting expectations of ownership, which suggested restitution of Portuguese or Indonesian era ownership titles. They recommended restitution of pre-independence ownership titles while retaining ownership rights based on long-term possession. The draft law now combines restitutary and possessory principles. Claims of ownership may be based on

asserts a need to reform land laws to improve agricultural productivity, including in relation to farm land under customary practices.

173 This rush to establish is evident in the large numbers of fences and walls and construction around plots of land and valuable areas of Dili and its surroundings.
174 The drafting process took place with the assistance of a working group that included Timorese lawyers and land experts.
175 Draft Land Law 2009, Article 10(3).
177 USAID advisers supported these recommendations on the basis that Portuguese and Indonesian ownership titles were relatively small both in number and areas covered, as most pre-Independent titles were limited term in nature.
Portuguese or Indonesian ownership titles and, where there is no such title, on continuous, peaceful and notorious possession that commenced on or before December 31, 1998. The law continues to provide that mere occupants, as defined, are not eligible to claim ownership titles to land.

G. When Bright Line Rules Create Conflict: Possessory Rules in Customary Districts

Unfortunately, the draft 2010 law does not extend the distinction between mere occupants and legal possessors to customary districts. Article 10 (3) defines possessors to include those who reside in, have erected buildings on, or have cultivated land claimed by another party based on the belief of ancestral customary domain, even when rent is being paid to that party. This definition encompasses large numbers of relocated peoples living on land claimed by a customary group in East Timor. Many have occupied the land since before 31 December 1998, which under the 2010 draft law entitles them to claim statutory ownership of land provided they have remained in possession. Yet it is clear that entitlement to ownership on the basis of individual possession alone, with unrestricted powers to sell land to other Timorese citizens, will be inconsistent with localized understandings of relocatee rights in customary districts. There is no customary rule or norm that length of time in possession gives rise to property entitlements, as the possessory significance of acts of clearing, cultivation and residence is negotiated with reference to questions of social status and affiliation. As with the lowland areas of Viqueque district, attempts to apply a bright-line rule of possession in customary areas are highly likely to lead to social conflict between firstcomer and newcomer claimants.

It seems the draft law did not trend towards complexity, in response to the potential for conflict, because the risks of customary land conflict are not well-known by city-based legal advisers, and are much less likely to destabilize the state than violent conflicts over urban housing.

Conclusion

Economic studies argue that simple baselines matter in property regulation because property information is costly in nature. A broad audience of regulators and resource users requires

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178 See Article 22. It seems that the decision to push the commencement date of possession back to 31 December 1998 was motivated by a desire not to reward ad hoc occupiers of land after 1999, in part because of fears of renewed possessory conflicts in Dili. It may also be that the current coalition government was concerned not to recognize post-1999 claims to valuable coastal land by Fretilin-connected actors.

179 Draft Land Law 2010, Article 10(3).

180 For a detailed case-study see Fitzpatrick and Barnes, Relative Resilience of Property, supra n. 74, at 226-234. Technically a land claimant in customary districts may make a sporadic application for registration of ownership, on the basis of special adverse possession. However, the possibility of sporadic applications in areas not subject to cadastral data is a matter that is to be determined under a law on title registration. In the short-term, the distant nature of the state in East Timor, and the relative lack of access to legal information, also renders it unlikely that claims based on special adverse possession in customary districts will be widespread.

181 Interview, Ibere Lopez, supra n. 162; Interview, Nigel Thomson, supra n. 156.

information relating to the identification, evaluation and enforcement of property. In a world of positive transaction costs, the informational complexity of property regulation matters for resource use efficiency because, all else being equal, reductions in information costs increase the efficiency of transactions.\textsuperscript{183} Moreover, a property rule that establishes ownership - the simplest form of exclusionary entitlement - provides a low-cost solution to the problem of bilateral resource conflicts.\textsuperscript{184} In these circumstances, the starting point for property regulation should be simple bright-line defaults, such as a rule or norm of first possession,\textsuperscript{185} which may be amended towards complexity where increases in the cost of information are outweighed by gains in transactional efficiency.\textsuperscript{186} As with close-knit communities, therefore, there is a trade-off in matters of rule complexity between the increased costs of information and associated reductions in deadweight losses.\textsuperscript{187}

Base-line economic preferences for bright-line property rules assume a high degree of social consensus because, as Merrill and Smith note, both laws and self-help are unlikely to provide the high degree of cooperation implicit in an orderly property system.\textsuperscript{188} In the absence of sufficient consensus on property, or a state capable of enforcing property determinations over local objections, bright-line allocation of entitlements may exacerbate rather than resolve resource conflicts because the rewards of crystalline rights, and the process of allocating well-defined entitlements, may provoke disorderly races for resource control. An economic preference for

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\textsuperscript{183} Merrill & Smith, Coasean Property, supra n. 181, at 34 (In a "positive transaction cost world one should expect to find a significant degree of standardization of rights, precisely because this would save on delineation, understanding, and enforcement costs").

\textsuperscript{184} Id., at 36 ("For transaction cost reasons we start with sovereign owners exercising the right to exclude over clearly delineated things, and we use this starting point to resolve a wide range of resource conflicts").

\textsuperscript{185} Merrill & Smith, supra n. 181, at 39 ("General norms of possession seem to form powerful defaults"); Smith, Community and Custom, supra n. 20, at 27-8 (describing informational efficiency of general defaults such as the first possession rule in whaling custom).

\textsuperscript{186} One type of pay-off may be greater flexibility in the delineation of entitlements where flexibility results in greater transactional efficiency: Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 34 (2000). Merrill also suggests that fuzzy rules may be appropriate to high transaction cost circumstances, as where large numbers of people are involved in actual or prospective bargaining over resource use. Where transaction costs prevent the reaching of bargains, a fuzzy rule may provide greater scope for the Courts to determine entitlements based on ex-post assessments of efficiency, which ideally would reflect the bargains parties would have reached if transaction costs were sufficiently low: see Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J. LEGAL STUD 13, 13-4 (1985).

\textsuperscript{187} For example, Merrill and Smith suggest that the higher costs of moving from a simple "exclusion" strategy to a "governance" strategy, where property rights are defined with more precision in terms of permitted and restricted uses, may be justified by gains from identifying specialized multiple uses of a resource: see Thomas Merrill and Henry Smith, The Property/Contract Interface, 101 Colum. L. Rev. 773.

bright-line rules may be instructive for informational efficiency, but not for development of the social order required to create pre-conditions for efficiency.\textsuperscript{189} Indeed the paradox is that, in the development of social order, there seems to be a preference for fuzzy rather than bright-line rules of property.

The hypothesis of this article - that rule complexity/simplicity trade-offs may have different results in different circumstances of social ordering - has important implications for the path-dependent trajectories of comparative property systems.\textsuperscript{190} While fragile state circumstances give greater prominence to questions of social order, property systems in stable socio-political environments are likely also to retain imprints from earlier concerns for social ordering. Property systems with histories of violent conflict, in particular, may have legacy rules of complexity that developed in response to imperatives for peace-building or state-strengthening. These legacy rules may be sub-optimal in the sense that, once social order is established, they produce lower gains from trade than a correspondingly simple rule. But they may be difficult to revise because they form part of the social contract that allowed formation and development of an orderly property system. As a result, while there will be economic incentives to trend towards institutional efficiency, there will also be contingent historical events that explain the divergent paths of different property systems.

\textsuperscript{189} Merrill and Smith suggest that the social consensus required for an orderly property system is more likely to coalesce around simple moral principles such as "no trespassing", again because of the communicational demands of property: see Thomas Merrill and Henry Smith, supra n. 186, at 1851-2. The analysis and examples in this article suggest different structural requirements for foundational processes of property ordering, namely the need for a politico-legal community to form around common principles or standards of fairness, before bright-line rules can be formulated and applied with a degree of legal certainty: see Braithwaite, Rules and Principles, supra n. 123 (arguing that a democratic culture, including the capacity to resolve agreements without resort to violence, is more likely to result where there is agreement on the broad political principles and standards in which bright-line rules are nested). See further Ronald Dworkin, LAW’S EMPIRE, 211 (Belknap: 1986) ("people are members of a genuine political community only when… They accept that they are governed by common principles, not just by rules hammered out in political compromise").

\textsuperscript{190} For an excellent discussion of path-dependency possibilities in property systems, highlighting the role of self-reinforcing mechanisms and switching costs in preventing transitions towards institutional efficiency see Maria Prado & Michael Trebilcock, Path Dependence, Development and the Dynamics of Institutional Reform, 59 U. of Toronto L. J., 341-379 (2009).