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Bright-Line Fever: Simple Legal Rules and Complex Property Customs among the Fataluku of East Timor

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Recent law and economics scholarship has revived a debate on bright-line rules in property theory. Economic analysis asserts a baseline preference for bright-line property rules because of the information costs if "all the world" had to understand a range of permitted uses, or deal with multiple interest holders in a resource. A baseline preference for bright-line rules of property arises from the cost of communicating information: all else being equal, complex rules suit smaller audiences (e.g., contracting parties) and simple rules suit large audiences (e.g., property transactors, violators, and enforcers). This article explores the circumstances in which a simple rule, purportedly for a large audience, takes on interpretive complexity as it traverses specialized audience segments. The argument draws on two heuristic strands of recent sociolegal scholarship: systems theory notions of autopoiesis, and concepts of negotiability in plural property relations. The potential for complex interpretations of simple legal rules is illustrated through a case study of the Fataluku language group in the district of Lautem, East Timor.

Recent law and economics scholarship has revived a debate on bright-line rules of exclusion in property theory. Thomas Merrill and Henry Smith (2011) argue that exclusion better defines the core element of property than the metaphor of a "bundle of rights."[1] Their argument is based on a conception of property as an act of communication: unlike rights in contract, property rights are good "against the world," and require rules that reduce the costs of information for a broad class of potential violators or

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[1] Merrill and Smith (2011: 8) note that their argument has echoes of Blackstones' definition of property as "sole and despotic dominion . . . over the external things of the world."

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transactors (Merrill & Smith 2001: 359; 2011: 31–34). The burden of information explains the simplicity of messages about property: "keep off" or "don't touch" (Merrill & Smith 2011: 25). Simple messages are necessary, as a baseline for the design of property rules, because of the "staggering" cost of information if "all the world" had to understand a range of permitted uses, or deal with multiple interest holders in a resource (Merrill & Smith 2011: 25).

This article explores the circumstances in which a simple rule, purportedly for a large property audience, takes on interpretive complexity as it traverses specialized audience segments. Complex interpretations of simple property rules may emerge as a result of divergences in epistemological understandings of law, and a plurality of sources of authority for property. We illustrate the potential for complex interpretations of simple rules by reference to a new law on land approved by the National Parliament of the new state of East Timor in February 2012.[2] The new law sets out a bright-line rule of possession: East Timorese citizens in possession of land since December 31, 1998 are eligible to claim ownership of the land. On its face, the rule reduces the costs of determining ownership in a new nation state that experienced widespread population displacement during a period of foreign military occupation (Fitzpatrick 2002). Yet, the new rule applies to customary areas of East Timor where there are different conceptions of possessory entitlements, and influential sources of property authority that are distinct from the State. Customary areas of East Timor have kinship-based mechanisms for property ordering, which mediate possessory entitlements to land through status systems based on descent from ancestral sources of origin or common derivation (Forman 1980; Fox 1996; Hicks 1976; Traube 1986). A legal rule of possession will have complex interpretive effects in customary areas, particularly as it provides pathways for displaced groups to claim land outside customary status systems.

Our discussion of simple rules and complex interpretation draws on two heuristic strands of recent sociolegal scholarship: notions of epistemic distance and autopoietic systems (Gillespie 2008, 2011; Luhmann 2004; Teubner 1988, 1993, 1998), and concepts of negotiability and plural authority in property relations (Berry 1993; Lund 2002, 2008). Teubner (1998: 15–25) sets out an

[2] The National Parliament of East Timor approved the new law on land on February 6, 2012. On March 20, 2012 the President refused to assent to the law, and referred it back to Parliament with a list of proposed revisions. As yet the Parliament has not reconsidered the law due to parliamentary elections in June 2012. For this reason, we refer to the law as the "draft 2012 land law."

influential view of legal transfers as a communicative process that involves distinct "autopoietic" systems, which interpret legal information in accordance with internal processes for the production of meaning (see also Luhmann 2004). New law is more likely to achieve its intended effects where there are structural linkages, and a degree of mutual intelligibility, between the epistemic frameworks of law and the target social subsystem (Gillespie 2008, 2011; Teubner 1992, 1998). Yet, at least in relation to property rights in land, the interpretation of new law not only involves system linkages and recursive processing of meaning within a system, as complex interpretation of simple law may also emerge where plural subsystems act as sources of authority for the assertion of property claims. Property and authority have mutually constitutive elements, which means that simple laws may take on complexity when competing property claimants adopt strategies of affiliation with competing sources of property authority (Berry 1993, 1997; Lund 2002; Moore 1978, 1998). In these circumstances, the interpretation of new land law not only takes place within a target system, it involves the conscious manipulation of meaning across systems, as competing property claimants "shop" their claims across multiple arena for property legitimation (Fitzpatrick 2006: 1015; Lavigne Delville 2000: 108; Platteau 1996: 41–46).

We explore the circumstances favoring complex interpretations of simple rules through a case study of the Fataluku language group in the district of Lautem, East Timor. As with other ethnolinguistic groups in East Timor, the Fataluku interpret relationships of land through localized understandings of social and spiritual order. Conceptions of possession are interwoven with mythical narratives of ancestral origin, and complex histories of migration and attachment to land. There is no customary norm among the Fataluku that acts of possession per se give rise to property entitlements, because the implications of possession are calculated by reference to principles of origin and social precedence. Inevitably, Fataluku preferences, norms, languages, and cognitive understandings of property will shape the interpretation of a new legal rule of possession. Yet, the interpretation of the new rule in Lautem will also involve strategic negotiation of claims outside the epistemic world of the Fataluku, as a result of the in rem nature of property and the opportunities created by new law. In particular, Fataluku settlements displaced during the Indonesian military occupation have incentives to take advantage of the new law by asserting entitlements to land over and above current customary arrangements. We illustrate this possibility through a social history of settlement movement in Lautem, including one small settlement (*aldeia*) named Vero in the village of Tutuala.

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Simplicity and Complexity in Legal Rules Relating to Custom

Property rights theorists draw distinctions between "bright-line" and "fuzzy" rules of property. Bright-line rules involve ex ante identification of permitted and proscribed behavior. Fuzzy rules involve levels of ambiguity or discretion that may require ex post interpretation by a source of adjudicative authority (Dukeminier & Krier 1993: 103–21; Krier 2009: 155–56; Penner 1997: 148). Merrill and Smith (2011: 31–34; 2001: 39) argue that bright-line rules are the appropriate baseline for property regulation because property information is costly in nature (see also Smith 2003: 1108–13). Unlike in personam rights, which are limited to specified parties to a contract or Court judgment, the in rem rights of property establish duties of noninterference in a broad class of potential violators. The cost of compliance with duties of noninterference is prohibitively large where the permitted range of uses of a resource varies from "place to place, thing to thing, or even person to person" (Merrill & Smith 2011: 10). The alternative is a simple rule of exclusion: if A is the owner, and the message is "don't touch," there is a low-cost solution to the problem of compliance with property (Merrill & Smith 2011: 35–36). Hence, the common law limits the range of rights that an owner may create to bind third parties, through the doctrine of numerus clausus, to ensure low-cost messages to a broad property audience (Merrill & Smith 2000). Correspondingly, the common law allows much greater flexibility for contracting parties to create context-specific in personam rights, as the cost of information remains comparatively low relative to the audience (i.e., the parties to the agreement) (Smith 2003: 1110–11).

Rule simplicity reduces costs for potential property transactors as well as violators. Merrill and Smith (2011: 28) put this point through a simple metaphor: if the applicable rule grants A the right of exclusion in relation to a car, then everyone knows that they must strike a deal with A. If "all the world" has the right to use a car, and A wishes to use a car, then A will have to strike a deal with all the world. A rule that provides for ownership—the simplest form of exclusionary entitlement—facilitates transactions and establishes an incentive to invest in a resource, which serves to maintain it and prevent overconsumption, because the owner captures the benefit of her investment. This is why the law prefers simple "winner-take-all" rules for the initial acquisition or allocation of property (Merrill & Smith 2011: 6). The rule of first possession grants exclusive rights to the first person to engage in acts of control over an unowned resource, available for claim, because it provides a low-cost mechanism for allocating ownership (Epstein 1979). Even a rule of

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adverse possession, which transfers rights from an owner, is justified by cost/benefit considerations because it removes the need for potential violators or transactors to search for old titles in the hands of a person not in possession, and provides a low-cost mechanism for determining ownership when other means of proof are lost or costly to establish (Merrill 1984: 1127–33).[3] It follows that a rule allowing context-specific disaggregation of rights in a resource—implicit in the standard "bundle of rights" metaphor for property—is justified only where increased transactional gains from disaggregated rights outweigh the increased information costs of identifying, delineating, and enforcing multiple interests in a resource (Merrill & Smith 2000).

Merrill and Smith (2007) argue for optimal rather than maximal standardization of property rules. In information cost terms the calculus of rule design tilts toward complexity where the efficiency benefits of complexity outweigh the increased costs of information, taking into account the size and nature of the audience (Smith 2003: 1109–11). The legal treatment of custom illustrates the baseline implication for property rules: all else being equal, the larger the audience the less likely a rule allowing for informational complexity (Smith 2003: 1117–21; 2009). For example, in the fox-hunting case of *Pierson v. Post* (1805) the majority determined property entitlement on the basis of a rule of control—first possession of the fox carcass—rather than the hunting custom of hot pursuit (which involved a high degree of interpretive complexity). Smith (2003: 1118) concludes that the majority sought to establish a rule for a broad audience, "not all of whom . . . concerned with foxes." In contrast, in *Ghen v. Rich* (1881) the Court determined entitlement to a dead whale, found on a beach by a beachcomber, on the basis of localized whaling custom that favored the first whaler to harpoon the whale. There were efficiency benefits to the custom, which rewarded investment in the hunt (Ellickson 1989: 89–90), and application of the custom implicated a small audience of whalers and members of whaling communities only (Smith 2003: 1121). Smith (2003: 1121) cites Judge Lowell in *Swift v. Gifford* (1872), another case favoring whaling custom over a general rule of possession: "while some [cases] represent great rules of policy, and are beyond the reach of convention, others may be changed by parties [including] . . . by usage, which, if general and long established, is equivalent to a contract."

[3] While some rules of adverse possession have complex interpretive elements, such as requirements of good faith, these may be justified where the benefits of incentives against "bad faith" possession, with intent to deprive ownership through forced rather than voluntary transfer, outweigh the increased interpretation costs of rule complexity (Merrill 1984: 1134–37).

In East Timor the rationale for standardizing custom through law seems even greater than for the fox hunters of the United States. The development of new land law involves the basis for ownership in a new nation state. As a response to high rates of poverty, the government plans to encourage outside investment in rural districts.[4] The law applies not only to a customary audience but to all citizens of East Timor. Yet, as our case study of the Fataluku customary group suggests, a legislative attempt to reduce complexity through bright-line property law reform, in complex communicative and enforcement settings, may engender further complexity as a result of interpretive adaptation within communicative systems, and strategic manipulation of new property concepts across enforcement systems. Our analysis highlights the way in which simple legal rules may accrue interpretive complexity as they traverse various communicative, epistemic, and enforcement settings. The argument applies heuristics from theories of information and communication, as well as insights from studies of property in plural authority settings, to explore the relationship between rule simplicity and audience complexity in an emergent nation-state.

Autopoietic Systems: A Framework for Analyzing Interpretive Complexity?

The systems theory notion of autopoiesis provides a potential framework for analyzing complex interpretation of information across diverse social settings (Luhmann 1995). Autopoiesis describes a self-organized or self-regenerating system that receives external information but adapts that information according to its own self-referential processes of communication. The internal processes of the system are devoted to self-regeneration rather than production of something external to the system. The autopoietic system retains its distinct method of self-organization, while interacting with other systems through a process of "structural coupling" (Luhmann 2004: 1). Luhmann (2004) and Teubner (1988, 1993) argue that law constitutes an autopoietic system as its processes are self-referential: it produces laws that have a "legal" quality because they satisfy internal processes of recognition. Moreover, law interacts with other social systems—the economy, industry, even groups of resource users—through structural coupling mechanisms that involve the "mutual misreading" of information

[4] In 2009, approximately 41 percent of the population lived below the poverty line (World Bank 2009). For a summary of the government's plans for rural development, see Government of Timor Leste (2010: 9).

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according to the self-organization imperatives of each system (Teubner 1992: 1456).

Autopoietic social systems have distinct epistemic frameworks and preferences that shape the interpretation of legal information (Gillespie 2008: 685–86). Paterson and Teubner (1998: 455–61) provide an example from regulation of the offshore oil industry in the United Kingdom. Their analysis of new safety regulations identifies three relevant autopoietic systems: lawmakers, industry regulators, and the industry itself. Lawmakers aimed to minimize the difference between an unregulated industry, involving a number of safety accidents, and a desired outcome of improving occupational safety. The industry regulators had a similar safety objective, but could not adopt the standard strategy of prescriptive regulation backed by sanctions as there was insufficient information on emerging technologies and hazards. Their strategy involved broad guidelines and lines of communication with the industry. For their part, the industry had a different systemic preference based on profit rather than safety. This preference could not simply be displaced by tougher enforcement or more detailed regulation, as it was "deep-seated and internally coherent" (Paterson & Teubner 1998: 462).

Gillespie (2011) utilizes related systems theory concepts in his analysis of land law in Vietnam. His fieldwork identifies four systems that regulate access to urban land in Vietnam: Central Party policy makers, land management technocrats, judicial communities, and self-organized urban communities. These communities differ in terms of their core norms and cognitive assumptions (Gillespie 2011: 247–57). Generally speaking, while policy makers and officials advocate strict adherence to formal legal rules, judges and local residents desire socially relevant outcomes, which include the possibility of multiple interests in an area of land (Gillespie 2011: 253). These coexisting interests may be unlawful according to the binary legal/illegal coding of formal law, but are valid according to the self-organized traditions of the "informal" residential system. Based on a survey of Court cases in Hanoi, Gillespie (2011: 257–67) finds that judges are unable to provide lasting resolution of many urban disputes through application of formal law because the results are inconsistent with the internal logic of the residential system. As a result, judges often either transfer the case to bureaucratic agencies for resolution, or seek to apply fuzzy notions of "reason and sentiment." Gillespie (2011: 252, 266–67) notes that this latter approach—the judicial incorporation of ex post discretionary standards into bright-line legal rules of property—is subject to political and professional limits. A key insight of his analysis is that increases in the bright-line nature of rules, through increased ex ante delineation of entitlements, may act in a perverse way to reduce the capacity of Courts to resolve complex urban land

disputes, because rule formalism further limits the application of situational standards to meet local expectations (Gillespie 2011: 271–72).

Autopoietic theory emphasizes the recursive production of meaning within self-organized epistemic systems. In relation to land law, lawmakers have a systemic preference for the projection or territorialization of state authority. They "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 nonstate systems of authority (Scott 1998). Land law maps the landscape through inherent processes of misreading, omission, and distortion because it has its own linguistic, institutional, and cognitive processes for the production of meaning (Blomley 2003; Santos 1987: 281; Teubner 1992: 1452–53). In James Scott's terms, the intent of the state is to reduce the "chaotic, disorderly, constantly changing social reality . . . to something more closely resembling the administrative grid of its observations" (Scott 1998: 82). At the same time, the target of land law—groups of resource users—may include separate self-organized local systems for resource governance, with preferences for managing competition and appropriation that contradict legal preferences for extension of state authority or reductions in information costs for outsiders. A self-organized local system of resource users may interpret information in a different matter from the legal system, not only in terms of distinct linguistic and cognitive frameworks for the understanding of property, but as a result of core distinctions between the "legal/illegal" code of law and the self-reproducing code of the resource governance system (see, e.g., Benda-Beckmann von et al. 2006).

Our case study of Lautem identifies stark differences in the generation of meaning—in relation to concepts of space, territory, authority, and possession—between the "legal" and customary systems of East Timor. It highlights incompatibility between the self-reproducing code of customary systems (origin/nonorigin) and the draft legal rule that long-term possession is the basis for ownership. In addition, there is little by way of structural coupling between the systems of custom and law in Lautem, as the new state of East Timor has very little presence in rural districts. Yet, epistemic distance and weak structural linkages are not the only variables that explain the likelihood of complex interpretation of simple legal rules in Lautem. The in rem nature of property is important because it establishes incentives for individuals to assert meaning—the significance of their claims—across multiple systems for property legitimation. The production of meaning across systems provides the basis for the assertion of rights "against the world." Teubner (1992: 1454–55) characterizes the negotiation of

meaning across systems as a form of "mutual misreading" of information by self-organized systems, which develops because of differences in the production of meaning within each system. We suggest that this argument overly reifies systems as interpretive actors in their own right, and underplays individual acts of strategic negotiation across multiple systems for rights legitimation. Gillespie's study of Vietnamese land law provides an example: not only did members of the informal residential community bring claims to court, the judges selectively drew on norms and beliefs from outside the legislative system to achieve their situational ends (Gillespie 2011: 447).

Legal anthropological literature on postcolonial land relations highlights the considerable amount of time and effort spent by individuals on asserting property claims through legitimization systems outside of law, including households, clan groups, religious systems, local government, village courts, nongovernmental organizations, human rights commissions, and parliaments (Berry 1993: 14, 1997; Shipton 1994). In sub-Saharan Africa, in particular, a number of studies highlight endemic processes of negotiation and adjustment in which authority plurality is exploited to achieve the situational ends of property claimants (Berry 1993, 1997; Lund 2002, 2008; Moore 1978: 50). The cross-system negotiation of property claims is encouraged in circumstances where the state lacks the legitimacy or authority to enforce claims in accordance with law, and property claimants have the opportunity to negotiate across diverse sources of legitimacy and authority, including contested landscapes of custom, group identity, and status (Berry 1997: 1228; Lund 2002; Peters 2002: 46; Shipton 1994: 348). A multiplicity of sources of authority can contribute to "legal forum shopping," which undermines authoritative settlement of claims (Fitzpatrick 2006), and "shopping forums" where sources of authority—state and nonstate—compete for interpretive and adjudicatory influence over contested claims (Benda-Beckmann von 1981). In pluralist circumstances of this kind, the meaning of land law is not only formulated within social subsystems, or stipulated by authoritative state institutions, but is negotiated and contested simultaneously across multiple sociolegal spaces for property ordering.

Lund (2008: 17–22) provides a useful example from Ghana of authority plurality and cross-system interpretation of property claims. In 1901, the British colonial administration assumed formal control over the northern territories of Ghana. As in other colonies, the British introduced a system of indirect rule, which provided a mechanism for organizing local political structures in order to simplify administration and collect revenue for the colonial regime (Chanock 1991: 64). The colonial administration delegated

authority over land administration to tribal chiefs even though spiritualized authority or stewardship of the land resided in local "earth priests." The chiefs then consolidated their authority through the manipulation and invention of "customary law"—itself a colonial construct—and through their legal powers over the endorsement of land leases. Yet, the earth priests also asserted their authority outside "custom" through participation in the political structures of the colonial and postcolonial state. In 1979, a constitutional change that divested the state of ownership of northern lands led to further contestation between chiefs and earth priests across a range of domains, including legal claims to restoration of land ownership, local tax collection, and decentralization and the creation of districts. Lund (2008: 23) concludes that successive sociopolitical changes in Ghana have created opportunities for the periodic reopening and renegotiation of property settlements, both at the national and local levels.

Customary Systems and a Rule of Possession in East Timor

The following case study of the Fataluku of Lautem describes complex systems of social ordering, which include resource governance mechanisms based on a nested set of private and common property arrangements. As our case study illustrates, the mosaic of property-like arrangements among the Fataluku is not specified through precise written agreements but through a broad principle of social organization, namely proximity of descent from a mythical source of ancestral origin. In the absence of specific agreements enforced by a coercive third party, the ordering principle of ancestral origin acts as a focal point that provides a pathway for agreement over resources, and an alternative to costly conflicts over land.[5] In a fundamental sense, Fataluku customary systems are engaged in autopoietic self-reproduction because the ordering principle of origin provides the primary basis for the avoidance and management of conflict, in historical circumstances of population growth, exogamous marriage, and settlement movements. As Fitzpatrick and Barnes (2010: 217–18) put it in their study of Viqueque district in East Timor:

> Local narratives of origin, reproduced through rituals and invocations of ancestral spirits, are well-known to all newcomers and

[5] Focal points are coordination mechanisms that have strategic significance for potential resource competitors based on common past experiences (Zerbe & Anderson 2001: 116). Because they guide initial patterns of behavior and predictions of behavior, focal points facilitate decisions by resource competitors to forego conflict and engage in coordinated acts of resource allocation (Sugden 1986: 70–71; 1989: 88–90).

> neighbouring groups . . . they generate patterns of compliance and anticipated compliance, because newcomers and neighbors know they can avoid costly forms of conflict and obtain access to land by incorporating themselves into origin group hierarchy through marriage alliances and ritualised relationships of gift exchange and reciprocity.

In common with other customary systems of East Timor, the self-organizing processes of the Fataluku are predicated on shared acceptance of the ordering principle of origin as the sole or primary basis for resolving resource competition. The principle of possessory entitlement set out in the draft land law of East Timor threatens the self-reproducing origin/nonorigin code of Fataluku customary systems because it allows subsidiary households, including groups relocated during the Indonesian military occupation, to claim alienable rights to land outside customary mechanisms. At the same time, it establishes the state as the default titleholder to lands not subject to lawfully recognized acts of possession (see below). Systems theory provides a partial framework for analyzing the likely result—interpretive complexity notwithstanding rule simplicity—as the rule of possession is not only incompatible, in an epistemic sense, with customary conceptions of possessory entitlement, it undermines the origin/nonorigin code of customary society. This threat to the self-organizing processes of customary systems creates autopoietic imperatives to adapt and alter the meaning of a rule of possession. At the same time, the draft law would establish incentives for strategic assertion of entitlements on the basis of possession, even by affiliates of customary groups, which would not only trigger adaptive responses by the customary system but also assertions of the meaning and significance of possession through noncustomary systems for the legitimation and enforcement of property.

Complex Property Customs among the Fataluku of Lautem

East Timor (Timor Leste) is a new nation state that lies northwest of Australia at the eastern end of the Indonesian archipelago. It is emerging from a long period of Portuguese colonization (1701–1974) and Indonesian military occupation (1975–1999). The District of Lautem is a triangular-shaped territory that covers the far eastern corner of Timor Island. Most of the population relies on forms of mixed agriculture for income, combining seasonal maize and secondary food crop cultivation with dry season horticulture and smallholder livestock production. Buffalo (*arapou*) and pigs (*pai*) hold important and reciprocal roles in local livelihoods, especially in the complex ceremonial exchanges that mark life

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cycle transitions and the making and remaking of social alliances. Coconut production has been a significant source of income for farmer households in Lautem, following concerted efforts by the Portuguese colonial government to establish the tree crop from the early 1900s (Lencastre 1929: 44–46). Much of the settled landscape of Lautem is a mosaic of active and fallowed food garden sites with coconut palms representing material markers of past occupation and contemporary claim. There is a relative abundance of land, and little evidence of unsustainable resource depletion.

The most populous ethno-linguistic community in Lautem is the Fataluku, who number around 35 000 resident native speakers (based on Census 2010). Lautem itself is composed of five subdistricts (*sub-distritu*), and Fataluku speakers form the principal resident communities of the three most easterly subdistricts (e.g., Tutuala, Lautem-Moro, and Fuiloro). There are up to seven dialects of Fataluku all of which are mutually intelligible, although definitive linguistic research on the issue remains incomplete. In the remaining subdistricts, a number of other indigenous languages are spoken. They include Makalero, primarily in the subdistrict of Iliomar (southwest Lautem), and a Makasai language dialect form known as *Sa'ané* in the mountains of Luro (western Lautem). All these languages including Fataluku are non-Austronesian in morphology and linguistic origin, but share many cultural affinities with their Austronesian-speaking neighbors in Timor and the wider region (see McWilliam 2007a). As a result of extensive histories of cultural association with Austronesian societies, the Fataluku—along with other non-Austronesian groups in East Timor—utilize Austronesian principles of origin and common derivation to structure social hierarchy and relations with land (McWilliam 2007a).

The ordering principle of origin reflects a pervasive and shared orientation in Austronesian societies for identity founded on celebratory forms of common derivation (Bellwood, Fox, and Tryson 1995). This derivation is socially constructed and "may be variously based on the acknowledgement of a common ancestor, a common cult, a common name or set of names, a common place of derivation, and or a share in a common collection of sacred artifacts" (Fox 1996: 132). As Fox (1996) has argued, ideas of origin and related conceptions of ancestry can vary significantly between Austronesian-speaking populations, but typically the ideas by which they are expressed rely on combinations of common relational metaphors recursively applied. Paired notions such as "trunk and tip," "inside and outside," "elder and younger," "head and tail/foot," "before and after," among others, provide the rhetorical categories for asserting and contesting relative proximity to ancestral origins and, by extension, the status of property entitlements

in land (see also McWilliam 2002). Fitzpatrick and Barnes (2010) argue that, as a well-understood mechanism for calculating relations with land, the principle of origin has acted as a resilient basis for managing resource competition, not only in a historical context of in-migration and exogamous marriage requirements, but in modern-day circumstances of forced population displacement as a result of the Indonesian military occupation of East Timor.

All Fataluku are affiliated with customary "origin" groups, known generically in Fataluku by the term *ratu*, which are constituted around enduring lines of origin. Fataluku women generally relinquish membership to their natal *ratu* upon marriage and enter that of their husbands, raising their children within the marital house. Across Lautem, there are dozens of residentially dispersed *ratu*, the local members of which assemble from time to time to celebrate their shared ancestral origins in ritual communion. An important component of *ratu* identity over time is the need to maintain the narrative histories and founding myths of the group, as well as ancestral regalia and forms of clan-specific ritual knowledge and spatial claims. Protecting, nurturing, and expanding the collective resources of the agnatic *ratu* is a key motivation in social life, as a form of social insurance and a mechanism for maintaining social order, particularly in historical contexts where colonial and neocolonial states have been antagonistic to Fataluku authority in Lautem.

The boundaries of *ratu* land ownership, and the relative size of their respective territories across Lautem, derive from the mythic origins of settlement and ancestral spatial practices. Today, the limits of ancestral common property lands are more or less fixed, their meandering edges marked variously by prominent trees, ridgelines, or marker stones, as well as crumbling stone walls (*lutur mataru*) of fallowed garden sites, creek lines, and other topographic traces. The fixing of group boundaries, after a precolonial history of intergroup warfare, reflects the "peace" imposed by Portuguese colonization, which increased the costs of intergroup conflict. The knowledge of group boundaries (*kai kai ho varuku*) is retained as part of the heritage of the *ratu* agnatic community, especially among the senior male affiliates of the group. Wrongfully assuming or appropriating the rights of the landed property of other *ratu* is now seen as a risky activity that is likely to result in spiritual sanctions manifest as misfortune or illness for transgressive households. One consequence of this pattern of settlement history is that in cultural terms there is no surplus or "free" land where customary attachment does not apply, even though there may be no acts of "possession" as envisaged by the 2012 draft land law.

In describing the authority and relationship of a *ratu* group to its ancestral lands, use is made of an honorific title, *mua ho cawaru*

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(lit. land and lord). The title refers to the status of a *ratu* group over the land in question, one that confirms and acknowledges their precedence, or mythic "first settler" status in the area and their emplaced ritual ties of intimate association. In Fataluku ritual speech, this relationship is expressed by the following phrases:

Mua cao vele ocawa Land head skin lord

Horo cao vele ocawa Gravel head skin lord

The reference speaks to the Fataluku conceptual distinction between the "body" of the earth and its covering "skin" (*vele*). People may cultivate the skin (*vele*) of the land for food crops or to hunt game, but only the "lord of the land," the *mua ho cawaru*, asserts a preeminent authority over the whole of the land in question. This is an enduring relationship reaffirmed through sustained ritual engagement: it confirms that, in a general sense, all land across Lautem is held as a form of common property by the collective members of discrete *ratu* groups who share "one blood, one serum" of origin (*vehe ukani, ahi ukani*). The common property area is said to form part of the "sacred land and the sacred garden" (*mua tei ho pala tei*) of the *ratu*, a phrase that links contemporary members to the early settlements of their ancestors, the autochthonous spirits of the land, and the long history of cultivation and food production that has provided life and sustenance to *ratu* households over generations (McWilliam 2011a).

Although aspects of Fataluku language, ritual, and precedence continue to inform conceptions of the collective property of the *ratu*, in practice there are divisions of the Fataluku commons among constituent lineages of the group. This division reflects the demographic growth of *ratu* groups beyond the spatial and political limits of a single unit of collective action. The scope and strength of lineage rights to land depends on the strength of the agnatic relationships involved, including a distinction between elder (*kaka*) and younger (*noko*) sibling lineages, while overall ritual authority for the territory remains the responsibility of the *ratu* leadership, which typically resides among the oldest men of the senior lineage known as the *laficaru* or "the master of chants, the master of words" (*nololonocawa*:: *luku-lukunocawa*). In contrast to the relatively fixed nature of external *ratu* boundaries, the internal boundaries of lineage authority have a degree of fluidity, which manifests in endemic processes of negotiation among origin-affiliated lineages. The fluidity of internal boundaries most likely reflects the relatively low costs of strategic attempts to enhance entitlements within the negotiating "umbrella" of affiliations based on origin, which minimizes the potential for costly forms of violence among constituent lineages of the group. The result is a nested—and at times

contested—series of lineage-based common property arrangements within a broader collectivity based on principles of descent from a mythical source of ancestral origin.

Patterns of Land Agreement among the Fataluku: Subsequent Settlers and In-Marrying Groups

The history of Fataluku land relations has given rise to a range of arrangements through which settlers or in-marrying groups gain access to collective *ratu* lands. Use rights to cultivate the "skin" (*vele*) of the *ratu* land are dependent on particular histories of association and agreement. Affiliated households to the land-owning *ratu* may be referred to as *i na maunu* (those who come later) or more prosaically as *olo ca maunu* (lit. "birds" coming from afar). This category includes both in-migrant *ratu* lineages with long-standing relationships of marriage exchange with *ratu* lineages, as well as newcomers with shallow histories of engagement. For reasons of etiquette and social propriety, however, direct reference to these phrases is considered impolite and subsequent settler households are more typically referred to either as "sisters and children" (*leren ho moco*), designating households deriving directly from the agnatic group, or as *lan(u) ho tava* (friends and acquaintances), who are groups more distantly associated. Alternatively in the highly metaphoric language of Fataluku relations, the botanical trope of the tree describes the respective entitlements between permanent *ratu* land owners of the "trunk and branch" (*ara ho pata*) and settler cultivators who receive rights to the "flowers and fruit" (*i cipi i mana*). These phrases illustrate the Fataluku preference for paired ritual speech to describe social relationships. The genre is a form of highly stylized poetic speech expressed in couplets as synonyms. Another version of the relationship between founder groups and in-marrying settlers, for example, is described in structural terms as *a'a la lunu*:: *a'a ca unu* (to add to the foundation: to pile on top of the base).

In practice, there are two categories of subsidiary or settler group land entitlements within Fataluku customary land practices. The first of these categories confers a status with a degree of exclusionary entitlement: that is, land that has been devolved or transferred from an origin settler *ratu* to an in-marrying affinal group as part of a marriage exchange and settlement agreement (the *leren ho moco*: sister and children's connection). These arrangements still exist, as our case study of Vero hamlet illustrates below. However, they appear to have been more commonplace in premodern days when the need to attract (male) labor and coresidential political allies was a compelling factor. The subsequent settler group controls access and inheritance decisions over the land

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granted to their ancestors, but issues of alienation or sale to third parties are usually said to require explicit permission from the preeminent "landlord" (*mua ocawa*). In reality, to date at least, the sale of *ratu* land remains largely hypothetical, particularly outside townships where alienation of land outside the group would be considered disrespectful, and risk spiritual retribution in the form of illness or economic misfortune. The prohibition on alienation outside the customary group reflects group norms that favor collective action and cohesion over transfers to nongroup members (see Ellickson 1993: 1375–76).

Across East Timor there is a mosaic of marriage agreements among "wife-giver" and "wife-taker" lineages, which not only create in personam rights between the married parties, but intergenerational and intergroup obligations of exchange and alliance. Marriage alliances form the basis of spatial networks that link affiliated groups across the landscape. Typically, marriage is accompanied by extended periods of negotiation to settle on the terms of bridewealth exchange and post-marriage residential arrangements. The lineage of the husband is beholden and indebted to their wife-giving affines and is expected to provide appropriate levels of material support (especially livestock in the form of buffalo, cattle, horses, and their monetary equivalent) and labor services when called upon to do so. Wife-giving lineages reciprocate in different ways, but characteristically provide cloth, woven textiles, pigs, and life cycle services to their sisters and daughters who have either married into other groups or accepted husbands into their hamlets. To deny or neglect these social responsibilities carries social and spiritual sanctions that may result in ostracism, misfortune, or illness (McWilliam 2011b).

In more recent times, and particularly as a consequence of Indonesian occupation of East Timor, subsequent settler entitlements to land have taken on a more contractual (in personam) character. Specifically, it is quite common for the land-owning *ratu* lineage (*mua ocawa*) to grant in-marrying males or relocated households rights to arable land for cultivation or house plots, but to deny rights to intergenerational transfer and even claim unilateral rights to revoke the settlers' entitlements. In common law terms, these arrangements are more akin to a revocable license to occupy than an in rem interest in land. Fataluku sometimes describe these arrangements for latter-day settler households using the Indonesian language terms "passengers" (*penumpang*) or even "refugees" (*pengungsi*), which depict the settlers as temporary occupiers of the land of others. In the circumstances of Indonesian military occupation, these depictions are ex post in nature as customary protocols governing in-migration were often bypassed and the resident groups were obliged to give ground to the newcomers under

situations of duress. Over time, there has usually been a degree of accommodation to these situations of reluctant resettlement, including moves to normalize relationships through marriage between members of resident *ratu* and settler households, but to date at least, these processes of adjustment and adaptation have not extended to offering heritable land entitlements, or entitlements terminable either at the expiry of a term or as a result of breach of agreed obligations. While we argue that agreements to manage relocation through intermarriage are highly significant, as context-specific responses to the problem of displacement, the status and claims of the contracting parties were not agreed with ex ante precision and are thus vulnerable to conflict, which is likely to crystallize should relocated groups on customary lands claim alienable ownership of land pursuant to the rule of possession in the draft 2012 land law.

To summarize the nested property arrangements of the Fataluku: there is a default conception of the commons among customary groups, extending not only to areas of group control but to areas of ancestral activity, and manifesting in the overarching ritual authority of senior male lineage representatives of the group. Within each *ratu* collectivity, there are areas of common property authority structured around the constituent lineages of the group, which include lineage rights to allocate land through agreements with in-marrying allies. The landed authority of a lineage may default to the broader "origin" group where there is a long-term loss of access and control. Finally, there are household rights of use, exclusion, and inheritance—but not alienation—for areas of residence and cultivation (either permanent or swidden). While these household rights correlate with acts of possession and input of labor, their strength and scope turns on the status of the householder lineage within the group, including its relative proximity to the source of group origin. This nested property system has evolved and survived over a long period of time in response to resource and environment-specific conditions at multiple levels of scale. The *ratu* collective provides economies of scale in terms of defense. The devolution of authority to lineages reflects attempts to maintain collective action notwithstanding generational increases in group numbers. In addition, the control rights of households provide incentives for available forms of investment in housing and agriculture. Above all, the norms and structures of Fataluku customary systems are directed at maintaining a collective capacity to manage the potentially disruptive effects of in-migration, including exogamous marriage, in order to avoid costly conflicts over entitlements to resources (see also Fitzpatrick & Barnes 2010).

Different structures and scales of resource governance in Lautem create incentives for group members to attempt to enhance

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entitlements to land.[6] For example, households often pursue entitlements through construction of concrete block housing, claims to land left fallow, and acts of intergenerational transfer. Lineage representatives make claims to precedence within the group through constructions of origin, the reshaping of mythical narratives, or leadership of rituals. In the history of Lautem, there have been dynamic social ordering equilibria within groups where multiple scale incentives within a group to confirm entitlements through acts of violence, or acts conducive to violence, have been balanced by shared desires to avoid the social costs of resource conflict via mutual acknowledgement of the focal point principle of origin. These equilibria are threatened by a new rule of possessory entitlement that provides incentives for individuals to claim the benefits of alienable ownership, without incurring the costs of ensuing degradations in local capacity to undertake collective action, particularly in terms of managing in-migration and conflict-caused population displacement.

Unsettling Histories: A Case Study of Vero

We illustrate the threat posed by a legal rule of possession to the autopoietic property systems of the Fataluku, and the incentives for relocated households to assert property entitlements on the basis of a legal rule of possession, through a social history of a Fataluku community, the small hamlet (*aldeia*) of Vero. For the people of Vero, and other members of customary groups in Lautem, the understanding of possessory entitlement extends to historical acts of attachment to land, including mythical areas of ancestral activity, and not simply to contemporary acts of control with intention to exclude. At the same time, the people of Vero, as with other relocated households in Lautem, have incentives to claim enhanced entitlements on the basis of a legal interpretation of possession, if only as a strategy in negotiations of entitlement with other resource claimants than as an autonomous basis for conclusive Court proceedings. The case study illustrates Carol

[6] The literature identifies incentives for group members to appropriate benefits and shift burdens in both commons and semi-commons systems (Fennell 2007: 1448–52; Smith 2000). In the commons, incentives for benefit appropriation may manifest in unsustainable rates of resource use—the "tragedy of the commons"—in circumstances of resource scarcity and "free-riding" on second-party attempts to enforce rules of resource governance (Smith 2000: 132, 136–37). In a semi-commons, involving household rights to cultivation and group rights to grazing, incentives for benefit appropriation or burden sharing arise where holders of rights to farming land encourage grazing livestock to trample on the farmland of others, or deposit disproportionate amounts of manure on their land (Smith 2000: 138–44). These types of incentives do not have significant social cost implications in Lautem, where land is relatively abundant and grazing involves small numbers of pigs and chickens, at the household level, rather than group grazing of livestock herds.

Rose's argument that possession is a cultural text which "reads" according to its interpretive community: for example, there are substantial differences in the understanding of possession as between swidden cultivators or nomadic groups and settler farmers (Rose 1985).

The contemporary settlement of Vero comprises one of four constituent hamlets (*aldeia*) of the village (*suku*) of Tutuala. With a population of around 254 people (Census 2004), Vero forms a closely settled compound of some 35 thatched and metal roofed houses adjacent to the main road that winds down into the center of the village (total population 1,539). Social services remain rudimentary, with a police station, health clinic, and school in operation, and until recently only intermittent electricity and a failed water supply system. There are few employment prospects for residents who for the most part pursue forms of swidden agriculture on surrounding land, cultivating maize and a range of secondary food crops. Households raise livestock, especially chickens and pigs, for consumption and participation in the community exchange economy. High transport costs to the district capital, Los Palos, some 35 km away, substantially constrain access to the district Courthouse and the Land and Property Directorate district offices. In Los Palos, there are only two Land and Property Directorate staff serving the entire district of Lautem, which has a total population of 60 218 (Census 2010).

In one sense, the location and composition of present day Vero is the product of 24 years of Indonesian occupation of East Timor. Vero residents have been in occupation since before 1999, thereby fulfilling the requirements for possessory entitlement in the draft land law of 2012, and some households have sought to enhance their rights by constructing more permanent concrete block housing. However, like other settlements across Lautem, Vero is a displaced community, the origins of which and the ancestral lands to which most of its members lay claim, lie at a distance from the present day settlement. The historical origins of Vero derive from the lower reaches of the Vero (river) Valley and the heavily forested southern slopes of the Paicao mountain range, a few hours walk to the south. These lands and the abundant natural and symbolic resources they contain are regularly accessed along well-defined walking trails by members of the Vero community. Yet, for at least a generation they have been unable to farm the arable lowlands of former garden areas (*Alaera lafae* and *Aleara moko*) where they previously grew irrigated rice. Their access to land resources both in the current Vero settlement and the immediate surrounding fallowed fields is therefore something of a compromise, namely an agreement with resident customary land holders (the *mua ocawa*), the clans Cailoro Ratu and Kukulori Ratu in particular, to remain in

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place and have intergenerational entitlements to settlement and cultivation at their place of relocation.

Heuristically, the historical displacement of Vero may be characterized by three, more or less, distinct phases of external intervention over a century from the early 1900s. Each phase had the effect of drawing Vero households more closely into the sphere of state systems of surveillance and control, and for most, geographically more remotely from their ancestral lands. The three phases coincide with (1) the pacification campaigns of the Portuguese colonial government at the turn of the twentieth century, (2) the return of the Portuguese government following Japanese wartime occupation, and (3) the Indonesian military occupation of the territory after 1975. The following account of Vero's displacement illustrates enduring attachments to vacated ancestral lands, and the successful management of relocation through the ordering principle of origin.

Phase 1 of the Movement of Vero: Origins and Colonial Intervention

Vero settlement has its origins in the mythic narratives of *ratu* groups that trace their ancestors to founding settlements in the Vero valley (the term *vero* is Fataluku for rivercourse). The general consensus among local Fataluku is that the founding settlers of the area are associated with the early sailing exploits of four allies or four "siblings" who subsequently took the clan (*ratu*) names: Renu, Marapaki, Keveresi, and Paiuru. The mythic landing site at *Teluo'o* near the mouth of the Vero (river) is marked to this day with a sacrificial altar post (*ia mari tuliya*: ancestral footprint) that also serves as a site of periodic invocation and sacrifice. Nearby on the Aleara plain, a prominent limestone outcrop covered in tangled vegetation is venerated as the fossilized "stone" boat (*loiasu mataru*) of the seafarers who beached on Timor. These and other signs of ancestral presence provide material evidence of the mythic origins of settlement and the basis for claiming landed entitlements. As "archives of past habitation and sociality" (Fairhead & Leach 1996: 113), the origin landscapes of Vero families are simultaneously sites of spiritual agency and moral authority (see McWilliam 2007c).

Taking precedence as the founding group, Renu Ratu is referred to by the title *mua ho cawaru* (lit. land and lord). Their seniority and preeminence has been reproduced over time as newcomers settled in the area and married into the Renu group. In the process, migrants gained residence and cultivation rights to portions of the common property of Renu Ratu. To this day, the Renu group is accorded the senior status among each of the subsidiary

groups that assert historical connection to the area. Members of other groups such as Serelau, Mainoh, Paiuru, Tana, Aca Cao Ratu, and Pai'ir Ratu, among others, forged alliances with Renu and secured entitlements to forested land. Today, Sidonio da Cruz, a resident of Vero settlement in Tutuala, is the senior representative of the now dwindling clan group, Renu, and the leading ritual authority for the *ratu* domain.

The Renu Ratu group and its allies established a mountain stronghold, Haka Paku Leki, and a series of fortified settlements (*pa'amakolo*) at strategic locations along the eastern foothills of the Paicao mountain range. The dates of these fortified settlements are not recorded, but recent archeological work on fortified settlements in Tutuala indicates they were built and operating by at least the late sixteenth century (O'Connor et al. 2012). Given their prominent locations on strategic hilltops with extensive defensive stonework employed to secure the perimeters of the structures, it is evident that mutual warfare and the fear of attack from other groups were abiding concerns (McWilliam 2011a; see also Forbes 1885 for comparison). Within the structures themselves, stone graves and old house platforms offer mute testimony to earlier residents who exploited surrounding forests and cleared patches for seasonal food gardens.

Among the more prominent fortified settlement sites are those of Ili Haraku (a massive rocky outcrop beneath the imposing Pua Loki mountain). Ili Haraku is one of the former principal settlements of the Renu Ratu group and its allies. Several kilometers to the southwest and deep in the forest is the smaller hilltop fort known as Maiana, linked to ancestral allies, Pai'ir Ratu and Aca Cao Ratu, while a third hill fort known as Pai Lopo is located near the western boundary of Renu Ratu territory at Vekasse Ver. The principal group associated with this site is also Aca Cao Ratu, which, according to clan histories of the area, was appointed by Renu to defend the western boundary of group territory. In ritual terms, the role of Aca Cao is referred to as a peacemaker or enforcer, the *ece moron:*: *aka moron* (to cover and stop the fighting). A large clump of bamboo (*petenu*), known as *Ratu Varuk* (Ratu boundary), demarcates a site where the ancestors of Aca Cao Ratu concluded a land settlement with Pai'ir Ratu to mark out the border between the two groups and settle hostilities that had broken out.

The four defensive hilltop settlement sites of Haka Paku Leki, Ili Haraku, Maiana, and Pailopo appear to have been occupied until the early twentieth century. All this was to change, however, when in 1902, after years of indifferent Portuguese colonial government attempts to control and tax the recalcitrant populations of Lautem, a concerted military effort was initiated to establish administrative control. In a series of violent clashes the military campaign

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was able to vanquish Fataluku resistance, which led to a new period of Portuguese military rule over the district, and the gradual but not particularly successful introduction of a range of government development initiatives (McWilliam 2007b). Included in these programs were attempts by the Portuguese district command to bring the scattered populations of Lautem into more accessible and concentrated settlements. In Lautem, as elsewhere in East Timor, a perennial motivation of the Portuguese administration was to encourage more efficient taxation of the local population, a task made much easier if they could be concentrated into a smaller number of accessible centers.

The consequences of the Portuguese extension of administrative control over Lautem initially had little impact on the forest dwelling inhabitants of Vero. But the combined effects of Portuguese administration and a lessening of intercommunal feuding that accompanied more peaceful times appear to have encouraged Vero residents to move out of the fortified settlements and settle in a series of garden areas scattered within the forest. Named locations such as Pitilete, Laivai, Cara cipi lori, and Ira Romonu, among others—all now covered with forest regrowth—reveal traces of previous occupation in the form of remnant coralline garden fences, old graves, and house foundations. These settlements took the form of small clusters of households known as *otu* whose residents cultivated the sloping forestland for maize and secondary food crops, shifting their sites periodically as yields declined and fences succumbed to termite infestation and dry rot.

Phase 2 of the Movement of Vero: Post-World War II Relocation

During the Japanese wartime occupation of Timor, Vero households continued to live in the forests and coastal hinterland of their domain in the shadow of the Pua Loki and Paicao mountains. The return of the Portuguese colonial government at the end of World War II, which Fataluku describe as *Monargia rua* (lit. the second Monarchy), brought another significant phase of settlement displacement for the households of Vero. As part of a more general strategy to promote greater economic development and taxation revenue for the colony, following the ravages of the Japanese occupation (Dunn 1983), the people of the Vero Valley were ordered to move away from the forested zone to an administrative village known as Suco Laivai, close to the main road at Tutuala. At that time, the forest dwelling population is estimated to have been in the order of 40 households.

The community was reluctant to abandon their gardens and ancestral lands, and had to be coerced to move by the colonial

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government. Some households of the village withdrew into the forests, or dispersed to alternative settlements such as Mehara and Malahara near the shores of Lake Ira lalaru, an area that offered extensive grasslands for buffalo herds and existing family connections that facilitated the move. Eventually just 12 households settled at the new site at Tutuala, selecting a ridge adjacent to the main road to construct basic housing. They called the new settlement, Vero, and they remained here until the Indonesian military invasion in 1975. The new location lay within the customary lands of two resident land-owning *ratu* groups (*mua ocawa*), Cailoro and Kukulori Ratu, that granted permission for the displaced households to reside on the land and establish their community.

The Dos Santos family of the Serelau lineage was one of the settler households. Their family history exemplifies the complex patterns of possession, mobility, and group agreement in Lautem. The father of contemporary resident, Mario Dos Santos Loyola, came of age in the new settlement of Vero and married the daughter of the senior Kukulori land owner, gaining access and cultivation entitlements to a sweep of nearby fallowed forestland. Mario and his siblings maintain a continuing close and interdependent relationship with their affinal Kukulori landholding allies, who as *ara ho pata* (base and post: wife givers) provide life cycle services and protection for their sister's children (*tupurrmoko*). They retain cultivation rights to Kukulori land, and have assumed control over the former food gardens worked by their late father. Dos Santos entitlements are expressed by the phrase, *ira ho oco, i cipi ho i mana*—water and coconut, flowers and fruit—which reflects their authority to take the "fruits" of the land controlled by Kukulori. In discussions over the tenure status of the land in question, Mario is quick to state that he and his brothers have "ownership entitlements," but adds that his brother-in-law (*vaien ara ho pata, Kukulori*) has ultimate say on matters of land division or divestment. The fact that Mario used the non-autochthonous term "ownership"—expressed in Indonesian by the term *milik*—illustrates the co-option of external property concepts from state systems of law (in this case, the neocolonial Indonesian state). Yet, it is significant that there was also autopoietic adaptation: "ownership" is not understood or applied by the Dos Santos family in its legislative sense of alienable right to exclude, but as subject to customary agreements that have a binding intergenerational quality.

Phase 3 of the Movement of Vero: Matebian and Back

The Indonesian military invasion of East Timor in December 1975 ushered in a new period of uncertainty and displacement for residents of Vero and their compatriots in the region. In Lautem,

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the Indonesian military controlled little more than the main settlements and road corridors until 1977. By late 1977, with increasing pressure from Indonesian military forces, most of the forest-dwelling resistance along with their civilian charges had worked their way along the southern coastal hinterlands behind the Paicao mountain range to Lore and Iliomar in the southwest, eventually seeking refuge in the massive mountains of Matebian and the adjacent coastal plains of Natarbora in the neighboring district of Baucau. Under protection from the armed resistance, an estimated 90 000 Timorese had sought refuge in the region by early 1978. The massive numbers all but overwhelmed customary protocols governing acquisition of entitlements to land.

In 1977, the Indonesian military intensified their operations against the "rebels" and initiated a sustained campaign of aerial bombardment and intimidation, "Operation Encirclement and Annihilation" (Taylor 1999). Shell shocked and weak from inadequate food, the battered Timorese resistance forces succumbed to the pressure and surrendered en bloc by September 1978 (Budiardjo and Liong 1984: 33). Survivors straggled back to their respective regions under Indonesian military supervision. From this time, the populations of Lautem were subject to a strict internal security regime. Many communities were relocated and concentrated into crowded settlements around the main town and other regional administrative centers such as Lautem, Luro, Com, and Tutuala. This was the experience for Vero residents whose settlement had been burnt to the ground in 1976 by Indonesian military forces. They were subsequently housed in a "temporary residential camp" (*Campo de Concentração*) in Tutuala before being directed in due course to reconstruct their settlement in its present site aligned with the main road. As part of the process, senior members of the Vero group made representations to the customary owners of the land, Cailoro Ratu, for permission to settle on the land in question.

The impact of Indonesian military restrictions on previously wide-ranging agricultural and hunting activities meant that much of the arable land held under customary entitlements underwent a period of extended fallow. During the 1980s and 1990s, the continuing guerrilla warfare in the forests precluded attempts to reopen former swidden garden areas for cultivation and much of the farming land has since returned to dense monsoon rainforest where traces of old settlement sites such as Ira Cao Piti and Laivai are marked by the decaying rubble of house foundations, old garden walls, and scattered graves. Over the last few years, Vero residents have discussed the possibility of reopening former garden areas, and extensive use of the forests is made for regular hunting and gathering of livelihood resources, but to date no specific attempts have been made to reoccupy the land, much of which is

now regarded as having returned to the communal jurisdiction of the customary steward, the clan group Renu Ratu.

Incentives to Claim Possession: The Relative Insecurity of Displaced Settlements

The incentive for the people of Vero to claim possessory entitlements under the proposed land law is reduced by the relative security of their relocation agreement with the landholding *ratu* group. Indeed, Vero households may contest application of a rule of possession to ancestral lands that are not subject to contemporary acts of use or control, which would vest in the state as land without "an identifiable owner" (see below). However, other displaced groups in Lautem have less security of tenure—as "passengers" (I: *penumpang*) or "refugees" (I: *pengungsi*) on other people's land—and have greater incentive to claim possession because of the enhanced benefits of legal entitlements relative to their customary status. The Fataluku settlements of Mua Pusu and Lohomatu on the north coast of Lautem are cases in point. Both groups were resettled by the Indonesian administration on the beachfront at the port of Com in the late 1970s. For displaced members of Mua Pusu and Loho Matu, customary patterns of land ownership and landed authority are retained on ancestral lands despite the relocation of the residential elements of the settlement. In Com itself, however, members of the two communities, who live there in separate residential groupings, have no such entitlements to land under customary arrangements. The senior land-owning group in Com and *mua ocawa* for the port area, *Kon(u) Ratu*, permits the residential arrangements created under military occupation to continue, but denies any form of intergenerational entitlement for relocated households, notwithstanding a degree of intermarriage between the communities. The denial of intergenerational entitlement, in particular, has led to a high degree of tension and insecurity, as the relocated households have now been in residence for more than a generation.

Another example of insecure customary arrangements as a result of the Indonesian military occupation is provided by the small settlement of Lupuloho, which is currently located on the main road to Muapitine village some 10 km east of Los Palos. Initially, the people of Lupuloho were forcibly moved from the southern coast by the Indonesian military to a compound in Los Palos in the late 1970s. Subsequently, they were permitted to develop a new residential site (named Pehe Fitu after their former origin settlement) on the grasslands near Lake Ira La Laru. Here, members have constructed basic thatch housing and are gradually fashioning rainfed food gardens nearby with the support of the

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local customary landholding group. But they complain that their "customary" entitlements to arable land in the area are the equivalent of simple usufruct, revocable by the landholding group, and many continue to express a desire to reestablish their old settlements on the coast where they retain an intergenerational interest in arable land, tree crops, and ancestral cultural sites (see McWilliam 2007c: 173). Should this land be classified as state owned, on the basis of the absence of possession since 1998, the people of Lupuloho will be left with the alternative of claiming ownership on the basis of possession in their place of relocation. While they have not yet done so—the draft land law has not come into effect—there is evidence from other parts of East Timor of displaced groups asserting entitlements outside customary mechanisms on the basis of an alleged Indonesian legal rule that 5 years of possession granted entitlement to ownership (Fitzpatrick, McWilliam, & Barnes 2013: 180). For the reasons set out above, and explored further below, we argue that a better institutional alternative to the problem of relocation is not cross-system assertions of possessory entitlement—similar to the pluralist negotiations of property in other postcolonial contexts—but context-specific facilitation of relocation agreements based on intermarriage and acceptance of the ordering principle of origin.

Which Audience Wins: Customary Systems and State Authority in East Timor

With the creation of the independent state of East Timor in 2002, the challenges of managing entitlement to land now include a scale of resource governance beyond the localized mechanisms of customary systems. The draft 2012 land law reflects an emergent state's desire to regulate resources at a national scale, based on default "territorializing" notions of state title to land (see Blomley 2003; Vandergeest & Peluso 1995). The law defines land held under the "private domain" of the state to include private land "without an identifiable owner" (art. 6 (3)). This provision establishes a bright-line default: the burden of proving private title lies with the claimant. The law then sets out the primary basis for claiming private title in Article 19,[7] which provides that ownership rights shall be awarded to claimants who "hold Timorese citizen-

[7] The draft law also provides for restitution of ownership titles issued by the Portuguese and Indonesian administrations, and held by East Timorese citizens. However, there were relatively few ownership titles issued by the Portuguese and Indonesians, and the draft law grants priority to claims based on possession over claims based on limited-term Portuguese or Indonesian titles, which were far greater in number: see Fitzpatrick (2002: 88–89, 158–60).

ship and possess the property with the intention of ownership, continuously, publicly and notoriously"; and who "initiated possession in a peaceful fashion before or on December 31, 1998. Possession is defined as the use of property for the purposes of habitation, cultivation, business, construction, or any other activity requiring physical use of land. Evidence of possession includes acts of construction, planting, fencing, and enclosures (art. 9).

The rule of possession is bright line in nature (and far removed from customary conceptions of possessory entitlements) as individuals may claim ownership based on acts of physical use and control alone. In terms, however, the rule is subject to an exception for "mere occupants." Article 10 (2) provides that "mere occupants" cannot obtain ownership on the basis of long-term possession. Article 10 (1) defines mere occupants to include people using land with no intention of ownership, such as lessees, and representatives and agents of the possessor, as well as anyone exercising possession on behalf of someone else. This approach is similar to the common law distinction between actual and legal possession, which allows owners to transfer physical control without losing legal entitlements to possess, or remedies based on entitlement to possess. While distinctions between actual and legal possessions create interpretive complexity, relative to a simple rule of possession, they allow for efficient transfers of control to nonowners for temporary periods. In analogous terms, there are benefits in East Timor, in terms of avoidance of conflict, to identifying and enforcing complex agreements between customary landholders and relocated households, notwithstanding their information intensiveness. Making legal space for these types of agreement means that relocated households fall into the category of mere occupants—lessees or agents of the possessor—and not the category of legal possessor.

While agreements between customary landholders and relocated households are information intense, they are the best available institutional mechanisms for managing the legacies of forced relocation, particularly in circumstances of state remoteness and weakness. Yet, in an excess of bright-line enthusiasm, the draft law forecloses the possibility of context-specific distinctions between mere occupants and legal possessors in areas of customary domain. Article 10 (3) states that:

> Possessors will be those who reside in, have erected buildings on, or have cultivated land . . . with ownership claimed by another party based on the belief of ancestral customary domain, even when rent is paid to that party.

Article 10 (3) allows individuals the right to claim alienable ownership even when they pay rent or otherwise acknowledge the "belief of ancestral customary domain" of another party. This category

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includes large numbers of subsidiary groups, affinal allies, and relocated households. The intent of the law seems clear: as a matter of in rem entitlement individual possessors of customary land may claim ownership notwithstanding in personam obligations arising from contracts with customary landholders. Moreover, if the claimants are heirs to historical agreements, they will not even be bound by contractual obligations unless they have novated the agreement.

The National Parliament of East Timor has made a choice to prefer a broad property audience, including potential investors in rural land, over the specialized audience of customary systems. This choice provides maximal but not optimal rule standardization in areas of customary domain. The parliament has approved a general rule of first possession that the state cannot enforce on a general scale. The rule is formulated in other languages (Portuguese and Tetun) than that generally spoken by customary audiences (in our example, Fataluku).[8] As a result of the rule, future negotiations among competing resource claimants in rural districts will take on the indeterminate qualities identified in other postcolonial contexts: they will not involve a shared norm, or salient focal point, for calculating cost/benefit strategies of cooperation or conflict, but competing norms that disable long-standing conditions for authoritative allocation of entitlements by establishing alternative bases for property legitimation (see Trebilcock and Veel 2008: 447).

Conclusion

In emergent states, the formation of authority not only involves the capacity for coercion, but the accrual of legitimacy, as no state can rely on coercive enforcement alone to ensure the implementation of property rights and rules (Merrill & Smith 2007; see also Atuahene 2010a). Merrill and Smith (2007: 1851–52) suggest that the social consensus required for an orderly property system is more likely to coalesce around simple moral principles such as "no trespassing" because of the costs of communicating property information to a large audience. The application of information cost analysis to East Timor, which has proposed a rule of adverse possession as the primary basis for land ownership in the new nation state, suggests that the purportedly simple rule of possession

[8] Tetun prasa is the language that developed among Timorese residents of the colonial capital, Dili, and is now the lingua franca for much of East Timor (where there are up to 26 ethno-linguistic groups).

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should be accompanied by efficient carve-outs for complexity in areas of customary domain. This may take the form of ex ante legislative simplicity—a default rule of possession—supported by ex post Court discretion to enforce contract-based customization of the possessory rule, or recognize customs that provide community-specific exceptions to the rule (as in *Ghen v. Rich*). Alternatively, there could be legislative recognition of community-specific custom, as an exception to default rule of possession, accompanied by mechanisms to limit strategic exit from customary systems, and reduce the transaction costs of dealings with outsiders (see, e.g., Knetsch & Trebilcock 1981: 71–76; Trebilcock 1984: 396–97, 400–10). While we agree that these institutional options are more appropriate than a blanket rule of possession, our analysis of complex interpretations of simple rules suggests a further consideration: that a politico-legal community must form around common points of epistemic reference before bright-line rules can be formulated and applied with a degree of informational simplicity (Braithwaite 2002: 50–51; see also Dworkin 1986: 211).[9] In the absence of sufficient epistemic consensus on property, or a state willing and able to absorb the costs of coercive enforcement of property, all types of new legal rules—simple or complex—may increase the information costs of property as they are interpreted within segmented systems of communication, and as individuals take advantage of opportunities for costly assertion of property claims across competing systems of property enforcement.

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[9] In a transitional context, involving historical acts of dispossession and land injustice, the formation of a property system around common points of epistemic reference may require elements of reparation or restitution to provide remedies for wrongful dispossession (as opposed to a rule recognizing current possession alone) (see Atuahene 2010b).

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