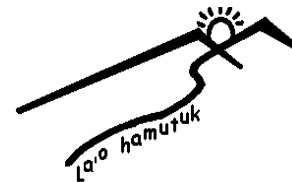


# La'ó Hamutuk

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## Submission to Committee A, National Parliament, Democratic Republic of Timor-Leste

from La'ó Hamutuk

### regarding land, housing and water rights in the draft Civil Code

29 September 2010

This submission will focus on the following:

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Our website [www.laohamutuk.org](http://www.laohamutuk.org) includes further analysis and documents on land issues.<sup>1</sup>

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<sup>1</sup> For specific suggestions for a national land consultation and holistic approach to land policy, read our October 2009 submission to government on the draft Land Law and implementation issues at: <http://www.laohamutuk.org/Agri/land/tll/SubTLLLH31Oct09En.pdf>

## **Introduction**

La'o Hamutuk is a local NGO that has followed the role of international institutions in Timor-Leste since 2000. In 2009 we began monitoring developments in Timor-Leste's new property regime together with members of the civil society Rede ba Rai (Land Network). International institutions play a major role in developing these processes.<sup>2</sup>

The Civil Code is a key pillar of law in Timor-Leste. It governs people's daily lives from birth to death: including paternity, inheritance, family, and land and water rights. It is the first of many new proposed property laws.

We thank Committee A for the opportunity to present a submission on the draft Civil Code. In this submission we focus on property rights in Book III – such as land, housing and water. We explore issues where there are potential inequities between actors: such as the State and community; landlords and tenants; commercial water users and household water users; formal systems and customary systems. The Civil Code does not stand alone: it interacts with other laws and policies. We explore the relationship of the Civil Code to the draft Land Law and the implications of passing these laws before there is a National Land Policy.

Although there are positive aspects to the draft Civil Code, we have a number of concerns that the draft Civil Code undermines Timor-Leste's Constitution and its human rights obligations.

## **The role of land and water in Timor-Leste**

There are high hopes for new land laws – for their capacity to secure land tenure, reduce conflict and encourage economic development. However, to work, these laws should be good laws, which promote social equity and respect Timorese culture.

For most Timorese people, land and water are crucial to their spiritual and physical well-being. It is at the core of our social relationships. It is our link with the ancestors. In many other countries, colonialism, occupation and globalization have undermined this “indigenous” relationship to land and water. Across the world, new understanding of indigenous knowledge systems and environmental sustainability reveal how intricate and sophisticated these relationships are. Timorese people are rightly proud of their tradition and culture.

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and our February 2010 Bulletin article *Land Justice in Timor-Leste*:

<http://www.laohamutuk.org/Bulletin/2010/Feb/bulletinv11n1-2.html#land>

<sup>2</sup> For example: USAID's Ita Nia Rai work on preparing a land cadastre and the Land Law; the World Bank's policy options paper on community land; Portuguese bilateral support to the Ministry of Justice to develop the draft Civil Code; and Portuguese law firm Miranda who drafted the Expropriation Law - at the same time as it represented Portuguese property developers in Timor-Leste.

Today most Timorese people have access to land that allows them to provide for many, if not all, of their daily needs. This is important to social equity. We believe the first priority of the property rights system should be to ensure that all people can access land for their physical and spiritual needs.

So far draft laws, including the Civil Code, give little consideration to the fundamental long-term issue of customary land and other land governed by communities. This is as much as 97% of the country's land area. It is the basis of the non-oil economy. Even at conservative estimates, the annual activity in the non-cash economy is hundreds of millions of dollars: access to land is at the heart of this activity.<sup>3</sup>

Decisions about land are also key to peace and reconciliation processes. Many people have told La'o Hamutuk that you can't discuss land without discussing its story. How did people come to be on the land? Was it given by the ancestors? Did they take it through force or corruption? Were their grandparents forcibly moved there as political prisoners? Did the Indonesian military force them into the towns? Did they gain a land certificate because they could read and write Portuguese? Did environmental destruction make it hard to live from the land and force people to move?

The story of Timor-Leste's land is the story of Timor-Leste's people.

For all these reasons it is crucial that Timorese people are involved in decisions on land and water issues, as we outline in the next section.

## **Popular consultation is needed for informed decisions**

Today Timor-Leste faces the daunting challenge of developing its own formal property rights process. This process will take many years, even decades. To guarantee fair land rights, laws are needed to protect the rights of the weak from the desires of the strong. People must also know and be able to access their rights under these laws. While new laws on land can bring benefits, they also hold risks. Laws may not be fair. By raising property prices and making it easier to buy, sell, lease and mortgage land, they could cause poor people to lose their land.

There is insufficient research or concrete data on land and property issues to allow us to know the impacts of different policy decisions. Without thorough research or extensive public consultation it is difficult for policy makers to ensure that new laws are consistent and appropriate for the Timor-Leste context.

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<sup>3</sup> For an example in Melanesia see Tim Anderson, "Land registration, land markets and livelihoods in Papua New Guinea" in Tim Anderson and Gary Lee (eds) *Defending Melanesian Land*, Melanesian Indigenous Land Defense Alliance, 10 April 2010 available at:

[http://www.aidwatch.org.au/sites/aidwatch.org.au/files/Land report April2010 for web.pdf](http://www.aidwatch.org.au/sites/aidwatch.org.au/files/Land%20report%20April2010%20for%20web.pdf)

The Vanuatu Cultural Centre has done extensive research into the traditional economy. See [www.vanuatuculture.org](http://www.vanuatuculture.org)

The draft Civil Code establishes rules that intimately affect people's daily lives: such as family, inheritance, land, custom and water. It is a difficult law to understand, with over 2,000 articles and 500 pages. There was only a short Dili-based consultation at the end of 2008. Many people we have spoken to are interested in discussing and debating issues covered in the Civil Code, if given the opportunity.

La'o Hamutuk and others suggest that a National Land Consultation should be the first step in developing Timor-Leste's property regime. The Ministry of Justice could lead this process, in cooperation with other government ministries.<sup>4</sup> A National Land Consultation could establish an overarching vision and guiding principles for property rights, and identify what people think is "fair." It could systematically identify what processes are needed to ensure that people know and can access their property rights such as: social housing; financial education; legal aid for land cases; mediation and arbitration; community land use planning; and an independent information service to support people to make informed decisions. It could prepare for future professional needs such as: anthropologists, paralegals; land academics; and popular educators. This process could map the links between policies and laws; and explore how people's social and economic status inform their access to property.

The consultation could then become the basis of a National Land Policy. A National Land Policy could establish a general policy position to ensure consistent laws – such as on customary land. It could identify "phases" for developing a property regime: to ensure that laws are sequenced in a way to minimize legal loopholes, and ensure that processes are in place to support people to access their rights under new laws, and that they are prepared for the changes that they bring.

Haburas Foundation's *Matadalan ba Rai* project shows that extensive community-led consultation is possible and can be done easily, quickly and cheaply.<sup>5</sup> In January 2010 Rede ba Rai wrote a detailed plan for how to develop and implement a national consultation process to inform a policy on customary land and other land governed by communities.<sup>6</sup> This shows that community level national consultation on land decisions is realistic and achievable.

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<sup>4</sup> Government could also encourage other stakeholders to discuss land issues; such as Parliament, community groups, NGOs and universities.

<sup>5</sup> This project aims to support community land advocacy and identify community concerns about land. This will inform Haburas' policies and processes to inform community education on land issues, and identify advocacy priorities. The project operates in 40 sucos.

<sup>6</sup> This was given to the World Bank and other donors supporting government on community land policy-making.

A National Land Consultation and National Land Policy could have anticipated many of the concerns we raise regarding the Civil Code. While we offer several recommendations, issues such as customary land are complex and the people most affected by these policies should have the right to participate in decision-making.

**We urge Parliament not to enact any legislation on property issues until government has facilitated a National Land Consultation, and a National Land Policy is in place.**

### **Statutory law should respect custom and common practice**

Article 2 of the Civil Code only recognizes local customs only when they are specifically written into the law. For this reason, it is essential to consider local custom and common practice in developing the Civil Code. We feel a National Land Consultation is the best process to determine what these needs are and to see how statutory law can complement traditional law.

If government is unwilling to undertake such a process, we offer the following recommendations:

We recommend new articles that:

- Establish people's right to access and protect sacred sites (fatin lulik or be'e lulik) according to their traditional law. This should include access to sacred sites when someone else owns the property they are on: such as public domain land and water, or property expropriated for public works.
- Guarantee strong rights for people whose water use is for subsistence needs (see *Strengthening the rights of household water users*, p. 6).
- Recognize people's rights and responsibilities to protect the land and water under traditional law. This should include the right to have a role in the day-to-day management of water resources: provided that this is sustainable and non-discriminatory. This should include a requirement of Free Informed and Prior Consent from customary land owners for use of customary lands. Permanent residents on customary land who are not part of the customary community should also be included.

In addition:

Several articles in the Civil Code refer to the rights of the “fruits” of the land, which includes profits from rents or harvest. Under the draft Civil Code, trees belong to the landowner. The landowner may have to pay compensation for one harvest or other costs to the person who planted a tree. In reality, planting a tree signifies different things in Timor-Leste. Local custom determines who has the right to that tree and its products, and the relationship to the land it stands on.

- We recommend that Parliament research policy options to address this issue.

#### **The Civil Code and customary land rights in the proposed laws**

Chapter V of the draft Land Law allows people to own property as a community. It also outlines a Community Protection Zone, with plans for a future Community Land Law or other regulations to outline special provisions for these areas.

Careful planning is needed if Parliament enacts a Civil Code and Land Law before special protections are in place for land under community governance. It should be clear when approving first property rights if exceptions to the Civil Code apply. For example, art. 957 of the Civil Code allows land leases up to 50 years.<sup>7</sup> This is inappropriate for communities. Once a 50 year lease is given, it is hard to revoke and revise.<sup>8</sup>

#### **Women’s property rights require a holistic approach**

There are many provisions that appear not to discriminate against women, but in practice reinforce inequality between women and men with respect to their property rights. (JSMP has articulated these further in their submission). We strongly recommend that the areas of marital property, inheritance and succession in Book IV and V be discussed extensively with women and customary communities.

We also have more general concerns about how property laws will impact women’s property rights. In Timor-Leste women have limited economic opportunities. In the cities, people live in a cash economy and women are more likely to have lower or less secure incomes. This makes it harder for them to meet rental costs or buy homes. Once land laws are in place housing prices and rents in urban areas will rise. It will be easier to mortgage land. Vulnerable people who are not prepared for these changes, or are very poor, will be particularly affected.

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<sup>7</sup> A 16 September JSMP focus group suggested 25 years as a possible starting point for discussions.

<sup>8</sup> Because of their complexity, developing community land laws and regulations take many years.

We recommend adding new articles to:

- Prevent the State from effecting evictions or expropriations until all tenants are resettled in alternative housing. If tenants rely on a land-based livelihood for subsistence, the State should ensure that they have access to an equivalent livelihood. (This could create incentive for social housing and ensure livelihood protections for poor people).
- Require government to publicly release an annual report on vulnerable persons' property rights. At minimum this report should:
  - list all Government expropriations and evictions from State land in the previous year
  - provide gender disaggregated statistics on property ownership, by district<sup>9</sup>
  - include statistics on average property values and rents, by district<sup>10</sup>
  - list services or programs that support vulnerable people's housing rights
  - list commercial leases to State administered land, with the name of the suco the land is in

## **Strengthening the rights of household water users**

Water relates to various human rights: including the right to health, the right to food and the right to water. It also relates to the rights of special groups – such as indigenous people and children.

### *Household and Large Water Users*

Book III, Title II, Chapter IV refers to private and public water sources, and water licenses. In many places it does not discern between household water use and commercial water use. (See Box: *Commercial water users' right to draw down on public water*, on p.7).

We recommend that the Civil Code require water licenses for commercial and industrial users, with exception to water from rainwater harvesting. Household and subsistence users should not require licenses.

This could be achieved by:

- Revising articles 1309 - 1314 to be consistent with a right of use for subsistence and household needs, and commercial and industrial licenses for other users.

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<sup>9</sup> These statistics are already available through the Ita Nia Rai land cadastre.

<sup>10</sup> A National Land Valuation Office (or similar structure) will soon be in place. This could provide information on property values. Average rental prices could easily be incorporated into National Directorate of Statistics economic research.

- Deleting art. 1316 and replace it with an article that limits the right of access without a license to household or subsistence use, with exception to rainwater harvesting.
- Deleting art. 1306(1) sub-articles b), d) and e) and limit a) to water sources based on rainwater harvesting.

#### **Commercial water users' right to draw down on public water**

*Art. 1314 & 1316 allow people to use underground water on her or his property for any purposes. This includes companies, and individuals. If this diminishes a public water source, they must replace what is lost.*

Dili relies on water from an underground aquifer. The aquifer contains both freshwater and saltwater. Over-pumping water will tip the balance, and pump seawater into the aquifer. This contaminates the drinking water supply with saltwater. The impacts of one over-user, such as a company, cannot be easily measured or reversed. This is one example why commercial uses should not be able to draw water without a license.

#### *Water users' rights*

We recommend a new article to:

- Require that all decisions that impact people's water use for subsistence be based on Free Prior and Informed Consent of regular, long-term users. Water conservation for environmental purposes, and water restrictions among domestic users, could be exempt.

This could recognize the crucial role of water, particularly the seas, in food safety nets. It could give vulnerable people the right to participate in decisions that affect their daily lives – such as a proposed South-West petroleum corridor, a future Betano Heavy Oil Power Plant or large dams.

### **Better protecting vulnerable people against unfair eviction**

The Civil Code refers several times to expropriation and the right of landlords to evict tenants. We think that it should establish stronger protections against wrongful eviction – which could be further articulated in other laws.

#### *Evicting Tenants*

Art. 980 outlines that if a tenant is 8 days late in paying their rent, they must pay compensation to the value of 50% of the rent, 100% if they are late 30 days. The obligation to pay 50% - 100% compensation is dangerous in an economy where many people live under, or close to, the poverty line. It is open to abuse by landlords, especially given the high housing demand.



- We recommend deleting article 980.

Art. 1018 h) allows a landlord to evict a worker residing on their property when the contract finishes.

- We recommend amending sub-article h) to entitle the worker to a minimum of 30 days notice before eviction, if the property is used as a principle residence. Landlords could apply to the court for an exemption if the worker's contract was terminated due to violence or behaviour that endangered other's well-being.

#### *Expropriation*

Art. 1231 refers to expropriation for "public or private use." We believe that the State should only have the right to take land for the public use.

- Delete "private."
- Add - that expropriation can only take affect with the Free Prior and Informed Consent<sup>11</sup> of those affected.

#### *Unknown property*

Art. 1265 states that real estate without a known owner is owned by the State.

- Add – reference to a process to attempt to identify the owner if the State intends to use this land.

#### *Seizing mortgaged assets*

Art. 635(1) allows a lender to call in the full value of a loan, when the value of the asset given as security drops - even when the borrower continues to pay back the loan regularly and did not contribute the drop in value. (See Box: *Seizing mortgaged assets before a borrower defaults*, p.9). If the borrower cannot pay the full loan, the lender can seize the asset. The lender should only be able to call in the full value of the loan if the borrower contributed to the drop in value.

- Amend – only allow the lender to demand the full value of the loan if the borrower contributed to the drop in value.

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<sup>11</sup> Many communities we have spoken are happy to negotiate land use, especially those projects which they think will genuinely benefit the local community. Their main concern is that they are not able to negotiate access to alternative housing or livelihoods, or access to sacred sites.

**Seizing mortgaged assets before a borrower has defaults**

Maria borrows \$2,000. She uses her house to guarantee the loan – her house is worth \$2,200. Each month Maria pays \$50 towards the loan. One day, the government announce that they are going to build a new power generator near Maria's property. The value of Maria's house drops to \$1,500. Maria still has \$1800 to pay back on the loan. Even though Maria continues to pay back the \$50, under art. 635(1) the money lender can ask her to pay back the full value of the loan all at once. If Maria cannot pay, then the lender can take the house.

*Deeded possession*

Book III, Title I describes deeded possession. This is when someone has received a transfer of title or ownership for a property from the owner, but this transaction is not yet registered with a notary. Deeded possession rights are much weaker than registered property rights. Vulnerable people who are illiterate and poor will find it hardest to access a notary. At present, many land transactions are registered with Xefe do Suco or Xefe do Aldeia – who are easier to access. We have concerns that many people will be denied a fair land right because they are unable to access a notary.

We recommend adding:

- An “equity” clause to ensure that notary services are accessible to vulnerable people: including illiterate people, those in rural areas, the poor, women and those with disabilities.

**Clarifying how the Civil Code relates to first property rights**

If the Parliament enacts a Civil Code before first property rights are issued, this could raise some specific issues, including those we list below.

We recommend that there should be clarity:

- That “titles” refer to titles issued by the Democratic Republic of Timor-Leste. Not the Indonesian or Portuguese administrations. This relates to articles 1174; 1181 d); 1185; 1210 and 1214.
- If art. 1193 applies to first property rights cases. This relates to the situation where someone has occupied someone else's land and made “necessary” improvements to the property. The property owner has to reimburse for the cost of these improvements. The property owner does not have to reimburse “luxurious” improvements. The devastation of 1999 and 2006, and the drastic difference in lifestyles and economic capacity, make it hard to determine between a “necessary improvement” (which is reimbursed) and a “luxurious improvement” (which is not).

So far, there is no research on the impacts on poor people of applying or not applying art. 1193. We have concerns that poor people who gain their land rights under a future Land Law could be forced to pay costs that they could not afford to reimburse for houses that a previous occupier built. This could be a barrier to land ownership.

- That people can claim “uzukapião”<sup>12</sup> as a community.

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<sup>12</sup> “Uzukapião” is a form of land reform. It allows people to claim land through long-term possession: this can include daily use, enclosing a land area with a fence, erecting a sign and other processes. People cannot claim possession if the land owner gives permission for people to use the land, asks for rent, asks people to leave the land or asserts that they are the landowner in any way.