



## *Rede ba Rai Submission on Community Land*

Rede ba Rai Timor-Leste is a network of 20 organisations who work on land rights issues in Timor-Leste. As identified by the KSI<sup>1</sup> slogan, ‘without land we have no dignity, without dignity, we have no nation’, we believe that guaranteeing access to land for all people is a fundamentally important part of protecting not only human rights and economic development but also of protecting our culture and our nation.

Rede ba Rai would like to take this opportunity to express our congratulations to the Minister of Justice on the publication of the draft Land Law, it is a Law that is crucial to many aspects of justice in Timor-Leste. There are many principles within the current law which point in the right direction and hope that the following principles and recommendations might help the Minister and the Land Law working group to improve upon the second draft of the Law.

**Rede ba Rai’s vision is a situation where ‘the people of Timor-Leste now and in the future have access to land that is just, appropriate to their needs and guaranteed by law’<sup>2</sup>.**

According to the network’s working vision there are four key pre-requisites to achieving this vision;

- Fair distribution of Land
- The creation of fair, independent and expedient mechanisms for the resolution of land disputes etc.
- That legislation and policies needs to be designed specifically with the view of protecting land vulnerable groups<sup>3</sup>  
*and most particularly,*
- **That ‘all land processes, administration, legislation and policies in Timor-Leste must reflect the social, cultural, economic and ecological context of Timor-Leste’.**

*It is with particular reference to the last two points that we write this submission on Customary Land.*

### A note on language

Many different words and expressions are used interchangeably to refer to land tenure systems in Timor.

During the consultation process communities referred (often interchangeably) to ‘sacred land’ (rai lulic/rai adat), ‘traditional land’ (rai tradisional), ‘customary land’ (rai customi), ‘community land’ (rai komunidadade), ‘communal land’ (rai komunal), ‘ancestral lands’ (rai avo sira).

The draft Land Law uses the term ‘community land’ in reference to these lands.

In our submission we have referred used the term customary community as referring to lands that are managed and owned by a self identified customary community.

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<sup>1</sup> Kdadaluk Sumulitik Institutu

<sup>2</sup> Rede ba Rai strategic planning – May 2009

<sup>3</sup> Rede ba Rai identified a number of land vulnerable groups, Women, farmers, customary communities, future generations, the urban poor

## *The importance of Customary Community Lands*

Customary communities are one of the largest and most vulnerable land groups. Customary communities are typically highly dependent on their land for all aspects of their survival (economic, social, cultural, ecological, cultural and spiritual). Experiences from other countries show that customary communities are often less consulted about their rights to land than other groups and that they are frequently the victims of arbitrary loss of access to land.

Lack of recognition or inappropriate recognition of customary community land has led to, social and political marginalisation, impoverishment, food insecurity and conflict.

One of the main goals of Rede ba Rai during the Land Law drafting and consultation process has been to promote and support the involvement of communities and the population of Timor-Leste in the formation of the Law. We had the good fortune to be able to attend and monitor the district consultation meetings where,

*Customary Land was mentioned as a crucial issue in every district consultation meeting, every land training event and every civil society meeting that was run by either Rede ba Rai or the Government.*

### *A brief look at Customary Community Land in Timor*

Structures of land tenure can vary a lot in different parts of Timor but generally are organised around clan structures (most often around the uma knua or uma lulic/lisan) which are governed by traditional/customary rules and norms.

**Although we use the term ‘community land’ what we are referring to is a community within which there are often individual or family rights to land/fields/resources.**

Land is a fundamental element of the entire customary structure.

Almost all land in Timor is governed by community or customary tenure

- 70 – 80% of the population are directly dependent on these structures by being involved in subsistence agriculture,
- Almost the entire population are dependent on customary social structures in general for spiritual rituals and cultural identity.
- According to the Asia Foundation 89% of the population depend on traditional and local authorities for justice.

Customary community land has been a crucial issue for the majority of countries in the world. Many countries (South Africa, Senegal, Botswana, Mozambique, Mongolia, Uganda, Tanzania, PNG, Vanuatu, Namibia and Ghana) have given communities prima facie recognition of their ownership rights over their lands<sup>4</sup> (the Ghanaian Constitution vests almost all land in customary authority).

In the past disputes over the lack of recognition of customary land have caused violence and social problems in many states (Australia, United States, Indonesia, Kenya, Papua New Guinea, South Africa).

**In Indonesia Suharto’s regime** used the Basic Forestry Law 1967 and other pieces of legislation to place over 75% (144 million hectares) of land under state control and take it away from adat communities.

*Recognizing and strengthening community ownership of land can;*

- Increase tenure security. Aside from the fact that many communities and land vulnerable groups within community structures depend on the flexibility of community tenure arrangements. According to land expert Daniel Fitzpatrick who advised the Ita Nia Rai programme, 'strong group and community links mean that traditional social structure can provide tenure security'.
  - Enable community economic development. Rather than hindering and slowing economic growth we should follow the global trend of looking at communities as the drivers of economic development. Recognition and mapping of community ownership within Kayan Mentarang National Park in East Kalimantan supported community negotiations in relation to local logging concessions (PT Sarana Trirasa Bakti) and enabled the community to secure better deals and compensation.
  - Increase security and reduce conflict. In many places local and/or traditional conflict resolution mechanisms are both more appropriate and legitimate for **resolving conflicts**. In these scenario's where communities feel that local and/or traditional conflict resolution mechanisms are more appropriate supporting existing structures (with appropriate checks and balances) is significantly more appropriate and more successful in terms of reducing and preventing conflict.  
While sensible reforms and appeals processes should be put in place to ensure that structures are more participatory and that decisions do not contravene basic human rights attempts to replace or weaken these structures is now globally recognized as a bad idea.
- The 2008 Asia Foundation Justice Sector report states that between 80 and 90% of people in Timor have faith in the traditional justice system and that 75% would rather bring a case to the traditional system than the formal system.
- Provide low cost land administration and resolution of land conflicts. Local justice and dispute resolution structures provide low cost solutions to land disputes which are generally more appropriate and sustainable. In the Ethiopian state of Tigray the handling of land administration at the most local level is hailed as particularly cost effective.
  - Protect against the unsustainable use of resources and environmental degradation. The strengthening of Tara Bandu and other local community institutions in Timor-Leste has already proved dramatically successful in the drive to prevent slash and burn agriculture, the destruction of forests and the management of local natural resources<sup>5</sup>.
  - Consolidate and support local institutions. In Mozambique, despite other implementational problems the recognition of **communities'** role in land ownership and the recognition of their right to be consulted helped to strengthen local level institutions.

*Weakening or taking away community ownership of land can occur in many ways and can;*

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<sup>5</sup> Haburas monitoring and evaluation of Tara bandu projects 2007, 2008.

- Weaken tenure security. For example ambiguous zoning of land belonging to community Citorek Kasepuhan inside Mount Halimun-Salak National Park (Jakarta) has resulted in the community suffering from severe tenure insecurity. While the existence of community land is recognised Citorek Kasepuhan land is also on land that is zoned as state land. Many communities have not undertaken improvements to their land or made investments because they fear losing their land. The ambiguity has also affected park authorities who are unable to draw up park management plans until the issue is resolved<sup>6</sup>.
- Reduce access to land and create poverty. Lack of legal aid and representation for communities during negotiation processes with companies and/or states has led to alienation of large tracts of community land and land monopolies in Mozambique, Brazil, Indonesia and Nicaragua. Communities in Niassa province in Mozambique, lost access to much of their land because of lack of adequate consultation in relation to a forestry project known as the Malonda project (ai kakeu). Communities lost their crops, and in many situations were relocated to remote land that had little access to health services or education.
- Cause Conflict. **'Inconclusive tenure reform can in fact increase conflict and insecurity'**. An unresolved land dispute between the people of the Kajang district, Bulukumba, South Sulawesi and rubber company Lonsum (who were granted a Hak Guna Usaha of 5 million hectares for rubber plantations on community land in South Sulawesi in 1982) escalated into a violent conflict in July 2003 in which 3 people were killed, dozens injured<sup>7</sup>.
- Increase food in-security. Research shows that communal fields and gardens, forests, common grazing land and common water sources are highly important for the food security of customary communities in Timor-Leste<sup>8</sup>.
- Increase environmental degradation. Many communities have very strong traditional environmental protection mechanisms, the Sasi in parts of Indonesia, Tara Bandu in Timor-Leste. Reducing communities control over their land, resources and environment weakens enforcement of these mechanisms and leads to environmental degradation.
- Restrict and undermine customary communities cultural activities. According to the EU, **'the internationally recognised right of indigenous people to collective identity, survival and self-determination depends upon their access to land and natural resources in their traditional territories'**<sup>9</sup>  
*Communities and Indigenous peoples rights to land are recognised under International Law*
- The Convention on Economic, Social and Cultural Rights (and it's optional protocol) which Timor-Leste has signed and ratified, recognizes the right of all people to 'an adequate standard of living' which includes adequate housing.

In Liquica Lianain and traditional leaders stated that the strength of these institutions were diminished in locations where communities were less certain of their land (for example, translocation and transmigration sites).

<sup>6</sup> [http://insideindonesia.org/index.php?option=com\\_content&task=view&id=1245&Itemid=47](http://insideindonesia.org/index.php?option=com_content&task=view&id=1245&Itemid=47)

<sup>7</sup> <http://www.indonesiaalert.org/article.php?id=38>

<sup>8</sup> Fitzpatrick, McWilliam and Barnes, 'Policy Notes on Customary Land in Timor-Leste', 2008.

<sup>9</sup> 'EU Guidelines to support land policy design and reform processes in developing countries' Communication from the Commission to the Council and the European Parliament, Brussels 19.10.2004, SEC (2004) 1289

- Article 27 of the International Covenant on Civil and Political Rights has been interpreted in a number of cases brought to the Human Rights Council to **protect communities' rights to their lands where it was recognised that withholding their land impacted on their 'enjoyment of their culture, the profession and practice of their religion or the use of their languages'**. (*Länsman et al. v. Finland*)
- The Declaration on the Rights of Indigenous Peoples (which Timor-Leste voted in favour of in September 2007) gives indigenous peoples **'the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership'** (Article 26.2) and obliges states to **'give legal recognition and protection to these lands, territories and resources'** (Article 26.3).
- Principle 22 of the Rio Declaration (1992) affirms that: **"Indigenous People and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development"**
- 1989 ILO Convention No. 169 concerning indigenous and tribal peoples in independent countries.
- UN Basic Principles and Guidelines on Development Based Evictions and Displacement. Many of the principles within this document should be taken and applied as best practice and international law. The basic principles call for example for states to place specific emphasis on the protection of vulnerable groups *in particular indigenous groups*. It recognises communities rights to be involved in consultation about laws and regulations which may effect them, their right to be involved in the planning process and the need for Eviction Impact Assessments which specifically take into account the impact of relocations or evictions on culture and identity of indigenous groups.

*What does the draft Land Law say about Community Land in Timor?*

Chapter 5 (Articles 24 – 27) is the section that deals with community land. While Article 24.1 recognises the concept of community land - ‘*Areas where local communities organize the use of the land and other natural resources by means of social and cultural standards are considered as community land*’,

*it does not recognize the community as having an ownership right.*

The explanation notes that accompanied the second version of the draft law referred to the concept of **community land as being ‘similar to the notion of ‘protected zone’**”. Article 24.3 which talks about the ownership of immovable properties located within community land talks about the ‘**characterization**’ of an area as community land.

The language used at every stage makes it clear that there is not a clear right of ownership for communities, and that the government have not given communities the presumption of ownership that was recommended in the research done by Fitzpatrick, McWilliam and Barnes<sup>10</sup>.

<p>Art 3.1 (Past land rights): This article recognizes the existence of <i>propriedade perfeita</i>, <i>hak milik</i>, ‘<b>customary rights</b>’, <i>hak pakai</i>, <i>hak gunah bangunan</i> and <i>hak gunah usaha</i>.</p>	<p>While the recognition of customary land in this article is a significant improvement on the original draft the phrase ‘<b>customary</b>’ is somewhat confusing.</p> <p>There is no reference in this article to community rights, leading us to infer that the rights given to communities in Articles 24 – 27 are so weak that they do not even get a mention in this article.</p> <p>According to the arguments and principles laid out in the previous pages, Rede ba Rai believes that communities should have a strong ownership right to their lands.</p> <p>Community land should be inalienable and there should be a moratorium on any large scale outsider dealings in community land until the state has passed appropriate legislation governing the use and protection of customary land, in order to protect customary lands.</p> <p>Future legislation should be designed in a way that guarantees maximum participation of customary communities, it should at the very minimum be a parliamentary law, but the Ministry of justice and DNTPSC should put in place as soon as possible some sort of consultation mechanism.</p> <p>It should look at, among many other issues, what constitutes a proper community consultation, what members of the community should act as representatives, how contracts and agreements should be entered into, how profits from lease of community lands should be shared by community members and in what situations the state can force alienation of community lands.</p> <p>We feel that it is very important to lay these principles out clearly but that the current law is not necessarily the appropriate vehicle for doing so.</p> <p>Nonetheless we feel that some basic principles should be acknowledged in this law;</p>
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<sup>10</sup> Policy Notes

	<p>-That communities are the fundamental owner of their lands</p> <p>-That as such they have a right to all profits and compensation derived from their lands</p> <p>-As with private land holdings, alienation of community land by the state can only be for certain stated purposes and after free, prior and informed consent, just compensation, and the provision of alternative land and livelihoods.</p> <p>The moratorium on large-scale outsider dealings in community land before such legislation is passed is envisaged as a way to protect communities from any imminent alienation of their lands in illegal and unfair ways.</p>
<p>Art 24 (Defintion of Customary Land)</p> <p>1. Areas where communities organize the use of the land and other natural resources by means of social and cultural standards</p> <p>2. The existing customary rights of land possession and use of natural resources are protected provided that they are not inconsistent with the Constitution and the laws.</p> <p>3. The characterization of an area as community land does not affect the ownership of immovable properties located in it or the rights of its respective title holders.</p> <p>4. The National Property Cadastre (ie. DNTPSC) identifies the areas to be considered as community land.</p>	<p>We feel that the definition of community lands is something that should be included in article 3 in order to give it the same standing as the other types of land rights.</p> <p>The definition should however be strengthened. According to Rede ba Rai community land should be given a strong primary ownership right which would put communities in a strong position to protect their own lands, negotiate with third parties, and the state.</p> <p>While there is without a doubt a need to protect communities, and prevent local level seizure of land and institutions Art 24.2 also leaves much room for mis-interpretation. It is implicit in the constitution and legislation that the exercise of a right of ownership must be in accordance with the constitution and the law. Article 24.2 instead gives significant power to the state to grant and take away communities rights.</p> <p>DNTPSC should facilitate the community to identify their own lands but the community itself should have a central role in identifying the community and its lands.</p>
<p><i>Art. 25 (Local Community):</i></p> <p>1. Definition of local community;</p> <p>-At the Suco level or lower</p> <p>2. Local communities may constitute co-operatives or other forms of association allowed by the law with the purpose of managing and engaging in commercial exploitation of community lands over which they may obtain property rights.</p> <p>3. Immovable properties under the ownership of the legal entities mentioned in part 2, located in community land are inalienable.</p>	<p>Where did the definition of community land come from? Was there adequate consultation with communities at the suco level to ascertain whether this definition is suitable?</p> <p>For example, how the fact that communities must be at the Suko level or lower impact on customary communities that sit on or across suco borders, or are not contiguous?</p> <p>Article 24.2 is an attempt to give recognition to some of the fears expressed by communities and civil society in relation to community land.</p> <p>In reality, it does little to deal with fears about appropriation of land and the weakening of community tenure. It would be better to give communities a strong inalienable ownership right under article 3.1. This would give them the best protection from third parties and the state, and will allow communities to benefit from profits on their lands.</p> <p>Because of the need to prevent unsustainable use of community land and ensure fair and just participation in the management of land and natural resources a moratorium could be placed on large transactions re. community land with outsiders and/or the state until further research, consultation and legislation have been prepared to regulate these scenarios.</p> <p>The current articles regarding legal associations and co-operatives needs to be thoroughly thought about as they</p>

	<p>could have significant impacts on communities.</p> <p>If the Minister feels that this article is still necessary perhaps a more sensible protection than the one contained in article 24.2 would be to state generally that local communities whether through forming a co-operative, legal association or some other mechanism, must administer and manage their land in a manner that ensures participation of all, follows the constitution and relative legislation.</p> <p>A secondary suggestion in this regard is that communities that claim land at the exclusion of other community actors or communities that attempt to transfer, mortgage, or enter into land contracts should not be able to until appropriate research is done and legislation passed on how best to regulate such arrangements. While the formation of legal co-operatives or associations is one such option, significantly more work is required to guarantee this.</p> <p>In the mean time, no company, third party or the state should be able to alienate community land by virtue of the fact that they have not yet formed a legal association. As a point of principle, no community or individual for that matter should lose a right because they have not yet (for example) formed a legal association. By recognizing a strong community right, we acknowledge the communities right without imposing upon them a very narrow set of options for formalizing their title.</p> <p>There should be a presumption of the right of the community, and the burden should be on the third party or outsider to show that this is not the case.</p>
<p><i>Art 26 (Local Community)</i></p> <p>Community participate in the management of natural resources, conflict resolution, the identification of the limits and boundaries of community land.</p> <p>(The identification of boundaries is not done following customary norms and practices and is done by DNTPSC).</p>	<p>This article is the vaguest of descriptions of community land, and the values and processes that the community currently and should have responsibility for.</p> <p>This right should be significantly stronger, and needs much reflection and consultation.</p> <p>This article could be changed to give special recognition (if not exclusive jurisdiction) to the importance of community conflict resolution and natural resource management, but it should be made very clear that this is not an exhaustive list and that the community is responsible for many other acts and issues in relation to community land. The regulation of these responsibilities should be left to subsequent legislation.</p> <p>It was made clear in the notes above that DNTPSC is not an appropriate body to be responsible for the delineation of communities and their lands, this role should be fundamentally that of the community.</p>
<p><i>Art 27 (Protection)</i></p> <p>1. The state is responsible for protecting community lands, preventing undue appropriations, indiscriminate and non-sustainable use of the natural resources and real estate speculation.</p> <p>2. Communities are to be consulted when the State wants to grant or lease their lands to a</p>	<p>The state should be responsible for protecting the entire country against undue appropriations, indiscriminate and non-sustainable use of all land.</p> <p>In relation to community land, the state should be responsible for putting legal structures and other processes and mechanisms in place that support and guarantee the protection of community land but it should be made clear that this is not a special power to oversee all matters, or projects on community land.</p> <p>The notion of sustainability should be better defined. At the</p>



<p>third party, but there is no definition of consultation, of how that consultation should proceed, which parts of the community should be consulted or who should be responsible for guaranteeing that the consultation is fair.</p> <p>Essentially the state can appropriate community land without the consent of the community because there is no obligation on the state to follow the results of the consultation mentioned in (Article 27.2)</p>	<p>moment state policy on the definition of sustainability is very unclear. A careful definition should include reference to environmental sustainability, social and cultural sustainability, food security and local livelihoods.</p> <p>Similarly the notion of consultation should be better defined. While further regulations are needed to lay down specifically how consultations in relation to the use of community land, and the sharing of profits or proceeds might operate, a general definition of consultation, which safeguards the rights of ALL community members to be informed and included in any and all decision making processes is crucial to ensuring local justice.</p> <p>The state should not under any circumstances have a right to grant away community land without the free prior and informed consent of communities. Consultation is not sufficient in this regard. In extenuating circumstances where the state can prove an exceptional need to take community land for public interest communities should receive just compensation, alternative land and livelihoods and be entitled to all of the safeguards and protections that other land owners have. Compensation should be specifically defined for communities as comprising a whole range of issues. There should be appropriate types of compensation for loss of livelihoods, cultural significance, loss and destruction of culture, loss of social security of traditional structures etc.</p> <p>Our key suggestion in this regard (as before) is to recognize a strong community land right. This ensures a legal right to compensation etc. Further restrictions and regulations can be laid down to ensure sustainable use and to prevent alienation.</p> <p>Given the nature of further regulations relating to community land and the implications that they will have for communities we suggest that future legislation not be by executive order but by parliamentary law.</p> <p>There should be a specific guarantee in art 27.3 which states that all laws, regulations and rules relating to community lands will be subject to deep consultation with affected communities.</p>
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### *Recommendations and Conclusions*

In failing to recognise traditional communities as the legal owners of their lands, we stand to significantly weaken existing tenure security, risking the alienation of communities from their lands. Without recognition of community ownership, the current draft would provide opportunities for the state, or third parties (e.g. agribusinesses) to alienate communities without first attaining the **communities'** free, prior and informed consent. Furthermore, in the absence of legally recognised ownership (and through the failure of the law to stipulate otherwise) in the event of alienation, traditional communities have no legally defined

#### *The principle of free, prior and informed consent*

*“The principle of ‘free, prior and informed consent’ has been developed as a benchmark in international and domestic law to protect customary groups in dealings with outsiders, including governments. Australia, the Philippines, Malaysia, Venezuela and Peru have national legislation that adopts some or all aspects of free, prior and informed consent of customary groups. Adopting this principle in legislation has the potential to make it easier and faster for outside investors to negotiate agreements involving customary land because it introduces a predictable process”*

right to adequate compensation; and no recognised right to receive profits collected from the lease of their lands.

As it stands, the current draft states that communities will have the right to form a formal cooperative or association, and that in doing this, they will be entitled to make a formal claim to become the legal owners of a parcel of land (Article 25.2). Whilst establishing formal associations may have benefits in terms of administering community land, this should not be a pre-condition to the recognition of community ownership of land.

Firstly, this would create a situation where communities who have chosen not to form a formal association, or those who are yet to complete the (potentially long-winded, complex, and expensive) process of creating a formal association would have no protection.

Secondly, in making the formation of a formal association a precondition to the acquisition of recognised ownership rights, the law may force the rapid development of associations. Associations formed under such pressure are likely to be of sub-optimal design, which could have negative implications for future management of community land.

Furthermore, the rapid and ill-prepared formation of formal associations could also have an unbalancing effect upon communities and create the potential for intra-community conflict.

While the use of legal associations and/or co-operatives may be an appropriate mechanism which **allows communities to 'unlock' their lands** and may promote security of tenure their formation **should not be a prerequisite to the recognition of a community's land rights.**

By not giving a strong recognition of community ownership of lands, the draft law risks undermining customary societal structures. Alienation of communities from their traditional lands (or even the perceived risk of alienation) could have huge implications for the structure of communities, and may undermine traditional sources of authority, societal values, every day mechanisms of traditional governance, and established coping mechanisms. 90% of the population feel that the community societal structure is directly responsible for upholding law and moral order<sup>11</sup>. Furthermore, according to a recent report by AUSAID, '[I]oss of authority can also weaken processes for resolving disputes involving customary land, so that disputes remain unresolved for a long time.'

In Timor-Leste, community land also provides a strong security net for vulnerable households. When vulnerable families fall upon difficult times, Xefe de Suco or Lianain often grant areas of community land for temporary agricultural use. The erosion of community control over their lands, and the threat of alienation could undermine established community coping mechanisms such as this.

In short, the key foundation of our submission is the need to give communities a strong ownership right. We feel that without this the draft Land Law cannot be serious about the protection of Community Land rights.

We hope that, given crucial nature of this issue, the government and the Ministry of Justice will engage communities, traditional leaders and civil society and other organizations with specific experience in a special consultation on community land with a view to finding a more appropriate structure for Timor-Leste. Rede ba Rai would sincerely like to join hands with the working group to examine this issue, and await your invitation.

Many Thanks for your attention, further information and clarifications can be sought from the Rede ba Rai office in Fundasaun Haburas, Rua Celestino da Silva, Farol, Dili. By email at [meabhcryan@gmail.com](mailto:meabhcryan@gmail.com) or by telephone at +670 730 7800.

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<sup>11</sup> The Asia Foundation 2008 report