



DRAFT
STRENGTHENING WOMEN'S RIGHTS TO
LAND AND PROPERTY:
RECOMMENDATIONS TO THE DRAFT RDTL CIVIL CODE
GENDER LAND LAW WORKING GROUP
13 February 2009

BACKGROUND

While Article 54 of the Constitution of Timor-Leste gives every Timorese citizen equal rights to private property,¹ strong anecdotal evidence indicates that the majority of women in Timor-Leste have limited opportunities to actually obtain land ownership. The initial *United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* report, which received the Council of Ministers of Timor-Leste's approval in January 2008, highlights a number of factors that hinder women's opportunities to gain greater land rights, the most salient being the predominance of highly patriarchal and patrilineal traditions in Timor-Leste (OPE, 2007). Males are typically favored in inheritance practices; land is typically registered in the name of the head of the household (typically considered to be a man); and women typically do not have equal access to land markets for a variety of factors. For the majority of women who lack land rights, the implications can be potentially devastating, perpetuating gender discrimination and the ability of women and men, girls and boys, and families to improve their livelihoods.

Growing global evidence points to the fact that women who own and control land and property (either individually or jointly with their husbands) can benefit in terms of food and economic security (e.g. from agricultural production on their lands);² added income for livelihood purposes (e.g. proceeds from the sale or income from the rental of land, or access to credit); and ability to obtain higher status and identity within their household and society. Increasing evidence also points to the fact that women who own land and/or property are less likely to be victims of domestic violence than women who do not own land.³ Other evidence points to welfare impacts where women who own assets will expend more on their children's educational and nutritional well-being to the benefit of future generations.⁴

As the Civil Code regulates individual rights, relationships between individuals, and

¹ East Timor Law Journal.

http://www.eastimorlawjournal.org/East_Timor_National_Parliament_Laws/Index.html

² In India, one study found that women who owned land generated more rural non-farm earnings from self-employment than did landless women (Chadha, 1992).

³ In India, one study found that 49 percent of women who did not own property versus 7 percent of women who owned property reported that they were victims of domestic violence (Panda, 2002).

⁴ In Bangladesh, one study found that where women own assets, more family income was spent on children's education and clothing, and girls' were healthier (Quisumbing and Maluccio, 2003).

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property, the Code is an important mechanism to ensure that women are actually able to achieve equal rights to land and property in accordance to the law. In particular, what is addressed in the Civil Code will determine if women view the Civil Code as a legal means to uphold their rights and provide protection before, during, and after their marriage, and also in situations where they are rendered the most vulnerable, such as in the event of widowhood, divorce, or separation.

Throughout 2008, the Secretary of State for the Promotion of Equality (SEPI), with technical support from the USAID-funded *Strengthening Property Rights in Timor-Leste* project (“Ita Nia Rai”), undertook consultations with key civil society and government representatives based in Dili through the establishment of a Gender Land Law working group (see list of representatives in Annex A). The objective of the working group has been to produce concrete recommendations to strengthen women’s land and property rights in Timor-Leste within relevant laws and implementing regulations, including the draft RDTL Civil Code, which the Ministry of Justice is currently developing. The group identified a number of issues that need to be addressed to strengthen women’s rights to land and property within the draft RDTL Civil Code.

Due to the Ministry of Justice’s limited public consultation period, it was not possible to conduct district-level public consultations. It is recommended that the Ministry of Justice extend the public consultation period to allow more of civil society to provide their feedback on the Civil Code.

In the meantime, the issues and recommendations developed are as follows:

GENERAL ISSUES

Adopt Gender-Inclusive Language

In general, the draft RDTL Civil Code uses gender specific language (“he,” “him,” “paternal,” “father,” etc.) rather than gender inclusive language (“he and/or she or they,” “him and/or her or them,” “paternal and/or maternal or parental,” “father and/or mother or parents,” etc.). In some cases, the RDTL Civil Code can also be interpreted as only applying to the “father” (e.g. Articles 1757 and 1758) rather than the “father or mother.” In line with the RDTL Constitution and CEDAW’s embodiment of the principles of “equality of men and women in their national constitutions or other appropriate legislation” (CEDAW, Article 2[a]), it is recommended that gender inclusive language be clearly reflected throughout the draft RDTL Civil Code to avoid language that could potentially be considered discriminatory. While one may argue that the RDTL Constitution does not allow discrimination on the basis of sex, the RDTL Civil Code can help to diminish discrimination if it reflects gender inclusive language. Language is a vehicle for conveying ideologies and shaping behaviors and attitudes. Therefore, it is relevant to consider the impact of gender inclusive language, particularly during legal literacy campaigns to raise public awareness of the Civil Code once it becomes law.



Treat all Religious Marriages Equally

Currently, the draft Civil Code recognizes civil, Catholic and traditional monogamous marriages (see Article 1475). It is discriminatory to give Catholic marriages special preference rather than treating all religions equally. While the Catholic church in Timor-Leste may currently have systems in place to issue marriage certificates, all religious marriages in Timor-Leste, including Catholic marriages, should be required to register in the civil registry.⁵ The type of marriages/relationships that are legally recognized under the Civil Code has implications in terms of what women understand to be their rights, including whether marital property rights apply to them or not. Thus, it is recommended that the Civil Code be revised to recognize not just Catholic marriages, but all religious marriages (in addition to civil and traditional monogamous marriages already recognized).

Recognize Consensual Partners/De Facto Married Partners

Regarding legal recognition of traditional monogamous marriages (see Article 1475), it is recommended that the Civil Code recognize consensual partners/*de facto married partners* (couples who have lived together for two/three or more years and/or when a child is born from that relationship) to give them equal rights as couples in civil marriages, including in relation to land and property rights. There are and will exist couples in Timor-Leste who are recognized in their local communities as traditionally married, but will not register their marriages in the civil registry for various factors – lack of knowledge of the registration process, lack of ability to pay registration fees, lack of understanding of the importance of registering their marriage. Thus, it is recommended that such couples should be granted equal protection under the Civil Code regardless of their formal marital status. The current draft Civil Code leaves the issue of consensual partners/*de facto married partners* uncertain.⁶

Adopt a No-fault Based Divorce System

In a culture such as Timor-Leste where women are typically not viewed as the victims of domestic violence, a fault-based system (which the Civil Code adopts – see Article 1656 [Culpable Violations of Conjugal Obligations]) puts women at a disadvantage. In a fault-based divorce system, the accuser (e.g. the victim of domestic violence) has to provide evidence in court that the accused (e.g. perpetrator of the domestic violence) is at fault (the principal culpable party). Women who are victims of domestic violence or other domestic abuse may find it difficult, due to the humiliation and embarrassment involved, to provide evidence in court. Women are also less likely to be able to pay the cost of and obtain legal services to pursue a fault-based divorce in the courts. Processes within the

⁵ Regarding the current draft Law on Registration, in developing a civil registration system for Timor-Leste citizens to obtain official, written documents, consideration should be taken to make the process as low-cost and simplified as possible, including in terms of registering land and property, given widespread poverty, legal illiteracy/lack of literacy, particularly among women, in the country.

⁶ The rationale for recognizing consensual partners/*de facto married partners* in the context of Timor-Leste as mentioned above is different from the rationale many Western countries adopt whereby the number of couples living together without getting married is growing and culturally acceptable.

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fault-based divorce system are also long, which in the context of Timor-Leste is not appropriate given the current backlog of court cases. In turn, a fault-based system has implications in terms of divorce proceedings. Overall, it is recommended that the Civil Code be changed to adopt a no-fault divorce system (with principles of equity adopted in the division of property).⁷

Timor-Leste is also a State Party to CEDAW, which recommends that a country adopt a “no fault-based” divorce system to adequately protect women (http://regionalcentreapacific.undp.org.fj/Files/CEDAW_web.pdf).

SPECIFIC ISSUES

Recognize Non-Financial Contributions in the Division of Property

Currently under the draft Civil Code, in the event of divorce, the division of property is divided in accordance to the marital property regime selected. As CEDAW advises, it is recommended that the Civil Code guarantee that “**equal division of property including recognition of non-financial contributions**” be recognized in the event of divorce (http://regionalcentreapacific.undp.org.fj/Files/CEDAW_web.pdf)

Non-financial contributions include unpaid domestic labor undertaken to maintain and care for the family home and family members. In Timor-Leste, due to strong cultural traditions, women typically make non-financial contributions, while husbands find work outside for pay. It is estimated that approximately 90% of all female employment is in the agricultural sector, and 70% of these women do not receive cash income for their services (OPE, 2007)

Therefore, it is recommended that if the marital property regime selected is separate marital property, then any property acquired during the marriage should take into consideration non-financial contributions one of the spouses made in order for the other spouse to be able to purchase that property, such that the individual that made the non-financial contribution is entitled to a portion of that property. Similarly, if property is registered in the name of only one spouse and it can be proven that the other spouse made non-financial contributions, then the property (registered in the name of the one spouse) should still form part of the pool of assets of the marriage that is to be divided in accordance with the division of property rules. That property should not be considered as separate from the pool of assets of the marriage simply because it is in the name of only one of the spouses.

The current draft Civil Code leaves the issue of “non-financial contributions to the division of property” uncertain, only considering non-financial contributions in terms of how maintenance support/alimony is to be calculated.

⁷ In case of proven Domestic Violence or other form of Violence, these facts should be taken into consideration when referring to the articles of the code in establishing legal guardianship and parental rights.

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Ensure “Security of Occupancy” Under Succession Intestate Law

In Timor-Leste, strong anecdotal evidence indicates that in the majority of cases, whether a widow can remain in the marital home after her husband’s death depends on the relationship she has with relatives on the side of her husbands’ family.

The draft Civil Code currently provides some provisions to ensure “security of occupancy” under its succession intestate laws. “Security of occupancy” is important to ensure that one has a secure place to live. Article 1968 states that “where there is no will, there is a right of the surviving spouse to inhabit the marital home and use what’s inside the house. However, if the surviving spouse does not live in the marital home for *one year*, then s/he loses the right to the use of the marital home.” However, there will be times when the surviving spouse may have to leave the marital home for a significant period of time, such as to find work. Upon return to the marital home, the spouse should be guaranteed a place to live. As such, it is recommended that the “security of occupancy clause” be guaranteed for the life of the surviving spouse (or until the surviving spouse remarries).

CONCLUSION

The draft RDTL Civil Code should be commended where it supports equality of men and women, boys and girls, and appears to strengthen women’s rights to land and property. For instance, in:

- guaranteeing that all legitimate heirs inherit equally under intestate law (Article 2003 - Succession per capita)⁸;
- giving surviving spouses, along with descendants, first-order priority among all potential successors under intestate succession law (Article 2000 – Class of successors);
- regulating fruits of separate/personal property (e.g. inherited and gifted land) as joint marital property (Article 1617 (b) – Property Integrated within the Community Property);
- granting equal rights of joint owners (including husbands and wives) to administer/manage joint marital property, and requiring consent of joint owners before a sale can be made;⁹
- restricting testamentary freedom such that the testator does not have absolute freedom to exclude his or her spouse from inheriting his or her estate should s/he

⁸ Book V (Right of Succession, Title II: On Legitimate Succession, Chapter 1, General Provisions) Article 2003 states: (Succession per person) The relative in each class inherit per person, or in equal parts, with the exceptions called for in this code.

⁹ CEDAW Article 16(h) states that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women “ the Same rights for both spouses in respect of the ownership, acquisition, management, administration, and enjoyment and disposition of property . . .” (<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>)

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wish, thereby guaranteeing that widows are left with assets to support themselves (Article 2020 – Compulsory Legacy)

However, the Civil Code can and should do more to strengthen women's rights to land and property. On behalf of the Secretary of State for the Promotion of Equality, the Gender Land Law Working Group has prepared the following recommendations to improve the draft Civil Code to reflect the principles of equality and equity as upheld in the RDTL Constitution and CEDAW, in turn, strengthening women's rights to land and property.

General Issues

- Adopt Gender-Inclusive Language
- Treat all Religious Marriages Equally
- Recognize Consensual Partners/*De Facto* Married Partners
- Adopt a No-fault Based Divorce System (with principles of equity adopted in the division of property)

Specific Issues

- Recognize Non-Financial Contributions in the Division of Property
- Ensure Security of Occupancy Under Succession Intestate Law

We look forward to further discussions with you regarding these recommendations. If you have any questions or comments, please contact:

Herminio Jeuier, Technical Researcher

Secretary of State for the Promotion of Equality (SEPI)
miniotrz@gmail.com; +670 7352736

Armando da Costa, Director of Policy and Development of Gender

Secretary of State for the Promotion of Equality (SEPI)
Costa874002@yahoo.com; +670 7393499

Elisio de Sousa, Gender Specialist

ARD Inc. "*Ita Nia Rai*" Project
USAID Strengthening Property Rights in Timor Leste Project
Av. Bispo Medeiros - Balide, Dili, Timor Leste
esousa@sprtl.tl; +670 7304019

Marjorie Huang, Gender specialist

ARD Inc. "*Ita Nia Rai*" Project
USAID Strengthening Property Rights in Timor Leste Project
Av. Bispo Medeiros - Balide, Dili, Timor Leste
mhuang@sprtl.tl; +670 7312400



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ANNEX A

Gender Land Law Working Group Members

Secretary of State for the Promotion of Equality
Ministry of Justice/DNAJL
National Directorate of Land, Property, and Cadastral Survey (DNTPSC)
Ministry of Agriculture and Fisheries
Rede Feto
Fokupers
Association HAK
Belun
JSMP
ASF
Caucus: Feto Iha Politika
Asia Foundation
World Bank
UNDP
UNIFEM
UNMIT – Human Rights/ Administration of Justice/ Governance Unit/ Gender Affairs
ARD, Inc. (*Ita Nia Rai*)