

# **Draft Submission to the Timor Leste Ministry of Justice on Chapter V of the Draft Land Law**

Dr Daniel Fitzpatrick  
Director, Centre for Commercial Law  
Australian National University

## **Introduction**

The Ministry of Justice, and its technical advisers, has done an excellent job in drafting a transitional land law that meets the very substantial post-occupation challenges of resolving competing land claims in Timor Leste. The inclusion of Chapter 5 relating to community land is particularly to be commended given that at least 90% of all land in Timor Leste is held or claimed under customary forms of authority.

The following specific suggestions and comments are intended as constructive inputs to a draft that is substantially of high-quality already.

1. Article 24 (3) states that:

*The characterisation of an area as community land does not affect the ownership of immovable properties located in it or the rights of its respective holders.*

If an individual in a community land area satisfies the requirements for special adverse possession, it seems that they are entitled to claim ownership and "full legal protection under the Civil Code" (see the new article 14, version 2 of the draft land law). They may also be entitled to seek sporadic registration of their ownership right, even though the community land in question is not designated as an area for systematic registration under the *ita nia rai* process.

Claimants for an individual ownership title in a community land area may either be "customary" landholders, or members of a group that were relocated before 1998 either by the Portuguese were Indonesians. This second category of individual claimant has not been incorporated into the local customary system through traditional marriage and alliance mechanisms.

Our research indicates that most rural districts have large numbers of relocated peoples living on the "community land" of a customary group. In most cases, the occupation of land by relocated peoples is accepted by the customary group, often on the basis of some type of usufruct or "non-transferability" agreement. While there is a very large variety of situations, we were consistently told that any attempt by relocated peoples to claim ownership of land, particularly in the sense of a right to sell that land, would create conflict.

My recommendation is to include an adaptation of article 15 (1) of the Mozambique Land Law Regulations, which deals with a similar situation:

*"The partitioning of community land areas for the purposes of recognising the ownership of an individual on the basis of special adverse possession shall only take place after consultation with the local community."*

I believe that individual "customary" landholders should have a prima facie right to claim statutory ownership on the basis of special adverse possession, as our research indicates that there is a high degree of individualisation of rights in cultivated community land areas. Similarly, relocated individuals should also be able to claim statutory ownership on the basis of special adverse possession, as some have been in continuous and peaceful possession to 20 years or more. In both cases, however, it is essential that claims to individual ownership, or full protection of continuous and peaceful possession under the Civil Code, be subject to a community consultation process in order to avoid the very serious likelihood of local conflicts. This is particularly the case as the acquisition of statutory ownership will allow land in community land areas to be sold outright.

This consultation process should follow the same principles and steps set out in the Decree Law for the grant or lease of rights to third parties in community lands under article 27 (2).

2. Article 25 (2) states that:

*"Local communities may constitute cooperatives or other forms of association allowed by law with the purpose of managing and engaging in economic exploitation of community lands under which they may obtain ownership rights."*

The experience in South Africa and Mozambique, before the 1997 Land Law, was that very few local communities sought to constitute themselves as legal entities for the purposes of obtaining ownership rights. Equally, while large numbers of customary land groups in Papua New Guinea have incorporated in the context of mining, forestry, tourism and other developments, this incorporation process has usually required a great deal of outside facilitation and considerable capacity among district land administration officials.

The literature on Mozambique concludes that, if collective ownership of community land is to be recognised, it is better to work through existing forms of social organisation than to require local communities to adopt relatively unknown and alien forms of legal organisation. Hence, Mozambique land law states that statutory rights to land may be acquired by local communities in accordance with customary norms and practices which do not contradict the Constitution (see article 12). It further allows for a statutory title to be issued to local communities in the name of the local community (see article 13). On this basis, the local community may enter into agreements with outside investors, provided that they undergo a "community delimitation" process that is set out in some detail in the Regulations.

The Mozambique process allows local communities, as a collective, to enter into agreements with outside investors without necessarily constituting themselves as cooperatives or as an incorporated association. In Vanuatu, a similar process has led to considerable conflict and loss of food security as landholding clans have entered

into leases for tourist developments without regulatory safeguards to ensure adequate transparency and consultation. In Mozambique, the "community delimitation" process introduces a number of safeguards while making it easier for local communities to enter into agreements (i.e without having to incorporate themselves or establish themselves as cooperatives).

The easiest way to reach this result in Timor Leste may be to retain article 25 (2), but to ensure that the Decree-Law establishes "community land associations", as products of a community delimitation process, as a "form of association allowed by law" within the terms of article 25 (2). This said, however, it may be necessary to amend article 10, which establishes that national legal entities may be holders of property ownership rights but defines national legal entities as those whose main office is registered within the national territory. For example, article 10 the 1997 Land Law of Mozambique states that:

"National individual and corporate persons, men and women, as well as local communities may be holders of [an ownership right]".

Additionally, it is important that article 21, which sets out the basis for claiming ownership through special adverse possession, provide for the possibility of ownership claims by local communities that have constituted themselves as cooperatives or other forms of association allowed by law. In Mozambique, article 10 goes on to state that:

"National individual and corporate persons may obtain [an ownership right] individually or jointly with other individual and corporate persons by way of joint title holding... [an ownership right] adheres to the principles of joint title holding for all the purposes of this law."

In other words, the draft law should allow for the possibility of joint acquisition of ownership through special adverse possession, so as to accommodate the possibility of ownership acquisition by local communities without necessarily constituting themselves as corporations or cooperatives.

This provision is particularly important because the right of the state to grant a lease to outsiders is limited to "state plots on community land". For outsider investors to obtain leases for other areas of community land, they would need to obtain agreement either with individual landholders who have ownership on the basis of special adverse possession, or with local communities that have constituted themselves under article 25 (2). In either case, there will be a number of procedural requirements before an outside investment could proceed, which may lead to loss of investment or non-compliance with the law. I can't see, for example, that the mechanism for local communities to incorporate as legal entities will be up and running in time for the current proposals for agribusiness developments in community land areas.

3. Article 27 (2) states that:

"State plots in community lands can only be leased or granted to third parties after consultation with the local community."

In the 1997 Mozambique land law, a similar provision is supplemented by article 13 (3) which states that:

"The application for [an ownership title] shall include a statement by the local administrative authorities, preceded by consultation with the respective communities, for the purpose of confirming that the area is free and has no occupants."

I suggest that this additional article is necessary as a safeguard against the possibility that article 27 (2) will be abused as a vehicle for land grabbing by well-connected state officials. Note that this has certainly been the case in Mozambique, even with the additional protection offered by the 1997 Land Law.

As a minor matter, the reference to "state plots" in the English version may need to be clarified so as to refer to land in the private or public domain of the state.

Daniel Fitzpatrick  
Canberra  
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