

Policy Notes on Customary Land in Timor Leste

Daniel Fitzpatrick
Andrew McWilliam
Susana Barnes

TABLE OF CONTENTS

INTRODUCTION.....	2
CUSTOMARY SYSTEMS REMAIN STRONG DESPITE INDONESIAN OCCUPATION	2
THE NATURE OF CUSTOMARY LAND TENURE.....	3
RELOCATED GROUPS ON CUSTOMARY LAND.....	4
CUSTOMARY TENURE AND AGRICULTURAL PRODUCTIVITY	4
WHERE CUSTOMARY AUTHORITY IS LESS INFLUENTIAL I: SITES OF AGRICULTURAL SETTLEMENT PROGRAMS	5
WHERE CUSTOMARY AUTHORITY IS LESS INFLUENTIAL II: PERI-URBAN AREAS.....	6
OVERLAPS BETWEEN STATE LAND AND CUSTOMARY LAND	6
MOVING TOWARDS REGULATION OF CUSTOMARY LAND IN TIMOR LESTE.....	7
THE LEGAL STATUS OF CUSTOMARY LAND AUTHORITY.....	8
PRIVATE SECTOR DEVELOPMENT IN CUSTOMARY AREAS.....	9
MANAGING LAND MARKETS IN RURAL AREAS.....	9

Policy Notes on Customary Land in Timor Leste

Daniel Fitzpatrick, Andrew McWilliam and Susana Barnes¹

Introduction

These policy notes form part of an Australian Research Council project - *Waiting for Law: Land, Custom and Legal Regulation in Timor Leste*. The notes are based on more than 3 years' fieldwork in selected areas of Timor Leste. They aim to:

- describe the current state of customary land systems; and
- contribute to policy debates on recognising and regulating customary land authority.

Customary Systems Remain Strong despite Indonesian Occupation

1. Customary land systems have been highly resilient in the face of Portuguese colonisation and Indonesian occupation. After episodes of displacement during Indonesian occupation, customary land systems have reconstituted themselves around their core principles of origin and alliance.
2. Origin groups define themselves as first possessors of certain areas of land. They are direct descendants of a mythical first settler. They have authority over land in most parts of rural Timor Leste. This authority is widely accepted by other groups. It is closely associated with social and moral order.
3. Origin groups form marriage-based alliances with subsidiary households on their traditional lands. Historically, these alliances have been mechanisms for incorporating in-migrants into local social hierarchy. Male in-migrants would marry women from the origin group so as to form a subsidiary household on origin group land.
4. Membership of an origin group is defined by kinship rather than territory. The boundaries of origin group land may be difficult to define and demarcate. Origin group land may not be contiguous. Sometimes areas of origin land will be cultivated in relatively dispersed settlements.
5. Origin group land tends not to coincide with current administrative boundaries, including hamlet (*povocao/aldeia*) and village (*suco*) boundaries. There is a considerable amount of potential overlap in relation to origin group claims. There is also a degree of

¹ Reader/Associate Professor, Australian National University College of Law; Fellow, Australian National University Research School of Asia Pacific Studies; Visiting Fellow, Australian National University Research School of Asia Pacific Studies. The views expressed in these notes reflect the personal opinions of the authors. They are not the opinions of any institutions with which the authors may be affiliated from time to time.

negotiability: origin groups tend to recognize when their ancestral claims to boundaries cannot be enforced due to political or demographic weakness.

The Nature of Customary Land Tenure

6. Origin groups have authority over land allocations, including permission for the clearing and cultivating of new land. They maintain ritualised prohibitions (e.g. *tara bandu*) on the use of certain areas of land. These prohibitions may have an environmental significance when they apply to water sources, old-growth forests and the like. The authority of an origin group forms part of an overall system of ritual and spiritual order.
7. Within the system of origin group authority there are highly individuated rights to land. It is not accurate to describe customary land in Timor Leste in terms of communal or common property only. Residential, garden and plantation plots are "owned" by families rather than the group itself. Generally speaking, these plots remain under family control even though they are left to lie fallow. They are inherited by direct family members. They have clearly defined boundaries.
8. Members of a subsidiary household have the same basic rights to land as members of the origin group. Their descendants will inherit residential, garden and plantation plots; and may clear and cultivate new plots with permission from the origin group. This permission would not generally be refused where land is available for cultivation.
9. As part of the traditional system of alliance and exchange, subsidiary households may even have considerable political authority. For example, *liurai* or *dato* may traditionally be appointed from a particular subsidiary household.² In some areas, *liurai* and *dato* will claim substantial areas of land in their own right.
10. Land is available for clearing and cultivation in most parts of Timor Leste. Population densities are relatively low. Since 1999, there has been a migration of people from rural to urban and peri-urban areas. This migration has overlapped with a general movement of people from eastern to western areas of Timor Leste.
11. Some land may be described in terms of common property. For example, there are defined areas for annual cultivation of food crops. Any group member (including subsidiary households) can farm this land. At the end of the cultivation period individual claims are relinquished and the land returns to communal property. While these common property areas are relatively small, they are highly significant in terms of maintaining food security.

² *Liurai* and *dato* are customary figures with forms of authority over the external relations of a group. In some areas, they are associated with the position of the village head/chefe de suco (*liurai*) and hamlet head/chefe de aldeia (*dato*).

12. Other areas such as water sources, forests, fringing reefs and pasturelands also have common property characteristics. In most cases, they may be accessed by any group member, including subsidiary households. In some cases there is privileged access for origin group members only. Individuals or households may also control portions of fringing reefs and rock platforms.
13. Some areas are forbidden (*lulik*) for use or access. These areas are closely associated with ritual or spiritual prohibitions.
14. There is a wide variety of tenure types and traditional group structures across Timor Leste. These notes present a stylised picture that reflects a basic format. They do not provide a comprehensive description of the diversity of customary structures in Timor Leste.

Relocated Groups on Customary Land

15. Most people relocated during Indonesian times have been allocated land by the local origin group (sometimes in conjunction with the local village head or *chefe de suco*). In some cases, the allocation may be implied or retroactive as there was no time to seek permission at the time of relocation. There is a strong inclusionary principle in Timor Leste custom. Relocated groups who have not returned to their land have access to local land, but are expected to respect the authority of the origin group.
16. Significant restrictions can apply to the use of origin group land by relocated groups. Relocated groups should seek permission to clear land, or access common property areas. They have long-term rights to economic trees and residential, garden and plantation plots. But there is an expectation - at least on the part of origin groups - that these rights are not heritable and are usufructuary only.
17. Some relocated groups wish to stay on the land of another group because their own land is too remote from transport and public services. There are cases where the children of relocated groups have inherited their plots without resistance from the origin group. There are also cases where relocated groups have commenced processes of incorporation into the origin group, or its subsidiary households, through marriage alliances.
18. In other cases there is considerable tension between relocated groups and origin groups. Some relocated groups have been told not to cut down trees for fuel, or clear further land for housing or cultivation. In these cases the balance of authority, and the outcome of any conflict, is connected to the relative numbers and political influence of the respective groups.

Customary Tenure and Agricultural Productivity

19. Customary land tenure systems in Timor Leste are not a significant constraint on

agricultural productivity. Garden and plantation plots are held under individuated forms of heritable tenure. Outside areas of chronic conflict, there is little evidence of under-investment in land due to perceptions of tenure insecurity. There is scope for smallholder forms of agricultural production involving new crops, seeds or fertilisers.

20. While agricultural land tends to be held under individuated forms of tenure, this tenure does not amount to statutory notions of ownership. Although there is no land market in most rural areas, there is a general sense that customary land may not be sold to outsiders. Land sales to outsiders undermine customary systems of authority. They transfer land to people who have not been incorporated into local social hierarchy.
21. In theory, customary prohibitions on the sale of land to outsiders are a constraint on agricultural productivity as they prevent transfer of land to potentially more productive users. But removing customary provisions on land sales will have no productivity effects where there is no market in land. Moreover, where there is a land market, or the state wishes to acquire customary land for agricultural development, the productivity benefits of land transfers need to be weighed against:
 - the potential loss of social insurance and food security arising from the loss of arable land; and
 - the potential effects on social order should outsiders access land without authority from the local origin group.
22. Granting statutory ownership to customary land holders will not create a formal market for credit. In most areas there is no land market, and few off-land employment opportunities for those whose land is foreclosed. As a minimum, land titling for credit purposes should only proceed in areas where land markets are emerging, and forms of social insurance other than customary mechanisms are available.

Where Customary Authority is Less Influential I: Sites of Agricultural Settlement Programs

23. There are rural areas where notions of origin group authority are not strong. They include lowland areas that were subject of agricultural resettlement programs instigated by the Portuguese, and continued or further developed by the Indonesian administration. Irrigated rice-fields are the most common form of production in these regions (e.g. in Maliana and Viqueque districts).
24. Origin group authority tends not to be strong in agricultural resettlement areas because historically they were forested and at most used only for hunting. While certain origin groups may claim overarching stewardship rights to these areas, their claims may be contested by other groups who "opened" or "tamed" the land by clearing the forest.
25. Some agricultural resettlement areas are sites of chronic land conflicts. Uato Lari is the best-known example. The subject of these conflicts does not necessarily involve

competing claims to origin group authority (although the lack of clear origin authority creates circumstances in which disputes are difficult to resolve). Instead, these conflicts have persisted over time because of multiple historical accusations of collaboration and resistance, as claimants have sought to legitimise their claims through unstable alliances with State or political authority (at various times either Portuguese, Japanese, Indonesian or East Timorese).

Where Customary Authority is Less Influential II: Peri-Urban Areas

26. Peri-urban areas with significant population density are another case where origin group authority is less influential. These areas have developing land markets involving a range of documentation, and a considerable amount of fraud and uncertainty. Examples include land around Ainaro and Dili.
27. In the absence of land ownership law and a land registry role for the Land and Property Directorate, the *chefe de suco* has emerged as a key figure in unofficial land markets. Some *chefe de suco* will witness documents, keep copies of documents and even issue documentary acknowledgement of land rights. Most parties to land transactions are aware of the *de facto* land administration role of *chefe de suco*, but are less sure of the role of the Land and Property Directorate.
28. Most *chefe de suco* will consult with origin group authorities where a purported transaction takes place on land claimed as customary land. This seems particularly to be the case in transactions involving outsiders or foreigners.

Overlaps between State Land and Customary Land

29. Law No. 1/2003 vests all land that belonged to the Portuguese state, and all state property acquired or built by the Indonesian regime, in the new state of Timor Leste. Potentially, this definition of state property covers a significant amount of land currently claimed by origin groups. Uncertainty over the boundaries of state land, and overlapping claims of state and customary land ownership, has caused considerable conflict in many postcolonial land systems. The boundaries of state land should be clearly demarcated in Timor Leste to promote certainty and avoid conflict. This demarcation process may require implementing regulations for Law No 1/2003.
30. Law No. 1/2003 does not provide a legal basis for customary land to be declared as public land belonging to the state of Timor Leste. Any general declaration that customary land falls within the public domain of the State may be inconsistent with the National Constitution, which provides that:

Requisitioning and expropriation of property for public purposes shall only take place following fair compensation in accordance with the law (art. 54(3)).

Moving Towards Regulation of Customary Land in Timor Leste

31. Most customary systems provide sufficient tenure security for available forms of investment in agricultural production. Even relocated groups have long term usufructuary rights to residences, gardens and economic trees. The main causes of low agricultural productivity are not to be found in tenure systems. At present, they lie in limited access to labour, markets and agricultural extension services.
32. Customary systems are providing tenure security at relatively low cost. Extending formal land administration services to customary areas will impose significant costs on the state. In circumstances of state weakness, the extension of land law and administration may overlay rather than replace customary systems. As in other postcolonial circumstances, the result may be a worst-case scenario where custom is no longer authoritative, and the state is too weak or fragmented to substitute for custom. This pluralist situation can lead to uncertainty, under-investment and opportunistic forms of "legal forum shopping".³
33. Extending land administration by surveying boundaries and collecting claims to customary land may create risks of conflict:
 - where relocated groups have settled on origin group land; and
 - if individuals obtain unlimited statutory rights of sale.
34. Extending land administration services may be appropriate in rural areas where customary authority is not strong. These areas include:
 - Lowland areas first cultivated under Portuguese agricultural programs.
 - Peri-urban areas where land markets and documentary records of rights and transactions are multiplying.
35. Many land parcels in these areas will be undisputed. They could receive priority attention in terms of surveying boundaries and registering claims. Some land parcels in these areas will be disputed. They could be the focus of dispute-resolution efforts, so that the land parcels in question can be secured under formal systems of land administration.
36. Some landholders in areas where customary authority is strong may want tenure documentation from the State. While there may be benefits associated with documentation, largely because it grants a degree of security against the state itself, these benefits need to be weighed against the considerable costs and risks involved in extending tenure documentation to strongly customary areas of Timor Leste. Where landholder investment is constrained by tenure insecurity, or there are signs of endemic land conflict, alternatives to tenure documentation in customary areas include legal

³ Legal forum shopping occurs when parties to disputes pursue their claims in multiple customary and state forums, thereby undermining the ability to provide definitive resolutions to land conflict.

confirmation of customary authority over land and ongoing commitment to land dispute mediation efforts.

The Legal Status of Customary Land Authority

37. The starting point for legal regulation of rural land could be a default or presumptive position that custom governs land outside city boundaries. Rural land parcels that were titled under Timor Leste's proposed new land law would automatically be removed from the jurisdiction of custom. Untitled rural land would remain governed by custom, subject to the possibility that disputes could be mediated by the Land and Property Directorate and/or taken to the Courts.
38. A default or presumptive recognition of custom would not undermine state sovereignty. Custom would apply unless and until rural land was titled. The Constitution states that the East Timorese State will "recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law".
39. There is no pressing need to define the boundaries of customary land, at least in relation to the rights of different origin groups. These boundaries may be difficult to determine. Attempts at the demarcation may produce inter-group conflict. In Mozambique, customary authority over rural land has been recognized without the need for demarcation of group boundaries.
40. Uncertainty of group boundaries is not currently a constraint on agricultural productivity. Group boundaries may only require demarcation when a land conflict is such that state intervention takes place in the form of Land and Property Directorate mediation or Court or arbitral proceedings.
41. While the law should provide legal space for custom in rural areas, it is not necessary to define either the nature and rules of "customary law", or to identify specific types of customary authority. There are few benefits and too much diversity across Timorese customary systems to justify this approach.
42. Any legal space for custom will be subject to the human rights provisions of the Constitution. These provisions will act as a safeguard against potential abuses in the name of "custom", including the denial of women's rights to land.
43. Cases involving custom will remain under the jurisdiction of the Courts. New laws will be required to facilitate the determination of custom by the Courts. Comparative experience suggests that expert evidence from local origin group elders is a better way to determine custom than attempts to codify "customary law".
44. Transactions in untitled rural land would remain subject to custom. Hence the sale of

customary land to outsiders would be prohibited (i.e. null and void), unless local custom allows such sales. If land is titled under Timor Leste's new land law, it will be available for sale to any citizen of Timor Leste.

45. Over time, it may be appropriate to develop mechanisms for customary groups to grant leases over customary land to outsiders. These mechanisms may not be appropriate in the short term as they require:
- a degree of institutional capacity on the part of the state and local customary groups;
 - a certain amount of well-funded outside demand for customary land; and
 - a high degree of institutional and legal safeguards to maintain sufficient access to food for customary groups.
46. Compulsory acquisition of customary land by the state will be available once the government of Timor Leste enacts a law on expropriation of property for public purposes, pursuant to s. 54(3) of the National Constitution.

Private Sector Development in Customary Areas

47. Private sector development in rural areas should not be hindered by a recognition of custom as there are ample amounts of state land available for development allocations. In practice, leases over state land are a primary mechanism for investors to access land in East Timor, with over 400 leases granted since 1999 and annual lease revenues of over US \$1 million a year.
48. There is a risk that untitled rural communities will be excluded from tourism and agribusiness developments by (1) an inability to sell or lease their land to outsiders; and (2) continued reliance on state land leases to provide land to investors. Prospects for participation by rural communities in tourist or agribusiness activity will be improved if the system for granting state land leases includes consultation and employment mechanisms aimed at local communities. Agribusiness activity on state land may also involve land parcel grants to small holders, so long as local customary landholders have either agreed or been consulted about the development.

Managing Land Markets in Rural Areas

49. A mechanism could be developed to recognize sales of customary land where local custom allows such sales. If a *chefe de suco* or the Land and Property Directorate receives sale documents relating to untitled rural land, with a view to witnessing those documents or registering ownership rights to the land, they should first check with origin group authorities as to whether sale of the land is allowed under local custom. *Chefe de suco* already tend to do this in areas where rural land markets are developing. If local custom allows the sale, the land would be titled (through legal mechanisms allowing sporadic registration of title).

50. Emerging land markets should be bought within formal systems of land law and administration. Comparative experience suggests that customary systems are undermined, with adverse effects on tenure security and environmental management, when land markets develop in circumstances of informality.
51. In areas where land markets are developing, de facto land administration functions undertaken by (some) *chefe de suco* should be integrated into formal land administration by the Land and Property Directorate. Multiple systems of land administration can develop when local government officials offer cheaper and more accessible services than the land administration office, even though those services are prohibited in law.
52. The formal system of land administration should include incentives and capacity-building to encourage *chefe de suco* to pass land transactions documents on to the Land and Property Directorate. One aspect of an appropriate incentive system involves ensuring that registering land transactions in the Land and Property Directorate is not prohibitively expensive for poorer landholders in urban and peri-urban areas.

© Daniel Fitzpatrick, Andrew McWilliam and Susana Barnes 2008.