



**JUDICIAL SYSTEM MONITORING PROGRAMME**  

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**PROGRAM PEMANTAUAN SISTEM YUDISIAL**

**LAND LAW REPORT**

Dili, Timor Leste  
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The *Judicial System Monitoring Programme* (JSMP) was set up in early 2001 in Dili, Timor Leste. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in Timor Leste. For further information see [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

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## 1. EXECUTIVE SUMMARY

The purpose of this report is to provide an outline of the current status of land law in Timor Leste and of initiatives presently being taken to develop a comprehensive property regime. An exhaustive and prescriptive analysis of all current and proposed legal instruments relating to property in Timor Leste is beyond the scope of this report. Instead it is hoped that the report will serve as an accessible means of explaining what is at present a complex, little understood, but extremely important component of Timor Leste's development as a functioning democracy. In doing so we will attempt to identify and analyse the salient provisions of the various legal instruments (both draft and promulgated) in the field of land law. This report will also examine several of the few cases which have been decided by the courts in order to provide an insight into the application of land law by the courts in Timor Leste at this point in time and some of the pressing issues arising from this.

As part of JSMP's activities in monitoring the justice system in Timor Leste, JSMP has monitored and analysed civil law cases in the district courts. As indicated in the JSMP report "Case Flow and Management: A Statistical Analysis, 2003 – mid 2004", in 2003<sup>1</sup> land law cases made up approximately 16% of the total civil cases in the District and Court of Appeal caseload. JSMP understands that only a small percentage of land disputes are currently within the court system, however, this is more a reflection of the general systemic problems with which the judicial system is faced at present rather than indicating that land ownership is not an important issue for the people of Timor Leste at present. In JSMP's view it clearly is.

The original objective of this report was to monitor the progress of a selected land law case to conclusion in the Dili District Court in 2004. This original objective was not possible, however, due to the virtual suspension of hearings in most civil matters, including land law cases, during 2004.<sup>2</sup> Therefore JSMP has selected for discussion three land disputes which have commenced in the district courts, one of which has been finally resolved and two of which have been stalled for significant periods. For the cases in which final judgment has not been provided this report will not seek to prescribe JSMP's view of what ought to be the appropriate legal outcome of the case but only to discuss the case by way of example of the types of matters which are being taken to court.

Before discussing the illustrative three land law cases this report will provide a brief historical background which is important to understanding the issues with respect to land law in Timor Leste. The report will then outline the current applicable law regarding property in Timor Leste and the new land law regime which is currently being developed and considered by legislators. The report will also discuss the important role of the

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<sup>1</sup> All JSMP reports are available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org). JSMP was unable to access the court files on civil cases for 2004 because all files, even those that were active, were at the Court of Appeal.

<sup>2</sup> See *JSMP Report*, 'Overview of the Courts 2004', 17 December 2004 and *JSMP Justice Update* 13/2004, 'Dili District Court Delivers Two Decisions On Cases Of Domestic Violence', 15 – 19 November 2004.

Directorate of Land and Property (DNTP), an agency attached to the Ministry of Justice, and the USAID-ARD Land Law Program (“the LPP”). However JSMP has not monitored the DNTP’s work and does not seek to analyse its decisions. The information regarding the DNTP was obtained through an interview with the Director of the DNTP. The information regarding the LLP was obtained through its reports and through an interview with its Timor Leste Chief of Party and Senior Research Coordinator.

## 2. INTRODUCTION

Land and property ownership are of major concern in Timor Leste due to the current uncertainty regarding title to large numbers of properties. The major, and most conspicuous, problem at present is the lack of a land regulation and registration system. The creation and implementation of a land registration regime is not yet possible for a number of reasons, chief among them being the unresolved conflict between titles obtained at various periods of Timor Leste’s long history of colonial occupation. Community confusion about land ownership has resulted in a number of land disputes being brought before the district courts. In short, the situation with respect to land and property existing in Timor Leste at present is exceedingly complex. As Daniel Fitzpatrick has said, “[i]f one were hypothetically to create a ‘most challenging’ land claims problem, it would contain many elements of newly independent East Timor”.<sup>3</sup> This report will therefore confine itself to what JSMP considers are the principal issues relating to land law and ownership in Timor Leste at present. Reference will also be made to three recent land law disputes that have come before the courts as illustrations of these issues.

The social and political events leading to the complex land situation in Timor Leste have been well documented.<sup>4</sup> The colonization by Portugal and occupation by Indonesia until 1999 resulted in the application of a multiplicity of property regimes, the appropriation and re-distribution of land by government and movement of the population. The forced displacement of large numbers of East Timorese together with mass destruction of property and property records in 1999 exacerbated this uncertainty and the potential for disputes in relation to property ownership. The successive transitional legal and political structures since 1999 have also contributed to the complexity of what exists today.

The government’s Directorate of Land and Property (*Dirrecao Nacional de Terras e Propriedades* (DNTP)), supported by the independent USAID-ARD Land Law Program (LLP), has drafted a number of land laws. Law No.1/2003, *Juridicial Regime for Real Estate: Ownership* and the *Law on State Property Administration/Leasing of State Property* are currently in force. The *Law on Leasing between Private Individuals* has been passed by the Parliament but is yet to come into force. The laws on *Land Dispute Mediation* and *Property System, Transfer, Registration, Pre-existing Rights and Title*

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<sup>3</sup> Daniel Fitzpatrick, ‘Land Claims in East Timor: A Preliminary Assessment’, (2001) *Australian Journal of Asian Law*, Vol 3(2), 135-166, at 135.

<sup>4</sup> See generally Fitzpatrick, ‘Land Claims in East Timor’.

*Restitution* have been presented to the Minister for Justice and the Prime Minister but are yet to be discussed by the Council of Ministers.<sup>5</sup>

There is clearly a need for these last two laws to be considered promptly by the government and the parliament. It is exceedingly difficult for court actors and the DNTP to settle land disputes in the absence of a settled, comprehensive legal regime. It is important for the government to facilitate conclusive resolution of land disputes to contribute to social stability and an environment supporting investment by both domestic and foreign investors and, in turn, economic growth.

### **3. BACKGROUND**

The Portuguese colonized and ruled Timor Leste for over 400 years, until November 1975 when independence was declared. In December 1975, Timor Leste was invaded by Indonesia. The occupation ended in August 1999 when the people of Timor Leste chose independence in a UN-coordinated referendum. Following the announcement of the referendum result, approximately 1400 East Timorese were killed, and another 200,000 were forced to leave Timor Leste by pro-autonomy militia and the Indonesian National Army (TNI). The UN Transitional Authority (UNTAET) was established to support the rebuilding of Timor Leste in October 1999.

During the 400 year Portuguese colonial period, Portuguese law was applied, including Portuguese land law. However, customary or traditional land law continued to co-exist with, and apply alongside, the Portuguese land law. Following the Indonesian invasion in December 1975, Indonesian law replaced Portuguese law in Timor Leste (although again, customary law and practice with respect to land use continued to apply in many areas).

During the Indonesian occupation, a number of formerly Portuguese government buildings were occupied by individuals. Also, land which had previously belonged to certain individuals (who had fled Timor Leste during the Indonesian invasion) was occupied and sold by others. The shape and structure of buildings was also altered by the new occupants.

In the violence of 1999 approximately 200,000 East Timorese were forced to abandon their places of residence. The majority of buildings and official documents were burnt. When Timor Leste achieved its freedom in 1999 a large number of East Timorese returned, including some who had been living overseas for more than 25 years. This led to disputes and arguments between property owners from Portuguese times and those who had possession during Indonesian times.

In short then, “there are four categories of potential land claimants in East Timor: underlying traditional interests; titles issued in the Portuguese or Indonesian eras; and occupation since the 1999 vote for independence”.<sup>6</sup> The range of land and property

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<sup>5</sup> Interview with Edwin Urresta and Rod Nixon, USAID-ARD Land Law Program, 7 June 2005.

<sup>6</sup> Fitzpatrick, ‘Land Claims in East Timor’, at 135.

systems which have been applied at differing times of Timor Leste's history, and which have given rise to this diversity of claims, combined with a proliferation of ambiguous property transfers during these periods, present the current government of Timor Leste with difficult challenges. It has been said that "[t]hese challenges concern the resolution of land claims and the preparation of a law on Land Rights and Title Restitution that will incorporate land rights originating during different eras into one cohesive framework."<sup>7</sup>

Of the estimated 200,000 land parcels in Timor Leste, less than 25% have ever been formally registered. The majority have been held by traditional landowners, mostly communities, under customary land tenure systems.<sup>8</sup> The majority of registered parcels, were registered during the Indonesian occupation, and fewer during the Portuguese.<sup>9</sup>

Since the enactment of the first land law since independence (Law 1/2003) 10,000 land claims have been lodged in Timor Leste.<sup>10</sup> Of these 10,000 claims, it is estimated that approximately 90% have been filed by Indonesian citizens.<sup>11</sup> There is clearly a pressing need to develop and pass legislation that will determine what kinds of pre-existing land rights (that is, prior to Independence) can eventually be validated and which land titles override others, in cases of competing claims for the same property.

#### **4. THE APPLICABLE LAND LAW IN TIMOR LESTE<sup>12</sup>**

Article 54 of the RDTL Constitution acknowledges private rights to possession of property:

“(1) Every individual has the right to private property and can transfer it during his or her lifetime or on death, in accordance with the law...

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<sup>7</sup> Urresta, E and R Nixon, *Research Findings, Policy Options and Recommendations for A Law on Land Rights and Title Restitution*, USAID-ARD Land Law Program, July 2004, pg. 38.

<sup>8</sup> Customary land tenure systems operated in Timor Leste before and during the Portuguese colonial era. Local systems regulated the distribution, transfer and exploitation of land, and continue to do so. Despite the Portuguese rule and Indonesian occupation, these local systems continue to apply, especially in rural areas. Ibid, pg. 10.

<sup>9</sup> Ibid, pg. 1.

<sup>10</sup> Resulting in large part from displacement during and towards the end of the period of Indonesian occupation: see Ibid.

<sup>11</sup> See Urresta, E and R Nixon, *Final Research Report: An Overview of LLP's Research Activities*, July 2004.

<sup>12</sup> According to the hierarchical system of laws that apply in Timor Leste at present, the RDTL Constitution is the highest law in Timor Leste. National Laws passed by the National Parliament since 20 May 2002 are the next highest source law, followed by decree laws passed by the Council of Ministers. In the absence of National laws 'covering the ground' of a particular subject matter, UNTAET regulations (promulgated from 27 November 1999 to 20 May 2002) continue to apply. In the absence of National laws and UNTAET Regulations, Indonesian law continues to apply: see UNTAET Regulation No. 1999/1, section 3.1. In 2002 the Council of Ministers accepted a proposal by the DNTP to develop land law policy and legislation as a step by step process. It was hoped this would permit the Government, the Parliament and other interested parties to make a substantive contribution that would strengthen the legitimacy and functionality of the nation's Land Law. Urresta, E and R Nixon, *Research Findings and Policy Recommendations for State Property Administration/ Lease of Government and Private Property*, USAID-ARD Land Law Program, 18 October 2003, pg. 5.

- (3) Requisitioning and expropriation of property for public purposes shall only take place following fair compensation in accordance with the law.
- (4) Only national citizens have the right to ownership of land.”

The government of Timor Leste has accordingly made it a priority to (a) develop a land law that reconciles existing land rights from different eras and regimes into a single cohesive land rights system, and (b) establish guidelines for the processing of claims that have been lodged concerning past wrongful dispossessions of property rights.

It has been decided to develop Timor Leste land law in stages, with several separate pieces of legislation prepared serially in a gradual approach.

#### **4.1 Law No. 1/2003 Juridical Regime for Real Estate: Ownership**

The principal legislative instrument in force at present is Law No 1/2003 – *Juridical Regime for Real Estate: Ownership*, which came into force on 10 March 2003. This is “the basic, or umbrella, law underlying the Juridical Regime of Immovable Property”<sup>13</sup> and presents general rules to be further developed through a gradual and structured process. The purposes of this law are to (1) establish clear legal jurisdiction for addressing land issues; (2) define land law-related legal terms; (3) determine what constitutes State Property (public domain and private domain); (4) establish the DNTP as a legal entity with substantive powers; and (5) allow for future legislation that enhances the juridical regime of immovable property.<sup>14</sup> The principal provisions of Law No 1/2003 are as follows:

- Article 1 defines immovable property (real estate) as predial<sup>15</sup> property and moveable objects permanently attached to it. That is, land is considered real estate and also the buildings, plantations, plants, tress and similar attachments
- Article 4 determines that all State property which belonged to the Portuguese State reverts to the State of Timor Leste. Similarly, Article 16.2 specifies that all State property acquired or built under the Indonesian regime reverts to the State of Timor Leste. Article 16.3 states that land rights acquired over those properties referred to in Article 16.2, in good faith and with actual payment, shall be protected.
- Article 5 provides criminal penalties for illegal appropriation. Article 6 applies criminal penalties for illegal occupation.
- Articles 7 and 8 provide for administrative eviction from State properties.

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<sup>13</sup> Urresta, E and R Nixon, *Research Findings and Policy Recommendations for State Property Administration/ Lease of Government and Private Property*, pg. 5

<sup>14</sup> *Ibid.*

<sup>15</sup> “of, consisting of, relating to, or attached to land”: Bryan A. Garner (ed), *Black's Law Dictionary* 8th ed, West Group, 2004.



- Articles 10 and 11 allow for judicial appeal from eviction orders.
- Article 12 initiated a land claim registration process for *national citizens*. East Timorese nationals whose properties had been illegally appropriated or occupied had a one-year period to lodge claims at DNTP (from 10 March 2003 to 10 March 2004).<sup>16</sup> Article 13.1 establishes a one-year time limit (ie. from 10 March 2003 to 10 March 2004) for all *non-national claimants* to register their land claims (to land owned prior to 19 May 2002) and supporting information. Failure to comply with this requirement means that properties in this category are presumed abandoned and revert to the State. Article 13 also specifies that forthcoming laws will determine what rights and effects, if any, may derive from those claims.
- According to Article 12.3 abandoned properties that do not belong to any known person are presumed to belong to the State after 10 March 2004.

#### 4.2 Supplementary Land Laws<sup>17</sup>

The *Law on Leasing between Private Individuals* was approved by the Council of Ministers on 24 June 2004 and passed by the Parliament on 24 May 2005. It has yet to be promulgated by the President or gazetted (ie. it is not yet in force).

The *Decree Law on State Property Administration/Leasing of State Property* was passed by the Council of Ministers<sup>18</sup> and promulgated by the President in December 2004. It came into force on 24 May 2005.

A bill on *Land Dispute Mediation* was finalized by LLP and the Ministry of Justice in May 2004. The bill is currently being considered by the Minister of Justice and the Prime Minister before being presented to the Council of Ministers.

The draft *Law on Property System, Transfer, Registration, Pre-existing Rights and Title Restitution* was presented to the Minister for Justice and the Prime Ministers in late 2004.<sup>19</sup>

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<sup>16</sup> The intention was to register land disputes for the mediation of conflicts and administrative title restitution. Conflicts imply that such properties are the subject of competing claims or one party disputes another's occupation. Once rights are validated or 'restituted', nationals will be entitled to formal registration of their land.

<sup>17</sup> Information from interview with Edwin Urresta and Rod Nixon, USAID-ARD Land Law Program, 7 June 2005.

<sup>18</sup> Decree laws can be passed, and amended by the Council of Ministers and do not have to be sent to Parliament for review and approval.

<sup>19</sup> This law provides for the following:

- Foreign owner compliance – system of restitution of pre-existing land rights held by non-nationals
- Types of land rights
- Option of land registration
- Determines creation of a land council for administering titling of property. This will be an independent body with representatives from government, parliament, church and other organizations so as to provide transparency. It would make administrative decisions based on DNTP's technical analysis. There are a series of steps set out for administering a decision.

### **4.3 Subsidiary Laws**

#### ***4.3.1 UNTAET Regulations***

Regulations were enacted by UNTAET to facilitate the administration of assets and prohibit transactions in land in Timor-Leste by Indonesian citizens and corporations as an interim measure until such time as a comprehensive property regime came into force.

The administration of assets is set out in Article 7.1 of UNTAET Regulation 1999/1 which states that UNTAET shall administer immovable or movable property, including monies, bank accounts, and other property of, or registered in the name of the Republic of Indonesia, or any of its subsidiary organs and agencies, which is in the territory of East Timor. According to Article 7.2 UNTAET shall also administer any property, both as specified in section 7.1 of the present regulation and privately owned that was abandoned after 30 August 1999, the date of the popular consultation, until such time as the lawful owners are determined.

Significantly, UNTAET Regulation 2000/27 on the Temporary Prohibition of Transactions in Land in Timor Leste by Indonesian Citizens not Habitually Resident in Timor Leste and by Indonesian Corporations banned the sale of land and the granting of leasehold interests by Indonesian citizens and corporations.

#### ***4.3.2 Indonesian Law***

The combined effect of Article 165 of the RDTL Constitution, Law No 2/2002 – Interpretation of Applicable Law and sections 2 & 3 of UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor is to apply the laws which applied in Timor Leste prior to the UNTAET mandate insofar as they do not conflict with international human rights standards or subsequent laws. In theory this allows for the application of Indonesian law to settle land and property disputes in the absence of a comprehensive Timor Leste land law.

Indonesia has a number of Basic Land laws, however the most relevant provision is set out in Basic Agrarian Law No.5/1960. According to Article 23:

- “(1) Property, and its transfer, expiration, and its encumbrance by other rights shall be registered under the provisions set out in Article 19(2) on land registration which encompasses (a) surveying, mapping and recording, (b) registration of rights over land and transfer of such rights, (c) the granting of documents demonstrating such rights, which are valid as reputable evidence.”

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With this law in place land titling could begin next year: Interview with Edwin Urresta, Chief of Party, USAID-ARD Land Law Program, 7 June 2005.

Nevertheless, in light of current initiatives for the creation of a comprehensive property regime for Timor Leste and the moratorium placed on property transactions under UNTAET regulations it would appear that the Basic Agrarian Law is of no practical effect and applies in theory only.

## **5. THE ROLE OF THE DNTP & LLP**

The Ministry of Justice, through the DNTP, is responsible for administering “immovable property” (i.e. land) in Timor Leste. Pursuant to Article 17.1 of Law 1/2003 the DNTP is responsible for identifying all land in Timor Leste until such time as an official land law regime is put in place. Under Article 17.2 the DNTP shall register and publish land titles for all legal subjects.

According to Article 17.3 the DNTP is also responsible for proposing a national land policy as well as drafting land legislation.

The ARD Land Law Program for Timor-Leste (LLP) is an independent USAID-funded scheme established to support the Ministry of Justice and co-operate with the DNTP and the National University of Timor Lorosa'e (UNTL) in developing and drafting a land law regime for Timor Leste. The LLP conducted applied research for, prepared and presented four major reports to the government concerning (1) State Property Administration/Lease of Government and State Property, (2) Land Dispute Mediation, (3) Land Rights and Title Restitution, and (4) Foreign Owner Compliance with the Constitution. Grounded on this research the LPP provided technical assistance with the drafting of the major land laws.

As noted in section 4.2 above, a number of laws based on LLP research findings and policy recommendations are progressing through government legislative institutions and procedures.

### **5.1 The settlement of land and property disputes through mediation**

The DNTP performs a supervisory and administrative role with respect to *public property* and *private property* and is given special status to settle disputes between parties via non-judicial mediation under Law 1/2003. Mediation is used to settle disputes as a means of avoiding conflicts between competing interests. In Timor Leste the majority of land disputes are settled outside of the court system.

The mediation process was put in place during the UNTAET period. Approximately one third of all land disputes are subject to mediation both at the national and district levels, via local branches of the DNTP in the 13 districts. Mediation is performed in the districts by DNTP officers and also involves community leaders who have been provided with training. Mediation conducted by community leaders is called *traditional resolution* and

is initiated by the DNTP. The DNTP also provides training to the community about mediation strategies.<sup>20</sup>

## **6. NUMBER OF CASES IN THE DISTRICT COURTS SINCE 2000**

All District Courts<sup>21</sup> have both criminal and civil jurisdiction (UNTAET Regulation 2000/11 s 6). The courts' civil jurisdiction encompasses land disputes.

The district courts of Oecussi, Baucau and Suai have received very few land and property disputes, and all of the cases they have received are yet to reach final decision.<sup>22</sup> Since the start of 2000, 267 civil cases have been registered at the Dili District Court. Seventy-nine of these cases relate to land and property, 38 of which have been decided by the district court.<sup>23</sup> During 2004 JSMP did not observe any final decisions relating to land and property.<sup>24</sup> At the start of January 2005, however, two cases were decided. There have been a number of appeals (both interlocutory and final) from the various district courts, however, the Court of Appeal has not made a decision in any of these cases, as it has yet to decide an appeal in a civil case.<sup>25</sup>

## **7. EXAMPLES OF CASES BEFORE THE DISTRICT COURTS**

To illustrate the range of factual complexities associated with land disputes being dealt with by the district courts JSMP has chosen to examine three cases which involve a number of competing interests. These cases raise issues relating to the appropriation of 'adat' land (proprietary interests created under traditional law) by successive governments,

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<sup>20</sup> Interview conducted with Pedro Xavier, Director of DNTP, 7 July 2004.

<sup>21</sup> There are four district courts in Timor Leste: Dili, Baucau, Suai and Oecusi, as well as the Special Panels for Serious Crimes, and the Court of Appeal.

<sup>22</sup> Since January 2005 it has not been possible to access any decisions from the district courts or Court of Appeal, so it is possible there have been decisions in these cases of which JSMP is not aware (although we have tried to monitor at least 80% of cases in all the courts).

<sup>23</sup> Data compiled by the registrar on civil disputes, August 2004. This total does not include two land dispute cases which reached a final decision in January 2005.

<sup>24</sup> The reason for the delays in decisions in these cases is because from 2003 onwards there was a halt in civil proceedings. The halt in civil proceedings relates to the general problems faced by all district courts. In particular, from July 2003, eight East Timorese judges went to Portugal for training, resulting in a reduction in the number of judges and a corresponding reduction in the number of cases that could be heard by the courts. For this reason criminal cases were prioritized over civil cases. Although these judges returned from Portugal in mid 2004, from September 2004 all of the national court actors started to attend a compulsory training program at the Judicial Training Centre in Dili. From January 2005 this intensive training was scheduled for another two and a half years. Four international judges, one international prosecutor, and one international public defender (who are all from Portuguese speaking countries), are currently working in the District Courts. This lack of court actors to deal with the significant backlog of cases means that criminal cases will continue to be given top priority. The international court actors also face difficulties using Indonesian civil law (with which they are not familiar, and which to date has only been translated to English) and many documents/case files have to be translated from Indonesian into Tetun or Portuguese.

<sup>25</sup> See *JSMP Report*, "Overview of the Justice Sector: March 2004".

legitimate transfer of land by past governments to private individuals, occupation of property by Indonesian military forces, and land which was vacated by owners who left Timor for the duration of the 25 year occupation by Indonesia. The handling of these cases by the court is discussed in the knowledge that new laws have not yet been passed to deal specifically with these varied situations.<sup>26</sup>

JSMP calls on the government and parliament of Timor Leste to discuss and pass the bills on *Land Dispute Mediation*, and the *Law on Property System, Transfer, Registration, Pre-existing Rights and Title Restitution* in order that the courts and nationals of Timor Leste, as well as non-national landowners, may have some certainty as to land titles and rights to restitution.

Following its promulgation several decisions have been issued which conflict with Law 1/2003. For example in the case of the *Baucau Pousada* land and property was appropriated to run a business without permission from the landowner. However an interlocutory decision from the court allowed the party taking over that land to continue its business. This property ought to have been administered by the state, as required by Article 4 of Law No.1/2003, or if this was not the case then in the very least the status of that land should have been declared before an agreement was reached.

### **7.1 Rosario dos Martires's case**

The plaintiff (Joao Jose do Rosario dos Martires) and his five siblings are the children of Maria Esmeralda Madalena Sequeira dos Martires and Joao Jose Carrezedo de Sousa dos Martires who died in September 1976 in Australia.

During his lifetime the deceased Joao Jose C. De Sousa Ferreira Martires owned a piece of land which contained a permanent construction (in accordance with Alvara De Concessao 2.@ VIA dated 2 June 1955) situated in Colmera, Dili. The plaintiff occupied this house before fleeing to Australia in 1975.

After the Indonesian National Army (TNI) invaded Timor Leste in 1975 the plaintiff's land and property became a TNI base named *Ajenrem*. During that time the plaintiff always kept in contact with the TNI authorities who were occupying the house.

After the TNI left Timor Leste in 1999 Dewan Solidaritas Mahasiswa (DSM) (the Respondent) occupied that house.

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<sup>26</sup> One common situation which is not discussed is the issue of foreign owned land and current property rights or rights to compensation. According to an ARD survey 73% of land claims registered to be adjudicated according to laws that have not been developed were made by foreigners. We note that the *Law on Property System, Transfer, Registration, Pre-existing Rights and Title Restitution* is yet to be passed by the Council of Ministers or the Parliament. See Urresta, E and R Nixon, *Research Findings, Policy Options and Recommendations for Compliance with the Constitution by Non-national Claimants of Pre-existing Freehold Rights in Timor-Leste*, p. 8.

The plaintiff lodged a claim to the property with the DNTP on 13 November 2000. The DNTP issued an instruction on 3 August 2001 to DSM instructing them to immediately vacate the property. In spite of the directive issued by the DNTP, DSM did not move.

DSM took issue with the status of the plaintiff. Other documents showed that the plaintiff had given power of attorney to Manuel Carvalho, resident of Timor Leste (because the plaintiff was residing in Australia). This granting of power of attorney was intended to give Manuel Carvalho power to manage the house and other assets in dispute and, if necessary, to pursue legal action by appointing a lawyer to handle the inheritance of Joao Jose do Rosario dos Martires.

In the defence statement, the respondent claimed to have occupied the property with permission from the DNTP pursuant to a Temporary Use Agreement.

In its decision of 21 July 2003 the Dili District Court partially accepted the claim of the plaintiff. The court found the respondent liable for its actions in illegally occupying the land and property belonging to the plaintiff. The court ordered the respondent to vacate the house belonging to the plaintiff without receipt of any form of compensation from the plaintiff. The court rejected the other claims of the plaintiff.

In this decision the panel of judges referred to the Indonesian Civil Code, Indonesian Law 20/1947, UNTAET Regulations, and Timor Leste Law No.1/2003. This case gives a good indication of the complex state of land law at this time.

## **7.2 Baucau Pousada case**

In March 2003 the plaintiff sued the Oriente Star Company (Respondent I) and Sofeba Company (Respondent II) for illegal appropriation of traditional lands. These two companies in a joint venture were believed to have been conducting their activities on land bequeathed to the plaintiff under customary law. It was claimed that this issue originated from colonial times whereby the land which now houses the Pousada and Flamboyant Hotel had originally been the location of a traditional house (Uma Lulik) for the family of the plaintiff following hereditary custom. However, due to coercion from the Baucau District Administrator in 1948-1949 via the government and through threats to label the plaintiff's family as rebels or anti-government, the plaintiff's family was eventually forced to vacate their residence. The building was later taken over by the Indonesian government.

The Baucau District Administrator Luis Franco Ricardo conducted similar activities in relation to traditional land during 1964-1966 by forcefully placing divider pegs. He was also responsible for torturing two land owners who had made a claim. This land now houses the Baucau swimming pool.

After Timor Leste gained independence in May 2002, Respondents I and II rehabilitated the building, and a management agreement was made with an additional party for a

period of twenty years. The plaintiff made a claim regarding the rehabilitation of the building during the second transitional period of UNTAET and the Department of Internal Affairs (*Menteri Dalam Negeri*) ordered Respondent I to cease his activities. Respondent I did not take this order seriously.

The plaintiff sued the respondents for USD 500,000 and requested an order for the respondents to stop their activities on the land, including operation of the Flamboyant Hotel. On 25 June 2003 a court majority struck out the plaintiff's claim by stating that the claim had not been made against all possible respondents.<sup>27</sup> The Oriente Star and Sofeba companies as well as the plaintiff were issued with a copy of this decision.

### 7.3 Carrascalao Case

In August 2003 the plaintiff, Mario Viegas Carrascalao, commenced a civil case against the DNTP claiming that he had illegally been forced to vacate his property.

The plaintiff claimed that in 1970 he had occupied a house located in Farol, Dili due to an offer made by the Portuguese government to enter into a lease-purchase contract. In order to acquire the house the plaintiff paid in full 704 Portuguese Escudos from 1974 until July 1975 when a civil war broke out.

During the Indonesian occupation the plaintiff reoccupied his house by exchanging it with another house situated right in front of the plaintiff's house, as that house was appropriated by Laksuda, a military group who did not pay for that house. The plaintiff also claims that from 1982 until 2003 the plaintiff had made repairs, alterations and additions to several rooms of the first house. The plaintiff had also obtained a certificate of right of ownership for this land and property No. 27.01.02.10.1.00006 measuring 1970 square meters.

However, the government of Timor Leste (the DNTP) considered that the land occupied by the plaintiff previously belonged to the Portuguese government, so that, according to Law No.1/2003, it now belongs to the government of Timor Leste.<sup>28</sup> On 23 February 2003 and 14 April 2003 the DNTP had requested the plaintiff to commence paying rent to the government if he wished to continue occupying the property, or to immediately vacate the property. This request was reinforced by a disposition from the Minister of Justice dated 9 May 2003 No./V/MJ/2003 stating that "the house occupied by the plaintiff belongs to the government and the plaintiff obtained possession illegally". On these grounds, and based on Law No.1/2003, the government, through the Minister of Justice on 15 July 2003 issued disposition No.480/VII/MJ/2003 forcing the plaintiff to vacate the land and house that he was occupying.

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<sup>27</sup> Interlocutory decision No. 02/pdt 6/2003/PD Baucau.

<sup>28</sup> Article 4 of Law No.1/2003 determines that all State property which belonged to the Portuguese State reverts to the State of Timor Leste.

The plaintiff presented his statement of claim to the court on 5 February 2004. Another hearing was heard on 2 March 2004.

## 8. CONCLUSION

The creation and implementation of an effectively functioning property regime is, or has been, a major challenge for every country in the world. The challenge is therefore particularly acute for Timor Leste, an impoverished country, and the world's newest, with a long history of conflict between foreign rule and local laws and traditions. In these circumstances it is hardly surprising that Timor Leste is burdened by what has been described as "a 'most challenging' land claims problem".<sup>29</sup> Nevertheless, significant legislative steps have been taken to directly address these issues through creation of a comprehensive property regime, although this is inevitably a gradual, step-by-step process which is only just beginning.

This legislative package is thus far comprised of five legislative instruments, of which two have been passed.<sup>30</sup> Law No 1/2003 – *Juridical Regime for Real Estate: Ownership* of Timor Leste provide the legal framework which will in the future provide the basis for more detailed, specific laws.

Whilst the laborious process of field research, analysis and policy development has been largely completed, it is clear that long process of drafting, passing and implementing land laws is only just beginning. The basic framework which is now in place will provide the foundations for the large number of legislative instruments which will be required to establish a truly comprehensive property regime in Timor Leste. Of the three draft laws awaiting promulgation the most important, in JSMP's view, is the draft *Law on Property System, Transfer, Registration, Pre-existing Rights and Title Restitution*. When passed it will implement some critical mechanisms essential for the creation of a title registration system which, it has been suggested, would enable the titling process to begin as early as next year. The law will also address the issue of restitution of pre-existing land rights held by non-nationals.

On a more basic level, while property owners and decision makers are awaiting legislative developments to bring certainty, there are fundamental issues which need to be addressed in the judicial system if the legislation is to be of any effect in the future. In adjudicating land claims the courts face a number of challenges in addition to the lack of necessary new laws. The two main problems faced by the courts in deciding land claims are the lack of court personnel and the language of the applicable law and case-file documents. As full-time training has now commenced with former national judges and

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<sup>29</sup> Supra note 3.

<sup>30</sup> *Law No 1/2003 – Juridical Regime for Real Estate: Ownership* (passed 10 March 2003); *The Decree Law on State Property Administration/Leasing of State Property* (came into force 24 May 2005); *The Law on Leasing between Private Individuals* (passed by Parliament but not yet promulgated by the President); bill on *Land Dispute Mediation* (currently being considered by the Minister of Justice and the Prime Minister); the draft *Law on Property System, Transfer, Registration, Pre-existing Rights and Title Restitution* (presented to the Minister for Justice and the Prime Ministers in late 2004).



other court actors the operation of the court is predominantly being performed by international actors. Following the current training programme, this situation will continue for a further two years. These demands on the limited resources of the court actors are likely to result in the continued situation in which, rightly, civil cases are given lower priority than criminal cases and therefore they are stalled in the system<sup>31</sup>.

There is, then, a clear need for the Government and Parliament of Timor Leste to approve the pending land laws as soon as proper process permits and to continue to develop the further laws necessary for creation of a functioning property regime. It is essential as a means of bringing certainty to property ownership and transactions which, since the commencement of the UNTAET mandate at the end of 1999, have remained largely in a state of confusion. Laws alone, however, will not suffice. Aside from the need for major efforts in judicial reform, active community education and outreach programs will be essential to ensure that the land laws are properly implemented and respected, and that future legal developments are adequately informed by traditional practices in the districts. Although there is much left to be done in the field of land law in Timor Leste the first important steps have been taken. It is critical that that momentum be maintained.

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<sup>31</sup> Until now it is JSMP's understanding that civil cases have not yet been heard by the international judges, however it is expected that they will commence hearing some cases within the next few months following translation of documents on court files.