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Faulty assumptions and misconceptions about land registration

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Land tenure in

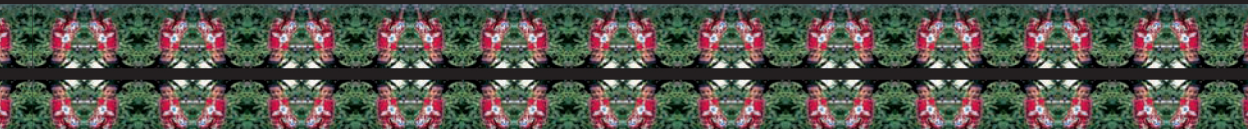
TIMOR - LESTE

Between resilient custom
and the resurgent state

Susanna Barnes (org/ed)

VOLUME IV

tlsa pt 2020



LAND TENURE IN TIMOR-LESTE: BETWEEN RESILIENT CUSTOM AND THE RESURGENT STATE
POSSE DA TERRA EM TIMOR-LESTE: ENTRE AS PRÁTICAS COSTUMEIRAS RESILIENTES E O ESTADO RESSURGENTE
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5. Faulty assumptions and misconceptions about land registration

Bernardo Almeida¹

Faulty assumptions and misconceptions about land registration

Land registration has a magnetic appeal to politicians, state officials, and practitioners. The objective of this paper is, in dialogue with the other papers of this special volume, to highlight some of the main assumptions and misconceptions on which land registration programs are often developed, the problems that they cause if not carefully implemented, and the conditions in which they can actually improve people's lives. This paper, based on my doctoral research (2020), does not aim to be a comprehensive literature review on existing knowledge regarding land registration nor an analysis of land registration in Timor-Leste, but aims instead to highlight a number of key authors and ideas on land registration that can contribute to the dialogue about this topic in Timor-Leste.

Land registration. Law. Land policy.

Suposições e equívocos sobre o registo de terras

O registo de terras tem um apelo magnético para políticos, funcionários públicos e profissionais da área. O objetivo deste artigo é, em diálogo com os outros artigos deste volume, destacar algumas das principais suposições e equívocos sobre os quais os programas de registo de terras são frequentemente desenvolvidos, os problemas que eles causam se não forem cuidadosamente implementados, e as condições em que eles podem realmente melhorar a vida das pessoas. Este artigo, baseado na minha pesquisa de doutoramento (2020), não pretende ser uma revisão abrangente da literatura sobre o registo de terras nem uma análise do registo de terras em Timor-Leste, mas visa destacar autores e ideias sobre o registo de terras que podem contribuir para o diálogo sobre este tema em Timor-Leste.

Registo da terra. Lei. Política das terras.

1. Leiden University College and Van Vollenhoven Institute (Leiden University Law School).

Hanoin oin-ketak no hala'ok sala kona-ba rejistu ba rai

Rejistu rai nian nu'udar atrasaun magnétiku ba polítiku sira, funsionáriu públiku no profisionál sira hotu iha área lala'ok ne'e. Artigu ne'e nia rohan mak atu, liuhosi dada lia ba malu ho artigu seluk iha volume espesial ida-ne'e, hasa'e hanoin ketak balu no hahalok sala balu mós ne'ebé programa rejistu rai nian dezenvolve ba, problema hirak-ne'ebé bele mosu karik bainhira la implementa ho kuida, no kondisaun ne'ebé hadi'ak ema nia moris. Artigu ida-ne'e bazeia ba peskiza ne'ebé hala'o tiha ba ha'u-nia doutoramentu (2020) no la haree luan ba literatura ne'ebé iha kona-ba rejistu rai nian no la'ós mós lehat ida ba rejistu rai iha Timor-Leste, maibé iha hakaran atu hasa'e autór no sira-nia hanoin kona-ba rejistu rai tuir oin ida-ne'ebé bele hatulun no loke dalan ba ko'alia ba malu kona tema ida-ne'e iha Timor-Leste.

Registrasaun rai. Lei. Política rai.

Introduction

Land registration has a magnetic appeal to politicians, state officials, and practitioners.² Factors such as the systematization and simplification of complex social realities that is expected from land registration (Scott, 1998) and the mesmerising effect of complex technologies and large-scale state interventions compel many to see land registration as *the* solution for land-related problems caused by colonialism, conflict, and displacement. Timor-Leste is no exception. Already during the Portuguese and Indonesian administrations, but especially since independence, land registration has often been seen as the main path to address problems facing the country, such as conflict over land, land tenure insecurity, and poor economic development. However, the supporters of land registration are often not aware that land registration is far from a silver-bullet for land-related issues; indeed, it can itself be a source of conflict, poverty, inequality and social exclusion. Land registration is an important tool of land administration, but only under the right conditions and for specific situations.

The objective of this paper is, in dialogue with the other papers of this special volume, to highlight some of the main assumptions and misconceptions on which land registration programs are often developed, the problems that they cause if not carefully implemented, and the conditions in which they can actually improve

2. For the sake of this paper I use a broad concept of *land registration* to include the process through which states collect geographical description about and land claims over land parcels, recognize and award land rights over those parcels, and record land rights in a public registry. A more nuanced definition of *land registration*, *land titling*, and *cadastral surveys* can be found in Almeida, 2020.

people's lives. This paper, based on my doctoral research (2020), does not aim to be a comprehensive literature review on existing knowledge regarding land registration nor an analysis of land registration in Timor-Leste, but aims instead to highlight a number of key authors and ideas on land registration that can contribute to the dialogue about this topic in Timor-Leste.

Faulty assumptions about land registration

The appeal of land registration and the arguments to promote it are not new. Centuries ago, colonial powers saw the individualization and formalization of land rights, in which land registration played a major role, as a necessary step to improve agricultural productivity and economic returns (Atwood, 1990: 659). Similar ideas about the importance of land registration for economic development became trendy throughout the 1960s, 70s and 80s, as part of the centralist governance style of postcolonial countries and with the support of international institutions such as the World Bank (World Bank, 1975; Bruce *et al.*, 1998: 251; Otto & Hoekema, 2012: 17). In 2000, Hernando de Soto and his famous book, *The Mystery of Capital*, again pointed to land registration as *the* silver bullet against poverty, saying that capitalism did not work in a number of developing countries because they failed to register their land (De Soto, 2000).

With different variations, the arguments in favour of land registration revolve around a number of common arguments: registering land rights – especially individual ownership rights – reduces conflict over land because it clarifies who owns each parcel of land, therefore creating tenure security; this certainty allows land owners to secure credit with the banks and it promotes investment in land, promoting a virtuous cycle of development and prosperity (Bruce *et al.*, 1998: 254; Ubink, 2009: 1; Hall, 2013). Moreover, registration is often, unintentionally or on purpose, described as a technical process, dependent on technology and conducted by ‘technicians’, masking the political nature of this process (Li, 2017: 1258; Almeida, 2020: 283). The argument in favour of land registration is simple and quite straightforward, and it is therefore so appealing. However, its simplicity overlooks a number of assumptions that are often not verified in practice (Benda-Beckmann, 2003; Benjaminsen *et al.*, 2008; Otto, 2009). For instance, it assumes that laws are favourable to poor people and will be enforced; that elites are willing to relinquish their power over land, leaving it to be more equally distributed, and that local powers will not interfere in the registration; that the administration has the capacity and means to adequately implement and maintain land registration projects, and issues such as corruption will not subvert the registration's result;

that banks are willing to give credit to people and the legal and administrative structures for this are in place; and that land registration will not clash with local norms and practices (*ibid*).

However, many of these assumptions are often not a reality in practice, and the expected virtuous cycle of land registration does not happen. In fact, research has consistently shown that land registration is often a new source of land-related conflicts, uncertainty regarding land rights, and new social grievances (Atwood, 1990: 663; Ubink, 2009: 8; Hall, 2013). Land registration can cause various problems. For example, it can reawaken dormant conflicts and cause new ones. It can concentrate land ownership among certain groups and allow elite capture of land, considering that the elite are in a better position to navigate administrative processes and exclude others from claiming land. It can further disempower women and vulnerable groups through their explicit or implicit exclusion from the registration process. And it can make de facto land tenure security even more insecure due to a mismatch between formal rights in the registry and informal land rights on the ground.³ In other words, land registration can be a tool for worsening and formalizing injustices and inequalities if poorly implemented (Borras Jr. & Franco, 2010).

Such a list of problems does not mean that land registration is completely without advantages. When adequately adapted to the circumstances on the ground and aimed at the right problems, land registration can contribute to improving people's lives (Deininger, 2003:47). The challenge is to know which circumstances are the right ones and which approaches are adequate to each specific context. A considerable amount of academic research has been done on this topic. The following section starts by giving an overview on land registration in Timor-Leste and then highlights some key findings and practices that research have shown to improve the outcome of land registration.

Timor-Leste, land registration and best practices

Land registration in Timor-Leste is not new; it started during the Portuguese administration and several registration attempts have been tried since them. The Indonesian administration implemented PRONA (*Proyek Operasi Nasional Agraria*), its large-scale land registration project (Yoder, 2005: 306; Fitzpatrick *et al.*, 2013: 254). UNTAET, pressured to not take any decisions on land-related issues, nev-

3. Among many other authors see, Atwood, 1990; Platteu, 1996; Lund, 2008; Cotula, 2012; Hall, 2013; Hall, 2013a; and Kerksen, 2013.

ertheless implemented an informal registration process (Yoder, 2005: 313). Since independence in 2002 there have already been three land registration attempts: the first based on Law 1/2003, through which around 13.000 land claims were registered. However, technical issues and lack of subsequent legislation about the legal status of these claims left these claims in a legal limbo (Almeida, 2020: 168).

The second land registration attempt was Ita Nia Rai (INR), a 10 million USD project implemented by USAID between 2008 and 2012, which collected around 50.000 land claims in the urban areas of each district capital and started to convert those claims into a property registry. However, due to a lack of political and operational coordination between USAID and the Ministry of Justice, the end of INR in 2012 was extremely messy, and its results were mostly wasted (ibid: 74).

Yet, no investment on land registration in Timor-Leste compares in cost with the third attempt, implemented through the SNC (National Cadastral System in its Portuguese acronym). At the end of 2013, through a sole-sourced six-year contract of around 60 million USD, the Government awarded a new land registration process to a Timorese/Portuguese joint venture without prior experience in this kind of work (ibid: 75).⁴ While SNC's terms of reference were never made public, the objective was to massively expand land registration throughout the country, with some people claiming that all land parcels in the country would be registered. SNC's practices and methodologies raised enormous controversy (Rede ba Rai, 2019; Human Rights Council, 2019: 15) and, to my knowledge, the data collected remains yet unused, has not continued to be updated, and is awaiting some kind of implementation. It seems that, again, the many assumptions mentioned above about the virtuous cycle of land registration were again not in place.

So what went wrong? It is beyond the scope of this paper to debate this question in detail, but key research on land registration is an interesting starting point of this discussion. And while there is no definitive agreement on what good land registration looks like, there are a number of fairly consensual best practices. For instance, the conclusions and recommendations of the edited volume by Bruce and Migot-Adholla (Bruce *et al.*, 1994) – one of the first comprehensive efforts to study the benefits, problems and misconceptions of land registration – provides an interesting analytical framework for looking at land registration in Timor-Leste. The study recommends questioning the wisdom and cost-effectiveness of large-scale, systematic programs of compulsory titling for smallholders in rural areas. As mentioned above, the success of land registration depends on a number of assumptions that are often borne out in these areas, and in such circumstances,

4. On the costs of land administration systems compare with other projects described by Burns & Fairlie, 2018.

land registration is at best a waste of money, but can also be a trigger of conflict, elite capture, disempowerment of parts of society, and dispossession. Therefore, land registration must be approached with scepticism and only implemented when well supported by adequate research on the local context. In fact, the study advises taking an incremental approaches to local tenure systems and moving away from a 'replacement paradigm' towards an 'adaptation paradigm', where land administration is developed taking into consideration and working with the existing systems on the ground (see also Bruce, 2012). This does not mean that land issues should be ignored, but rather that efforts should be redirected from systematic individual registration to the effective needs at local level; for instance, more than registration, communities might need an adequate legal and de facto recognition of their customary systems. Also, the authors advise focusing land registration efforts on areas where land registration can be more useful, such as valuable areas subject to intense competition and disputes, where there is no customary system, or where the customary system is failing to cope with conflicts, such as urban and peri-urban areas. They also recommend focusing on the rehabilitation of existing registries before considering the expansion to new areas, and they highlight the risks of land registration endangering secondary land rights that often are not part of the registration process, such as land use rights. Finally, the authors advise updating information from day one. Too often land registration programs are implemented without the administrative systems to update the registered land parcels when transacted, quickly becoming outdated.

The concept of 'fit-for-purpose land administration', supported by the Federation of International Surveyors (FIG) and the World Bank and the Global Land Tool Network, also establishes a number of interesting principles to analyse land registration in Timor-Leste (Enmark *et al.*, 2014; Enmark *et al.*, 2015).⁵ This concept results from lessons learned from numerous failed land registration processes around the world. In short, the authors say that, in the development of a formal land tenure system – including land registration processes – the main objective must be serving people's basic needs (e.g., tenure security), rather than focusing on highly technological solutions. These systems must be flexible, and can be incrementally improved over time, but it is important that they start in a simple and sustainable way. Highly sophisticated systems can be seen as an end objective, but not a starting point, as highly sophisticated systems depend on years of experi-

5. In my view this concept, developed primarily by land surveyors, is too is focused on land registration as a 'the' tool of land administration, without sufficient consideration for alternatives (Almeida, 2016). It is nevertheless a well-developed and informed critic of land registration programs.

ence and incremental improvements. Without going through the complexity of all recommendations, there are a few more technical points that are worth highlighting. For instance, the authors recommend that the geographic accuracy of land boundaries must be adapted to the existing needs and capacity of land administration institutions. Geographical accuracy is very expensive and time consuming to obtain and maintain, and it does little to address key issues such as achieving tenure security or solving disputes over land rights. The authors also highlight the need for adequate consideration of the bureaucratic barriers that prevent people from participating in land registration. Another central recommendation is the need for a ‘fit-for-purpose approach’ to technological choices, which should aim first and foremost at the current needs of society and be aware of the various examples throughout the world where complex technology immediately failed due to the lack of local capacity to maintain it. Finally, the concept of ‘fit-for-purpose’ highlights the importance of transparent land information and the need for easy and affordable access for all.

When comparing SNC’s work in Timor-Leste with these recommendations, we can only conclude that, besides being conceptually very problematic, its implementation ignored many of the basic recommendations for land registration (see Rede ba Rai, 2019; Almeida, 2020: 76; 213). The fast, one-size-fits-all expansion of land registration, the disregard for communal land claims, the lack of a gender strategy, the lack of a mechanism to keep up with land transactions, the administrative and logistical impediments to citizens’ participation in the process, and the lack of transparency are only a few examples. Therefore, it is not surprising that SNC’s land registration has not improved land-related issues in Timor-Leste, and has instead created a new layer of problems and complications.

Conclusion

In line with what the literature has reported in several other countries, the case of Timor-Leste shows that land registration is far from a silver bullet for issues such as conflict over land, land tenure insecurity, and poor economic development, and it can even aggravate these and other problems if not carefully used. As previous research on SNC has already described – and the reality on the ground continues to show – poorly designed registration processes that take a one-size-fits-all approach and do not account for local systems, administrative limitations, and most importantly the needs of the people on the ground, at best soon become obsolete, but most probably become a source of more confusion, conflict, dispossession and inequality. It is therefore important that politicians, state officials and

practitioners become more aware of the risks of land registration, and start seeing it as one of many tools that can be used for land administration, rather than an end in itself. For instance, in Timor-Leste the tenure security of many rural communities could be easily strengthened by making sure that the state – the biggest threat to their tenure – does not arbitrarily dispossess them of their land. As said by Atwood, in certain circumstances ‘a simple and well publicized government decree declaring the validity of certain kinds of land claims or transactions may be much less costly, and as effective, as a major land titling program’ (1990: 667).

Finally, as I concluded in previous research, the most important step for improving land-related issues in Timor-Leste is not any new technological solution for land registration, but a stronger political will to protect people’s rights to land (Almeida, 2020: 284). Although a number of other factors might also contribute to improving land-related issues, such as better-organized lawmaking and stronger administrative procedures, a change in the existing political paradigm in which people can be easily displaced is paramount for fairer land tenure in Timor-Leste.

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