



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

**JSMP Proposal for the Draft Civil Code to reflect the real situation in
Timor-Leste**

Proposal for Committee A of the National Parliament

23 September 2010

1. Introduction

JSMP congratulates Committee A of the National Parliament for providing non-government organizations an opportunity to make comments on the code in question, which is a crucial law. JSMP believes that a comprehensive Civil Code that reflects the reality of Timor-Leste will make a massive contribution to the judicial system and will strengthen the rule of law and aid development in Timor-Leste.

In this proposal we present our overall view of the Civil Code and make several recommendations about how Committee A can provide guarantees that this draft laws will truly reflect the needs of Timor-Leste.

The aim of our proposal is to show that:

- This Civil Code is extremely important because it constitutes a law that will act as a basis of all other civil legislation;
- This Civil Code is particularly complex because no version is available in Tetum which means it will be difficult for people to understand it;
- Until now there have been no efforts to disseminate information about this draft law; and
- This Civil Code will have a direct impact on the lives of people in Timor-Leste and therefore there is an urgent need to organize an in-depth discussion about this law.

JSMP believes that it is extremely important for non-government organizations to be given an opportunity to voice their opinions on this law, discuss it and initiate efforts to gain a better understanding of this draft law and its impact. For this reason JSMP organized a Focus Group Discussion to discuss this Civil Code and brought together representatives from NGOs, the professional sphere, academia (universities) and religious organizations.

This proposal aims to present questions to members of parliament about the challenges that are posed by this Civil Code. The purpose of this process is to use case studies to highlight the many important issues that need to be discussed and agreed upon before the Civil Code is approved. This proposal does not contain specific and detailed recommendations on what needs to be included in the Civil Code, however we have tried to emphasize to the National Parliament that it must adopt a consultation process in order to draft a law that reflects the actual situation in Timor-Leste and to ensure that this law can be implemented. Due to the fact that JSMP organized a Focus Group Discussion involving NGOs, this proposal focuses on the issues that emerged from specific cases studies and will possibly touch upon important matters that are not directly related to the Civil Code. However, these issues are crucial to understanding the thoughts of the community towards all of these matters, what is occurring now and what the participants believe should happen in the future in relation to the aforementioned case studies.

JMSP has included technical analysis and specific recommendations in this proposal. However, Committee A should not consider this technical analysis to be complete, because we had limited time, human resources, capacity and language. The analysis provided by JSMP merely demonstrates the need to have technical experts to discuss this law and adapt the law to the context of Timor-Leste.

JSMP prepared this proposal with the assistance and commentary on Section 2 from Mr. Filipe Alfaiate, an international lawyer.

a. Structure of this Proposal

The draft Civil Code includes a number of articles that are extremely complex. Therefore we have not been able to comment on everything in the draft law. The draft law contains many articles that are well drafted and ready to be implemented. However in this proposal we have tried to provide some examples that show that this draft law is not ready for approval and that further consultation is required. We have chosen to rely on cases studies based on the real situation in Timor-Leste because this draft law will have a major impact on everyone, and every aspect of their life. Although most people are not lawyers or members of parliament, they have many important ideas on how the government can regulate their lives, especially on matters such as marriage, divorce, inheritance, land, ownership, adoption etc.

This proposal is set out as follows:

- **Section 1** – Short introduction about the proposal, including information about all the activities undertaken by JSMP in relation to this draft law and the challenges faced by JSMP.
- **Section 2** – Provides general information about the Civil Code in Timor-Leste and the experience of other countries.
- **Sections 3 – 7** include cases studies that provide examples on how this draft law will influence peoples' lives. This section includes commentary from those who participated in the Focus Group Discussion (FGD) facilitated by JSMP which discussed the draft law, as well as several considerations from JSMP on how this draft law can be applied in a wide range of situations.
- **Section 8** – Includes other general commentary from us and those who participated in the FGD.
- **Section 9** – Presents general recommendations prepared by JSMP on how to resolve problems relating to the draft law in its present form.

b. JSMP activities relating to the Civil Code – Translation and FGD

JSMP believes that this draft law is crucial and will have an impact on everybody's life. Therefore JSMP, through its Parliamentary Watch Program (PWP), organized two activities to help everyone in the community to have a least some understanding about this law and how they can contribute their thoughts.

The first JSMP activity focused on how to obtain an unofficial translation into Tetum of Book IV from the draft Civil Code, which focuses specifically on 'Family'. Although it should be the responsibility of the government and national parliament to translate all draft laws into Tetum so that everyone can participate in the legislative process, JSMP organized an unofficial translation to help enable the people of Timor-Leste to present their views on a law that deals with family issues, namely a law that regulates the relationships between family members in this country. JSMP organized this translation because we believe that it is of utmost importance that all citizens and NGOs can participate in the process of developing such a crucial law. JSMP decided to focus on Book IV only because of funding and time restraints. However this does not mean that Book IV is the most important section. If there are any irregularities in the translation then please refer to the original version. To access the translation of Book IV of the Code please refer to Attachment 1. We have also

included a translation of Articles 1 – 11 in Attachment 2. To make these translations available to the general public JSMP placed them on its website.¹

The second JSMP activity was to organize and conduct a Focus Group Discussion (FGD) with participants who come from a wide range of professional backgrounds and from different fields. The FGD was held on 16 September 2010 in the meeting room of Yayasan HAK. This FGD saw the enthusiastic participation of NGOs, representatives from various religious organizations, including the Catholic, Protest and Muslim faiths, representatives from the Ministry of Justice, academics, national lawyers and a number of international lawyers totaling some 41 individuals. This FGD used 'case studies' to enable all participants to think about how the state can regulate their lives. JSMP has included the very same cases studies in this proposal. For more detailed information about the FGD please refer to Attachments 3 and 4 that were included in a Press Release on this FGD as well as a list of participants.

c. Limitations of this proposal

JSMP is very happy that Committee A provided an opportunity for us to prepare a proposal on the draft Civil Code. We believe that it is of utmost importance to hold consultations so that the community members, who are the ones that will be affected by this law, are given a chance to state their opinion or make suggestions so that this law will be specifically adapted to suit the conditions and circumstances of Timor-Leste. Nevertheless, JSMP wishes to explain the limitations it faced when trying to participate in this consultative process and when trying to draft an honest proposal.

One limitation relates to language. JSMP wishes to emphasize that because it was only able to access this law in Portuguese (and an unofficial version in English) our ability to make specific comments was extremely limited and all of the comments presented below are general in nature. JSMP is also concerned that members of the National Parliament or Government might face the same difficult because of language. The National Parliament discussed this problem on 31 May 2010 when it conducted a public debate on this draft Civil Code.² JSMP believes that the draft Civil Code should have also been produced in Tetum as well as Portuguese to ensure that the consultative process could run smoothly.

These second limitation we faced was the difficulty in obtaining information about this draft Civil Code. JSMP was only able to get a Portuguese version and an unofficial English version through informal channels, and not through a formal consultative process. JSMP was never formally invited by the Government or Parliament to participate in a meeting or workshop on this draft law. In August and September JSMP requested for the National Parliament to include this proposal, but at that time all members of parliament were still on holiday and we did not receive confirmation about this matter until 20 September 2010. This proposal had to be written very quickly and therefore JSMP acknowledges that there may be some parts of this proposal that have not been prepared thoroughly, completely or in a sufficiently detailed manner. We hope that you understand that this situation was caused by the limitations that we faced.

JSMP is aware that members of National Parliament and Government are extremely busy dealing with a large number of activities, however JSMP wishes to emphasize that a formal consultation process, for example a workshop or seminar, on this draft law is something of extreme importance. This law comprises many articles that are very complicated, but at the same time the law will impact on the lives of everyone and will form the basis for all other relevant legislation in the future. If we

¹ www.jsmp.minihub.org

² For more detailed information, please refer to JSMP Press Release '*Use of the Portuguese language makes it hard for a number of parliamentarians to debate the draft civil code*', June 2010, which is available on the JSMP website: www.jsmp.minihub.org.

can learn from Portugal, it took 22 years to accumulate input from all parties, to conduct adequate research to draft and approve their Civil Code. It is fair to say that the drafting of the Timor-Leste Civil Code has been extremely rapid because the draft code has been put together in just a few years. It is necessary to reflect on and discuss the matters regulated in the draft Civil Code and a considerable amount of time and resources should be provided before endeavoring to draft this law.

2. What is the Civil Code? Why is the Civil Code so important? Why does the Civil Code have to reflect the real situation in Timor-Leste?

The Civil Code is a law that regulates the legal relationship between an individual in relation to the needs of another individual or the community.³

The Civil Code is a law that generally aims to establish a foundation for all other civil legislation. This law will contain the norms or standards that will provide reference points/guidelines to all other laws that specifically relate to any matter contained in the Civil Code itself (for example, adoption, custody rights etc). These norms establish rights and responsibilities, their implementation in various contexts, time limits and how to deal with legal relationships, property and disputes.

The Draft Civil Code of Timor-Leste consists of five sections:

1. Section 1 on "*general provisions*" (Book 1)
This section includes the general principles applied to all books, for example who has the capacity to enter into a legal relationship and how to interpret the law.
2. Section 2 on "*Obligations*" (Book 2)
For example: contracts in general, responsibilities, guarantees, fulfillment of contract, legal sanctions for those who do not fulfill their contractual obligations, construction contracts, mandates, etc.
3. Section 3 on "*property and land*" (Book 3)
For example: ownership rights, land rights, sales, contracts etc.
4. Section 4 on "*family*" (Book 4)
For example: who can marry, divorce, adoption, alimony etc.
5. Section 5 on "*inheritance*" (Book 5)
For example: who has the right to inheritance, how the government decides on the size or value of an inheritance.

The Civil Code is extremely complex. Mr. Filipe Alfaiate, an international lawyer invited by JSMP to speak before the FGD, explained that in Portugal it took 22 years to research and draft their Civil Code. This was necessary because the Civil Code regulates the most important and complex aspects of a person's life, for example marriage, family, inheritance, land, contracts, the respective responsibilities ascribed to individuals who damage the property of others.

On the aforementioned occasion, Mr. Filipe stated that the draft law prepared by the government is almost entirely the same as the Portuguese Civil Code which is also the same as other civil codes in

³ Prof. R Soebekti SH, '*Hukum Perdata*' (Civil Law), published on March 26, 2009 *Kunjungan*: 15643

European nations and Portuguese speaking nations. The legal solutions provided in the Portuguese Civil Code are normally quite satisfactory. Therefore Timor-Leste can use the Portuguese code or the codes from other countries as a basis for drafting its own Civil Code. However, Timor-Leste should refrain from merely copying or duplicating the content.

Mr. Filipe urged all Timorese people to analyze the draft Civil Code to see how strongly it is linked to the social reality of Timor-Leste. If the code is not properly adapted then people will ignore it, which is what has happened in Ethiopia, where their Civil Code is not effective because it has no connection with the reality in that country, or it fails to reflect the real circumstances and culture of that country.

Why should the drafting of the Civil Code reflect the real circumstances in Timor-Leste? Based on the experiences of other countries, including Portugal, the drafting of a Civil Code always involves sufficient research and consideration of case studies as well as analysis of all factors. Mr. Filipe presented this argument based on the fact that all countries have different traditions and cultures and well as living conditions that vary significantly. It is really important for the members of national parliament to discuss the source of all rights that will be deemed applicable by the courts in Timor-Leste, especially the nature of values originating from traditional law. For example, traditional legal values on inheritance or family responsibility.

JSMP believes that for a law to be valued and respected by all parties, ideally it should take into consideration the following aspects:

- The law must be consistent with the *"culture"* of each area, although this issue requires further discussion because some cultures are in conflict with international principles of human rights, but others could become reference points to be developed, promoted and protected if they don't conflict with the aforementioned international principles. We should not forget that the Constitution of Timor-Leste is the fundamental law which is the highest source of law which demands respect for traditional cultures that are not contrary to the rights prescribed in the Constitution and human rights (Article 2 of the Constitution of the Democratic Republic of Timor-Leste). The Civil Code must correspond with and be compatible with all of the articles contained in the Constitution; otherwise it will be deemed unconstitutional.
- The law must be consistent with *"sociological"* aspects because the law and the community continuously impact on one other. Changes in values, or in what is right and wrong, or what is appropriate or inappropriate in the eyes of the community, can influence the development of the content of the law itself.
- The law must be consistent with *"philosophical"* aspects because the outlook of a particular community or nation is the foundation for its existence and its legal identity, both in terms of how this is expressed in the legislative sphere, as well as how it legally binds all citizens.⁴
- Finally, a law must be drafted to be consistent with *the resources* owned by Timor-Leste and the current status of development in Timor-Leste. Currently Timor-Leste has extremely limited financial and human resources, therefore the Civil Code should not provide complex solutions if those who work in the judicial sphere do not have sufficient capacity to interpret the code effectively.

JSMP believes that if the Civil Code does not adequately reflect the criteria mentioned above, then many problems will emerge and the community of Timor-Leste may refuse to adhere to, or ignore, this aspect of the formal legal system.

3. Case study I on Traditional Marriage, Domestic Violence and Divorce

⁴ Kelik Endro Suryono in *'Politika Legal 2002'*, pages 6 and 8.

10 years ago Luiza got married at 16 years of age in accordance with traditional or customary law, and now she has four children. She never got married in a church or civil ceremony, however the community in which she lives consider her to be married. She lives with her husband and his family in Dili, and Luiza's family live in Baucau. Luiza works as a cleaner in an office. Her husband works as a carpenter.

Luiza is often the victim of domestic violence committed by her husband. Sometimes she needs to go to hospital as a result of the violence committed by her own husband. Sometimes her husband also commits violence against their children.

Luiza wants to get divorced but she is confused because she doesn't know where she can get legal representation and she is worried about how she will be able to raise her children without any money. Her husband tells her that if she makes a complaint to the court then she will lose custody of her children. Luiza is faced with a very difficult situation because she can not return to her family, because this will embarrass them and undermine the dignity of her own family.

a. Views of the participants in the Focus Group Discussion (FGD)

According to the views expressed by those participating in the FGD, this type of situation is quite common in Timor-Leste. They believe there are four stages of resolution that are normally utilized by in the community. Firstly they will try to settle the matter between the respective families of the wife and husband. If this process is unsuccessful, they will proceed to the second stage which is to meet with the local elders who have authority in that region. If this is unsuccessful then they will proceed to the third stage, and take the matter to a higher level, namely the local village chief. If this is unsuccessful then they will proceed to the final stage which is to take the matter to be resolved in court.

The participants saw a number of problems with using this process to settle such disputes. For example, sometimes the decision making process is dominated by a particular group or the decision of the family in question can cause the victim to be victimized for the second time, whereby she was first a victim in the family sphere and subsequently in her own community. Therefore those who participated in the FGD suggested that it would be more appropriate for the victim or vulnerable person to settle their problem through formal justice or take the matter to court in accordance with the more appropriate formal system. The problem is that they do not have sufficient knowledge to access this system. The participants recommended that the law should reflect the real circumstances in Timor-Leste. Those living in isolated areas do not have a good understanding or knowledge of the formal process, and therefore the government and civil society or NGOs and all parties need to raise awareness and initiate formal processes in all areas, for example the village council could also be tasked with providing protection and trying to raise the welfare of the community in general. The participants also believed that this law should correspond with the tasks or roles of local authorities.

The participants also identified the relationship between criminal law and civil law. They believe that if a crime is committed then it should be processed in accordance with the formal law, and should not be settled in a traditional manner or merely based on a non-formal process, because sometimes the decisions made are not fair on victims. They also believe that because we have a law on domestic violence, any person who sees an act of domestic violence can report the matter and have it resolved through the formal process, because this type of violence is considered as a public crime.

During the final session the participants stated that the draft law does not cover all criteria and regulations for those who are sharing a household but have not yet been official married, either in accordance with traditional law or religion. This will create problems for people like Luiza.

b. JSMP's views on how the draft Civil Code can be applied to this case study

JSMP believes that this situation highlights the specific vulnerability of women in relation to the draft Civil Code in Timor-Leste. Article 1538 of the draft Civil Code states that marriages have to be registered. If two members of the opposite sex live together in a home (husband and wife) and are acknowledged to be husband and wife, but they have no formal documentation, then the court can not acknowledge their marriage and other provisions in the Civil Code can not be applied to them. This means that the protection provided for in the Civil Code can not be applied in the case of Luiza.

JSMP believes that for this registration process to be relevant there must be extensive awareness raising efforts across Timor-Leste to emphasize the importance of registration. It is also necessary to establish ways in which to provide the community with the same level of assistance to obtain registration and facilitate this process. JSMP believes that if this does not occur then many people will not register the status of their relationship. JSMP believes that if the state does not have human resources or if the National Parliament does not want to take part in disseminating information about the law, with the intent of protecting the rights of all citizens in regards to this matter, in line with the objective of the Civil Code, then the law must acknowledge '*de facto*' relationships for those who live as husband and wife without formal registration. If the National Parliament decide to recognize '*de facto*' relationships it is crucial that the Civil Code clearly states that two people have to be living together before they are given legal recognition (for example, at least one year). If they do not do so then many Timorese women in the same situation as Luiza will find it very hard to obtain civil protection, for example it will be harder for them to obtain their right to alimony if they are getting divorced or it will be very difficult for them to obtain an inheritance.

The International Committee on the Eradication of All Forms of Discrimination Against Women (CEDAW Committee) stated in General Comment No 12 (Paragraph 18) that a woman in a '*de facto*' relationship must be have equal status with a man in the household and the same right to obtain land, money and everything else mentioned in Article 16 (1) of the Convention on the Eradication of All Forms of Discrimination Against Women (CEDAW). JSMP refers to this statement to support its recommendation for the Civil Code to give some recognition to *de facto* relationships.

JSMP believes that criminal acts such as domestic violence are caused by an unequal balance of power between men and women, and women like Luiza are not able to obtain protection from the Civil Code and Luiza and her children are extremely vulnerable. In the case of Luiza, if her husband did not want a divorce, then for Luiza to obtain the divorce she would have to contemplate legal grounds for taking action. In such a situation the Civil Code only mentions grounds for separation, whereby if there has been a crime against marital rights/obligations and the severity of the crime does not allow them to live together (Article 1656 (1)). Marital obligations are set out in Articles 1560, 1562, 1563, 1564. Article 1560 states:

The spouses are reciprocally bound by the duties of respect, fidelity, cohabitation, cooperation and assistance.

Even though the aforementioned article suggests that Luiza can get divorced if her husband violates her right to be respected, this is not true according to Article 1657 (b), as Luiza can not get a divorce if:

The petitioning spouse's subsequent conduct, namely, explicit or tacit forgiveness, reveals that he or she does not regard the act in question as an impediment to communal life.

Article 1657 reduces Luiza's capacity to distance herself from her violent husband. Luiza must stay with her husband, not because she has forgiven him, but because she is very concerned that if she leaves her husband she will not get custody of her children, and Luiza is afraid because of various threats made by her husband.

In 2010, the Law against Domestic Violence was enacted. This law confirms that domestic violence is a public crime and reflects the commitment of the National Parliament to eradicate acts of domestic violence in Timor-Leste. To achieve this goal vulnerable women like Luiza have to also be given

protection in the Civil Code. However, the draft Civil Code does not say anything about domestic violence. This is a major problem, because domestic violence is a crime that should be punished, and domestic violence should provide a reason to obtain a divorce in any circumstances. The Civil Code should acknowledge that any woman who is subjected to violence may stay with her husband because she does not have the capacity or money to leave him. The Civil Code should also contain specific protection for women to exercise their legal capacity when they wish to leave such violent relationships or environments.

In relation to domestic violence, there are a number of articles in the Civil Code that are problematic when it comes to reconciliation. Article 1651 (1) states that during the divorce process, spousal reconciliation will always be attempted. JSMP believes that for women such as Luiza, this article does not provide clarification to a judge and thus fails to protect Luiza's rights. If she is subjected to domestic violence the state should not pressure her to stay with her husband. If she has to follow a formal reconciliation process JSMP believes that she will be deeply afraid and will be pressured by other parties to not pursue a divorce. She will be made to live a state of insecurity which will be to the detriment of her and her children's physical and mental health, and her rights will always be violated in such circumstances.

JSMP is also concerned about another article in the Civil Code that prescribes the minimum age of entering into a marriage. According to Article 1490, if a person is under the age of 17 then he/she is not allowed to get married. However Article 1500 states that if a person is 16 and has the permission of his/her parents; they are allowed to get married. Articles 118 and 119 are also relevant to the status of minors, the provisions in these articles state that a person must be 17 years of age to have the capacity to enter into a civil relationship. All of the aforementioned articles state that for a person to get married when they are 16, as was the case with Luiza, that person would need to get formal permission from both of his/her parents. JSMP believes that the provisions that require permission for a minor aged 16 to get married, and the provisions that grant legal capacity to a minor aged 17, are not in accordance with Timor-Leste's international obligations, although JSMP acknowledges that the Timor-Leste Constitution prescribes the minimum age of 17 to be able to take part in general elections (Article 47).

According to the Convention on the Rights of the Child that was ratified by Timor-Leste and has become a part of Timorese law, a person is recognized as an adult when they reach the age of 18. In Timor-Leste, children can be pressured by their own family to get married at a young age even if the minor does not want to get married. JSMP acknowledges that perhaps these provisions in the Civil Code are intended to assist minors who want to get married as the result of their own conviction (in other countries like Portugal this may also happen), however in Timor-Leste a provision like this has the potential to place pressure on a minor to get married even though the minor does not wish to do so. This actually violates the right to get married in accordance with the wishes of all parties as set out in Article 23 of the International Convention on Civil and Political Rights (ICCPR) and also Article 39 of the Timor-Leste Constitution.

4. Case study II on bride price (*belis*)

Jinha is a girl aged 22 who is going out with Mario. They have been going out for two years and they wish to get serious. Their families sat together to discuss their relationship (to accept the proposal from Mario's side). The process did not go well because Jinha's family asked Mario and his family to pay a very high bride price (77 cows together with money). Both of the families agreed for a small amount to be paid first and then the remaining amount would be later on paid in installments.

Because they had already paid some of the bride price Mario's family took Jinha home to Mario's house and they started living together as husband and wife. Their family life was not that happy because Mario needed to work hard to pay the remaining bride price to Jinha's family, because of the bride price Mario's extended family had to use their money and assets to pay Jinha's family, so his

family also started talking about Jinha. For this reason Jinha and Mario often had arguments and physical fights.

a. Views of the participants in the Focus Group Discussion (FGD)

The participants agreed that this situation occurs in Timor-Leste. They acknowledged that a bride price can create problems in the community, especially if it is too high. They believe that it is very difficult to resolve this problem. Currently the civil law does not provide for or mention anything about bride price. The participants believe that one option is for the law to set a maximum price and thus if a particular family wants to set a bride price at a higher rate they can't ask the court to enforce such an agreement. The participants also expressed an alternative view to eradicate the practice of paying a bride price. The participants considered that there are both positives and negatives when it comes to regulating the practice of paying a bride price.

Positives:

- The law can provide benefits to families and the community;
- The law can minimize problems with the family and community; and
- The law can standardize the practice of paying a bride price and remove the burden on future generations.

Negatives:

- Cultural values can be lost if the state does not pay attention or provide protections; and
- It is difficult to standardize customary practices from one district to another.

During the FGD organized by JSMP there were participants both for and against. Some participants felt that in essence the practice of paying a bride price was crucial to the dignity of women in Timor-Leste, and others felt that this practice can victimize Timorese women.

After considering both sides the participants of the FGD prepared the following recommendations to the National Parliament:

- The participants recommended to Parliament that there is a need to conduct sufficient research in the 13 districts of Timor-Leste to obtain accurate data and information on the practice of paying a bride price and problems that arise from this practice.
- The participants asked Parliament to refer to the findings of this research and then make a well considered and balanced decision. The question is: can the civil law regulate the practice of paying a bride price?
- If a decision is made to regulate this practice then the Parliament must work together with all components of society in Timor-Leste to spread information about this law and to establish appropriate provisions in the civil law regulating this practice so that the people of Timor-Leste will be able to understand the law once it enters into force.
- National Parliament should organize consultations with community representatives (customary elders) in communities across all 13 districts to examine the positives and negatives in each district which will enable them to draw appropriate conclusions.
- They also recommend for this research to encompass the patriarchal, patrilineal and parental system in relation to bride price and the civil law, to benefit members of the community who use these systems.

b. JSMP's views on how the draft Civil Code can be applied to this case study

In Timor-Leste there is a practice of paying a bride price that has been in place from generation to generation, and it is considered a way of respecting women and a sign of thanks to the parents of the girl for their sacrifice over a long period of time in raising their daughter. However on the other hand this practice can lead to violence within the family, can burden men and their families and a number of men interpret the payment of a bride price to the family of the women to mean that the woman has the same status as an object. Another problem is that sometimes the family of the woman will exploit the situation and render their daughter, her family and her husband's family destitute. To ensure that the civil law is relevant to Timor-Leste, it is necessary to consider all of these matters.

JSMP believes that the bride price issue is quite problematic because it is not clear exactly what is the tradition and culture, and there is a difference between the principle behind the payment of a bride price which is supposed to pay respect to the woman, and the practice itself which often creates problems for the woman. The bride price is actually understood as a custom to pay respect to the woman and her parents for their sacrifice over a long period, for taking care of and raising their daughter, because she will marry and leave her own family to go and live/stay with the family of her husband. According to this principle after the daughter marries she will leave her parents and go and stay with her new family and therefore she will have less opportunity to interact with her parents.

There are several components of traditional law that protect women from violence. For example, there are several traditions that decree that when a husband hits his wife and his wife returns to her parents with a good reason, the husband must be sanctioned and pay a fine to his wife, and only then he can try and convince his wife to return to their home. If the wife does not accept or agree with this effort and her parents are supportive, then she can separate and the bride price does not have to be given back to the family of the husband.

Although the bride price practice is based on such principles, when the bride price is set very high there is potential to cause problems because the husband may think that he has the right to hit his wife because there is an incentive for the family of the wife to pressure their daughter to go back to her husband's family. Therefore JSMP believes that in some regards the bride price can contribute to the victimization of women.

The bride price practice is a cultural and symbolic practice that has great significance and various models in Timor-Leste. However, bride price is not currently recognized or provided for in the Civil Code. The draft Civil Code contains several provisions on marital gifts (Articles 1630-1643) and promise to marry (Articles 1480 - 1484), however these provisions are only applicable if a husband and wife receive gifts or if a promise has been made. These articles are not applicable to gifts that are given to the families of a husband and wife or promises that involve other parties. In order for the Civil Code to effectively regulate the husband-wife relationship as is intended, then it should acknowledge and respond to the bride price practice with mechanisms that continue to address human rights principles as protected in the Constitution and international law.

JSMP believes that there is no uniform practice of bride price across the districts and the issue is extremely controversial, therefore it is necessary to conduct intensive research to formulate good solutions on how to effectively and fairly regulate this practice across Timor-Leste as a whole. However, JSMP believes that such research should take into account the following characteristics:

- Even though recognition is given to a number of different practices relating to the payment of a bride price, these practices are an important component of Timorese culture and must be given recognition in the national legal system in accordance with their characteristics and objectives.
- However because *barlake* (bride price) is a symbolic practice it should not impact on the legitimate rights and responsibilities of husband and wives and their families. The law must contain provisions that state that when a husband and wife are no longer living together or have separated, all parties are prohibited from taking a *berlake* agreement to be settled in court. *Berlake* should be seen as a gift (donation) to prevent future

generations being burdened with debt, as well as protected the ability of women to enter and exit a marriage in accordance with their own wishes, and also to guarantee that *berlake* does not violate the rights of others.

- As *berlake* should be seen as a gift or donation, it should not be the result of coercion, and people should have the right to choose, and if the husband-wife separate then the matter can not be taken to court to have the bride price returned. If this does not occur then women like Jinha will be subject to massive pressure from their families to stay with their husbands, even if they and their children are not living in safe conditions. In the same way, husbands and their families (such as Mario and his family) will find it very difficult to get enough money or assets to pay the bride price.
- The law should regulate the practice of paying a bride price, so that such a practice does not grant rights to others to receive compensation.

In reference to the considerations above, JSMP recommends that the Civil Code should contain a specific article about bride price to define this practice.

5. Case study III – Custody rights, alimony and children’s rights

Joana is a girl aged 17 who lives in Oecusse. She has a boyfriend named João who is 25. As a result of their relationship Joana has become pregnant and she said that is the father or her unborn child because Joana says she has never been with anyone else. However Joao denies that he is the father of the child and decides to go to Dili to live with his family and then he gets a job as a cashier in a shop and he refuses to marry Joana.

Joana has a daughter named Daniela, however she is unable to take care of and raise Daniela.

When Daniela is 8 years old Joana takes her to live with her aunty Maria in Dili. Joana does not give any money and also does not care for Daniela. Joana then returns to Oecusse. Maria has many children and does not provide any support to Daniela. Daniela can not go to school and must work really hard in her Aunty Maria’s house.

When Daniela is 12 years old, Joana dies. Joana’s brother Luis says that he can adopt Daniela. Daniela then returns to Oecusse to live with her uncle; however she is not treated the same as Luis’ children. Luis does not give her the same opportunities, and does not treat her properly, and Daniela is treated like a maid, not like a daughter.

a. Views of the participants in the Focus Group Discussion (FGD)

The participants acknowledged that cases like Daniela’s are quite common in Timor-Leste. They believe that there are two ways currently used by society to resolve such problems, the first method is used by those in rural areas and the second is used by those in urban areas.

The participants said that communities in rural areas normally settle such cases before traditional elders or according to customary and community practices and local authorities. Urban based communities settle such matters between the two families, and take the matter to court if no solution is reached. The participants believe that it is very important to establish conditions that will encourage vulnerable groups to protect their rights. If victims are minors, there should be a process and institution with the responsibility of protecting and paying attention to their needs.

In relation to the issue of paternity, the participants emphasized the importance of ensuring that in all locations people should be able to gain access to DNA testing to prove the paternity of fathers who deny their children. However, currently this is available in a few locations only.

During the FGD, the participants said that parents should have a clear responsibility prescribed in the Civil Code. They also believed that consideration should be given to whether or not the extended family also has specific responsibilities.

The participants also believe that the Civil Code does not give consideration to husbands and wives who have not yet been married in a traditional or religious ceremony who have been recognized by the state as entitled to adopt children if they are under the age of 30.

b. JSMP's views on how the draft Civil Code can be applied to this case study

In this scenario many of Daniela's rights as a minor have been violated, including her right to know and be looked after by her parents, to receive an education and protection from abuse or physical assault, neglect, and exploitation as set out in the Convention on the Rights of the Child. The Civil Code should protect the best interests of Daniela, and the state also has an active responsibility to ensure that she is cared for and given the best opportunities.

According to Article 1750 of the draft Civil Code, Joana is a mother who is still a minor, and a complaint can be raised on behalf of Daniela if she is represented by a special guardian appointed by the court. According to Article 1751 there is a presumption that João is the father of Daniela because Joana is still young (was a virgin), or because of specific circumstances or because he had previously promised to marry Joana (Article 1751 (d)), or if it is proven that he had sexual relations with Joana at the time of conception (Article 1751 (e)).

If João is proven to be the father he has the responsibility to respect his child, provide support and assistance to Joana and Daniela (Article 1754 (1)); the duty of assistance includes the obligation to provide alimony and contributing to the expenses of family life (Article 1754 (2)). In accordance with Article 1758, João has the responsibility to fully support Daniela, including being responsible for her health, education, representing her and providing assistance. As a parent he must provide support for Daniela's physical, intellectual and moral development (Article 1765). João also cannot avoid his responsibilities as a father (Article 1762) even if he is not married to Joana, he has the responsibility and obligation to provide assistance throughout Joana's pregnancy and the first year after Daniela is born (Article 1764).

JSMP believes that the most important thing is the presumption that João is the father so that he can not avoid his responsibilities and obligations towards Joana and Daniela. It is also important that women can gain access to DNA testing to identify the father of their children so make sure that they fulfill their responsibilities and obligations to the mother and the child.

JSMP recommends that after Luis has gained the trust of Daniela, or before the matter has been legitimized by law, he has full obligations in his role of parent as set out above (Article 1788), so he can not take her in and treat her like a maid.

However the most important aspect of the Civil Code is the role of the state in protecting the rights and interests of children and ensuring that parents fulfill their very important responsibilities and obligations.

It is also important to examine and consider the context of the Civil Code, which only refers to the small family unit, whereby generally parents take responsibility or have the main obligation to care for their children. In Timor-Leste generally it is the responsibility of the extended family and not just the parents, and it is not necessary to go through a formal adoption process. The Civil Code does not deal with such situations, and this indicates that children like Daniela may not get adequate protection from the law.

JSMP requests for Parliament to promptly establish specific mechanisms to monitor situations like this to ensure that children are not neglected or subjected to unfair treatment and can gain access to

education and appropriate care. JSMP also request for the Civil Code to be modified to highlight the interests of those adopted in an 'informal' manner. Therefore everyone like Luis is obliged to provide protection to children, especially those who have adopted a child in an unofficial manner.

6. Case study IV – Renting Community Land

A company that develops coconut oil wishes to rent some land to set up a coconut plantation in Timor-Leste. The company has identified suitable land for growing coconuts in the area of Be'e Metin. This land is customary land. The community meets and decides that they are willing to rent the field to the company, as long as the company is willing to create jobs for the community.

Several parents are concerned that their population is increasing and they need to ensure that their children can get access to the land to plant crops and build houses.

They believe that in the future their children need to have the ability to decide how they wish to use the aforementioned land. If they don't need it then they can enter a new agreement and continue to rent the land to the company.

a. Views of the participants in the Focus Group Discussion (FGD)

The participants suggested that before enacting the Civil Code, it is necessary to define community land and customary land. It is also necessary to define who has the right to rent the land – domestic or foreign companies. When considering this matter it is necessary to examine how the Civil Code corresponds with the Law 4/2005 on Domestic Investment and Law 5/2005 on Foreign Investment. The participants gave the following examples: land that has been rented to Timor Global, customary land in Iralalaru, and other pieces of land that are now being used by companies to produce gravel.

The participants believe that it is not clear what methods are used to seek solutions to the aforementioned problems. Therefore they insist that:

- The community need to know about and be involved in the drafting of laws that relate to land issues;
- Land laws must correspond with the Civil Code;
- It is necessary to have a law on customary land; and
- The community must participate in the decision making process.

The participants believe that all of these conditions need to be addressed and if not then this will create problems for them and will have an impact on future generations.

The participants felt that investing in community land (Timorese land in general) will be valuable if Timorese people receive some benefit, if not then the investment will only exhaust existing resources. The participants also agreed that community land can be rented by companies, but for shorter periods of time in comparison with private land.

The reason for this is to ascertain what benefits accrue from the investment and to monitor the division of profits (interest) for consistency, or to note any decreases. Another reason is that it is not possible to sell community land and it is very difficult for the community to negotiate with companies (if they don't agree with the behavior of a company or they have a problem with the company they can not sell the land to someone else).

The participants believe that laws should be drafted in a transparent and open manner to provide information to the community. The law must define that rental agreements must be unambiguous and clearly mention the rights and obligations of both parties.

b. JSMP's views on how the draft Civil Code can be applied to this case study

To get a better understanding about why it is necessary to protect community land we need to consider all of the things that occurred in Timor-Leste during Indonesian times. There are clear

examples where the government took community land and rented it to companies. However they did not first consult with the community who were victimized because they did not know that the land had potential and could be profitable, and consequently they received no benefits from the land. During Indonesian times when a company identified land that had potential they would enter into a rental agreement directly with the government and ignore the rights of the farmers over the land.

Problems like this did not just occur in relation to community land. Another clear example relates to customary land whereby family land was forcibly taken by local government authorities who forced a company to invest in drinking water. After the drinking water was piped from the customary land some locals became sick and died because they believed that the land where the sacred well was located could only be used if permission was obtained from the family who owned the sacred house.

Although there are a small number of companies investing in the Timor-Leste at the moment, and perhaps only a small number of incidents where farmers or community members have had their rights to community land violated, the two aforementioned case remind us that in the future it is possible that the economy of this country will improve, with increased stability, and everyone will want to invest in Timor-Leste. Therefore the National Parliament needs to consider all of these cases to ensure that there is no negative impact on the community, especially in relation to community, customary or sacred land in the future.

The Civil Code contains many articles that relate to land rights (especially in Book 3) however there are no provisions to regulate transactions related to community land. For example, there are five people working a piece of community land to establish a plantation with the aim of protecting their crops from animals and every year they eke out a living from their plantation. JSMP is very concerned that the Civil Code does not have a single article which regulates how to sell, use or process other transactions in relation to community or customary land. Land practices are very complex in Timor-Leste and are based on Timorese culture. All of these practices have experienced considerable change because Timor-Leste has just emerged from a period of conflict.

JSMP believes that members of the community face particular problems and obstacles if they enter negotiations on their land. These obstacles include the following:

- It is very difficult for community members to obtain accurate and independent information (that doesn't originate from the government or company);
- It is very difficult for the community to obtain information about companies (for example, what history does the company have with other communities? Do they always fulfill their environmental and social obligations?); and
- It is very difficult for the community to understand their rights when they negotiate an agreement.

JSMP believes that if the Civil Code does not provide protection to the community and their land then companies will exploit the community and they may lose their resources and will get no benefits from those investing in their land.

JSMP understands that in some other countries they are able to effectively regulate how a community can control its community and customary land by using a registration system like that envisioned under the Civil Code. To avoid conflict between separate communities or within communities, and to guarantee that the communities do not lose their control over land to companies, and to ensure that there are equal land rights, JSMP recommends for the parliament to conduct research about systems used in other countries to regulate the use of community and customary land, before amending and approving the Civil Code. JSMP hopes that this law will properly reflect how Timorese people use their land.

JSMP believes that the government must prepare a complete and comprehensive land policy for Timor-Leste as a reference for any other legislation, regulations or policies relating to land. This type of policy will guarantee consistency between the Civil Code and other subsequent legislation, namely:

- Draft law No. 19/2004 on Juridical Regime of Property: Official Allocation and Leasing of Private Property of the State;
- Law No. 4/2005 on Domestic Investment;
- Law No. 5/2005 on Foreign Investment ; and
- Law on the Numerous Immovable property that are now State Property or State Administered Property and which have been Unlawfully Occupied or Taken Over 152A/GM/MJ/V/2008 (Law on Government Land).

As there is no official Tetum translation of the Civil Code (Book 3), JSMP has found it difficult to make comprehensive criticisms on how the law regulates land rights. JSMP requests for the National Parliament to provide a Tetum version of the Civil Code, which will ensure that land can be used effectively and peacefully to protect the economic and social life of citizens, and to enable substantive consultation with the community to determine the best way to settle land disputes that are currently affecting members of the community in Timor-Leste.

7. Case study V – Inheritance

José and Maria have been living together as husband and wife for 15 years. They did not get married through a formal process but the community recognizes them as husband and wife. They have four sons and one daughter. Then Maria passed away.

One year later José married a woman named Marta through an official ceremony in a church, and they had two boys and one girl.

José has land measuring 50 hectares. After being with Marta for five years José dies. His children do not know who the land belongs to – Maria’s children or Marta’s children – just the boys, or the girls as well?

Before José passed away he left a will for his children.

José’s children often argue about the will. Maria’s children always use pressure, intimidation and threats against Marta’s children.

a. Views of the participants in the Focus Group Discussion (FGD)

The participants agreed that this situation is common. They believe that people currently use a range of methods to settle such disputes. They believe all children have the right to inheritance. They said that normally people will use traditional (customary) methods to settle such disputes. If these are unsuccessful then the matter will be taken to court.

The participants believe that the Parliament should consider holding consultations in accordance with the customary practices of each of the 13 districts in Timor-Leste. Thereafter they can draft a law that provides equality to male and female heirs in relation to the distribution of their parent’s inheritance. The Civil Code should also state that when a pregnant mother marries another man, the child should have the same rights as an aunty or uncle in the family.

c. JSMP’s views on how the draft Civil Code can be applied to this case study

Pursuant to Article 1895 of the Civil Code, the issue of inheritance is initiated upon the death of José and relates to Marta and all of the children (Article 1897) except where these conditions can not be applied (for example incapacity due to a legal impediment) with the presumption that the conditions

are applicable to all José's children who are entitled to the inheritance, unless they reject it (Article 1915). They can all submit a request to the court to validate their entitlement to the inheritance (Article 1939).

Marta as José's wife has the right to live in the family home and use all of the goods there (Article 1968) and obtain at least one quarter of the inheritance (Article 2006) the children are entitled to receive inherited property amounting to $\frac{3}{4}$ of the remaining inheritance (Articles 1999 and 2003), regardless of their sex. However the inheritance will not benefit the extended family of José who are still alive and who wish to use and obtain benefits from the land.

Although some of these articles in the Civil Code are positive because they grant the same rights to male and female heirs, JSMP is concerned that the draft Civil Code has been copied from Portugal because it is insensitive towards or fails to address:

- Land requirements in Timor-Leste;
- The reality of extended family in Timor-Leste;
- The need to look after land to protect family in relation to agricultural produce;
- No chance of fairly distributing or selling land; and
- The possibility that land disputes and conflicts will only be resolved between families due to the issues mentioned above.

Land issues in Timor-Leste are extremely complex and take on many forms, therefore JSMP requests for the government to conduct research on the opinions of community members in the districts about the best way to promptly end inter-family land disputes or conflicts. The draft Civil Law in its current format will increase tensions relating to inheritance disputes because it is ambiguous and has not been adapted to the Timorese context.

In order to hold extensive consultations on inheritance issues, it is important for the Parliament to translate the five books of the Civil Code into Tetum. If they are not translated it will be difficult for everyone to understand how the law will change their ability to pass on land to someone of their own choice.

8. Other general comments about the Civil Code

a. Religious Marriages

Article 1475 (1) recognizes civil, Catholic and traditional monogamous marriages, and Article 1475 (2) states that the Civil Code recognizes Catholic marriages and traditional monogamous marriages. This definition of marriage discriminates against other religions and conflicts with Article 45 (2) of the Timor-Leste Constitution, which prohibits discrimination on the basis of religion and also Article 2(2) and Article 18 of the International Convention on Civil and Political Rights (ICCPR). JSMP requests that this article be amended to grant the same recognition to other religious marriages that has been given to Catholic marriages.

b. There needs to be consistency between the Civil Code and the Constitution in granting recognition to traditional law

Article 2 of the Timor-Leste Constitution establishes the following fundamental principle:

The State shall 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

However, the draft Civil Code does not correspond with this article in the Constitution because it only identifies specific laws as immediate sources of the general law (Article 1) and also states that local customs are judicially applicable when the law so determines (Article 2). JSMP recommends that the Civil Code must be amended so that this law will reflect the recognition that has been given to customary law in the Constitution. If not, then the Civil Code will not only be useless, but the majority of Timorese people will ignore it because they believe that traditional practices and law are very relevant in their lives in comparison with the formal system.

c. There needs to be adequate resources to implement the Civil Code

The draft Civil Code mentions various measures and resources that will be used after it has been enacted; however the reality is that Timor-Leste does not have adequate resources and facilities. JSMP believes that the use of such measures will require substantial funding from the state, as well as adequate infrastructure, human resources and expertise. For example, the condition that requires evidence of no impediments to marriage (Article 1498), the condition on pursuing reconciliatory mediation with a judge in order to get divorced even when both parties wish to get divorced (Articles 1651-1655) and general conditions on drafting documents and amendments.

So that the Civil Code can be relevant and applicable in Timor-Leste, the government needs a lot of time, money and human resources to establish and apply the measures provided for in the law. The government also needs to carefully monitor if these measures are working effectively, to raise awareness and make necessary adjustments to make sure these measures correspond with the needs of the community. If this is not done, then JSMP recommends that the process needs to be simplified so as not to be too cumbersome and should properly reflect the capacity of Timor-Leste, as a new nation with infrastructure that is still being developed.

d. The Civil Code must give consideration to articles that will impact differently on women and men

Even though many of the articles in the Civil Code do not specifically mention gender, JSMP is concerned that several articles fail to recognize that currently men and women in Timor-Leste do not have the same authority. For example, Article 1570 states that each spouse will administer his or her own property and the proceeds received from his or her work. However, often women in Timor-Leste do not have property, so Article 1570 will perpetuate this inequality.

To improve gender equality, as set out in Article 17 of the Constitution, JSMP recommends that careful consideration should be given to who is the owner of property and land within a marriage (family), (including also joint marital property, how to distribute land and property in the event of divorce, and what are marital gifts). It is important to consider how this law will impact on marital couples in Timor-Leste, especially women.

JSMP believes that the draft land law recognizes that men and women jointly care for and develop land and property in their family. Therefore JSMP believes that the Civil Code needs to include these matters so that an individual can take such matters to court when they arise.

9. General Recommendations on the Civil Code

Once again JSMP congratulates Committee A of the National Parliament for giving an opportunity to civil society to voice their opinions on this law because it is a very important piece of legislation. JSMP has made several specific recommendations above, and as stated in the introduction, we are not providing recommendations for every article, due to time and resource restraints as well as the lack of a version in Tetum.

Nevertheless JSMP has several recommendations for Committee A on how they can initiate the process of consultation, discussion and revision on this draft law in order to ensure that the Civil Code is relevant to the real circumstances of Timor-Leste and can be implemented in practice.

JSMP makes the following recommendations about what must be done before the National Parliament can amend and approve this law.

1. So that everyone can understand and voice their opinion on this important draft law, JSMP recommends for the Parliament to translate into Tetum all of the books that form this law.
2. JSMP also recommends that there should be a wide and substantive consultation process so that this law can be applied in practice. This consultation should consider the following points:
 - a. Consultations must be held in every district to find out peoples' opinions on family, land, property and traditional law;
 - b. Must involve civil society, especially organizations who are relevant to each area;
 - c. The materials and documents must be prepared using simple text in the local language and must be accompanied by clear examples;
 - d. The government, and especially the relevant ministries, must disseminate detailed information about this law to the community; and
 - e. There needs to be adequate time and resources.
3. The consultation process must cover all of the issues included in the Civil Code, not just the issues mentioned in this commentary. The following issues should be addressed:
 - a. How to grant recognition to *de facto* relationships;
 - b. How to regulate the practice of paying a bride price;
 - c. How to regulate domestic violence;
 - d. Protection of community and customary land;
 - e. How to regulate inheritance matters; and
 - f. How to protect the rights of children when they are part of a family living in impoverished conditions.
4. The consultation process must consider measures to provide legal assistance to vulnerable people so that they can use the formal system to protect their rights as contained in the Civil Code.
5. The consultation process must consider how to disseminate information effectively so that everyone in Timor-Leste can understand everything contained in the Civil Code that is new or relevant to their daily life (for example, how to get married, who has the right to inheritance, how to distribute income from community/customary land rented to companies).
6. The consultation process must include discussions with local authorities such as the sub-village chief, village chief and customary elders, and must recognize that in certain circumstances it is normally the local authorities who settle disputes in their local area.
7. In order to implement this consultation process and to revise the draft law, JSMP suggests that Parliament could perhaps establish an institution or commission with a strong mandate. This commission could have the following responsibilities and structure:
 - a. Comprising 6 or 7 professionals with relevant experience who work every day on the Civil Code. Some members of the commission must be Timorese, as well as professional experts and those who have experience dealing with Civil Codes in other countries;
 - b. The Commission must have adequate resources to hold consultations in all locations on this law as well as disseminating information about the law;
 - c. The commission must hold regular consultations with a working group comprising members of civil society;
 - d. The commission must consider Timor-Leste's obligations in accordance with international human rights law;

- e. The commission must conduct research and consider the civil codes used in other nations and the particular experiences of post-conflict and developing nations ; and
 - f. The commission will be responsible for amending the law and reporting to the parliament within 6 or 12 months so that the law can be approved in 2011.
8. After the consultation process the National Parliament can reconsider the draft Civil Code and decide if this law is ready to be approved or requires further revision.

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