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ACCESS TO JUSTICE BRIEF COMMUNITY DISPUTE RESOLUTION IN TIMOR-LESTE

A Legal and Human Rights Analysis



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ACCESS TO JUSTICE BRIEF

COMMUNITY DISPUTE RESOLUTION IN TIMOR-LESTE: A LEGAL AND HUMAN RIGHTS ANALYSIS

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GLOSSARY OF TERMS AND ABBREVIATIONS

Administrative Post	An administrative unit in East Timor that forms part of a Municipality. It will contain a number of <i>sukus</i> . Administrative Posts were previously referred to as Sub-Districts
ADR	Alternative Dispute Resolution
<i>Aldeia</i>	The smallest administrative unit in Timor-Leste. An <i>aldeia</i> may be a village or “hamlet”, or might be a small area within a larger town. A number of <i>aldeias</i> together form a <i>suku</i>
CPC	Criminal Procedure Code
CSO	Civil Society Organisation
GoTL	Government of Timor-Leste
JSMP	Judicial System Monitoring Program: a Timorese non-government organization which monitors the formal justice sector
<i>Lia nain</i>	Historically, a community leader exercising authority on matters of traditional law. In present day Timor-Leste, this term also signifies an appointed office on the <i>suku</i> council
<i>Lisan</i>	Customary/religious law
<i>Lulik</i>	Sacred spiritual practices and beliefs
MoJ	Ministry of Justice (of the Timor-Leste Government)
Municipality	The largest administrative unit under the state. Timor-Leste is composed of 12 municipalities as well as the Special Administrative Region of Oecusse and Ambeno. Municipalities were previously referred to as Districts
PAAS	<i>Pesoa Apoiu Administrativu Suku</i> : A local community member contracted by the Ministry of State Administration to provide administrative support to the <i>Suku</i> Council
PDHJ	Provedore for Human Rights and Justice
<i>Suku</i>	The second smallest administrative unit in Timor. Sometimes translated as “village” a <i>suku</i> comprises a geographical area which may include a number of small villages or form part of a larger town
<i>Suku Council</i>	Leadership body within the <i>Suku</i> . Composed of a number of elected members (Chief, an elder, youth representatives, women’s representatives) and an appointed <i>lia nain</i>
<i>Tara bandu</i>	A particular form of traditional community law involving hanging sacred objects in connection with a social agreement regulating conduct. Now used more generally to refer to local regulations incorporating some aspect of actual or purported traditional law
UNDP	United Nations Development Program
UNTAET	United Nations Transitional Administration in East Timor. It administered Timor-Leste from 25 October 1999 to 20 May 2002

EXECUTIVE SUMMARY

This Access to Justice Brief reviews the use of community dispute resolution mechanisms in Timor-Leste and considers how they can be used to improve access to justice.

The Brief provides an overview of community dispute resolution, the types of matters dealt with, procedures followed, and the existing legal framework for them, including current linkages to the formal justice sector. It then analyses current community dispute resolution practices from an access to justice and human rights perspective. It asks to what extent the use of these mechanisms contributes to access to justice and to what extent they currently raise difficulties in terms of access to justice and compliance with human rights standards. Finally, the Brief considers some of the efforts in Timor-Leste directed at establishing formal linkages between the formal and informal justice sectors, or for regulating community dispute resolution, and considers their strengths and weaknesses.

Potential to better utilise community justice

The Brief notes the ubiquitous nature of community dispute resolution mechanisms in Timor-Leste. These mechanisms offer some significant advantages in terms of accessibility and community acceptance. However little information is available about the procedures followed, and minimal guidance is currently provided by Timorese law. The relationship between community procedures and the criminal justice system is poorly understood.

The Brief concludes that there is significant potential to harness community dispute resolution procedures to resolve *civil* compensation claims and promote community reconciliation, including where parallel criminal proceedings are initiated. Where a public crime is alleged these proceedings run in parallel to a trial and should not prejudice it. Where a *semi-public* crime is alleged, community mechanisms may lead to the withdrawal of a complaint and the termination of criminal proceedings. Establishing systems to promote this form of diversion from the formal justice system for semi-public crimes would assist to reduce the strain on courts and court actors.

Human rights challenges in community dispute resolution

Despite this positive potential, care is needed to ensure that community mechanisms comply with human rights standards under the Timorese Constitution and international law. These basic standards should be applied, particularly where there is any doubt about the voluntariness of the procedures used or the outcome of the procedure. Challenges in effectively monitoring these mechanisms mean that little information is available about the procedures involved. However potential areas for concern include ensuring:

- that community mechanisms do not operate in practice to prevent access to the formal courts: participants must have an informed and free choice to use local procedures rather than the formal justice system;
- that community leaders involved in facilitating community-based procedures are independent and impartial (something which may at times become difficult in small communities);
- that community procedures are held in private in appropriate cases, including those concerning children or vulnerable participants;
- that any substantive principles used to reach an outcome in a community-based procedure comply with human rights standards, including prohibitions on gender discrimination.

Human rights challenges relating to local regulations

One issue raised as a special area of concern is the use of informal justice procedures in communities to implement local regulations (sometimes called “*tara bandu*”) which effectively criminalize and sanction certain types of behavior. While this practice certainly may have the possibility to reduce local conflict, communities and those working with them should ensure that their activities comply with Timorese law and international human rights standards. In this regard it is noted that Timorese

law provides exclusive jurisdiction over criminal justice to the formal courts, and that both the Constitution and international law require stringent fair trial guarantees to be complied with in criminal cases. More robust steps may be needed to ensure that where local regulations are utilized they do not (in law or in fact) create criminal sanctions or empower local leaders to determine criminal responsibility. Government officials and members of civil society can play an important part in ensuring that regulations established with their involvement do not inadvertently invite human rights violations.

Recommendations

In light of the applicable law and human rights standards, and recognizing the practical realities of informal and formal justice mechanisms in Timor-Leste, the Brief proposes a minimalist approach to regulating community dispute resolution. More interventionist approaches – attempting codification or the provision of judicial powers to local bodies – would be impractical and unlikely to improve the accessibility of justice mechanisms or their conformity with human rights standards. Instead, the Brief recommends:

- 1) Education efforts should continue to increase the understanding of communities and their leaders concerning:
 - the limits of community leaders' dispute resolution powers, including what roles they can play where a crime is alleged to have occurred;
 - core principals and minimum standards to apply in dispute resolution procedures, including the need to maintain appropriate records.
- 2) If legislation is to be passed in this area, it should be clear in treating community mechanisms as distinct from commercial dispute resolution, and in respect of the former could most usefully do the following:
 - establish clear, simple minimum standards for community dispute resolution and make clear what consequences follow if they are violated;
 - *avoid* imposing stringent formal requirements in order for the outcomes of community resolution to be considered binding;
 - identify any common traditional practices which are to be avoided because of inconsistency with the Constitution or human rights standards.
- 3) Consideration should be given to practical and institutional options for linking community mechanisms with the criminal justice system, especially for using the former to divert cases of alleged semi-public crimes from the latter.
- 4) Programs to increase the accessibility of legal advice throughout Timorese communities should be continued and strengthened.
- 5) Efforts should be made to establish the systematic monitoring of community dispute resolution procedures, whether by civil society or another appropriate body such as the *Provedore* for Human Rights and Justice ("PDHJ").
- 6) There is a need for government, the PDHJ and civil society to re-evaluate the current approach to local regulations or "*tara bandu*" and to ensure that where these are used they do not lead to practices which are inconsistent with Timorese law or international human rights standards.

I. INTRODUCTION

The range of local, traditional and alternative dispute resolution mechanisms operating in Timor-Leste has been the subject of many reports¹ and academic writings.² Such mechanisms are in practice used to handle a substantial number (perhaps even the great majority) of disputes which arise in Timorese communities.³ Given this, and the well-known limitations of Timor-Leste's formal justice sector,⁴ a question naturally arises as to how the informal mechanisms might be used to ensure access to justice. One important aspect of this question is the extent to which the existing range of informal justice mechanisms require regulation.

The importance of this issue has been recognized by the government of Timor-Leste (GoTL). Specifically, the possibility of a comprehensive law regulating the use of traditional justice mechanisms has long been discussed by Timorese authorities.⁵ The GoTL's 2011-2030 Strategic Plans incorporate that goal⁶ as well as the intention to establish alternative dispute resolution (ADR) mechanisms relevant to commercial disputes.⁷

However, despite several collaborations between the Ministry of Justice (MoJ) and United Nations Development Programme (UNDP) since 2008 in this area, it appears that the GoTL has placed on hold work towards a comprehensive regulation of the informal justice sector which would include "customary" mechanisms. Instead, draft laws on ADR have been prepared. Meanwhile, the Legislative Reform and Justice Sector Commission, established by the Council of Ministers in 2015, will review traditional justice systems as part of its mandate to review areas requiring harmonization.⁸

This Access to Justice Brief aims to review the current state of community dispute resolution mechanisms in Timor-Leste and consider options for improving their use as a tool for access to justice. Properly understood, that concept – access to justice – must incorporate not only the availability and accessibility of justice mechanisms, but also their conformity with human rights standards.

¹ For example: T. Hohe and R. Nixon, *Reconciling Justice: "Traditional" Law and State Judiciary in East Timor*, United States Institute of Peace, January 2003; A. Swaine, *Traditional Justice and Gender Based Violence*, International Rescue Committee, August 2003; A. Kovar, *Customary Law and Domestic Violence in Timor-Leste: Approaches to Domestic Violence Against Women in Timor-Leste: A Review and Critique*, UNDP Timor-Leste, January 2011; R. Clarke, *Customary Legal Empowerment: Towards a More Critical Approach*, IDLO, 2011 (pp18-26); A. Kovar and A. Harrington, *Breaking the Cycle of Domestic Violence in Timor-Leste: Access to Justice Options, Barriers and Decision Making Processes in the Context of Legal Pluralism*, UNDP Timor-Leste, October 2013; T. Kirk, *Legal Aid Lawyers and Paralegals: Promoting Access to Justice and Negotiating Hybridity in Timor-Leste*, JSRP and The Asia Foundation, June 2014.

² For example: D. Babo-Soares, "Nahe Biti: the Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor", *The Asia Pacific Journal of Anthropology*, vol.5, no.1 (April 2004), 15-33; L. Grenfell, "Legal pluralism and the rule of law in Timor-Leste", *Leiden Journal of International Law*, vol. 19, no.2 (2006) 305-337; A. Senior, "Traditional Justice as Transitional Justice: A Comparative Case Study of Rwanda and East Timor", *Praxis*, vol.28 (2008) 67-88; T. Kirk, "Taking Local Agency Seriously: Practical Hybrids and Domestic Violence in Timor-Leste", *International Journal on Minority and Group Rights* vol. 22 (2015), 435-458; R. Nixon, *Justice and Governance in East Timor: Indigenous approaches and the "New Subsistence State"* (Routledge, 2012), pp164-201.

³ T. Wassel and G. Rajalingam, *A Survey of Community-Police Perceptions in Timor-Leste 2015*, The Asia Foundation, 2015, Figure 3.7, p61.

⁴ For a recent overview see: Judicial System Monitoring Program, *Overview of the Justice Sector 2015*.

⁵ See for example: Government of RDTL and UNMIT, *Joint Transitional Plan: Preparing a new partnership in a peaceful and stable Timor-Leste*, 19 September 2011, pp19 and 39

⁶ *Timor-Leste Strategic Development Plan 2011-2030*, p177; Government of RDTL, *Justice Sector Strategic Plan for Timor-Leste 2011-2030*, pp27, 39, 61, 84, 86, 93.

⁷ *Timor-Leste Strategic Development Plan 2011-2030*, p152; Government of RDTL, *Justice Sector Strategic Plan for Timor-Leste 2011-2030*, p86.

⁸ Ba Distrito is actively engaged in supporting this process, including through the provision of technical advice to the Commission.

This paper therefore aspires to contribute a legal and human rights analysis to the significant body of writing concerning other aspects of legal pluralism in Timor-Leste. While much has been written about informal justice's gender implications,⁹ a wider legal and human rights analysis is lacking. Such an analysis is important in reviewing whether regulation of the informal justice sector would achieve access to justice in the full sense of the term. At the same time, the analysis used must be practical: reflecting the existing realities of life in Timorese communities, and taking a realistic view of proposals for change. This briefing paper will seek to adopt such a framework for analysis: namely one that is both human rights oriented and practical.

Scope and terminology

Various forms of dispute resolution operate in Timor-Leste outside the formal courts. The great majority of procedures fall into the following categories:

(a) Community-based dispute resolution

Disputes between or within communities are very frequently resolved within those communities themselves. This typically occurs within extended families, or at the level of *aldeia* or *suku*, but can also involve spiritual/traditional leaders or even members of the Catholic Church. Approaches used to resolve disputes are flexible and vary between fora. For most people these procedures are the first avenue accessed to resolve a dispute in all but the most serious of cases.

(b) Non-community mediations

Outside of community-based procedures, much of the informal dispute resolution in Timor-Leste involves mediation undertaken by civil society organisations (CSOs), government agencies, or lawyers. It appears that a significant proportion of these cases involve land disputes. A small number of CSOs are active in mediating land cases, and mediations are also provided by the National Directorate of Land, Property and Cadastral Services. Legal aid organizations and other lawyers provide mediation in a wider variety of non-commercial disputes, including for example family law matters.

(c) ADR in commercial cases

Efforts by the Government to regulate the use of mediation, conciliation and arbitration in commercial cases reflect the difficulties in achieving a timely resolution of those cases through the Timorese courts. Because of these challenges it is thought that a significant proportion of commercial cases are dealt with through various forms ADR.

This paper focuses principally on the first of these categories: community-based dispute resolution. Although reliable statistics do not exist, it seems likely that community-based dispute resolution represents is the mechanism most frequently used by average Timorese citizens.

Identifying appropriate terminology to refer to these mechanisms can be difficult. Terms such as "customary", "traditional", "community" or "local" justice each cover some but not all of these mechanisms. "Alternative dispute resolution" carries a connotation of diversion of cases from mainstream systems and does not reflect the widespread and, in fact, dominant, nature of community-based mechanisms. This paper therefore will use the term "informal" to refer to the range of mechanisms which exist outside the formal courts. Within that category, "local" or "community" are used to designate mechanisms which occur within *aldeias* and *sukus*. Attempts will also be made to distinguish between the different categories of informal mechanisms which are in use. For example, it is noted that not all community mechanisms necessarily incorporate traditional or spiritual practices.

⁹ A. Swaine, *Traditional Justice and Gender Based Violence*, International Rescue Committee, August 2003; A. Kovar, *Customary Law and Domestic Violence in Timor-Leste: Approaches to Domestic Violence Against Women in Timor-Leste: A Review and Critique*, UNDP Timor-Leste, January 2011; Search for Common Ground, *Empowering Women and Increasing Access to Justice in Timor-Leste: Midterm Report*, 31 October 2012; A. Kovar and A. Harrington, *Breaking the Cycle of Domestic Violence in Timor-Leste: Access to Justice Options, Barriers and Decision Making Processes in the Context of Legal Pluralism*, UNDP Timor-Leste, October 2013.

Those that do are indicated by use of the terms “spiritual” and/or “traditional”. However it is also necessary to recognize that the distinction between these categories, and indeed between the informal and formal systems, is often blurred by overlaps and some already existing linkages.

Sources of research

This Brief is based on the following main types of research:

- During 2014 - 2015 the USAID-funded Ba Distrito Program and one of its Timorese implementing partners, Belun, carried out access to justice programs in 100 *sukus* across four Municipalities (Baucau, Covalima, Ermera, Liquica) and the Special Administrative Region of Oecusse Ambeno (“Oecusse”). With support from Ba Distrito, Belun staff also gathered information about dispute resolution processes from stakeholders including members of *suku* councils (*suku* chiefs, *lia nains*, women’s representatives); other organizations involved in dispute resolution (CSOs, legal aid groups and government departments); and persons who had participated in dispute resolution procedures. To gather this data, standard questionnaires were used, although a strict research methodology was not attempted. While this means that the data is of qualitative value only, it has proved useful in identifying potential issues and areas for further analysis and research. Throughout this paper this source of information is referred to as the Ba Distrito/Belun research.
- Information concerning how the formal justice system deals with informal mechanisms was gathered through a review of three months of court monitoring data published by another Ba Distrito implementing partner, the Judicial System Monitoring Program (JSMP). Case summary reports from January, February and March 2016 from each of the four District Courts were analyzed. In total 261 case summaries were reviewed.
- Recourse has been had to the wealth of previous writing on the subject of traditional and community dispute resolution in Timor-Leste. Comparative literature concerning the formalization of traditional justice systems in other contexts has also been used.
- During April and May 2016, a series of meetings and interviews was held with individuals and organizations working in justice, local governance and other related spheres.

It is clear that these sources are limited. The possibility of regulating informal justice mechanisms in Timor-Leste is a complex issue. Any policy adopted should be based on comprehensive data and follow a consultative and inclusive process. As a result, it is important to note the limited goals of this briefing paper. It does not purport to provide a detailed or definitive proposal on how formal and informal justice systems should be linked in Timor-Leste. Rather, it sets out some considerations relevant to that question, which it is hoped may be of use as a part of the GoTL’s ongoing process of developing and reforming the justice sector as a whole.

II. OVERVIEW OF INFORMAL JUSTICE MECHANISMS IN TIMOR-LESTE

The Ba Distrito/Belun research provides a picture of some key aspects of community dispute-resolution mechanisms. However, it is important to note two significant caveats:

- First, generalizing about these procedures is difficult. Significant variety exists in terms of all aspects of the mechanisms: for example, in respect of the specific fora used, the persons who are involved as facilitators and as participants, the procedures and traditions used, the extent to which records are kept. This variety demonstrates the inherent flexibility in these mechanisms. They vary not only based on the local customs which differ across language groups and geographical areas, but also depending on the individual personalities involved, as well as the type of case.

- The Ba Distrito/Belun research supports conclusions elsewhere¹⁰, that parties to a dispute will usually seek to resolve it at the “lowest” level possible. This may be within their family or the *aldeia*. It is usually only where those efforts fail that a dispute will reach the *suku*, or be taken to traditional leaders. Limited information exists about procedures used at the “lower” levels.

Types of matters dealt with by community-based informal mechanisms

Asked during the Ba Distrito/Belun research which types of cases they typically deal with through local resolutions, community leaders most frequently referred to disputes about land, crops, and livestock. Some also mentioned personal or family disputes such as adultery, husbands “abandoning” their wives and paternity disputes. Some of the matters reportedly dealt with do not necessarily involve a legal dispute – they include, for example, fallings out and arguments between community members, and allegations of cheating between spouses.

When asked specifically about whether disputes are taken to the police or to community leaders for resolution, most indicated that it depends on the nature of the case. Some framed the distinction as one of “serious” cases (examples given included homicides, serious assaults, knifings, and sexual assaults) and other cases. Other respondents said that the distinction is drawn based on whether the disputes involves a “civil” or a “criminal” case. Since it is not clear how the latter terms are understood by communities, it may be that these classifications express the same approach. The belief that informal community mechanisms are appropriate only for resolving “small” and not “big” cases, has been previously reported.¹¹ What requires further investigation is how community members assess a case as being “big” or “small”; “criminal” or “civil”.

Many respondents identified homicides as serious cases that would always be referred to the police. However meetings with even a small number of *suku* council members revealed a case of an (apparently) accidental death which had been dealt with through community resolution.¹² Likewise, while many respondents indicated that sexual assaults should be dealt with by police only, others reported them being resolved through community mechanisms, indicating either that views on this subject vary, and/or that the approach depends on the nature of the sexual assault in question.

A significant number of community leaders mentioned receiving complaints in domestic violence cases. Many qualified this statement by saying that these are always referred to police and not dealt with in the community. However those qualifications are at odds with research carried out elsewhere which suggests that the great majority of reported domestic violence cases are dealt with in some way by local justice procedures.¹³ During follow up interviews in a small number of communities, leaders at first readily volunteered that they never resolve domestic violence cases; however this did not accord with *suku* records and on further discussion it was explained that some such cases are dealt

¹⁰ Grenfell, “Legal pluralism and the rule of law in Timor-Leste”, *Leiden Journal of International Law*, vol. 19, no.2 (2006) 305-337, p317; T. Kirk, *Legal Aid Lawyers and Paralegals: Promoting Access to Justice and Negotiating Hybridity in Timor-Leste*, JSRP and The Asia Foundation, June 2014, pp14-15; A. Kovar, *Customary Law and Domestic Violence in Timor-Leste: Approaches to Domestic Violence Against Women in Timor-Leste: A Review and Critique*, UNDP Timor-Leste, January 2011 p16; A. Kovar and A. Harrington, *Breaking the Cycle of Domestic Violence in Timor-Leste: Access to Justice Options, Barriers and Decision Making Processes in the Context of Legal Pluralism*, UNDP Timor-Leste, October 2013 p24.

¹¹ T. Wassel and G. Rajalingam, *A Survey of Community-Police Perceptions in Timor-Leste 2015*, The Asia Foundation, 2015, Figure 3.7, pp52-53; A. Kovar and A. Harrington, *Breaking the Cycle of Domestic Violence in Timor-Leste: Access to Justice Options, Barriers and Decision Making Processes in the Context of Legal Pluralism*, UNDP Timor-Leste, October 2013, pp17, 43; MoJ and Ba Distrito, *Increasing Legal Awareness to Strengthen Access to Justice in Timor-Leste: Analysis of the Effectiveness of Legal Outreach Sessions from the Ministry of Justice*, forthcoming 2016, p36.

¹² “Omisidui negligente” (manslaughter) is a public crime under the Penal Code, and is punishable by up to four years imprisonment.

¹³ D. Cummins, *Ami Sei Vitima Beibeik: Looking into the needs of domestic violence victims*, The Asia Foundation, 2012, cited in S. Marx, *Timor-Leste Law & Justice Survey 2013*, The Asia Foundation, 2013, p49.

with locally. On this topic it may be that *suku* council members provide what they believe to be the “correct” answer regardless of practice, and that information could be more reliably obtained from other sources, including *suku* record books or community members themselves. As explained further below (see section III), misconceptions about the permissibility of dealing with domestic violence in community dispute resolution may be hampering the correct reporting of how such cases are handled.

In addition to dealing with conflicts between individuals and families, community leaders also deal with another type of case: instances in which a local regulation is said to have been violated. In addition to long-standing customs regulating behavior – which would ordinarily have been unwritten – a number of communities are now adopting written codes of behavior which attach sanctions to their violation. Frequently they are referred to as *tara bandu*.¹⁴ However, while such local regulations may incorporate elements of *lisan* (customary spiritual law) in their substance and the procedures for their adoption, they may also display various features which depart from traditional systems. In some instances, these local regulations are adopted at the level of *suku*¹⁵ (or even *aldeia*¹⁶), but in others they cover a larger area such as an Administrative Post¹⁷ or even a whole Municipality.¹⁸

Typically, local regulations purport to do one or more of the following: regulate behaviour impacting the environment; require appropriate management of livestock; set limits on cultural activities and expenditures on them; and regulate or prohibit certain other types of conduct (for example gambling, assaults, sexual relations.) In many cases (though not all) specific sanctions are established in the written regulations. Published research to date on these local regulations has been limited¹⁹ and does not consider the means that are used to adjudicate alleged violations when they occur. Information gathered for this Brief suggests that adjudication often occurs at the *suku* level before members of the *suku* council. In some areas local regulations are also enforced with the assistance of informal police appointed by communities for this purpose: under the Ermera-wide “*tara bandu*”, these police are referred to as *kablehan*,²⁰ and play a prominent role.

Number of community-based procedures

No comprehensive data exists to indicate the proportion of disputes in Timor-Leste which are resolved through community mechanisms. Interestingly, the Ba Distrito/Belun research suggests that most *sukus* deal with less than one dispute per month. However, this may merely demonstrate that the great majority of cases are resolved at the *aldeia* level and therefore never reach the *suku*.

Research carried out by The Asia Foundation in 2015 indicated that in the event of a crime, 54 percent of respondents first sought assistance from their community, their traditional leaders or their *suku* or

¹⁴ Now commonly used to denote a type of local-level social agreement to regulate behaviours, the term was originally used in some parts of Timor to denote a specific traditional process for regulating conduct in communities. For discussion of the term, see: *Tara Bandu: Its role and use in community conflict prevention in Timor-Leste*, The Asia Foundation and Belun, June 2013, p10.

¹⁵ For example: *Lei Tradisional (Tarabandu) Suco Vatu-Vou*; *Tara Bandu* for Suku of Balibo Vila.

¹⁶ For example: *Tara Bandu: Gestão Rekursu Tasi no Tasi Ninin ho Baze Komunitade, Aldeia Adara*

¹⁷ For example: *Tara Bandu* for the Administrative Post of Maubisse; *Lei Domestika Suku 11 Sub-Distriu Aileu Vila*.

¹⁸ For example, for the Municipality of Ermera: *Akta no Regulamento Tara Bandu Distrito Ermera*, 27 February 2012.

¹⁹ *Tara Bandu: Its role and use in community conflict prevention in Timor-Leste*, The Asia Foundation and Belun, June 2013.

²⁰ The *kablehan* are not regulated by any formal laws or regulations. Information provided during this research by community leaders indicates that they are appointed within communities and are invariably men. They do not receive salaries for their work, but as explained below, in some cases may receive payments based on their work in specific cases. It is noteworthy that *kablehan* appear to be far more numerous than the community police working within the PNTL. Whereas a *suku* will usually have one community-based PNTL officer, *sukus* visited for this research had between 10 and 30 *kablehan* each.

aldeia leadership.²¹ Some of these cases were then sent to the police, but of those cases reported to the police, 77 percent were referred back to community leaders for resolution.²² Where cases were dealt with in the community, The Asia Foundation found that 87 percent were dealt with through an informal procedure (“mediation” or “settlement”) led by a community leader.

In addition to this large proportion of *crimes* which are ultimately dealt with by community mechanisms, those mechanisms also deal with a far wider range of problems, including various land and livestock disputes and even interpersonal disagreements. It therefore seems probable that the total number of cases dealt with across the range of community resolutions is very substantial.

Estimating the number of cases dealt with by local leaders which involve violations of local regulations is even more difficult. No research appears to have been done on this question.

Procedures followed in community-based informal justice mechanisms

In considering whether informal mechanisms are accessible and comply with human rights standards, a central issue is what procedures are used in those mechanisms. Unfortunately, little reliable information exists on this. Gathering such information is difficult. Practices appear to be flexible and to vary considerably and records are not kept of procedures followed. The best way to understand the nature of procedures used would be to directly monitor informal dispute resolution as it occurs. To date no organisation has managed to systematically do this.

Despite the lack of detailed information about procedures followed, some general conclusions can be gleaned from the Ba Distrito/Belun research:

- The identity of persons who facilitate or oversee community-based dispute resolution varies. Most usually this role is played by (male) leaders from the extended family, *aldeia* or *suku*, most often by one or more of the *xefe*, *lia nain* or elders. In some cases, local administrative officials, such as the PAAS or community police officer, and/or church leaders are also involved. It appears that the identity of dispute resolution facilitators owes more to their specific personalities, social status and relationships with the community than to their formal positions.
- The overwhelming majority of those who participated in the Ba Distrito/Belun research indicated that women do not facilitate dispute resolution in their communities. Where, in a very small number of *sukus*, women on the *suku* council do undertake this role, it appears to be based on their individual characteristics and/or particular personal leadership role in their community.
- Local dispute resolution procedures are open to members of the community to attend. In addition to recording the outcome of a dispute (see further below) *suku* record books are sometimes used to record the identities and signatures of those who attended the hearing. Records from a small number of such hearings reviewed during this research suggest that hearings can be well attended, and that the majority of attendees are men. Attendees may participate actively by expressing their views on the case being dealt with.
- Two commonly mentioned features of these community mechanisms is their focus on *collective* rather than individual interests, and that they do not result in a “winner” and a “loser”. Discussions are inclusive of community members regardless of whether they are personally affected by the dispute, and outcomes may involve exchanges between families rather than individuals. Often payments will be made in both directions, with the putative claimant or victim also required to contribute something (often, for example, an animal for use in the reconciliation feast).
- The terms “traditional” and “customary” are often used in connection with community-based justice mechanisms. However most such procedures are not strictly reflective of *lisan*, although they may incorporate elements of it. Indeed, community justice processes are now most often overseen by persons who are elected or appointed to leadership positions. While they are

²¹ T. Wassel and G. Rajalingam, *A Survey of Community-Police Perceptions in Timor-Leste 2015*, The Asia Foundation, 2015, p57.

²² *Ibid.*, Figure 3.7 p61.

sometimes the same individuals who would have been responsible for adjudicating disputes according to *lisan*, more often they are not. Identifying whether the methods used are secular or spiritual is also not simple. Some interviewees spoke of adopting customary religious (*lulik*) rituals into otherwise secular dispute resolution procedures in order to increase compliance through a fear of consequences arising from a breach.

- Respondents frequently used the term “mediation.” Many community leaders have received training on mediation and dispute resolution and appear to have at least a basic understanding of these concepts. Those met with for this research stated that when they resolve a dispute, the parties themselves decide on the outcome and are free to reject any settlement reached. However, interviewees who have observed informal justice mechanisms in the community expressed doubt as to whether outcomes are truly voluntary. Some described community leaders actively urging parties to “agree” to a resolution, or of the unspoken pressure inherent in a settlement suggested by a respected community leader. *Suku* leaders also spoke of summoning parties to respond to complaints, a procedure which suggests that community members are under some pressure to participate in and comply with the process.

These general observations suggest that community-based informal justice mechanisms are not readily able to be categorized, either as traditional/customary practices, or as a particular type of dispute resolution (mediation, arbitration etc.). Procedures used are flexible and vary depending on the individuals involved and the case in question. They may incorporate various elements of custom as well as practices learned through mediation training; roles of participants and facilitators may not be clearly defined as in a formal mediation or arbitration, making it difficult to apply ADR concepts to these procedures.

In many *sukas*, written records are made of dispute resolution outcomes. These typically explain something brief about the dispute, and the outcome (for example compensation payments or exchanges to be made between the parties). Attendees or community members may be asked to witness the written agreement. It was said in some communities that this is a means by which to apply social pressure on parties to comply with the agreement.

Many of the features of community justice mechanisms identified above are also reasons why involving lawyers in them has proved very difficult. Procedures often occur on little or no notice, in remote areas. Participants live far away from key legal services such as public defenders and the few existing private legal aid organisations. Moreover they are unlikely to identify a need for legal advice in the context of informal procedures. Despite past sporadic attempts by some agencies to develop community-based paralegal networks, no large scale program of this kind has been developed. Public defenders are overstretched dealing with formal proceedings,²³ and while the legal aid organizations supported by Ba Distrito appear willing to assist in the context of ADR mechanisms, they are few in number and have limited resources.²⁴

Some of the same problems which hamper the provision of legal assistance in community procedures also make systematic monitoring of these mechanisms difficult. Because procedures happen on short notice in remote locations it is difficult to envisage a system for monitoring other than the use of monitors who live within communities themselves and perhaps monitoring on an *ad hoc* (part-time) basis. However, training such persons to ensure consistent and objective gathering of information would be particularly difficult. This is because community mechanisms do not follow rigid procedures and some of the questions of most interest (such as any real or perceived bias by facilitators or decision-makers) are inherently difficult to assess from an objective perspective in any event. Despite this, it is possible to conceive of methods for systematically monitoring community dispute resolutions, but implementing them would require a long-term engagement with community-based

²³ Ba Distrito, *Access to Justice Brief: Legal Assistance in Timor-Leste: Summary of Assessment Findings and Recommendations*, September 2014, especially pp12 and 14, JSMP, *Overview of the Justice Sector 2015*, p13.

²⁴ Ba Distrito, *Access to Justice Brief: Legal Assistance in Timor-Leste: Summary of Assessment Findings and Recommendations*, September 2014, especially p9.

monitors and provision of significant training and support. In the absence of a mechanism appropriately placed to do that work, the current best source of information appears to be organizations (such as Belun and legal aid groups) that work regularly within local communities and speak with community members and leaders about their practices. In the future, further use could also be made of *suku* records to track the types of cases dealt with and their outcomes. Human rights groups among civil society or the Provedore for Human Rights and Justice (“PDHJ”) could consider undertaking this work.

Views on informal and formal justice

Attitudes to the justice sector, including its informal portion, have been reported on comprehensively by The Asia Foundation.²⁵ This subject is touched upon here briefly, since it is important to understanding when and why informal justice mechanisms are used.

While The Asia Foundation reported that preferences regarding the formal and informal justice systems depend on the type of case,²⁶ it also showed that overall more people demonstrated high levels of confidence in local or customary justice mechanisms than in the court system.²⁷ This was confirmed by the Ba Distrito baseline survey.²⁸

In those surveys compelling reasons were given for engaging with the informal rather than formal justice system, and many of these were also identified through the Ba Distrito/Belun research:

- Respondents explain that using community mechanisms strengthens family structures, cultural traditions and social cohesion. The Asia Foundation reported that the most common reason cited for confidence in local dispute resolution is its connection to family structures and fairness.²⁹
- Many respondents in the Ba Distrito/Belun research believed that community-based procedures can better achieve compliance with agreed outcomes, because they can harness traditional beliefs and the fear of “natural” consequences in the event of non-compliance.
- Some respondents indicated that informal systems are preferable to formal ones because they are faster.
- Others mentioned that resolving a dispute in the community is less costly than accessing the formal sector, both in terms of the money and the time away from work which is involved.
- Procedures used in community-based mechanisms were noted as allowing participants to speak more freely, and even in a local language, in comparison to the formality of a court hearing. Indeed, The Asia Foundation found language to be a major barrier in the formal justice system.³⁰

The Asia Foundation survey also demonstrates that many people have little knowledge of the formal justice system. Of their respondents 60 percent had not heard of a public prosecutor, and 53% had not heard of a lawyer.³¹ Of those who had been to a court, 30 percent did not understand the procedures while in court.³² This situation no doubt contributes an additional reason to prefer what is local and familiar.

Despite these factors, the Ba Distrito/Belun research also revealed some of the concerns that people have about informal justice procedures. Interestingly, most of these referred to the fact that in such mechanisms disputes are not decided “according to the law”. Some respondents also considered that the customary practice of requiring payment from both “sides” to a dispute is not fair because the person who is “right” in the dispute nonetheless has to make payment. Community leaders also

²⁵ S. Marx, *Timor-Leste Law & Justice Survey 2013*, The Asia Foundation, 2013.

²⁶ *Ibid.*, p24

²⁷ *Ibid.*, p16; see also pp39-40, 42-43.

²⁸ *Ba Distrito Baseline Survey 2014: Local Governance and Access to Justice in Timor-Leste*, Social Science Dimensions, September 2014, pp65, 67-99.

²⁹ *Ibid.*, p18.

³⁰ *Ibid.*, pp34-35

³¹ *Ibid.*, p16

³² *Ibid.*, p17

mentioned that they sometimes face difficulties when the parties are not able to be reconciled or do not accept the solutions which are proposed to them.

Connections between the informal and formal justice sector in practice

Much of the time Timor-Leste's informal and formal justice systems appear to operate in parallel but in isolation of each other. However, they do at times intersect.

Case summaries produced by JSMP through its court monitoring activities reveal that in some criminal trials the prior resolution of the dispute by traditional processes is discussed as part of the proceedings. In one case reported on by JSMP in 2015, the Suai District Court awarded \$3000 in civil compensation to a child victim of sexual assault. The Court noted that the case had been dealt with through a community dispute resolution and \$2000 paid to the victim's family. However it took the view that the local procedure had not satisfied the victim's entitlement to compensation as the money had been paid to her family.³³

In most cases reported on by JSMP, judges do not state explicitly what impact a previous community resolution has on the outcome of the court proceedings. Not infrequently community resolutions are referred to by lawyers or witnesses in the proceeding. Whether judges in fact *do* take such information into account – and if so how – is usually not revealed. It may be that, as permitted by the Penal Code, this is a matter considered in sentencing.³⁴ However it would be concerning if the court used the fact of an earlier community reconciliation to presume guilt, thus arguably interfering with the presumption of innocence.³⁵ This is an area worthy of further monitoring and analysis.

In contrast, something that is clear from JSMP reports is a significant number of cases resolved by agreement once they come before a court for the scheduled hearing. In the first quarter of 2016, JSMP produced case summaries of 260 criminal cases. Of these cases 68 (26 percent) were settled at court – either as a result of a court initiated conciliation, or based on a request from the complainant to withdraw the complaint. This procedure may only be used for minor (semi-public) crimes (see further below). Most of the cases settled in this way involve property damage or minor physical assaults not involving domestic violence. It appears that in a large proportion of cases, crimes are ultimately resolved by court-endorsed conciliation or withdrawal of complaint. The readiness of parties to settle in such cases is clear from the fact that while 68 cases were successfully settled at court, JSMP reported on only one court attempt at conciliation during this period, which failed.

What this demonstrates is the significant possibility for many minor crimes to be dealt with by settlement and the withdrawal of formal complaints. It seems likely therefore that the full potential for diversion of minor crimes to the informal sector is not yet being fulfilled, since these cases are currently settling only once a scheduled court hearing occurs. If more of these cases were able to be settled through informal community procedures and withdrawn at an earlier stage, it could reduce significant pressure on prosecutors, public defenders and the courts. This would also likely be of significant benefit to the parties involved. Where a matter is not settled until it reaches court, the delay involved is often substantial. Of the cases reported on by JSMP in the first quarter of 2016, most were ultimately settled at court more than a year after the incident in question; in some cases many years had passed.³⁶ As discussed below, some concerns remain about the ability of community justice mechanisms to comply with fair trial rights even in the resolution of civil cases. These concerns should

³³ JSMP Press Release: Suai District Court sentences defendant to 13 years in prison and orders him to pay compensation of US\$3,000 in case of sexual abuse against a minor, 30 September 2015.

³⁴ Penal Code, article 55(2)(g).

³⁵ At least one JSMP case summary reviewed suggested that this might have occurred: Case Summaries, Dili District Court, January 2016, summary no.19.

³⁶ JSMP reports may be among the most reliable data currently available on this question. A Ba Distrito assessment of court functionality in Baucau and Oecusse in September 2014 found that official statistics were not being kept on the period of time between case initiation and resolution: B. Walsh, *Functional Assessment of the Oecusse & Baucau District Courts: Summary of Assessment Findings and Recommendations*, September 2014, p5.

be borne in mind when considering the diversion of cases from the formal sector. However, if coupled with measures to increase the fairness of community dispute resolution, there is great potential to constructively use local mechanisms to divert cases involving semi-public crimes away from the formal justice system.

III. CURRENT LEGAL FRAMEWORK FOR THE INFORMAL JUSTICE SECTOR

To date there is no comprehensive legislation regulating the informal justice sector. However, it is not entirely unregulated by Timorese law. Some existing laws have a bearing on the legality and effect of local justice mechanisms. However, the approach is piecemeal and not always clear. The following are the key areas of regulation at the present time:

Constitutional recognition

The Constitution provides that “[t]he State shall recognise 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.”³⁷ However no specific legislation dealing with customary law has been enacted and the legal consequences of this provision are not entirely clear.

The provision appears to intend the legal invalidity of “norms and customs” which are contrary to the Constitution. However, where practices are *not* inconsistent with the Constitution, no framework exists for identifying which are part of “the norms and customs of East Timor”³⁸. Since traditional beliefs and practices are not static, and indeed are regularly mixed with new or foreign systems, identifying “norms and customs” is not a simple matter. Moreover, the content of the state obligation to “recognise and value” such norms is also unclear. This could be interpreted as creating an obligation on the state not to harm traditional “norms and customs”, or a requirement to enact legislative recognition of those “norms and customs”. It is unclear whether the provision intends to give legal effect to such norms in the absence of specific legislation.

In addition, various interpretations could be given to the concept of “inconsisten[cy]” with the Constitution. It might be argued, for example, that Title V of the Constitution (and in particular section 123) aims to establish exhaustively the organisation of the Timorese judicial system. If this is so, then any traditional courts are inconsistent with the Constitution and can have no legal validity.³⁹

Section 123(5) of the Constitution appears to be directed at *non-judicial*⁴⁰ dispute resolution. It permits such dispute resolution to be “institutionalize[d]” by the law. To date no law has been passed to regulate or “institutionalize” non-judicial dispute resolution. The first law(s) which may do so are the currently proposed draft arbitration, conciliation and mediation laws (see further below). However, section 123(5) may support the interpretation above, in that the only other dispute resolution envisaged is *non-judicial*. This suggests that the Constitution itself does not permit local or customary courts which exercise judicial powers.

Laws concerning community leadership

Community leaders who were involved in the Ba Distrito/Belun research frequently referred to Law No. 3/2009 on Community Leaders and Their Election as the source of their powers. However, they also often indicated that the law was insufficient.

³⁷ RDTL Constitution, section 2(4).

³⁸ Several provisions of the Civil Code do give recognition to “local custom”, at least making clear some specific legal issues and circumstances in respect of which local custom has legal force. The Code does not, however, elaborate as to what amounts to a “local custom” or how the content of those customs is to be identified.

³⁹ Unless they can be considered to be “Arbitration Courts” within the meaning of section 123(3), an interpretation which seems implausible.

⁴⁰ The provision states that “[t]he law may institutionalise means and ways for the non-jurisdictional resolution of disputes.”

The Community Leaders Law was effective until July 2016. It provided that the “responsibilities” of a *xefe de suku* included “[f]avour[ing] the settlement of minor disputes involving two or more of the Suku’s aldeias”,⁴¹ “[s]upporting such initiatives as are aimed at monitoring and protecting the victims of domestic violence and at dealing with and punishing the aggressor...”,⁴² and “[r]equesting the intervention of the security forces in the event of disputes which cannot be settled at local level, and whenever crimes are committed or disturbances occur.”⁴³

Interestingly, despite apparently requiring the *xefe de sukus* to request police intervention whenever a crime occurs, the Law nonetheless gave them the role of “punishing” perpetrators of domestic violence. Additionally, the dispute resolution function of *xefe de sukus* was described only as a responsibility to “favour” settlement where an inter-*aldeia* dispute occurred. The Law didn’t appear to engage with the reality of what is occurring at the *suku* level in practice, and nor did it usefully elaborate on the key provisions of the Constitution.

In July 2016 a new *Suku* Law, Law No. 9/2016, was enacted. It addresses some of these deficiencies. It provides that “duties” of *sukus* include to “promote the a solution to litigation occurring within the community or between *aldeias* in the *suku*”.⁴⁴ *Xefes de suku* have the competency to “intervene, whenever requested, in the mediation of conflicts or disputes between community members” as well as “between the *aldeias* in the *suku*.”⁴⁵ Nonetheless, *Xefes de suku* are also to “inform the [police] about facts which can constitute a crime.”⁴⁶ The new Law does not refer to the punishment of domestic violence perpetrators.

Nonetheless, while resolving these minor problems, the new *Suku* Law provides little new detail to regulate informal justice sector. It does not resolve the gaps in the Constitutional framework identified above. And indeed by using the term “mediation” it raises a new question of whether that specific type of procedure is intended to constitute the limits of *xefe de sukus*’ dispute resolution powers.

Criminal procedure law

The most detailed legal framework relevant to the informal justice sector is the Criminal Procedure Code (CPC). While the CPC is principally intended to regulate procedures in the formal justice system, it also touches upon the circumstances in which matters can be dealt with extra-judicially. Unfortunately, the Code establishes a regime which is complex and difficult for laypersons (indeed even lawyers) to understand.

Two features of the CPC are particularly relevant to the informal justice sector. First, the CPC distinguishes between “public crimes” and “semi-public crimes”. Where a public crime is reported, prosecutors are in every instance required to conduct an investigation. An indictment must then be issued unless the evidence is insufficient, the perpetrator remains unknown, or the case would be inadmissible.⁴⁷ In contrast, “semi-public crimes” are only prosecuted where a complaint has been made by the victim or another specified person.⁴⁸ In a case involving a “semi-public crime”, it is also possible for the complainant to terminate proceedings by withdrawing the complaint,⁴⁹ and/or for the judge to attempt conciliation between the victim and defendant.⁵⁰ This distinction is intended to give victims control over the institution of *criminal* proceedings in relation to minor crimes.

⁴¹ Law No. 3/2009 on Community Leaders and Their Election, article 11(2)(c).

⁴² Law No. 3/2009 on Community Leaders and Their Election, article 11(2)(e).

⁴³ Law No. 3/2009 on Community Leaders and Their Election, article 11(2)(f).

⁴⁴ Law No. 6/2016 *Suku* Law, article 5(1)(c); see also article 6(1)(a).

⁴⁵ *Suku* Law, article 23(1)(p) and (q).

⁴⁶ *Suku* Law, article 23(1)(o).

⁴⁷ Criminal Procedure Code, articles 235 and 236. (Article 235 provides for the circumstances in which a case may be dismissed. Article 236 requires that otherwise an indictment be issued.)

⁴⁸ Criminal Procedure Code article 71, 211(3) and 214.

⁴⁹ Criminal Procedure Code, article 216.

⁵⁰ Criminal Procedure Code, article 262.

It is crucial to understand that in most cases where a crime is committed, a right to civil compensation also arises. In general terms this is so whenever a crime causes harm to somebody. All legal systems recognize the distinction between civil and criminal liability. Where both arise from the same set of facts, some legal systems maintain separate proceedings for their determination (as in the Anglo-American tradition), while others conjoin them. The CPC establishes a presumption that civil compensation will be dealt with in a criminal proceeding⁵¹ (albeit at the discretion of the judge) *unless* the victim opts otherwise. Technically, in order to initiate a separate civil proceeding, an “aggrieved party” must, within eight days of being informed of his or her rights, declare an intention to file a civil request separately.⁵² However there is nothing in the CPC to prevent a claimant and accused person reaching a settlement on the payment of civil compensation in the absence of a formal civil suit.

Importantly, the possibility to seek civil compensation, whether through the criminal proceeding or separately, applies wherever a crime has caused harm. This is so equally for public and semi-public crimes. As a result, the victim of even a *public* crime may choose how to pursue civil compensation, including by agreement with the perpetrator. Accordingly, there appears to be no legal impediment within the CPC to informal justice mechanisms being used to determine *civil compensation* where a public crime has occurred.

Despite this, there is significant misunderstanding about these issues in communities, and indeed among lawyers. The Ba Distrito/Belun research and supplementary interviews reveal a lack of understanding about the distinction between a civil and a criminal case.⁵³ Communities tend to see any case as a single indivisible dispute, rather than understanding that it may have both civil and criminal components which need not be handled together. The public / semi-public crime distinction is also little understood, perhaps in part because of simplified public education campaigns which have attempted to distil a complex legal concept into accessible terms. Communities have come to understand that serious crimes (public crimes) must be dealt with by the police, whereas less serious (semi-public) crimes can or must be dealt with locally. In other words, communities believe that the distinction leads to a different forum for the resolution of disputes.

In fact, far from permitting the use of a different forum to determine criminal liability in respect of semi-public crimes, the CPC provides that only the formal courts are competent to administer criminal justice.⁵⁴ It therefore makes clear that informal mechanisms are *never* competent to determine criminal matters. Conversely, as explained above, informal justice mechanisms are *always* able to assist in the settlement of civil claims, even where the case involves a public crime.

The confusion surrounding these concepts can have real consequences. Although some cases do proceed concurrently through both formal and informal mechanisms, where communities do not understand that this is possible they may refrain from reporting crimes to the police so that the matter can be dealt with locally. Conversely, where they see that a matter is being dealt with by police, they might refrain submitting it to informal mechanisms even where they wish to do so.

These difficulties are particularly apparent and acute in respect of domestic violence. For all the reasons set out above (see Section II) communities, families and even victims may be strongly inclined to submit the case to an informal mechanism. Where they believe that reporting a case will mean that they are no longer permitted to pursue local measures, they may be inclined not to report it.

The difficulties with the CPC are not limited to issues arising from its lack of effective socialization. Despite being long and detailed, it provides little recognition of the fact that many criminal cases are

⁵¹ Subject to the possibility that in complex cases the court may refer the question of quantum to a civil court after the conclusion of the criminal proceedings: Criminal Procedure Code, article 284(2).

⁵² Criminal Procedure Code, article 72(2).

⁵³ See also MoJ and Ba Distrito, *Increasing Legal Awareness to Strengthen Access to Justice in Timor-Leste: Analysis of the Effectiveness of Legal Outreach Sessions from the Ministry of Justice*, forthcoming 2016, pp36-37. The findings there suggest that while many community members are aware that the law categorises disputes into civil and criminal matters, confusion remains about how the two categories are delineated.

⁵⁴ Criminal Procedure Code, article 7(1).

dealt with in some way in communities. Although the Penal Code (art.55(2)) recognises previous reconciliation between the parties as a mitigating factor in sentencing, no guidance is given on how such reconciliations affect civil compensation. And no systematic framework is established for diversion of minor cases to informal resolution, despite the fact (as set out above) that very many cases involving semi-public crimes are ultimately resolved by settlement. The CPC is in this respect a missed opportunity to set out basic parameters for communities' role and to benefit from community resolution in cases where it is appropriate. The CPC could, ideally:

- Expressly provide that communities may resolve claims for civil compensation and take steps to restore community harmony, even while a criminal prosecution is ongoing for the same incident;
- Make clearer that in cases of semi-public crimes, a complainant may withdraw a complaint and thereby terminate the criminal proceedings. The CPC could give recognition to the possibility of this occurring through a community resolution, and could include procedures for systematically considering local settlements as a means by which this may occur (where done in accordance with due process and duly recorded in writing and signed). Under the current framework a further process of verification by prosecutors is necessary before a complaint can be withdrawn;
- Set out minimum standards to be applied where informal justice mechanisms resolve civil compensation claims and/or lead to a decision to withdraw a complaint in a semi-public case;
- Make explicit and clear the impact on criminal proceedings where other aspects of the case have already been dealt with through informal justice procedures. This should include making clear the impact on guilt or innocence, on sentence (in the event of a conviction), and on civil liability. Currently none of these questions are dealt with explicitly by the CPC.

Finally, the question of community based informal justice being used to sanction people for violating local regulations is nowhere provided for in the CPC. Indeed, insofar as such procedures involve the imposition of criminal penalties, the CPC in fact disallows them. As noted above, it provides that only the formal courts may administer criminal justice.⁵⁵ If the GoTL were to permit community-imposed sanctions under local regulations, the CPC would need to be amended in order to take account of this, among other changes required to address the human rights issues addressed in next section.

IV. HUMAN RIGHTS ISSUES ARISING FROM THE INFORMAL JUSTICE SECTOR

Applicable human rights standards

Two categories of human rights standards are relevant to informal justice mechanisms: those concerning the substantive principles which a mechanism applies; and those concerning its accessibility and procedures.

(1) Substantive principles applied

Informal justice mechanisms often apply a separate body of substantive law– sourced from indigenous traditions rather than state institutions. Human rights bodies have expressed concern that principles applied by informal justice mechanisms must comply with human rights standards. Such concerns often relate to discrimination and violence against women⁵⁶ although other concerns such as the use of corporal punishment have also been raised.⁵⁷ Human rights bodies

⁵⁵ Criminal Procedure Code, article 7(1).

⁵⁶ Although the treaty bodies are usually not explicit, this appears to be their concern in the following documents: CEDAW, Concluding Observations (Botswana), CEDAW/C/BOT/CO/3, 26 March 2010, paras 13, 17; CEDAW, Concluding Observations (Kenya), CEDAW/C/KEN/CO/7, 5 April 2011, para.13; CEDAW, Concluding Observations (Mexico), CEDAW/C/MEX/CO/7-8, 27 July 2012, para.34; HRC, Concluding Observations (Nepal), CCPR/C/NPL/CO/2, 15 April 2014, para.13;

⁵⁷ HRC, Concluding Observations (Bolivia), CCPR/C/BOL/CO/3, 6 December 2013, para.16.

have made clear that “traditional, historical, religious or cultural attitudes” cannot provide justification for human rights violations.⁵⁸

(2) Accessibility and procedure

Human rights principles applicable to the accessibility and procedures of justice mechanisms will largely be well known. They include principles of equality before the law, access to courts and minimum procedural safeguards. Special additional guarantees apply in criminal proceedings.

These protections, as they appear in various international instruments,⁵⁹ were drafted with formal court proceedings in mind. Despite this, human rights bodies have made clear that the core minimum standards are also applicable where judicial power is exercised through traditional mechanisms. Most relevantly, the Human Rights Committee has said that:

*Article 14 [of the ICCPR] is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.*⁶⁰

The United Nations Declaration on the Rights of Indigenous Peoples provides for the promotion, development and maintenance of “juridical systems or customs, in accordance with international human rights standards”.⁶¹

However informal mechanisms exercising judicial power must be distinguished from consensual and non-binding procedures such as some forms of ADR. Human rights principles will generally only apply in a non-judicial mechanism where it involves some element of coercive or binding effect.⁶²

The role of the state

International human rights law places responsibilities on state authorities, not on individuals. A state’s obligations regarding informal mechanisms are most clearly engaged when those mechanisms have become part of the public apparatus and those working within them are agents of the state. A state is responsible for the conduct of its officials under international law, regardless of their seniority or their status under domestic law. However, as the Human Rights Committee made clear, obligations are also engaged where a state gives legal recognition to the role of informal judicial bodies. Even where

⁵⁸ HRC, General Comment 28, para.5.

⁵⁹ UDHR, articles 10 and 11; European Convention on Human Rights, article 6; Inter-American Convention on Human Rights, article 8; African Charter on Human and People’s Rights, article 7.

⁶⁰ Human Rights Committee, General Comment 32, para.24; see also Human Rights Committee, Concluding Observations (Rwanda), CCPR/C/RWA/CO/3, 7 May 2009, para.17; Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/8/4, 13 May 2008, para.38.

⁶¹ United Nations Declaration on the Rights of Indigenous People, UN GA Resolution 61/295, 13 September 2007, art.34; See also: Human Rights Council, Access to justice in the promotion and protection of the rights of indigenous people: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, Study by the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/27/65, 7 August 2014, para.21; and Committee on the Elimination of Racial Discrimination General Recommendation XXXI, para.5(e).

⁶² This question has principally been the subject of analysis in the context of commercial arbitrations. For comment on its application in traditional justice systems see: F.Kerrigan, *Informal Justice Systems: Charting a course for human rights-based engagement*, (UNDP, UNICEF, UN Women), p96.

this has not occurred, there is a strong argument that other forms of state support or recognition given to informal justice mechanisms may suffice to engage the state's human rights obligations in respect of those mechanisms. This might be the case for example where the state provides resources used for the operation of the mechanisms.⁶³

In addition, some obligations imposed on states under human rights instruments require them to take positive action to regulate the behaviour of non-state actors. This is the case for example regarding gender discrimination.⁶⁴ As a consequence where informal justice mechanisms act in a gender-discriminatory way, the state must take positive steps to address this.

Human rights implications of community dispute resolution

The most fundamental human rights standard concerning justice is that all persons are equal before the law and courts,⁶⁵ and that all persons can access a court in order to uphold his or her legal rights.⁶⁶

Any fair analysis must recognize undoubtedly, that informal justice procedures in Timor-Leste are significantly more accessible to most of the population than the formal sector. For example:

- Informal justice procedures are often carried out much closer to the parties' homes than a court proceeding. Although the use of mobile courts has brought about advances in access to formal justice,⁶⁷ the majority of formal proceedings still occur in one of only four towns where the District Courts are located: Dili, Baucau, Suai and Oecusse. The Asia Foundation reports that of those who have heard of a court, 39% said there is not one in their area.⁶⁸ Prosecutors have now opened offices in the Municipalities of Viqueque, Ermera and Bobonaro but public defenders' offices are yet to be established outside the District Court locations. Although some community leaders reported during the Ba Distrito/Belun research that geographical distance is a challenge even within a *suku* (particularly given the lack of transport resources), these distances are usually significantly less than those involved in travelling to engage with the formal justice system.
- In part because of the lesser distances involved, but also owing to the fewer procedural steps, the informal mechanisms requires parties to spend less time away from their work and families.
- Meaningful participation in informal justice mechanisms is more easily assured, given that they are culturally familiar and undertaken in a language understood by all of those involved.

In addition to accessibility, human rights standards require that justice operates promptly.⁶⁹ In this respect informal systems in Timor Leste have a clear advantage over the formal courts. Cases reported on by JSMP frequently take a year or more to reach court.

Informal justice systems can be seen as an implementation of cultural rights, but nonetheless they must comply with other human rights standards, including minimum procedural guarantees. These include the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.⁷⁰ (Closed hearings are permitted on certain bases.⁷¹) In the absence of direct monitoring of community processes, it is difficult to draw firm conclusions about their compliance with fair trial rights, however there are some grounds for concern.

First, informal justice mechanisms may interfere in practice with the right to access a court. Despite being more accessible to local communities, community-based justice mechanisms in Timor-Leste (in their present state) cannot be considered as "courts" within the meaning of the international

⁶³ On the question of linkages between informal justice mechanisms at the state see: F. Kerrigan, *Informal Justice Systems: Charting a course for human rights-based engagement* (UNDP, UNICEF, UN Women), pp88-89.

⁶⁴ CEDAW, art.2

⁶⁵ ICCPR, article 14(1); UDHR, article 7; CEDAW, article 15;

⁶⁶ ICCPR, article 14(1); Human Rights Committee, General Comment 32, para.9.

⁶⁷ Judicial System Monitoring Program, *Overview of the Justice Sector 2015*, pp15-16.

⁶⁸ S. Marx, *Timor-Leste Law & Justice Survey 2013*, The Asia Foundation, 2013, p17.

⁶⁹ Human Rights Committee, General Comment 32, para.27.

⁷⁰ ICCPR, article 14(1).

⁷¹ ICCPR, article 14(1).

requirement for access to a court. Individuals may *choose* to resolve a civil dispute through means other than a court; however, this should be a voluntary and fully informed choice. Where an individual is in practice unable to access a court because of a lack of information, or pressure to use an alternative mechanism, this could constitute an interference with the right of access to a court. In Timor-Leste pressures to use informal over formal mechanisms often come from family and community members and cannot be attributed to the state. However, in at least some instances it appears that state officials (particularly police officers but also potentially PAAS) are involved in exerting such pressure. Moreover, it falls to the state to ensure that courts are functioning and accessible and that citizens have sufficient information and the practical means to use them.

Where the state has failed to make the formal justice system accessible in practice, the existence of non-judicial mechanisms cannot resolve this unless the informal system is formally linked and incorporated into the legal system. To date it is clear that this has not occurred. As indicated by the Human Rights Committee, this would require that the state recognizes such procedures or entrusts them to carry out judicial tasks. If this is done, judgments of community mechanisms should also be validated by state courts and be open to challenge on the basis of a failure to comply with fair trial guarantees.⁷² To date the recognition given in Timorese law to community dispute resolution does not rise to this level. Community leaders are empowered with resolving disputes but not (apparently) in a judicial capacity. The only judicial task provided to them – punishing perpetrators of domestic violence – was not elaborated upon, appeared to conflict with the Constitution, and was removed with the new *Suku* Law

Beyond the question of access to a court, a separate question arises as to whether procedures used in the informal justice sector guarantee a “fair trial.” The extent to which fair trial rights apply in the community-based resolution of disputes is not a straightforward one. If, as many believe, these procedures amount merely to a process of mediation, wherein the settlement is entirely voluntary as between the parties, then fair trial rights would arguably not apply. However, for the reasons set out above, it is doubtful whether these procedures are truly entirely voluntary mediations. This question can ultimately only be resolved through effective monitoring; however, there are some reasons to believe that proceedings are – at least in many cases – closer to a form of community based arbitration. If this is the case, and especially where there is little genuine free choice about whether to use the mechanism and comply with its outcome, core fair trial rights should be respected. Although the state has not formally endorsed the informal justice sector, it might nonetheless be responsible for violating fair trial rights if its agents are involved in unfair informal procedures.

In this context perhaps the most important fair trial guarantee is the requirement that a decision-maker be independent and impartial. At the present time guarantees of impartiality do not exist in community dispute resolution. Factors such as a family relationship between a party to a dispute and a community leader involved in resolving it are not necessarily seen as requiring the recusal of the community leader. This is a challenging issue in the context of mechanisms which are by their very nature close to the parties they deal with. Particularly at the most local levels – for example within *aldeias* – ensuring impartiality may be extremely difficult. However minimum standards could be established to regulate what extent of connection to parties in a dispute is (un)acceptable.

Another area in which clear procedural standards would assist relates to the publicity of proceedings. While community mechanisms normally comply with the general fair trial principle of a public hearing, they do not make sufficient allowance for exceptions in appropriate cases. No standards exist on this question and it does not appear to be a matter which is given attention by community leaders. As a result, even sensitive matters involving sexual violence and/or children are dealt with publicly. This is another area where the use of minimum standards would assist community leaders in improving procedures for civil compensation in sensitive matters including public crimes.

Finally, concerns have been raised about the substantive principles applied in community dispute resolutions. There is a clear possibility for these to violate basic human rights principles – particularly

⁷² Human Rights Committee, General Comment 32, para. 24.

those prohibiting gender discrimination. Theoretically, traditional norms may be applied only to the extent that they are consistent with the Constitution. However, because the Constitution's minimum human rights standards are framed in general terms, most local leaders (and community members) are not well-placed to determine the principles which they are and are not permitted to apply. Many respondents in the Ba Distrito/Belun research indicated a preference for local mechanisms to be more guided by the law, something which is currently difficult for them to achieve.

Where questionable practices are in use, the GoTL is responsible under international human rights law if it recognizes the role of these mechanisms, or actively provides other forms of support (such as resources) to them. Given that the dispute resolution mandate of *xefes de suku* is provided for by legislation, and that state agents (PAAS) provide support for such procedures, it is very arguable that the state is responsible for ensuring their compliance with human rights standards. This position is only strengthened where other state officials participate, as is increasingly the case as "Community Police Councils" are used – a forum which includes *suku* council members as well as the local community police officer.⁷³

Human rights concerns regarding implementation of local regulations

A much greater set of concerns arises from the use of informal justice procedures in communities to implement local regulations. These regulations effectively criminalize certain types of behaviour at the local level. In some instances they even use the term "crime" to refer to the conduct in question.⁷⁴

Under international human rights law, specific additional guarantees apply where judicial proceedings can be classified as "criminal" in nature. Crucially, such cases include not only those specifically identified as penal under domestic law, but also other proceedings which "regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity."⁷⁵

In these regards, it is clear that the "*tara bandu*" or local regulations referred to by other names do establish a type of criminal responsibility. They prohibit specified conduct, with the purpose of deterring such conduct for the public good. Sanctions are usually prescribed for breaches. While the sanctions used tend to involve fines, to be paid in money or personal property, they can be substantial, particularly when compared to the seriousness of the conduct in question and the levels of fines used in the formal justice system. Courts frequently order suspended sentences without any associated conditions, even in relatively serious cases.⁷⁶ Fines ordered by the courts for minor crimes tend to be very low – usually less than \$100. Fines under local regulations can be much higher than this in some cases: the Maubisse *tara bandu* includes fines of \$1000 or more for a number of violations, including infringements against the environment (chopping wood improperly, hunting game, discarding waste in a public place etc);⁷⁷ or participating in certain prohibited gambling activities.⁷⁸

The conclusion that these local regulations create criminal responsibility leads to troubling consequences in terms of compliance with human rights standards. Several fundamental guarantees are set out in the Constitution and the International Covenant on Civil and Political Rights as applying in all criminal proceedings:

⁷³ T. Wassel and G. Rajalingam, *A Survey of Community-Police Perceptions in Timor-Leste 2015*, The Asia Foundation, 2015, pp14, 37.

⁷⁴ For example: Maubisse *Tara Bandu*, article 20(i); *Lei Domestika Suku 11 Sub-Distrito Aileu Vila*, article 3; *Lei Regulamento Area Suco Tulataqueu ba Ano*, article 17.

⁷⁵ Human Rights Committee, General Comment 32, para.15.

⁷⁶ JSMP has reported that in 2015 a suspended sentence was imposed in 52% of the domestic violence cases which it monitored: Judicial System Monitoring Program, *Charging, Trials and Sentencing in Cases of Sexual Violence in Timor-Leste 2012-2015*, p31.

⁷⁷ Maubisse *Tara Bandu*, articles 20 and 22.

⁷⁸ *Ibid.*, article 25 and 26.

- Both international law and the Constitution guarantee that a person shall not be convicted for an act which was not criminalized by law at the time of its commission.⁷⁹ A question arises as to whether local regulations can be said to constitute “law”. They are generally created by a range of individuals including members of *aldeia* and *suku* councils, administrative post chiefs, and representatives of political parties, the police, and the Catholic Church. On occasion national level officials have been involved, including government ministers.⁸⁰ However such persons have no legislative power in Timor-Leste. To the contrary, the Constitution establishes the separation of powers.⁸¹ It provides general legislative power to the Parliament⁸² and (with Parliamentary authorization) the Government,⁸³ while the President has the power to promulgate or veto statutes.⁸⁴ Legislation must be published in the official gazette to have legal force.⁸⁵ Local instruments created at the *suku*, administrative post or district level therefore fall entirely outside the Constitution’s scheme for legislative creation, and bypass the checks and balances deliberately included in it. It is also doubtful whether the local regulations could be recognized under section 2(4) of the Constitution, which requires the state to “recognise and value norms and customs”. As mentioned above, no formal recognition of such norms and customs has yet been given in the form of the specific legislation as apparently envisaged by section 2(4). In any event it is far from clear that local regulations necessarily embody traditional norms. Indeed in some instances they are expressly intended to modify them.⁸⁶
- Additionally, even if the local regulations did have the status of law, another difficulty arises. This is because sanctions are not always specified. Even where they are, they may not be followed, and a different sanction imposed instead. Community leaders in one *suku* in Ermera explained that where limitations on certain traditional practices are violated, one sanction sometimes imposed is a refusal by the Catholic Church to issue certificates demonstrating civil registration. Where a sanction is imposed which is not previously established by law, this is also in violation of the Constitution and human rights law.⁸⁷
- In addition, specific guarantees must be applied when the criminal law is applied, to protect the person accused of a criminal offence. These guarantees include, for example, the presumption of innocence,⁸⁸ the right to legal representation,⁸⁹ and the right to call witnesses and to examine (or have examined) adverse witnesses.⁹⁰ However where a person is suspected of violating a local regulation, these guarantees are not necessarily protected. Of ten local regulations reviewed none contained any stipulations as to the process for deciding whether an infringement has occurred. None contained procedures which would protect these fundamental guarantees. And research suggests that in practice no specific procedure is followed and an opportunity to deny the allegation may not even be afforded.
- The lack of any clear linkage between the formal justice system and procedures for adjudicating violations of local regulation also creates difficulties. Human rights law require that persons

⁷⁹ ICCPR, article 15(1); RDTL Constitution, section 31(1) and (2).

⁸⁰ See for example Maubisse *Tara Bandu*, signed by the Minister of Justice and the Minister of State Administration.

⁸¹ RDTL Constitution section 69.

⁸² RDTL Constitution, sections 92, 95(1)

⁸³ RDTL Constitution, section 96. In particular, regarding criminal law and procedures: section 96(1)(a) and (b).

⁸⁴ RDTL Constitution, sections 85(a) and 88.

⁸⁵ RDTL Constitution, section 73.

⁸⁶ For example, *tara bandu* in both Ermera and Maubisse explicitly set out to restrict the amount of money spent on traditional celebrations and bride price payments.

⁸⁷ RDTL Constitution, section 31(3); ICCPR, art.15(1).

⁸⁸ RDTL Constitution, section 34(1); ICCPR, art.14(2).

⁸⁹ RDTL Constitution, section 34(2); ICCPR, art.14(3)(b) and (d).

⁹⁰ ICCPR, art.14(3)(e).

convicted of a criminal offence have a right to appeal.⁹¹ It also requires that a person may not be tried more than once in respect of the same conduct.⁹² Currently neither of these requirements can be guaranteed where a sanction is imposed for breach of a local regulation. No possibility of appealing exists. And since many *tara bandu* cover conduct which is already criminalized under the Penal Code, it is also possible that a person could be dealt with twice in respect of the same conduct: once locally and once in the formal system.

In addition to these human rights questions there are other causes for concern about the use of local regulations. Many such regulations envisage the collection of fines by local authorities but most do not deal with how the proceeds are to be used or recorded.⁹³ In Ermera, the local informal police (*kablehan*) who enforce the Ermera *tara bandu*, even collect a payment directly from a person accused by them of a violation.⁹⁴ These procedures clearly create a risk of corruption and abuses of power.

There are therefore a number of reasons for concern about the use of local regulations to criminalize certain types of conduct. While this practice certainly may have the possibility to reduce community conflict,⁹⁵ communities and those working with them should ensure that their activities comply with Timorese law and international human rights standards.

V. OPTIONS AND PROPOSALS FOR REGULATING INFORMAL JUSTICE MECHANISMS

UNTAET-era experiences in utilizing the informal justice system

Indonesia's withdrawal in 1999, and the devastation accompanying it, famously left Timor-Leste without a legal and judicial system. During the subsequent period of UN administration (under the United Nations Transitional Administration in East Timor, "UNTAET"), efforts began to create a national legal and judicial system. In the interim period, several proposals and attempts were made to fill the vacuum through use of local and traditional mechanisms.⁹⁶ (The most ambitious and well known of these was that implemented by the Commission for Reception, Truth and Reconciliation, which dealt with 1371 persons accused of "non-serious" crimes committed during 1999.⁹⁷) While there was some variation among these schemes, all centred on the idea that the fledgling formal system could not cope with responding to all criminal cases, and that minor crimes could be dealt with locally. Criminal jurisdiction was therefore to be divided between the formal and informal justice sectors.

Despite the limited use of these models during the UNTAET era, none was ultimately adopted as an alternative or recognized complement to the formal justice system which was ultimately established. As discussed above, the Constitution when promulgated in 2002 provided judicial powers exclusively to the formal court system. While it foresaw the possibility of recognizing traditional norms, it did not explicitly envisage the use of traditional or community justice mechanisms.

⁹¹ ICCPR, art.14(5).

⁹² RDTL Constitution, section 31(4); ICCPR, article 14(7).

⁹³ Of 10 local regulations reviewed for this research only two (from Maubisse and Adara) provide guidance on what uses are to be made of resources collected through fines. None requires the recording of information about fines imposed or how those resources are used.

⁹⁴ *Akta no Regulamentu Tara Bandu Distritu Ermera*, article I(B)(a). Although according to the *tara bandu* this applies only to one particular category of crime, local leaders interviewed in Ermera reported that it was a more general practice.

⁹⁵ As claimed by supporters of the practice: *Tara Bandu: Its role and use in community conflict prevention in Timor-Leste*, The Asia Foundation and Belun, June 2013.

⁹⁶ For a more detailed overview see: R. Nixon, *Justice and Governance in East Timor: Indigenous approaches and the "New Subsistence State"* (Routledge, 2012), pp186-192.

⁹⁷ *Chega! The report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)* Part 9: Community Reconciliation, para.6.

Legislative proposals for regulating the informal justice system

Despite the lack of a clear constitutional mandate, a number of efforts have been undertaken to formalize local or traditional justice systems. Since 2009, UNDP's Justice System Program has worked with the MoJ on three separate proposals to link the formal and informal justice systems. No detailed draft law has ever been made public for consultation; however, information about the key aspects of the past proposals has been shared in general terms through interviews.

The first draft law⁹⁸ took a far reaching approach. It proposed local courts with lay judges and support staff. In addition to regulating the procedure for these courts, it also sought to codify existing Timorese customary law. This approach was later identified as being problematic. Codifying the full range of customary law seems likely to prove an enormous and potentially fruitless task: different language groups and communities have different traditions and a huge amount of research would be required to identify the content of these laws. Questions would arise about how to resolve differing interpretations and areas of uncertainty. Codification would also potentially present an impediment to the usual process by which customary laws evolve. And in systems where traditional leaders may frequently be of limited literacy, a question would arise as to whether codifying customary laws would actually lead to any practical benefits.

Two subsequent re-workings of the draft produced a second and then a third proposal.⁹⁹ While they varied in their detail, they shared the same fundamental approach. The drafters of these versions recognized the enormous difficulties in codifying traditional law, and therefore avoided that approach. Instead they focused on a system to provide formal effect to decisions of local justice mechanisms. This would be achieved by a recognition and registration process undertaken by a court actor, based on the compliance with certain specified legal standards.

Currently it appears that the MoJ is not intending to continue work based on any of the drafts developed to date with UNDP assistance. Although the Legislative Reform and the Justice Sector Commission is considering this topic as part of its review, a process in which Ba Distrito is providing technical support, it also remains unclear whether there will be political will in the current government to take action following that process. Meanwhile, the GoTL has produced two draft ADR laws which are discussed below.

Policy considerations behind regulating the informal justice system

In order to identify the best approach on the question of regulating the formal justice sector (whether to regulate it, and if so how) it is first necessary to consider what the objectives of this step would be.

Early attempts at linking the formal and informal justice system during the UNTAET era were driven by the absence of viable alternatives for handling criminal cases, particularly in large numbers. Since then, and even after the formal criminal justice system began to develop in earnest, it has continued to be assumed by many that traditional justice mechanisms should be used to determine criminal liability in respect of minor offences.

Several factors discussed in this report provide reasons for questioning this assumption. JSMP's court monitoring data shows that a very significant portion of semi-public crimes are resolved at court by conciliation or the withdrawal of the complaint. Creating avenues for this resolution to occur by consent in community-led procedures, and ensuring early withdrawal of criminal complaints where it does, could reduce the caseload of the formal system significantly. It could also do so through community procedures not substantially different than those already in use, and without necessitating complex or resource-intensive procedures.

All of this could be achieved without formally conferring judicial powers on local mechanisms, which would potentially require amending the Constitution (section 123 on the categories of the courts) and establishing a system for verification by the formal courts (in accordance with the Human Rights

⁹⁸ It is believed that the first draft was produced in 2009, following community consultations.

⁹⁹ These versions are understood to have been completed in 2010 and 2014 respectively.

Committee position set out above at page 14). The latter procedures would present a number of difficulties (for example, how would a court know after the fact whether appropriate procedures had been followed in the local mechanism?). And because of the distances involved in accessing the formal courts for this purpose, it would also likely serve to defeat the intended accessibility and efficiency benefits of using local mechanisms.

In addition to these potential challenges in establishing local courts of criminal jurisdiction, it is also important to recall the specific human rights standards which are applicable in criminal proceedings, both under the Timorese Constitution and under international law. Implementing these rigorous standards at the local level would prove extremely difficult. It would likely require the involvement of lawyers and/or paralegal advisors to community leaders. Already there are insufficient numbers of either to assist in the formal sector.

These factors indicate that it would be preferable to adopt a more minimalist approach to regulating the informal justice sector. The existing and well-established use of community leaders to assist in the settlement of low-level disputes could be maintained. This would not require substantial structural changes. Improvements in linkages to the criminal justice system could largely be achieved through minor legislative amendments, the continuation of community legal education¹⁰⁰ and effective systems within judicial institutions. Continuing efforts would be required in order to ensure that procedures are in fact consensual, and also that basic standards are met.

At the same time, more robust steps may be needed to counter the trend towards using local regulations to create criminal sanctions adjudicated within communities. Since these local regulations are already arguably without legal force under the Constitution, such steps need not principally require further legislation. Rather, advocacy and community education should be directed towards local leaders (and the civil society groups working with them) with a view to discouraging local regulations which penalize and punish specified conduct. Efforts should also be made to ensure that money collected through local authorities in any capacity is properly accounted for. *Suku* Law 9/2016 now requires *xefes* to report on “revenue collection” to the relevant Municipality. This should be interpreted as including any money paid through the *suku* or persons working with it, including fines, and this should be made clear to *suku* councils, whether through law and/or education.

Current proposed laws on alternative dispute resolution

While the government has put on hold plans to regulate traditional and local justice or establish criminal jurisdictions in communities, it has produced two draft ADR laws, one on mediation by the MoJ and one on arbitration, mediation and conciliation by the Office of the Coordinating Minister for Economic Affairs (MECAE). It is presently not clear which draft will be preferred and information from within the GoTL suggests that a new proposal may be developed incorporating aspects of both.

While the principal intention of these proposed laws may be to regulate commercial dispute resolution, there is no doubt that they will also impact on community resolutions. A detailed analysis of these laws is premature as a draft for consultation has yet to be made public. However, because a law in this area will affect the informal justice sector, there is merit in identifying potential issues to avoid.

(1) Terminology and scope of application

Both draft laws define their scope by reference to terms used in ADR (“mediation”, “conciliation”, “arbitration”). While such terms may be useful in respect of commercial disputes, their helpfulness when dealing with community mechanisms is doubtful. Few of those involved in such procedures (including legal aid lawyers) understand the distinction between these mechanisms. Community leaders are likely to find it difficult to identify whether they are engaged in a mediation, a conciliation or an arbitration. And indeed this question will often not be simple to resolve.

¹⁰⁰ Significant work has been done in this area, including the community training and other forms of legal outreach undertaken by Ba Distrito grantees. However, achieving a change in practices on a large scale requires sustained efforts in all parts of the country.

Whereas parties might notionally have the ability to refuse to participate in a process or to reject a settlement proposal made by a community leader, social relationships might mean that in reality doing so becomes extremely difficult.

If a law is intended to regulate community dispute resolution (and it appears that both draft laws do intend this) then a preferable approach would be to define the scope of the law's application by reference to features that are readily identifiable to communities. For example, a set of principles could be developed which are applicable to all dispute resolutions conducted by *suku* or *aldeia* council members. Having a separate chapter of the law (or even an entirely separate law) for community resolutions as opposed to commercial resolutions would enable appropriately different approaches to be taken for these two fundamentally different types of mechanism. While commercial arbitrations are likely to benefit from detailed regulations, laws governing community systems should focus foremost on clarity and accessibility.

(2) Applicable principles and consequences of violation

A positive feature of both draft laws as they would apply to community mechanisms is the establishment of basic principles for the conduct of dispute resolutions. Key among these are principles concerning voluntariness, equality of the parties, and the independence and impartiality of the facilitator. A law or part of a law which was focused specifically on community-based dispute resolution could also provide more specific and appropriate guidance on questions such as the publicity of proceedings and the circumstances in which this should be set aside to protect privacy and confidentiality.

In addition to establishing principles of this kind, there is a need to identify the consequences, if any, where one of these principles is violated: whether, for example, it renders a settlement void, or allows a party to request a new procedure within a specified time. Avenues for raising concerns about an applicable principle in advance of a procedure or during it should also be included.

(3) Formal requirements for binding settlements

Great caution should be exercised about stringent formal requirements for settlements to have binding effect. It is true that for arbitration procedures in the true sense, an external legal basis is required to provide these with binding force. However, where parties reach a voluntary agreement at the conclusion of a procedure, there appears to be no reason why the outcome cannot be made binding through ordinary principles of contract law.

Simple formal requirements should be imposed only where they are able to be met and serve a useful function. This is the case for example for a requirement that procedures and their outcomes be recorded in writing and stored by the local authority. This is already being done in many *sukas* so is clearly possible. It provides clear benefits in terms of certainty and transparency.

Conversely, requirements should be rejected if they would be difficult to implement and/or bring little benefit. This is the case for requirements that settlements will be binding only if a procedure was conducted by a registered facilitator, or if the outcome is registered with a court. The extremely widespread use of community facilitators, and the difficulties in accessing courts strongly suggest that even if such requirements were introduced, most local communities would simply not comply with them. The result would be numerous dispute resolution outcomes with questionable legal enforceability: a result which would not benefit communities or provide legal certainty. Again, these are reasons for establishing separate legal regimes for community versus commercial dispute resolution. While rigid enforceability requirements may have considerable value in respect of the latter, they would be counterproductive for community procedures.

VI. RECOMMENDATIONS

As indicated above, this paper proposes that a minimalist approach to regulating the informal justice sector should be taken. It is clear that while the informal justice sector plays an important function, challenges exist in the way that it is currently operating. A number of these could be resolved by

legislation; however, most will only be addressed most effectively through education. In respect of the use of local regulations, government officials and civil society can also play an important part in ensuring that regulations established with their involvement do not invite human rights violations.

Community education

Many of the changes needed to improve the current system of community dispute resolution can only be achieved through effective community education. Significant work in this area has been done already, including by Ba Distrito partners such as Belun and JSMP. However, the scale of the work required is substantial and there is a need for these efforts to continue. Most importantly:

1. The limits of community leaders' dispute resolution powers need to be better understood:
 - (a) It needs to be understood that, according to the law, parties may always opt to resolve a claim for civil compensation before local leaders, regardless of whether a criminal case is underway.
 - (b) Communities must be educated in the means by which a minor criminal case can be terminated. Where a resolution is reached between the complainant and suspect, the complainant should be aware of how the complaint can be withdrawn and that it is not necessary to wait until the matter is called to court in order to do so.
 - (c) Conversely, it must also be better understood that local leaders do not have power to determine criminal responsibility.
2. Communities and their leaders need to understand the core principles for fair dispute resolution. While many of these could be usefully set out in legislation, the primary goal should be to improve the knowledge of dispute resolution participants. The most important principles in this regard are the voluntary nature of procedures, the equality of all community members, and the requirement for an independent and impartial facilitator. Education concerning the prevention of gender discrimination and the appropriate treatment of children should also be included.
3. Local communities should be encouraged and supported to record the process and outcomes of local dispute resolution proceedings.

Legislative changes

Efforts to codify traditional principles or establish detailed procedures for local justice mechanisms are unlikely to succeed and may not produce added benefits. Instead, the government should pursue its current focus on ADR. However, some variations in the current approach should be considered:

1. Community mechanisms should be subject to a different regime than commercial dispute resolution procedures. The former should be defined in a simple and accessible way (not by technical terminology). Consideration should be given to an entirely separate law for community mechanisms, which would be short, clear and simple. This would assist in ensuring the accessibility of the relevant legal regime.
2. Basic principles should be set out in the law, including on the voluntariness of the process, equality of participants, and independence and impartiality of the facilitator. Clear criteria for assessing whether a facilitator is impartial would assist, as would guidance concerning in which circumstances procedures should be closed to members of the community. Principles concerning the participation of women and the role and treatment of children should also be included. The effect of violating core procedural principles should be clear according to the law.
3. The law should avoid including stringent formal requirements for the outcome of community-based dispute resolution to be recognized as binding.
4. While an attempt at codification of the substance of customary law is clearly ill-advised, the law could identify key specific "traditional" norms and values which are *inconsistent* with the Constitution and therefore should not to be applied.

Other measures

Several other measures could be taken to further support these key steps:

1. To create clear and effective links in practice between local mechanisms and the formal criminal justice system, efforts should also be taken within the public prosecution service. This could include encouraging information sharing between local leaders and prosecutors so that where community dispute resolution occurs in the case of a semi-public crime, this is able to result in the formal withdrawal of the complaint at the earliest stage. Prosecutors could, for example, be required to engage with local leaders in respect of semi-public crimes.
2. Efforts to provide accessible legal advice in communities should be continued and strengthened. Such advice would assist potential litigants in understanding the choice between the formal and informal systems, and ensure that the choice is both informed and fully consensual. Such advice could be provided through legal aid organisations, private lawyers, the public defenders' office or paralegals. The few legal aid organisations currently operating (most of which are funded by Ba Distrito) are undertaking important work in this area, but there is a need for additional resources and support so that they can extend their reach and improve the quality of their work.
3. Effective monitoring of the processes and the outcome of community procedures is necessary in order to understand the procedures being followed and to ensure compliance with human rights standards and the law. Presently no organization is undertaking this work. Conducting complete and systematic monitoring of community justice procedures will require a long term commitment, most likely utilizing community-based monitors who receive significant training and support. However, at the very least, more basic monitoring could be undertaken by reviewing *suku* records to identify types of cases handled and their outcomes. The PDHJ should consider establishing a monitoring program for this purpose.
4. The GoTL, PDHJ and CSOs should reassess the question of "*tara bandu*" or local regulations from a human rights perspective. Efforts should be taken to prevent these regulations from forming the basis for quasi-criminal proceedings which do not comply with the Constitution or international standards. Where necessary in specific communities, assistance should be given to amend existing local regulations to ensure that they do not purport to create criminal responsibility or empower local leaders to adjudicate in criminal cases.

