

WOMEN'S MULTIPLE PATHWAYS TO JUSTICE:

*Alternative Dispute Resolution
and the impact on women in Timor-Leste*



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WOMEN



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Title: Women's multiple pathways to justice: Alternative Dispute Resolution and the impact for women in Timor-Leste

Author: Dr. Deborah Cummins

Legal Review: Ms Maria Agnes Bere

Research Team: Dr. Deborah Cummins and Ms Maria Agnes Bere

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Report Author: Dr. Deborah Cummins

Legal Review: Maria Agnes Bere

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GLOSSARY

ADR	Alternative Dispute Resolution
Aldeia	Sub-village or hamlet
Arbitration	The settlement of a dispute by a person or persons chosen by the disputants to hear both sides and come to a decision. The arbitrator(s) determine the outcome of the case. ¹
Belak	Traditional medallion/metal chest ornament
Barlake	Bride price given by groom's family to the bride's family in patrilineal areas, as part of cultural mutual exchange between families.
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
Conciliation	A dispute resolution procedure for the peaceful and just settlement of differences between parties through third-party investigation and recommendations, ordinarily not binding on the parties. ²
CPC	Criminal Procedure Code
DNPCC	National Directorate on Community Conflict Prevention (at Ministry of Interior)
DNTP	National Directorate on Land and Property (at Ministry of Justice)
Fetosan-umane	A complex set of rules, rights and responsibilities defining the relationship between a bride and groom's family: a relationship and set mutual obligations which may extend over generations.
FGD	Focus Group Discussion
Kaben tama-kaben sa'e	A complex set of rules for particular cases where matrilineal or patrilineal rules are not applied.
KPK	Community Police Council
Lia-n'ain	Literally 'owner of the words'. Customary authority responsible for interpreting customary law, carrying out ceremonies, and resolving disputes via customary dispute resolution.
Lisan/Adat	Tetun and Indonesian (respectively) terms used to refer to the customary justice system or culture more broadly
Mediation	Process in which a neutral third party facilitates communications and negotiations among parties to find a mutually acceptable resolution of a dispute. In some forms of mediation, the third party may engage in evaluative tasks, such as helping parties assess likely outcomes and exploring the strengths and weaknesses of the arguments presented. ³
MSS	Ministry for Social Solidarity
NGO	Non-Government Organisation
OPS	Suku Police Officer
Public crime	Major crime, in which prosecutors are in every instance required to conduct an investigation.
Semi-public crime	Minor crime, in which prosecution will proceed if a complaint has been made by the victim. Judge may attempt conciliation.
Suku	Village
Tesi lia	Literally 'cutting the words'. Process of resolving dispute via <i>lisan</i> .
Xefe aldeia	Chief of sub-village
Xefe suku	Chief of village

1 <https://unterm.un.org>

2 <https://unterm.un.org>

3 <https://unterm.un.org>

EXECUTIVE SUMMARY

The alternative dispute resolution (ADR) landscape in Timor-Leste is a dynamic and important source of justice provision in Timor-Leste. Within Timor-Leste's broader state building process and efforts to achieve the 2030 Agenda for Sustainable Development, in line with its commitments under its National Action Plan for Women, Peace and Security, justice provision must be inclusive to the context for reaching all people. However, a variety of factors, including gender inequality, limit the reach of the existing justice mechanisms and create disparities in who is able to access the right to justice. By understanding how ADR operates within the broader justice system and starting with women's experiences as a diverse group often among those most left behind, Timor-Leste can take steps to make justice effective and accessible for all.

As in many countries, ADR practices are widely used and operate in diverse ways between communities. In the context of Timor-Leste, ADR is closely interlinked with both the formal justice system as well as customary dispute resolution. Within this context, the research was developed around two central and interrelated research aims: first, to understand the operation of ADR in Timor-Leste, and its impact on community members and second, to investigate more deeply the gendered dimension of alternative dispute resolution by examining women's experiences of ADR. The research identified significant room for improvement, both in strengthening the complementarity between the different systems as well as better provision of ADR services overall. The need for improvement in both areas becomes even more pronounced when considering the impact of ADR on women community members. Given the gender disparities identified, the research concludes with recommendations for enhancing justice provision for women in communities within Timor-Leste.

Toward a more holistic and integrated approach to improving access to justice for women and men in Timor-Leste, it is valuable to recognise customary dispute resolution as a *part of the operating*

environment for justice provision in Timorese communities. Considering the need for improved complementarity with the formal justice system, this research recommends a minimalist approach towards customary dispute resolution, rather than attempting to codify its operation through legislation, or creating new processes or structures. For example, noting that *lisan* or *adat*⁴ varies significantly from one community to the next, it is difficult (if not impossible) to develop processes or normative principles that appropriately reflect the different customary practices. A more useful approach would be to appropriately engage with local authorities to ensure they understand the principles of women's and men's basic human rights as protected by state law, and encourage them to work in accordance with these principles.

There is also significant opportunity to harness ADR (including customary dispute resolution) to support ongoing efforts to strengthen the formal justice system, in accordance with Timorese law and basic human rights. In civil cases, ADR may be used to fully resolve a dispute. In semi-public crimes, ADR may lead (if the victim so chooses) to withdrawal of a complaint and termination of criminal proceedings. In public crimes, ADR may run in parallel to criminal justice proceedings, but should not prejudice a criminal trial.

The research also found that there is significant potential to use non-customary ADR provided by *suku* councils, NGOs and government bodies as a 'bridge', to better link community members with the formal justice system. Because non-customary ADR is provided in a manner that is accessible and easily understood by community members, it addresses many of the challenges that people face when attempting to use the formal justice system. But unlike customary dispute resolution, which sources its legitimacy via *lisan*, non-customary ADR sources its legitimacy from the state, via legislation and government-sanctioned structures.

⁴ *Lisan/adat*: Tetun and Indonesian (respectively) terms used to refer to the customary governance and justice system, or culture more broadly.

Methodology

In order to understand how ADR operates in Timor-Leste, and the differential gender impacts of ADR on women, the research examined women's experiences in seeking justice in three types of cases: (i) land, (ii) abandonment/child maintenance, and (iii) domestic violence. These three 'types' of cases were selected because they represent a broad range of cases from civil disputes through to public crimes, with different links between customary processes, non-customary ADR and the formal justice system. The study used qualitative methods, with a team conducting fieldwork in three areas: Baucau, Bobonaro and Oecusse. A total 35 key informant interviews (19 women/16 men) were conducted with female complainants/victims, community leaders, police officials including community police, mediators, lawyers, judges, prosecutors and public defenders, and civil society representatives/local women's advocates. The team also conducted three full-day participatory focus group discussions (FGDs) with a total 31 women complainants and victims in Baucau, Bobonaro and Oecusse.

The research team looked at a variety of ADR processes that are used to resolve disputes between community members.⁵ These included customary dispute resolution processes (referred to as *tesilias*⁶) which continues to be an important source of justice provision in Timorese communities. It also included dispute resolution carried out by elected *suku* chiefs and *suku* councils, mediation provided by government agencies & civil society organisations, and conciliation provided by the courts.

Given the scope of the research questions and the complexity of ADR processes, this research should be considered as only a first step in developing policy and legal recommendations for gender-responsive ADR in Timor-Leste. Future research is needed to identify the specific factors which render non-customary ADR processes gender-biased in the Timor-Leste context and/or what might be done to improve women's substantive access to justice via ADR. In this regard the following recommendations provide an entry point for further inquiry.

Recommendations

Crucially, for non-customary ADR⁷ to be effective as a bridge between community members and justice providers, there is a need for ongoing civic education to advise people of their rights and responsibilities in using different forms of ADR. For non-customary ADR to have a positive impact for women community members, the research also identified key areas for making processes more gender-sensitive, and in levelling the bargaining power and position between female and male disputants.

Specifically, the research makes the following broad recommendations:

- To clarify ADR providers' role in facilitating mediation or arbitration:
- Amend Suku (Village) Law 9/2016 to clarify *suku* (village) dispute resolution role as providing mediation only, and clearly define what actions constitute mediation.
- Develop gender-responsive mediation guidelines and training materials specifically adapted for *suku* authorities (tailored to diverse levels of education).
- Recognise an existing body, or create a new body, to provide gender-responsive monitoring & support to mediators, to ensure dispute resolution processes follow basic mediation principles and are sensitive to the needs of women.

To encourage women disputants' active participation in ADR processes:

- Encourage and recruit women mediators.
- Train, support and monitor mediators in actively encouraging women to speak during mediation processes.
- Support women's organisations to provide assistance in preparing women who will participate in ADR processes, so they are equipped with information on their rights and the process.

5 The Government of Timor-Leste's *Strategic Development Plan 2011-2030* (page 152) also envisages the establishment of ADR for commercial disputes. As this research focuses on women's experiences with ADR in communities, ADR for commercial purposes was not examined.

6 *Tesilias*: literally 'cutting the words'. Process of resolving dispute via *lisan*.

7 For the purposes of this report, 'non-customary ADR' includes mediation conducted by designated government officials, mediation offered by legal aid providers and NGOs, dispute resolution provided by elected *suku* council members, court conciliation, as well as informal dispute resolution offered by other important stakeholders.

To ensure women disputants receive equal opportunity in ADR processes and from ADR providers:

- Support women's groups/NGOs to accompany women participants in ADR processes.
- Develop and pilot a system formally recognising women's groups/NGOs' accompaniment of women disputants during mediation, to ensure they are recognised as legitimate participants.

To protect women disputants' safety:

- Develop clear mechanisms for mediators, police and service providers to coordinate in protecting women's safety before, during and after mediation.
- Improve and continue broad civic education, so that people are aware of their rights and obligations under the law, as they relate to civil matters, semi-public crimes and public crimes.

To protect women disputants' privacy during sensitive proceedings:

- Ensure mediation is conducted in a private venue, agreed upon by both disputants.

To facilitate the development of mediation 'options' that are in women's best interests:

- Clearly explain parties' rights to the disputing parties before and during the mediation process.
- Train mediators in facilitating parties to develop options that approximately reflect parties' legal rights, and communicating these basic rights to the parties.

Further research should also be conducted to identify what specific mechanisms are necessary for gender-responsive ADR in Timor-Leste, to inform the development of upcoming ADR legislation, and of the underlying regulations, guidelines, training and support for mediators. In addition, broad consultation on the upcoming ADR legislation is necessary to ensure that recommendations build on existing knowledge, experiences and best practices, and are appropriate to the Timor-Leste context.

INTRODUCTION

The concept of justice is rooted in all national cultures and traditions and is closely linked to fairness, equity and impartiality. The United Nations views justice as “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs”.⁸ Access to justice is both a basic human right and a means of implementation of other human rights. Women’s justice needs and experiences may, however, be different from men due to higher levels of poverty and unequal power dynamics and distribution of resources in the family and community.

Equal rights for women and men are guaranteed in Timor-Leste’s Constitution and the country has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). These establish the State obligation to respect, protect and fulfil human rights, including through the provision of justice and legal remedies, which extends to formal and other justice systems alike. As a State Party to CEDAW, there is specific guidance for Timor-Leste to shift justice delivery for women. Specifically, CEDAW General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations (CEDAW GR 30) and CEDAW General Recommendation No. 33 on Women’s Access to Justice (CEDAW GR 33) emphasize that justice delivery must traverse development, conflict, post-conflict and various forms of crisis contexts, because women and girls are at risk of violence and other forms of violations in all these settings.⁹

The 2030 Agenda for Sustainable Development prioritises those who are furthest behind, and in many cases, this means women. Sustainable Development Goal (SDG) 16 seeks to promote “peaceful and inclusive societies for sustainable

development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. However, justice will not be “equal” and for “all” unless the root causes of discrimination in access and delivery are addressed. Inclusive access to justice is at the centre of Goal 16, which was included in the Global Agenda following Timor-Leste’s strong advocacy.

The g7+ countries, of which Timor-Leste is a main member, has also identified the Goal to *Address injustices and increase people’s access to justice* as one of the five Peacebuilding and Statebuilding Goals under the New Deal, as a key component to ensure sustainable development.¹⁰ Engagements in these global platforms are among the various efforts Timor-Leste has made to develop its legal framework since independence, including through the Administrative, Economic and the Legal Harmonization Reforms underway since 2015.

In Timor-Leste, there are a variety of pathways community members may choose to have access to justice and to find solutions to their conflicts and disputes. These include state and non-state systems and can fall into three overarching categories: (i) formal justice system, and ADR processes, which include (ii) customary dispute resolution, and (iii) non-customary ADR. Each of these three modalities have their place in the Timorese legal environment, are considered by community members to be legitimate and are used for different purposes.¹¹ It is worth noting that in all three mechanisms, men are often, although not exclusively, facilitating and making decisions in the disputes, which is an important consideration for understanding women’s experiences with these processes.

8 United Nations, *Guidance Note of the Secretary-General. UN approach to rule of law assistance*, 2008, p1. <https://www.un.org/ruleoflaw/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf>

9 United Nations, *A Practitioner’s Toolkit on Women’s Access to Justice Programming*, 2018

10 http://www.pbsdialogue.org/media/filer_public/07/69/07692de0-3557-494e-918e-18df00e9ef73/the_new_deal.pdf

11 See for example Cummins, D. (2014) *Local Governance in Timor-Leste*, 76-95; The Asia Foundation (2013) *Timor-Leste Law and Justice Survey*; UNDP (2013) *Breaking The Cycle Of Domestic Violence In Timor-Leste; Access To Justice Options, Barriers And Decision Making Processes In The Context Of Legal Pluralism*; Ba Distrito Baseline Survey (2014) *Local Governance and Access to Justice in Timor-Leste*; Kirk, T. (2014) *Legal Aid Lawyers and Paralegals: Promoting Access to Justice and Negotiating Hybridity in Timor-Leste*; D. Babo-Soares (2004), “*Nahe Biti: the Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor*”, *The Asia Pacific Journal of Anthropology*, 5(1).

In the context of a formal justice system which is as yet unable to deal effectively with its caseload, resulting in delays for court hearings which may stretch into years, the operation of ADR, and specifically customary dispute resolution, is largely positive, allowing community members to deal with the issue quickly, restore balance to the community and avoid further pressure on the courts.¹² There is a significant body of knowledge detailing the ongoing importance and legitimacy of *lisan* or customary dispute resolution in Timorese communities.¹³ Across the various communities of Timor-Leste, it is considered normal for local leaders to resolve local conflicts via customary dispute resolution. However, while customary dispute resolution enjoys significant local legitimacy among women and men in Timorese communities, it is also known to have differential gender impacts. A survey conducted in 2013 across five Municipalities and Regions indicates that while a high number of women and men considered it legitimate and important, women were less likely than men to feel it resulted in just outcomes.¹⁴ This also reflects the results of other research on community perceptions of justice provision at the local level.¹⁵

While undoubtedly important, customary dispute resolution is not the only form of ADR in Timor-Leste. There are also other forms of non-customary mediation, arbitration or conciliation that are carried out across the country, which, similarly to customary dispute resolution, work to remove strain from the formal justice system.

This includes mediation conducted by designated government officials of Ministry of Interior, Ministry of Justice or Ministry of Social Solidarity and Inclusion (among others), mediation offered by legal aid providers and NGOs, dispute resolution provided by elected *suku* (village) council members (often referred to as mediation, but in practice more akin to arbitration), court conciliation, as well as alternative dispute resolution offered by other important stakeholders. Some of these processes have a firm legal basis; others do not. Throughout this report, as a way of distinguishing these processes from customary dispute resolution, these will be referred to as 'non-customary ADR.' However, it is also acknowledged that in some cases it can be difficult to distinguish between customary and non-customary ADR.

The Government of Timor-Leste is in the process of developing a legal framework for the provision of ADR in the country. As of August 2018, it is not clear what approach the Government will take in establishing an ADR framework within the formal legal system. This offers an important opportunity for Timor-Leste to include mechanisms and approaches that are responsive to the distinct experiences and needs of diverse women and girls in Timorese communities. It is hoped that the recommendations emerging from this research will assist in this process, by identifying priority areas for improvement of current ADR approaches and important points for legislative inclusion in the future.

12 See for example UNDP (2013) *Breaking The Cycle Of Domestic Violence In Timor-Leste; Access To Justice Options, Barriers And Decision Making Processes In The Context Of Legal Pluralism*; Cummins, D. (2014) *Local Governance in Timor-Leste*; The Asia Foundation (2013) *Timor-Leste Law and Justice Survey*; Grenfell, L. "Legal pluralism and the rule of law in Timor-Leste", *Leiden Journal of International Law*, vol. 19, no.2 (2006) 305-337.

13 See for example Boavida dos Santos, A. and da Silva, E (2012) 'Introduction of a Modern Democratic System and its Impact on Societies in East Timorese Traditional Culture', *Local-Global Journal*, vol 12; Cummins, D. (2014) *Local Governance in Timor-Leste*.

14 Ba Distrito Baseline Survey (2014): *Local Governance and Access to Justice in Timor-Leste*, p.8.

15 The Asia Foundation, *Timor-Leste Law and Justice Survey*, 2013.

METHODOLOGY

The objectives of this study are to:

1. Develop an understanding of access to justice for women through alternative dispute resolution mechanisms in Timor-Leste; and
2. Based on this understanding, identify strategies that can be used to enhance women's access to justice through alternative dispute resolution in Timor-Leste.

Conceptual Framework

In the absence of an ADR legal framework, the research team took a broad approach to examining how different ADR practices are conducted in the country. On the basis of this examination, the team conducted a gender analysis of the different practices and their links to the formal justice system in order to develop some basic recommendations.

The research was entirely qualitative in nature, taking a process-driven approach that tracked women's experiences in seeking assistance across multiple fora – including customary dispute resolution, non-customary ADR and the formal justice system. The research was designed in this way in order to reflect people's lived reality in which a single case may be dealt with using more than one modality, allowing the research team to go beyond considering each one separately, and recognise the fluidity, links and opportunities for complementarity between the different modalities. Rather than promoting one form of justice provision over another, **the focus was to identify constraints and obstacles that women and girls faced in accessing justice across the different modalities, with 'justice' defined from their own perspective.**

The team examined women's experiences in seeking justice in three types of cases: (i) land, (ii) abandonment/child maintenance, and (iii) domestic

violence. These three 'types' of cases were selected because they represent a broad range of cases from civil disputes through to public crimes, with different links between customary processes, non-customary ADR and the formal justice system. Land disputes are civil in nature and are commonly dealt with by a combination of customary and non-customary ADR, as cultural leaders are often needed to share the history of the land and land ownership. Abandonment/child maintenance cases are also civil in nature, but are often linked with crimes of domestic violence, as the wife either leaves her violent husband or he abandons her as 'punishment' for shaming him by going to the police. Domestic violence cases, on the other hand, are public crimes that are legally mandated to be prosecuted through the formal justice system, but in practice often dealt with via customary dispute resolution and not progressed to the formal system.¹⁶

Gender Analysis

As discussed above, the research team chose to use three different 'types' of cases (land, abandonment/child maintenance, and domestic violence) as a lens through which to analyse women's experiences in accessing justice via ADR. These cases were chosen in part because of their differing legal status (some civil, others criminal). They were also chosen based on previous research, which highlights them as areas of law with significant biased limitations in which women are commonly disadvantaged when attempting to access justice.¹⁷

In undertaking a gender analysis, the process is just as important as the outcomes. Conventional research processes tend to be controlling, with respondents treated as subjects and researchers holding the power to interpret their stories as they consider to be most appropriate. This conventional

16 See for example The Asia Foundation, (2013) *Timor-Leste Law and Justice Survey*, 49; Ba Distrito (2016) *Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis*, 4-5.

17 Judicial System Monitoring Program (2015) *Overview of the Justice Sector*; D. Cummins, D. (2012) *Ami Sei Vitima Beibeik: Looking into the needs of domestic violence victims*; The Asia Foundation, *Timor-Leste Law and Justice Survey*, 2013; CEPAD (2014), *Women's Access to Land and Property Rights in the Plural Justice System of Timor-Leste*.

approach has the effect of reproducing existing inequalities, including gender inequalities, by using methodologies which fail to draw on a multiplicity of voices and perspectives, and by prioritising some voices and forms of expression (typically, more confident forms of expression) over others. This tendency of conventional research approaches to reproduce existing inequalities can then lead to knowledge and research further reinforcing a gender-blind understanding of the world.

In an effort to address this problem, the research was designed to be participatory, putting women's stories at the centre of analysis, using a truncated narrative approach.¹⁸ The fieldwork team (two women) deliberately designed interviews and FGDs with women victims and complainants to be open, allowing women to share their own stories and explain the importance of certain events in their lives, in their own way. During three full-day FGDs with women victims and complainants, women began by sharing and discussing their stories and the problems they faced when attempting to access justice, with 'justice' defined from their own perspective, using the normative phrase '*hetan solusaun diak*' (to find a good solution) to ask people's opinions and experiences in justice outcomes.¹⁹ This is based on the understanding that many community members consider the Tetum term '*justisa*' to be the province of the formal justice system. Based on these stories, the research team facilitated a discussion in which the problems they described were grouped together to form different 'issues'. Using a participatory voting methodology, the women then identified and prioritised the issues that they considered to be most important for women in their communities. These issues, which varied from one municipality to the next, were then used as the basic analytical framework to guide research analysis and findings. These FGD results are presented in Appendix 2 of this report.

Fieldwork

Fieldwork included a combination of interviews and participatory FGDs across the municipalities of Baucau and Bobonaro, and the Special Region

of Oecusse. These three municipalities/regions were selected to include a mixture of matrilineal and patrilineal cultural groups, and municipalities/regions with a court (Baucau and Oecusse) and without a court (Bobonaro). The team also travelled to administrative posts outside the municipal centre, in order to assess the impact for community members of living some distance from the municipal or regional centre.

A total 35 key informant interviews (19 women/16 men) were conducted as follows: 8 respondents in Baucau (3 women/5 men), 10 respondents in Bobonaro (6 women/4 men), and 17 respondents in Oecusse (10 women/7 men). Interview respondents included a combination of the following: women complainants/victims, community leaders who are responsible for different forms of ADR, police officials including community police, mediators working for different government bodies, lawyers, court actors including judges, prosecutors and public defenders, and civil society representatives/local women's advocates.

The team also reached 31 women complainants and victims of varying ages through three full-day focus group discussions (FGDs) in Baucau, Bobonaro and Oecusse (involving between 7 – 12 participants per location). These FGDs were facilitated in a participatory manner, using an open style in which each woman could tell her own story in her own way, with facilitators assisting them in identifying key areas of concern that impeded their access to justice. These key areas of concern were then amalgamated in a group discussion to avoid duplication, and each member of the group was invited to vote on the three most important areas for improved justice delivery for women in their community. Results from each Municipality and Region are included in Appendix 2 of this report.

Preliminary results were shared in a full-day workshop with 22 (11 women and 11 men) civil society representatives, government representatives and justice providers in Dili on the 5th of December 2017, to validate the research findings and to discuss the implications for programme and policy development.

18 For an explanation of narrative analysis, see for example Ride, A. (2016) 'Involving Participants in Data Analysis', In D. Bretherton and S. Fang Law (Eds.), *Methodologies in Peace Psychology*.

19 As the Tetun term for 'justice' is often correlated with the formal justice system, the research team used the terms 'good solution' or 'good process' to encourage respondents to assess ADR mechanisms from their own perspective. See also CEPAD (2014), *Women's Access to Land and Property Rights in the Plural Justice System of Timor-Leste* 57-58 for a discussion on different understandings of justice.

Ethics

Given that many respondents were survivors of various forms of violence, this research required a strong ethical framework. Ethics guidelines were developed based on the World Health Organization's *Ethical and Safety Recommendations for Research on Domestic Violence Against Women* (2001), and according to the basic principle that the physical and emotional safety of the respondents and research team is paramount, and should guide all project decisions. No respondents were aged below 17 years. All fieldwork was confidential, and everyone involved in the fieldwork were briefed on the ethical requirements of the research, including how to protect the confidentiality of research participants.

To manage for the risk of possible re-traumatisation for women recounting stories of violence and abuse, research took a deliberately open 'story-telling' approach, asking the women to tell their stories in their own words, thereby allowing them to choose what they felt comfortable in sharing rather than being led by the researcher. Where necessary, this was then followed up with questions to fill in some of the technical details. In order to build on existing relationships of trust, the research team worked together with local service providers including representatives from legal aid NGOs and women's shelters to identify women victims and complainants to participate in the focus group discussions. This also provided the team with an in-built safety network, ensuring that women participants' situation would continue to be monitored, and that they had access to any necessary support after the research team left.

Research Limitations

In keeping with its focus on examining ADR processes in Timor-Leste, research results presented in this report should be understood as primarily process-driven rather than normative. While the research team needed to use actual cases in order to properly examine the enabling and constraining factors for justice delivery via ADR (including linkages with the formal justice system), the approach was not to make a normative examination of the different legal

areas of land, abandonment/child maintenance, and domestic violence. Such a comparative legal analysis would be well beyond the scope of this project, as the details of *lisan* vary significantly from one cultural group to the next. Rather, these cases were used as a 'lens' to examine the *process of ADR justice provision* in different types of disputes, and to gather lessons on gender-responsive ADR that is appropriate to the Timorese community context.

Given the sensitivity of the research, the fieldwork approach necessarily drew on existing relationships of trust, with the research team working together with local legal aid NGOs and women's shelters to identify women complainants and victims, who approached them to participate in the research. Such a purposive sampling approach was necessarily biased, with most women participating in the research having already had some interaction with service providers (and in most cases with the formal justice system).

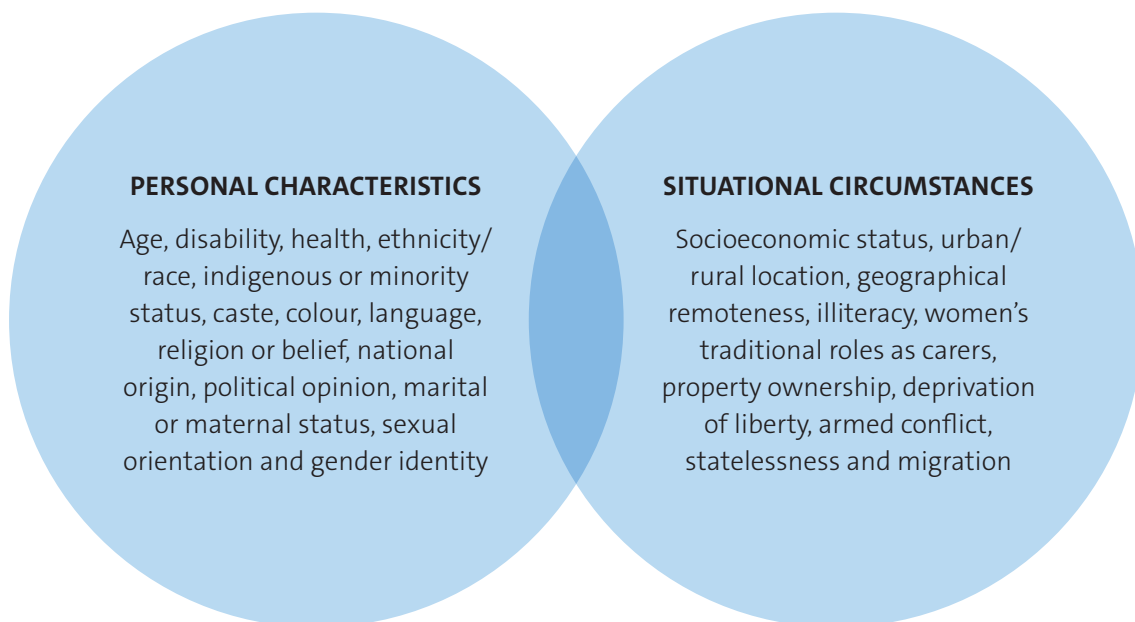
WOMEN'S ACCESS TO JUSTICE

Discussion of respect for women's rights often remains tied to the notion of 'balancing' these rights with culture and custom rather than taking a more dynamic and process-oriented view of culture. As in other countries, tradition in Timor-Leste is deeply embedded within communities, and there is a general perception of its immovability. However, culture and norms change over time, also within culture and tradition. A UN analysis of informal justice systems across countries has found that *'flexible and adaptable approach of customary law can allow it to change in ways that reflect changing values in society'*.²⁰ As gender inequalities and violations of women's rights are frequently driven by groups of individuals, rather than states, the discussion around the need

to legislate or not the ADR processes in Timor-Leste can also provide an opportunity for communities to engage in determining the way forward.

When working on women's human rights, it is imperative to accept the intersectionality that affect the level of vulnerability of women. Women are not a homogeneous group. Several personal characteristics and situational circumstances often combine to deepen their exclusion and marginalisation. When one or more of the factors highlighted in Figure 1 overlap—as is often the case—the risk of social exclusion and marginalisation is not only perpetuated, but also acquires an enduring quality that can span over a lifetime and across generations.²¹

FIGURE 1 Characteristics and situational factors that influence vulnerability



20 United Nations, *Informal Justice Systems: Charting a course for human-rights based engagement*, p.12

21 United Nations, *A Practitioner's Toolkit on Women's Access to Justice Programming*, 2018

ADR PROVISION IN TIMOR-LESTE

Human Rights obligations

Timor-Leste is a party to various international human rights instruments. These place responsibilities on state authorities, not on individuals. Timor-Leste has a duty to provide access to justice for all its citizens and residents as a human right under the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). **The mechanisms for access to justice do not have to be formal or state mechanisms, but the State still has the duty of ensuring access to justice.** In terms of discrimination against women, Article 2(e) of CEDAW makes the scope of this responsibility very broad, extending the State parties' responsibility of eliminating discrimination to include *'any person, organisation or enterprise and therefore clearly underlining the responsibility to control, manage, and sanction any structure, state or non-state, formal or informal, that discriminates.'* Therefore, the ADR approaches described in this research fall under **state responsibility**, as to ensure each mechanism **provides access to justice in a non-discriminatory fashion.**

Current Legal Framework on Gender Equality

Gender Equality is embedded in the Constitution. Article 6, section j. states that one of the fundamental objectives of the State shall be *"...to create, promote and guarantee the effective equality of opportunities between women and men"*. Article 17 (Equality between Women and Men), further states that women and men shall *"...have the same rights and duties in all areas of family, political, economic, social and cultural life"*.

When it comes to protection of women's rights in the specific legal areas discussed in this report, the Law against Domestic Violence No. 7/2010 clearly defines domestic violence as a public crime, meaning that the public prosecutor must conduct a full investigation whenever a case is reported, with no possibility for the victim of withdrawing the case once it is registered. In addition, the Land

Law No.13/2017 clearly defines *"equality between women and men"* and *"prohibits any discrimination in respect to ownership, acquisition, management, administration, enjoyment, transfer and disposition"*.

Article 1559 of the Civil Code sets out the basic principle of equality between spouses, and Article 1562 describes the joint obligations of spouses as they relate to family life, including the responsibility to provide for the economic and other needs of their children.

Current Legal Framework on ADR

There is currently no comprehensive legislation regulating ADR provision in Timor-Leste. It is in the plans of the Ministry of Justice to develop an umbrella law that would regulate all ADR practices. Other laws exist which gives some guidance to ADR:

Article 2(4) of the Constitution of the Democratic Republic of Timor-Leste on sovereignty and constitutionality expressly recognises and values the norms and customs of Timor-Leste that are not contrary to principles enshrined in the Constitution and other legislation. Article 123(5) of the Constitution foresees that laws may be created to institutionalize means and ways for the non-judicial resolution of disputes.

With regards to ADR for criminal cases, the Criminal Procedure Code (CPC) provides the most detailed framework, defining appropriate legal treatment for public crimes (Articles 235 & 236), and for semi-public crimes (Articles 211(3) & 214). Under the CPC, if a public crime is reported, the public prosecutors must in every instance conduct an investigation. This means that for public crimes, the prosecutor must continue to investigate and prosecute a case even if the victim and offender have reached a resolution using ADR processes. By contrast, when a semi-public crime is reported, it is possible for the complainant to withdraw the complaint and/or for the judge to attempt conciliation between the victim and defendant before going to full trial. In such cases of semi-public crimes, ADR processes may be used to fully resolve the issue if the victim chooses to

withdraw his or her complaint from the prosecutor’s office. In cases where ADR has been used but the case has also been heard in the courts, the Penal Code (Articles 56 & 123) recognises prior reconciliation between the parties as a potential mitigating factor for sentencing. This means that any agreement reached via ADR may be taken into account to reduce the sentence, if an offender is found guilty of a public or semi-public crime.

Some institutions are also explicitly empowered under the law to provide ADR services. The New Statute of Public Defender (Decree Law No.10/2017, AArticles 3 & 6) gives competency to the Public Defender’s Office to promote extrajudicial resolution, in terms of mediation, conciliation, and arbitration and to participate in conflict resolution processes in the community. They also have the competency to delegate this power, which they have used in delegating specified NGOs to provide mediation on their behalf. In addition, *suku* councils (village councils) and, in particular the *xefe suku* (village chief), are empowered under Suku Law No. 9/2016 to promote the resolution of disputes that occur within the community. The law does not specify which types of disputes this covers or what modality of ADR (mediation or arbitration) the *suku* leaders should use in resolving disputes.

The use of ADR in Timorese Communities

There is no single approach to the use of ADR in Timorese communities. Community members use a variety of modalities in different orders and in different ways, as they look for a dispute resolution mechanism that they consider to be legitimate, and that will be effective in meeting their needs. The path that is chosen may involve customary dispute resolution or non-customary ADR and might also involve the formal justice system – or a combination of all three. Community members’ choices are influenced by a variety of factors that are further influenced by their gender identity, among the other factors mentioned earlier. The choice of justice pathway is largely driven by: (1) the perceived accessibility of the system, (2) their knowledge on the different options that are open to them,²² (3) advice and/or pressure from family and others,²³ and ultimately the (4) potential that they see for the mechanism to provide them with a just outcome.

Different pathways for conflict resolution in Timor-Leste:

Different pathways for conflict resolution in Timor-Leste		
<p>Formal Justice System:</p> <p>is linked to the formal legal system, codified through the formal legal framework, and implemented through the judiciary.</p>	<p>Customary Dispute Resolution:</p> <p>The process of customary or traditional justice in Timor is referred to as <i>tesi lia</i> - literally ‘cutting the words’. Although the system varies from region to region, it is the process of resolving dispute via <i>lisan</i> (customary justice) and implemented through the <i>lia-na’in</i>. The <i>lia-na’in</i> means literally ‘owner of the words’. They are the customary authority responsible for interpreting customary law and resolving disputes via customary dispute resolution.</p> <p>It sources its legitimacy from <i>lisan</i> (customary law and governance) and follows its own hierarchy of authority in the community. <i>Lia-na’in</i> are traditionally men.</p>	<p>Non-Customary Dispute Resolution:</p> <p>is often provided by designated government officials or legal aid providers and NGOs (with both women and men in these positions). It can also be done by the elected <i>suku</i> (village) council members, or the judiciary (which are male-dominated).</p> <p>The common form is mediation; however, it can also take forms of conciliation or arbitration. Some processes have a firm legal basis (as the mediation offered by the Public Prosecutor’s Office); others do not.</p>

22 Interviews: Judge Baucau District Court, 12 October 2017; Public Prosecutor Bobonaro, 9 November 2017; Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017; Alfela Lawyer, Oecusse, 13 November 2017; Belun Coordinator & Mediator, Baucau, 11 December 2017.

23 Interviews: Alfela Lawyer, Oecusse, 13 November 2017; women’s advocate Atabae, Bobonaro, 8 November 2017; Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017, Director Maneo, Oecusse, 15 November 2017.

Limited number of women involved in conflict resolution processes.

Across the different pathways identified above, the justice landscape currently offers little room for women in key leadership roles. As of 2018, in the formal justice system, women represent 13 of the 34 judges, and there are only 5 women public defenders on a total of 30.²⁴ In regard to customary and non-customary ADR, women do not normally facilitate these processes in their communities. At the community level, women only represent 4.5% of key positions as *suku chief* and tend to not occupy the *lia-na'in* role. And even though the *suku* council has at least two female representatives, their influence remains limited. In a very small number of *sukus*, women on the *suku* council have more influence, but it appears to be based on their individual characteristics and/or particular personal leadership role in their community.²⁵

Unsurprisingly, research respondents generally agreed that those in town centres were more likely to know about their rights under the law. Those in urban areas also use the formal justice system to resolve their issues, compared to those living in remote areas who rely almost entirely on ADR (whether customary or non-customary).²⁶ However, there are also other practical issues that stop community members from using the formal justice system. Many complained that it **can take years for the judge to decide on their case**, and that they must travel long distances to attend multiple court sessions. Recognising the difficulties for many community members who need to travel long distances to attend court hearings, and limitations on women's mobility due to social norms and household care responsibilities, with associated expenses for themselves and witnesses, a system of mobile courts has been established for Municipalities where there is no permanent court. These mobile courts rotate between locations. For example, in the Municipality of Bobonaro, it operates one in every three months, as it is shared with the Municipalities of Ainaro and Manufahi. The mobile court also travels to various Administrative Posts within the Municipality, giving more remote communities greater access to the formal justice system.

The practical accessibility of the formal justice system is not the only reason for many community members' preference for ADR. In addition to the issues of time, distance, and the expenses associated with travelling and paying for witnesses' travel expenses in attending court from remote areas, many **community members feel more comfortable with customary and non-customary ADR** because the mediator/arbitrator is often known by the disputants, they understand the forum, and it is conducted in a language in which they can comfortably communicate.²⁷ This compares favourably with the formal justice system, which they find intimidating in its formality, and which still only issues official notifications in Portuguese – a language that many Timorese are unfamiliar with.

Many **community members feel more comfortable with customary and non-customary ADR** because the mediator/arbitrator is often known by the disputants, they understand the forum, and it is conducted in a language in which they can comfortably communicate.

In addition, when asked to comment on the perceived legitimacy of the formal justice system and different ADR processes, many respondents spoke favourably of the difference in process, **with the consensus-building approach of ADR focusing on finding a perceived win-win solution, versus the formal justice system which results in win-lose outcomes**. As one mediator put it,

ADR is important because it creates stability and peace. In the formal process one person wins and one loses, so this does not repair relations between families... Cultural justice, if they lose, they all lose, if they win, they all win. It strengthens relations between the family.²⁸

24 Data from UNDP Justice System Programme, December 2017

25 Ba Distrito (2016) Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis

26 Interview, Alfela Lawyer, Oecusse, 13 November 2017; interview, Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017; interview, Belun Coordinator & Mediator, Baucau, 11 December 2017; interview, Public Prosecutor Bobonaro, 9 November 2017; interview, xefe suku Holsa, Bobonaro, 8 November 2017.

27 Interview, xefe suku Holsa, Bobonaro, 8 November 2017; interview, Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017.

28 Interview, national mediator DNPCC, Bobonaro, 7 November 2017.

Mediation was particularly appreciated for its peace-building approach, with one female mediator commenting, “ADR is important, and mediation is better than other options because it makes peace, and it strengthens relations between the two parties.”²⁹

Despite these positive aspects to current ADR practices, the approach to ADR often reinforces the existing power imbalance between women and men in society and limit the agency of women as parties to the dispute, reducing their likelihood of receiving a just outcome. For example, many customary and non-customary ADR processes are carried out with an audience, led by men entrusted with power to lead the process, with community members actively invited to attend. This can affect the agency of disputants, and in particular women disputants, in speaking openly about their case, particularly if the case is sensitive or women might be blamed for the dispute (such as in cases of abandonment or violence). There is often limited understanding of the existing inequalities between women and men in ADR processes, with the mediator not paying sufficient attention to power dynamics and potential intimidation or violence against female disputants, which also limits women’s agency during ADR processes. Many ADR providers have limited understanding of the key differences between mediation and arbitration, impacting on disputants’ rights to access justice. Linkages between ADR and the formal justice system are at times unclear, with disputants not understanding their right to take their case to the police or courts, which also negatively impacts on disputants’ rights to access justice. These are all issues that could be usefully addressed and incorporated into new legislations and underlying regulatory frameworks and guidelines, for ADR provision in Timor-Leste.

Customary Dispute Resolution

In addition to the preference of women and men for **ADR in general because it is quicker, closer, and takes a consensus-building approach, customary dispute resolution is also important because**

of its connections to culture and spirituality.³⁰

Many local leaders consider that by instilling fear of the consequences of spiritual transgressions, the customary mechanism can be more effective in guiding community members’ behaviour. It continues to be the primary forum through which local disputes are resolved. As a female *xefe suku* explained, “in *suku* Soba, there is strong tradition, people follow tradition because they are afraid of getting sick or dying if they don’t comply with the decision or agreement that is made.”³¹ Because of its connection with cultural beliefs, it is seen as effective, with a female member of the community police council (*konsellu polisia komunitaria*, or KPK) in Oecusse recounting the ease with which they were able to resolve a recent case of buffalo theft, when the police were unable to establish who was lying and who was telling the truth:

We used our ancestors’ system, that to make judgements we must ask God, make a small fire, and the two [disputants] must put their faces in the sacred water... we place rice in the bottom of the water and the *lia-na’in* pray to the sacred land, declaring that there will be a signal ... that the rice will go up the offender’s nose... The offender was scared and admitted to stealing. When it was done, I just rang the police and informed them.³²

Across different communities in Timor-Leste, customary authority is ordered hierarchically, starting with the extended family and going through the different levels of customary governance. The exact hierarchy of customary authority varies significantly from one group to the next, with different authorities taking on different roles in the community according to their particular *lisan*.³³ The basic approach to dispute resolution is structured, following a step-by-step process which starts with the family *lia-na’in*³⁴ (or equivalent customary authority) hearing the case and attempting to resolve the issue. If the customary authority (most often a man) is unsuccessful, the case will be brought up the chain of the local traditional hierarchy to be heard by other higher-level customary authorities.

29 Interview, national mediator DNPCC, Baucau, 12 October 2017.

30 See for example Boavida dos Santos, A. and da Silva, E (2012) ‘Introduction of a Modern Democratic System and its Impact on Societies in East Timorese Traditional Culture’, *Local-Global Journal*, vol 12; Cummins, D. (2014) *Local Governance in Timor-Leste*.

31 Interview, national mediator DNPCC & xefe suku, Baucau, 13 October 2017.

32 Interview, female community police council member, Oecusse, 16 November 2017.

33 Cummins, D. (2014) *Local Governance in Timor-Leste*, 62-78; Boavida dos Santos, A. and da Silva, E (2012) ‘Introduction of a Modern Democratic System and its Impact on Societies in East Timorese Traditional Culture’, *Local-Global Journal*, vol 12.

34 *Lia-na’in*: literally ‘owner of the words’. Customary authority responsible for interpreting customary law, carrying out ceremonies, and resolving disputes via customary dispute resolution.

In most cases, there is a general expectation that community members will first take an issue to their customary authorities before going to the police or the *suku* council. However, this does not apply if the case is considered 'big' (generally interpreted to mean blood-letting, but often not including domestic violence which is viewed as a private problem). For 'big' cases, people may go straight to the police. For other cases, if customary authorities are unable to resolve the issue, the case might then be taken to elected members of the *suku* council, and following that to non-customary ADR providers or to the formal justice system.

While traditions vary significantly from one place to the next, the use of spiritual belief and community fear of the spiritual consequences of transgression are common across different cultural groups.³⁵ As one male mediator from the DNTS explained:

Our traditional law is like a rock. There may be the Constitution and if someone violates it, they go to Prison. But if you contravene traditional law, your place is Santa Cruz [the cemetery].

According to many men and women in communities, *lisan* and customary dispute resolution are important sources of community resilience, allowing community members to govern themselves in the context of a weak formal justice system, and in some cases allowing them to solve problems that the police or courts are unable to solve.³⁶ While there have been various efforts taken to legislate customary law, and/or to clearly define the modality of customary dispute resolution as mediation or arbitration, customary dispute resolution has not been so easily categorised.³⁷

Given the very different worldview through which customary dispute resolution operates, and the fact that its legitimacy and power is sourced via *lisan* rather than state law, it is useful to consider customary dispute resolution as part of the *basic operating environment* for other forms of state-based justice provision, including the formal justice system and non-customary ADR.

Non-Customary ADR: Suku Authorities

Non-customary ADR practices at times are regulated by the formal legal framework and at times are in the informal space. ADR provided by the *xefe suku* (village chief) and *suku* (village) council members are given legitimacy via election according to Law 9/2016. By Law 9/2016, they are local elected authorities with a variety of roles, and for ease of reference in this report are referred to collectively as 'suku authorities'. The dispute resolution legitimacy that is given to *suku* authorities is distinct from customary dispute resolution, which sources its legitimacy from *lisan* (customary law and governance), and follows its own hierarchy. It is also distinct from other types of mediation conducted in the country. Law 9/2016 which governs *suku* authorities stipulates that they are responsible for "keeping the peace" and "resolving local conflicts [...] in respect of the principle of equality", however it does not specify how they should go about this. The *suku* authority, especially the *suku* chief, who are 95% male across Timor-Leste, also have clear responsibility to prevent domestic violence and 'protect and accompany victims of domestic violence in the community'. In practice, they typically use a mixture of mediation and arbitration methods to carry out their role, which tends to vary depending on the issue and the people involved.

When a dispute is brought to a member of the *suku* council, they will often also invite members of the community police council (KPK) if it exists, and also invite the *suku* police officer (*ofisial polisia suku*, or OPS) to provide security. The method that is typically used to resolve a dispute depends on the *suku* authority's experience and training, whether or not he or she can claim customary legitimacy, and his or her general leadership approach. *Suku* authorities who are also recognised by the community as customary leaders (i.e. coming from a family that traditionally has legitimacy to rule and having been taught how to *tesi lia* via *lisan*) will often use customary dispute resolution practices to resolve disputes. This approach draws on cultural methods that are often very different to 'modern' ADR which emphasise principles of neutrality and equality of treatment of the disputing parties. Whereas a mediator would not

35 Boavida dos Santos, A. and da Silva, E (2012) 'Introduction of a Modern Democratic System and its Impact on Societies in East Timorese Traditional Culture', *Local-Global Journal*, vol 12; Cummins, D. (2014) *Local Governance in Timor-Leste*; Mearns, D (2002), *Looking Both Ways: Models for Justice in East Timor*.

36 Boavida dos Santos, A. and da Silva, E (2012) 'Introduction of a Modern Democratic System and its Impact on Societies in East Timorese Traditional Culture', *Local-Global Journal*, vol 12; Mearns, D (2002), *Looking Both Ways: Models for Justice in East Timor*.

37 Ba Distrito (2016) *Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis*.

be allowed to act as a witness in the proceedings, or to simply 'decide' who is in the right and who is in the wrong, such an approach is not uncommon for dispute resolution carried out by many *suku* authorities. By contrast, other *suku* authorities who have received mediation training, such as *xefe suku* who are also designated as Government mediators, may act more as facilitators for the disputing parties, following the guidelines and training they have received. In all cases, perceptions of women and men's roles in disputes and status in society are also factors which affect the facilitation process.

Dispute resolution processes also tend to vary between different approaches depending on the facilitator's circumstances - their training experience, customary legitimacy and general leadership style, and influence. For instance, in cases where the *suku* authority can exercise his or her authority sufficiently to come to a decision and have that decision followed (arbitration), it is likely that he or she will do so. In cases where his or her authority may well be questioned because disputing parties are too angry, or otherwise likely to ignore a 'decision' from the *suku* authority, an approach closer to mediation will likely be taken.³⁸ The variation between different approaches based on the facilitator has important implications for women's access to justice. In practice, it often means that women are subject to approaches more closely approximating arbitration as they may not have the power within their family/community or feel confident to disagree or negotiate with *suku* authorities. For this and other reasons, including the risk of nepotism, many respondents argue that *suku* authorities should be limited to providing mediation and not arbitration.³⁹ This issue is further discussed in Section III of this report.

Non-Customary ADR: Government, Legal Aid and NGOs

In addition to *suku* authorities, there are a variety of other stakeholders who provide non-customary ADR. Most of this is in the form of mediation, with the courts and Public Prosecutor's Office having the competency to provide conciliation in cases of semi-public crimes, which involves building a positive relationship between the parties of dispute, identifying a right that has been violated and

searching to find the optimal solution.⁴⁰ In current practice, only the courts provide conciliation to resolve disputes, prior to such cases being brought before a judge.

Excluding dispute resolution carried out by *suku* authorities, the vast majority of non-customary ADR provided in the country is in the form of mediation. Designated government officials of the Ministry of Interior - National Directorate on Community Conflict Prevention (DNPCC), Ministry of Social Solidarity and Inclusion, and National Directorate on Land and Property (DNTP) under the Ministry of Justice all provide mediation. As of November 2017, DNPCC used 34 volunteer community mediators (of which 10 are women) who mediate cases of land disputes in addition to DNTP, which coordinates their work and gives them training and oversight. The Public Defender's Office was also recently given the competency under Decree Law 10/2017 to "*promote extrajudicial dispute resolution*" as a form of non-customary ADR. In a pilot program modelled on Brazilian mediation which uses civil society mediators, the Public Defender's Office has delegated NGOs Belun and the Justice & Peace Commission to carry out mediation on their behalf, which is conducted mainly by men. The Ministry of Social Solidarity and Inclusion (MSSI) is also mandated to provide mediation services for issues related to child protection and other family issues, although in practice this competency appears to be used only rarely. Finally, there are a variety of NGOs and legal aid providers that provide individual mediation services, at the request of individual disputants but without delegated authority from any public institution.

As mediation is entirely voluntary, the process is designed so that the disputants themselves come to a resolution that is mutually agreeable. The mediator's role is to facilitate the discussion, helping to identify and examine relevant evidence and witnesses, providing a safe and neutral space so that each party can put forward their arguments, and identify various options to resolve the conflict.

In most cases, mediators follow a set of guidelines when doing their work, which varies from one provider to the next. These guidelines have different levels of quality. DNPCC, for example, mainly uses PowerPoint presentations for training, together

³⁸ Cummins, D. (2014) *Local Governance in Timor-Leste*, 79-97.

³⁹ For example, interview, Belun Coordinator & Mediator, Baucau, 11 December 2017

⁴⁰ Criminal Procedure Code, Article 216(3)

with basic questionnaires that mediators complete whenever they conduct mediation. Belun uses broad TORs for mediators, which are complemented with training. Mediation, as described by the mediators who participated in this research, generally takes the following approach:

First, on becoming aware of the dispute or being approached by one of the disputants, the mediator will seek to ascertain whether both disputants wish to take part in mediation. Based on the principle of voluntary participation, if only one disputant seeks mediation and the other does not, the mediation will not go ahead.

Second, the mediator then gathers evidence, speaking to each disputant and potential witnesses, and examining evidence which is put forward. Particularly if the dispute is contentious, this will generally be done with each disputant separately, and it is only after the mediator has spoken to each person separately that the disputants will be invited to attend mediation at a specified place and time.

Third, when the disputants have been brought together and mediation begins, the mediator will explain the rules for mediation to which the disputants agree to. Typically, these rules will include that each person be given equal opportunity to speak, without interruption or intimidation from the other party. Each party is then given the opportunity to tell their story, possibly with the support of evidence or witnesses who can corroborate their version of events. The mediator will take active part in the discussion, asking questions to help each party put forward their case in a coherent manner.

Finally, once the evidence from each party and relevant witnesses has been heard, the mediator will provide one or more 'options' for the parties to consider, that might solve the conflict. The parties are not bound to accept these options; they may come up with their own options to resolve the dispute, or they may simply reject the option(s) that is put forward by the mediator. If the parties come to an agreement, a document is drawn up specifying the conditions of agreement, that is signed by disputants, mediator and witnesses.

Typically, the guidelines and training that are given to mediators emphasise the basic principles of mediation as a voluntary process, focusing on providing equal time and space to the two parties during the mediation, acting as a neutral facilitator to the process, and providing a safe environment in which parties can put forward their case. However, there is no overarching framework which streamlines the mediation practices from one organisation/institution or reinforces the legal basis for mediation to another which reflects the differences in exact guidelines and training provided to the different groups of mediators. From the research conducted, the mediation processes rarely address gender-related power imbalances or integrate efforts to encourage women disputants' active participation. The process also depends on mediators themselves, including their understanding of, and willingness to follow, mediation processes. In some situations, mediators may use their charismatic leadership and position in the community to adopt a method more akin to arbitration—similarly to many *suku* authorities' approach. This was clearly the case with one DNPCC mediator who is also a respected veteran in the community,⁴¹ and is an issue that needs to be addressed. This is discussed further in Section III of this report.

Mediation or Arbitration?

Because Law 9/2016 governing *suku* authorities does not specify the mode of ADR that they should take when resolving disputes, many *suku* authorities draw on their experience with customary dispute resolution techniques. These approaches more closely approximate arbitration than mediation, with the *suku* authority first hearing the case, and then after discussion of the evidence 'resolving' it. Sometimes the *suku* authority may also act as a witness in the same proceedings, violating a basic principle of 'modern' mediation that the mediator act as an impartial facilitator. Because of complaints related to *suku* authority nepotism and other associated issues, research respondents including civil society representatives and a prosecutor strongly recommended that *suku* authorities be legally empowered to provide mediation only.⁴²

41 Interview, national mediator DNPCC, Bobonaro, 7 November 2017.

42 Interview, Public Prosecutor Bobonaro, 9 November 2017; interview, Belun Coordinator & Mediator, Baucau, 11 December 2017.

The voluntary nature of mediation is also in women's best interests, giving them space to deal with possible gender bias, withhold their agreement, and/or take their problem to a different authority if they feel they have not been dealt with fairly.

The use of customary techniques for non-customary ADR is not limited to *suku* authorities: Government endorsed mediators such as veterans who volunteer for DNPCC may also use their influence in the community to simply 'resolve' a dispute. In this research, while some mediators were able to explain a clear step-by-step process by which they gathered evidence from the parties, facilitated the discussion between disputants, and then suggested options for resolution, others appeared to rely more on their charismatic leadership, simply 'resolving' as they saw fit. This was the case with one mediator, a well-respected veteran in the community, who explained his process in very simple terms: finding out the case

history, inviting the disputing parties to present their different versions of events, and then 'resolving' it. While he had a good track record in getting parties to sign a mediation agreement, he appeared to follow more of an arbitration than a mediation process, despite his status as a registered mediator. When pressed to explain how he 'resolved' some of the cases he described, he could not break them down into the different steps required for mediation. He did, however, explain that it was easy for him to get a resolution because he is a veteran.⁴³

Including important members of the community such as veterans or customary authorities can be of real benefit to community mediation; wherever possible, they should be engaged with and included. However, it is essential that they be given sufficient guidance and monitoring to ensure they do not 'slip' into more arbitration-like techniques, which have a different set of principles and use.

43 Interview, national mediator DNPCC, Bobonaro, 7 November 2017.

WOMEN'S EXPERIENCES OF ACCESS TO JUSTICE

As outlined above, principles of gender equality are enshrined in Timorese law. However, in practice there are still many factors that constrain women and girls' access to justice, across all modalities of justice provision.

Women victims and complainants who participated in this research recounted frequent problems that they experienced in trying to access justice. Typically, these women experienced problems and challenges across multiple forums, including the customary system, *suku* council dispute resolution and the formal justice system.

Civil Cases: Land

Disputes over the rightful ownership of land in Timorese communities are common, with competing claims from land title registered during Portuguese colonial rule, Indonesian occupation and Timorese independence. This is made further complex by the long history of conflict during which land was occupied by people who did not own it, or where ownership documents were lost. There are also complicated systems of customary land tenure in place, which vary from one place to the next, and which may be in conflict with registered land title.

In dealing with disputes over land, many women and men community members, mediators and formal justice officials stated that ADR is better than the formal justice system, pointing out the various difficulties in using the formal justice system and the need for local knowledge. As they described it, customary leaders and *suku* authorities are accustomed to hearing land disputes. Additionally, customary leaders bring an in-depth knowledge of the history of land use and ownership in the area, which is often necessary in understanding the facts of the case and coming to a fair resolution.

This research shows that there are many obstacles that conspire to undermine women's rights to land, which reinforces findings of earlier research on the subject. These include limited rights under customary land tenure and inheritance, not knowing the land's history, inability to take part in customary dispute resolution processes, biased decision-making by customary authorities, limited understanding of their legal rights and options, and limited support in pursuing their legal rights.⁴⁴

Customary norms relating to land inheritance in particular is deeply gendered and do not reflect women's rights under the new Land Law No. 13/2017, which in Article 4 specifies "equality between women and men" and "prohibits any discrimination in respect to ownership, acquisition, management, administration, enjoyment, transfer and disposition."⁴⁵ Despite the legal framework's guarantee of equality between women and men, the reality is that in patrilineal areas (the majority of Timor-Leste), land is culturally passed onto sons, because it is expected that daughters will marry out of the family.⁴⁶ In matrilineal areas, the land is culturally passed onto daughters—however, men generally exercise control and make decisions over the land.⁴⁷

Despite the legal framework guaranteeing equality between women and men in accessing and inheriting land, the existing cultural norms are so embedded in society that communities are afraid to contradict them. Women tend not to ask for their rights, and in cases where they do, the customary norms will be guiding the process.

44 CEPAD (2014), *Women's Access to Land and Property Rights in the Plural Justice System of Timor-Leste*

45 Law No.13/2017, Special Regime for Definition of Ownership of Immovable Property (Land Law).

46 CEPAD (2014), *Women's Access to Land and Property Rights in the Plural Justice System of Timor-Leste*, 52-53.

47 Narciso, Henriques, Tilman (ND), 'Land and Gender in matrilineal Timor-Leste'. See also Miranda, S. (2011). *Relatório Género e Agricultura em Quatro Distritos de Timor-Leste (Bobonaro, Ermera, Manatuto e Viqueque)*.

These customary norms are deeply embedded, and many are frightened to change the practices they inherited from their ancestors because of possible cultural-spiritual consequences, including sickness or death.⁴⁸ As such, when it comes to inheritance, women tend not to claim their rights, and if they do, their claims to land are generally considered weaker than their male family members.

Women in our village [Soba] do not claim their rights if the parents have already given the land to their brothers. As I said earlier, our custom runs very deep, and people are scared to go against their ancestor's words. They could fall sick or even die.⁴⁹

Given the norms for women's rights to land via customary dispute resolution, non-customary ADR is seen by some as a better alternative. As a mediator in Baucau explained, "*lia-na'in* resolve cases according to their culture, and we can see in most cases the advantage is given to the man."⁵⁰ Mediators from DNTP, DNPCC, and NGOs operating on behalf of the Public Defender's Office are trained in mediating land disputes. They often work closely with customary and *suku* authorities when conducting mediation, while also endeavouring to apply the basic principles of equality as enshrined in state law.⁵¹ The approach to dispute resolution depends in large part on who the complainant approaches first. If he or she asks customary leaders or *suku* authorities to *tesi lia*, they will often do this first, and if they are unsuccessful, they will ask for assistance from mediators. If the complainant approaches mediators first, then they will mediate the dispute, requesting assistance from local authorities.

However, **even in cases where non-customary ADR is applied, there is still often an expectation that customary norms will be applied.** As a male DNTPS mediator explained, they cannot ignore cultural norms because,

"if the case involves a woman and her brother, we need to look at the system (patrilineal, matrilineal or *kaben tama-kaben sae*⁵²). Even though the Land Law gives rights to women, the traditional system through *fetosan-umane*⁵³ can also give the land to their daughter. This process is sacred so the *lia-na'in* implement this because the ancestors decided it should be so..."⁵⁴

While there are various customary norms which also work to protect women's rights to land under certain circumstances – for example, a widow's right to life tenure on her deceased husband's land⁵⁵ – it is common for male relatives to claim the land, without regard for the woman's rights.⁵⁶ In such circumstances, it is often difficult for women to defend their rights because they do not know the history of the land (which is traditionally passed onto the men), and so cannot put forward a strong claim. As a number of respondents, including *xefe suku* and civil society representatives explained, while they explain to community members that there is now a Land Law giving equal rights to women and men, the depth of these cultural beliefs means that few people dare to contradict them, and often women lose out.⁵⁷

In addition to inheritance disputes, there are also cases in which a woman has clear ownership over land and property, but she loses these rights because

48 Interview, national mediator DNPCC & xefe suku, Baucau, 13 October 2017.

49 Interview, suku chief and DNPCC mediator, Baucau, 13 October 2017.

50 Interview, mediator DNTPS, Baucau, 12 October 2017.

51 FGD, national mediators DNPCC, Oecusse, 13 November 2017; interview, national mediator DNPCC, Bobonaro, 9 November 2017

52 *Kaben tama-kaben sa'e*: a complex set of rules for particular cases where matrilineal or patrilineal rules are not applied. Eg. if a patrilineal family has 1 daughter and does not want to lose her through marriage, they may use *kaben tama-kaben sa'e*.

53 *Fetosan-umane*: a complex set of rules, rights and responsibilities defining the relationship between the bride and groom's families: a relationship and set mutual obligations which may extend over generations.

54 Interview, mediator DNTPS, Baucau, 12 October 2017.

55 Interview, customary elder, Oecusse, 16 November 2017.

56 Interviews: former xefe suku Bobometo, Oecusse, 16 November 2017; Director Maneo, Oecusse, 15 November 2017; national mediator DNPCC & xefe suku, Baucau, 13 October 2017; Gender Focal Point Municipal Administration, Maliana, 7 November 2017; xefe suku Holsa, Bobonaro, 8 November 2017. See also CEPAD (2014), *Women's Access to Land and Property Rights in the Plural Justice System of Timor-Leste*

57 Interviews: former xefe suku Bobometo, Oecusse, 16 November 2017; Director Maneo, Oecusse, 15 November 2017.

of **customary authorities' gender bias**. This was the case for one woman, a survivor of domestic violence, who left her violent husband and went to live with another man. When *lia-na'in* resolved the case, they ignored the domestic violence which led to her leaving her husband, blamed her for abandoning him and awarded all of their shared property, including her home and land, to her ex-husband. When she asked to speak and put forward her case during the proceedings, they told her she had no right to do so "because she was in the wrong". When she explained her case during the focus group discussion, the belief in her own wrongdoing was so strong that she actually believed it herself, repeating many times during the focus group discussion that she "knows she was wrong", but that she thought she should have been allowed to keep at least some of her possessions, as she is now totally dependent on her second husband.⁵⁸

In yet other cases, while women may know they own the land, they are unable to reach an acceptable resolution via ADR and are **too frightened of the formal system to properly assert their claim**. This was the case with one woman, whose male tenant attempted to assert ownership and sell her family's land. As she explained it, she allowed him to stay when he moved to her *suku* during Indonesian times because he had no place to stay. However, a few years ago he forged ownership documents to the house and land and, deliberately intimidating and taking advantage of her lack of legal knowledge, threatened that she would go to prison if she did not give him what he wanted:

He seized me and forced me to go with him to the police, showing them his [forged] certificate. He asked me: 'do you want to go to prison?' Then he said to me, 'if you don't give me that land, I'll destroy the house.' But I built that house, he didn't have the right to do that.⁵⁹

Because she did not in fact understand that his threats of going to prison had no legal basis, she now lives in fear because she opposed him. When she told her story, she explained that when they went to the police, they didn't do anything, so she just went home. Following this, the *xefe suku* attempted to mediate, but the option that he gave was that the

land simply be divided between the two of them, which would have effectively meant she gave away half of her land. She did not agree to this, and as of February 2018, the case was not fully resolved.

While it is generally agreed that ADR is a good forum for dealing with land conflicts, there is also a need for improved ADR delivery that will better protect women's rights. This includes more extensive civic education on women's rights, possible accompaniment of women complainants by local civil society representatives to monitor proceedings and provide support, more training and monitoring of ADR providers so that the 'options' they provide are in women's best interests, and others. These are further discussed in Section IV of this report.

Civil Cases: Abandonment & Child Maintenance

In legal terms, 'abandonment' covers two different types of dispute: accidental pregnancy resulting in paternity dispute, where a man does not accept that a woman is pregnant with his child, and child maintenance cases, in which the father leaves his wife and children (often in order to marry another woman) and is asked to pay for the children's upkeep.

Abandonment and the limited responses to it was identified by women victims and complainants as a key issue in all three FGDs in Baucau, Bobonaro and Oecusse. Significantly, women in the FGD in Baucau and Oecusse identified it as the number one priority to address in improving women's access to justice. For some women, their concern was that if they left a violent relationship and particularly if they lodged a complaint with the police, their husband would 'punish' them by leaving them and their children destitute (discussed further in the next section). Others who had successfully navigated the system and had child maintenance agreements made in their favour explained that it was simply a waste of effort because they haven't been able to enforce them.

Abandonment cases are typically dealt with using the full spectrum of ADR mechanisms, and also the formal justice system. Respondents explained that the majority of abandonment cases are dealt with first using customary dispute resolution or by *suku*

58 FGD women victims & complainants, Bobonaro, 10 November 2017

59 Interview, land complainant *suku* Holsa, Bobonaro, 8 November 2017.

authorities, following which women might then take the issue to the formal justice system. The exact approach varies from one place to the next. In *suku* Bobometo (Oecusse), for example, abandoned women and their families first attempt to resolve the issue using a mixture of customary and *suku* authorities. If this is unsuccessful, they will then ask the Public Defender's Office (PDO) to mediate, often with *suku* and customary authorities invited to participate as witnesses.⁶⁰ In *suku* Holsa (Bobonaro), by contrast, the *xefe suku* stated he will only attempt to resolve divorce cases, generally by ordering that *barlake*⁶¹ be repaid to restore balance between families. However, he explained that he does not attempt to resolve child maintenance cases, instead sending them directly to the PDO for mediation.⁶² In yet other cases, the disputing parties may ask NGOs or legal aid providers to conduct mediation, sometimes in coordination with MSSI and *suku* authorities, before asking assistance from the PDO.⁶³

While this approach of attempting to first resolve the issue locally is supported by many stakeholders, including the Public Defender him or herself,⁶⁴ a major disadvantage of **customary dispute resolution is that it focuses on 'closing the shame' and 'restoring balance' between families, rather than prioritising the economic needs of the abandoned woman and children.** As a result, if the man is required to pay a fine, it is generally paid to the woman's family. A civil society representative explained that this is something that women often complain about to her:

the disadvantage is that sometimes the fine that is imposed does not properly value the children's future, because the fine is given to the wife's family rather than the wife and child, so they become victims.⁶⁵

However, it is **not only the customary system which is letting women down. Women are also being let down by the formal justice system,** a point which has

also been reflected in previous research.⁶⁶ In one case, a woman described how she went straight to the authorities for help after her husband abandoned her and her children. However, she was told that because she did not have documentation proving her husband's salary, she could not lodge a case. They refused to access the documentation for her, even though her husband's office (an INGO) was walking distance to their home.⁶⁷

In another case, a woman who had been subjected to serious violence described being refused the right to speak, by *both* the *lia-na'in*, and then the judge, when her case was heard in court. Because her husband suspected her of infidelity, he beat and forced her to have sex, and locked her in the home when he went to work. When the *lia-na'in* [several] 'resolved' the problem between her and her husband using customary dispute resolution, they only listened to her husband's account that she was being unfaithful. They ignored her husband's violence and did not allow her to speak, simply telling her that she was in the wrong and requiring her to pay a fine. While she knew she had the right to file a complaint, she did not lodge a complaint with the police because she was frightened that if she did so, her husband would abandon her and she would be left in a worse position. She continued to live with her husband for almost a year, during which time the jealousy and violence continued, until ultimately her husband left the house, abandoning her and her three children. At this time, a representative from women's NGO Fokupers became aware of her case and helped her to lodge a formal claim for child maintenance. Mediation was unsuccessful, and when it finally went to the court almost a year later, she described proceedings as follows:

I was alone and did not understand the court system, and the woman judge just yelled at me. She said: 'you have been separated for almost a year and did not clean his clothes,

60 Interview, former *xefe suku* Bobometo, Oecusse, 16 November 2017.

61 *Barlake*: bride price given by groom's family to a bride's family in patrilineal areas, as part of ritual mutual exchange between families.

62 Interview, *xefe suku* Holsa, Bobonaro, 8 November 2017.

63 Interview, Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017; interview FFSO lawyer, Oecusse, 13 November 2017

64 Interview, Public Prosecutor Bobonaro, 9 November 2017

65 Interview, Director Maneo, Oecusse, 15 November 2017.

66 See for example Judicial System Monitoring Program (2015) *Overview of the Justice Sector*; Cummins, D. (2012) *Ami Sei Vitima Beibeik: Looking into the needs of domestic violence victims*; The Asia Foundation, *Timor-Leste Law and Justice Survey*, 2013; CEPAD (2014), *Women's Access to Land and Property Rights in the Plural Justice System of Timor-Leste*.

67 FGD women victims & complainants, Baucau, 12 December 2017

and now you ask money from him?' ... In the court, the judge did not let me speak, she just yelled at me ... she only listened to my ex-husband, did not give me time to speak. I asked to speak but the judge said that my husband had already spoken so it was all over. The prosecutor did not do or say anything...⁶⁸

A major issue identified by women FGD participants was that even if they went through the system and were successful in gaining a child maintenance agreement, there is no system to ensure compliance.⁶⁹ If the father chooses to ignore the child maintenance agreement, the responsibility is put on the women to go through another lengthy process, paying for travel to and from the court to submit new documentation and initiate a new case. This was the case with one respondent, who explained that she travelled from Maliana to Suai to attend court conciliation three times before a decision was made. However, since then, her ex-husband has simply ignored the agreement with no consequences:

My case was heard in Suai court in 2012 and 2013. The court reached a decision in 2015, and the judge told my husband that he must pay child maintenance every month without fail. He said "yes" to the judge, but then when we returned to Maliana he only paid for seven months, and then stopped... I went to the Public Defender and they said that the case has already been decided, and that I needed to return to the Suai court [to get an order to enforce it]. They said, if the court telephones us, then they can deal with my husband. But I have no money to go to Suai, it costs \$60 to pay someone to take me on their motorbike. Where can I get this money? Because of this I just wait...⁷⁰

The research team heard of many cases in which the husband simply ignored the agreement that had been reached, with no consequences.⁷¹ While there

is the possibility for judges to issue declarations requiring MSSJ officers to monitor for compliance, it is unclear where the real issues for failure to monitor for compliance lie, with court officials and MSSJ officials each passing responsibility onto the other to make it happen.⁷²

It is essential that appropriate mechanisms be put in place to monitor existing child maintenance agreements, and to enforce these agreements in cases of non-compliance in a manner which does not put a heavy burden back on the woman. In particular, such a system must ensure that public officials implement it properly, with avenues for women and civil society representatives to make formal complaints (and have those complaints responded to) if appropriate steps are not taken to enforce these agreements.

Public Crimes: Domestic Violence

Since Timor-Leste's independence, women's rights activists lobbied hard to have domestic violence taken seriously, resulting in it being defined as a public rather than semi-public crime in 2010. Yet despite the legislation, recent research has shown the high prevalence of domestic violence and the wide acceptance of domestic violence in Timor-Leste. Approximately three in five women aged 15 to 49 (59 percent) who had ever been in a relationship said they had experienced physical and/or sexual violence by a male intimate partner at least once in their lifetimes. Also, the vast majority of women (80%) and men (79% in Dili and 70% in Manufahi) believed that a husband is justified in hitting his wife under particular circumstances.⁷³

The LADV defines domestic violence as:

[A]ny act or a result of an act or acts committed in a family context, with or without cohabitation, by a family member against any other family member, where there exists influence, notably physical or economic, of one over another in the family relationship, which

68 Interview, domestic violence and abandonment victim, suku Memo, Bobonaro, 8 November 2017

69 JSMP, Report on suspended sentences with conditions, December 2017; Ministry of Justice, *Report on Gender Responsive Alternative Dispute Resolution Seminar 4 & 5 December 2017*, Dili, 2018.

70 Interview, abandonment victim, suku Holsa, Bobonaro, 9 November 2017

71 Interview, Gender Focal Point Municipal Administration, Maliana, 7 November 2017; interview, abandonment victim, suku Holsa, Bobonaro, 9 November 2017; interview, domestic violence and abandonment victim, suku Memo, Bobonaro, 8 November 2017; FGD women victims & complainants, Oecusse, 17 November 2017; FGD women victims & complainants, Bobonaro, 10 November 2017; FGD women victims & complainants, Baucau, 12 December 2017.

72 Interview, judge REAO Court, Oecusse, 15 November 2017

73 The Equality Institute on behalf of the Asia Foundation (2017), *Understanding Violence Against Women and Children in Timor-Leste: Findings from the Nabilan Baseline Report. Main Report*; p 83.

results in or may result in harm or physical, sexual or psychological suffering, economic violence, including threats such as acts of intimidation, insults, bodily assault, coercion, harassment, or deprivation of liberty (Article 2(1)).

This redefinition of domestic violence as a public crime means that legally it is no longer an option to have the case stop at the local level if it is resolved via customary dispute resolution; legally, such cases must also be taken to the courts.

The high level of tolerance for domestic violence, as demonstrated by the fact that both women and men find justifiable that women are beaten by their husbands, also does not encourage women to seek any assistance. For women who have experienced violence, 86% never seek any help, and if they do, they understandably look for support with families or friends.⁷⁴

Given widespread perceptions that domestic violence is a private family matter and the general acceptance of domestic violence as a normal behaviour under certain circumstances, it is not surprising that this is reflected in the actions of local leaders and even formal justice actors.⁷⁵

There seems to be an overall awareness of local leaders and mediators from NGOs and Government institutions of the requirements under the law to refer domestic violence cases to the formal justice system. However, the testimonies of domestic violence survivors during this research further confirm other reports showing that, when families seek redress for domestic violence, they still prefer to deal with domestic violence through traditional or local justice processes.⁷⁶

All mediators and *suku* chiefs said that when they receive complaints of domestic violence cases, they always refer them. As a female mediator and *suku* chief from Baucau states it:

I have only been requested to mediate one case of domestic violence in 2012. However, because of the LADV, I referred the case to the police. I don't solve cases of domestic violence.

However, a survey from 2015, asking community leaders what their first reaction was when having to deal with domestic violence, 52% responded that they handled the case through *suku* or *aldeia* mediation, 12% pursued a settlement through *adat* and 21% referred to PNTL.⁷⁷ This also confirms analysis by Belun of more than a 100 *suku* records, showing that domestic violence is being dealt with at the community level.⁷⁸

The weaknesses of customary dispute resolution in dealing with domestic violence are well-known, with **women often barred from participating (or participating fully) in the process, and *lia-na'in* failing to protect women and girls' human rights.**⁷⁹

Because customary processes focus on restoring communal harmony and balance between families rather than individual rights, it is common for *lia-na'in* to sacrifice women's right to be free of violence in order to preserve the family unit.

Because customary processes focus on restoring communal harmony and balance between families rather than individual rights, it is common for *lia-na'in* to sacrifice women's right to be free of violence in order to preserve the family unit. In practical terms, this often means that an abused woman is expected to return to her violent husband if he pays a fine to her family, generally her parents.⁸⁰ Because this fine is paid from household money, this means that she is also paying that fine. Sometimes the husband must promise to not repeat the violence; other times, he simply pays the fine without making such a commitment.⁸¹

74 Idem, p. 113

75 JSMP, The courts and Alternative Dispute Resolution, Dili, 2017, p. 11.

76 Ba Distrito (2016) Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis, p. 11.

77 The Asia Foundation, A Survey of Community-Police Perceptions in Timor-Leste 2015, Dili, p.55.

78 idem, p. 11; Cummins, D. (2012) *Ami Sei Vitima Beibeik: Looking into the needs of domestic violence victims*

79 Cummins, D. (2012) *Ami Sei Vitima Beibeik: Looking into the needs of domestic violence victims*; Khan, N. & Hayati, S. (2012) *Bride Price and Domestic Violence in Timor-Leste*.

80 Interview, Director Maneo, Oecusse, 15 November 2017.

81 Interview, Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017

Results from FGDs in all three case study sites clearly show that ‘resolving’ crimes of gender-based violence via customary dispute resolution, without those cases also being dealt with via the formal justice system, does not result in satisfactory outcomes for women and girls.⁸² Many women victims spoke of their experiences in such cases, where the *lia-na’in* ignored the husband’s behaviour and instead sought to blame the victim for provoking the violence. Similarly, a local activist explained that in her community it is very common for even serious offences to be resolved using customary processes, describing one recent case of sexual violence:

this was a case where a girl was sexually violated... and the victim’s father wanted to resolve it in the family. The girl wanted to continue onto the police with the case, but the father just decided to receive money. So the family received a cow and a *belak* (traditional medallion/metal chest ornament).⁸³

As she went on to explain, family and community preference to resolve the issue locally, in order to ‘close the shame’ and restore balance between families, almost invariably results in negative outcomes for women:

As I see it, the results from customary process is that the victim isn’t happy when [the case] is resolved via *adat*. I can only think of one case recently where the victim was happy because she wanted her husband to return to her, and in the customary process the husband decided to return to her.⁸⁴

Justice System Monitoring Program (JSMP) researched the interlinkages between cases solved at the community level and at the courts, and found that in practice the ‘formal and informal justice have a complementary relationship in their application [and...] the formal justice system often considers community-based dispute resolution that is directed and led by community leaders as a mitigating factor in judicial decisions’, even in cases of domestic violence.⁸⁵

However, similarly to issues of abandonment and child maintenance, it is clear that many women and girls are being let down badly by the formal system. This is not a new insight: there are many research reports detailing the various failures of the formal justice system, most notably from the Judicial Systems Monitoring Program (JSMP).⁸⁶

82 FGD women victims & complainants, Bobonaro, 10 November 2017; FGD women victims & complainants, Oecusse, 17 November 2017; FGD women victims & complainants, Baucau, 12 December 2017.

83 Interview, women’s advocate Atabae, Bobonaro, 8 November 2017

84 Interview, women’s advocate Atabae, Bobonaro, 8 November 2017

85 Judicial System Monitoring Program (2017) Courts and Alternative Dispute Resolution,

86 See for example Judicial System Monitoring Program (2015) *Overview of the Justice Sector*; Cummins, D. (2012) *Ami Sei Vitima Beibeik: Looking into the needs of domestic violence victims*; The Asia Foundation, *Timor-Leste Law and Justice Survey*, 2013; CEPAD (2014), *Women’s Access to Land and Property Rights in the Plural Justice System of Timor-Leste*.

STRONGER LINKS BETWEEN ADR & FORMAL JUSTICE FOR WOMEN'S INCREASED ACCESS TO JUSTICE

Improving complementarity between formal justice and ADR in cases of domestic violence

The women's stories gathered during this research clearly demonstrate that community members use ADR mechanisms and the formal justice system in various combinations, as they try to find assistance in resolving their problem. This varied use of ADR is also reflected in previous research that has been conducted on similar topics.⁸⁷ As such, it is vital that the linkages between different forms of dispute resolution are clearly understood by all, and that they work together effectively so that the systems are complementary rather than in conflict.

A basic principle in discussing how the formal justice system and ADR systems should be balanced is that complementarity between these systems must be guided by the Timor-Leste Constitution and governing legislation, including human rights instruments that the Government of Timor-Leste has signed up to and which have force under domestic law. While respondents from state institutions and civil society emphasised the important role of customary and non-customary ADR in resolving conflicts and supporting peace in the community, they also reiterated that it must be in line with Timorese law and human rights standards. As the Public Defender in Baucau noted,

ADR can reduce the number of cases in court. It can continue, but the process must be in accordance with the Constitution and human rights. [So we] must give training to customary actors and also to mediators. Because the customary process can also assist in keeping community peace.

Similar comments were made by a judge in Oecusse who explained, "*there are both [customary and formal justice] systems, but we must give priority to the formal system, because we are talking about legitimacy.*" This basic principle was repeated in different ways by many respondents including community leaders, civil society representatives, police, prosecutors, public defenders, and judges across all three municipalities/regions where research was conducted.

While it was acknowledged that there are some areas in which state law and customary norms are in conflict, no one recommended that customary or traditional law be institutionalised via the state system in order to harmonise the two systems. Rather, for research respondents, the focus was on **supporting and improving the implementation of customary and non-customary ADR so that it does not contravene basic human rights standards and Timorese law.**

⁸⁷ Cummins, D. (2014) *Local Governance in Timor-Leste*; Mearns, D (2002), *Looking Both Ways: Models for Justice in East Timor*.

Many respondents argued that the more conservative, gendered aspects of customary dispute resolution can be improved if customary authorities are better engaged and encouraged to adapt approaches in line with human rights standards. This point was made by the head of local NGO in Oecusse, which has been implementing a customary justice program for several years. As she explained, their approach of acknowledging the important role of customary authorities and working together with them, while also explaining to them their limits under the law, has been key to the program:

we needed to explain that like it or not, we have the law, and we all live under the law. We provide a lot of capacity building to local leaders so they know which types of cases they can resolve, and which not... We can't lose our culture, but we can improve it through capacity building for *lia-na'in*, so we can link our culture with our formal law. So that when they use traditional justice, they also respect human rights and the law of Timor Leste.⁸⁸

Considering possibilities for ADR in Timor-Leste, there are opportunities to improve linkages between ADR and the formal justice system so that local practices are complementary to, rather than conflicting with, the formal justice system. Key to this is recognising that the law does not prevent the operation of customary dispute resolution in public crimes. Rather, the obligation is a positive one: requiring that such crimes be also referred to the police and dealt with via the formal justice system.

As discussed previously, in many cases of domestic or sexual violence, there is a strong community preference to use customary dispute resolution to *taka moe* (close the shame) or *hadia naran* (repair the family name) and restore the victim's family dignity. Because the focus is on the family dignity, rather than the victim's (most often woman's or girl's) individual rights, using customary dispute resolution in cases of violence often does not appropriately reflect the harm that is suffered by the victim. The operation of customary dispute resolution in such cases has been considered a key impediment for protecting and upholding rights of women and girls.⁸⁹

When customary dispute resolution is recognised as only one part and one option in the process of dispute resolution, then it is still possible to use the customary system and also lodge a complaint with the police to protect citizens' rights under state law. **There is no legal requirement to choose between the formal and customary processes in such cases. The jurisprudential reason for requiring that public crimes be dealt with by the courts is that they are considered so harmful that they are not simply an offence against a single individual, but against all of society, damaging societal values and norms.** This is why it is a 'public' crime, and public officials (prosecutors) are responsible for making decisions on prosecuting the case, rather than victims themselves. Unlike semi-public crimes, where victims may choose whether or not to take their case to the police, and may choose to withdraw their case from the police or prosecutor's office if they wish, public crimes require that a case, once registered, be dealt with to the full extent of the law.

The legal regime for public crimes does not preclude the possibility of these offences being dealt with via customary dispute resolution. Rather, it means exactly what it says: that public crimes must be referred to the formal justice system. This means that community members have the possibility of using *both* formal justice and ADR processes in parallel, with the formal justice system being applied as soon as relevant authorities become aware that a public crime has been committed, while customary processes continue locally. This possibility for people to use both paths simultaneously is in line with well-established legal practice, in which the civil and criminal elements of a crime may be dealt with separately, and using different forums.⁹⁰

While this research and in other previous research clearly demonstrate that in cases of gender-based violence, customary dispute resolution often does not appropriately protect women's and girls' individual rights, fieldwork results for this research indicate that the real problem arises when women either don't know their legal rights, or when customary processes are used to *block* the operation of the formal justice system. **It appears that it is not the operation of customary dispute resolution *per se* that is the main**

⁸⁸ Interview, Director Maneo, Oecusse, 15 November 2017.

⁸⁹ See for example Khan, N. & Hayati, S. (2012) *Bride Price and Domestic Violence in Timor-Leste*.

⁹⁰ Ba Distrito (2016) *Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis*.

problem, but rather the fact that it is thought by women (and community members more generally) that they must ‘choose’ between one or the other. In such cases, women FGD participants explained that they were often put under significant pressure to ‘choose’ customary processes, and when they did so, believed they had to accept the *lia-na’ins*’ decision as final. By contrast, in cases where it was understood that both systems may operate in parallel, women FGD participants expressed fewer issues with the customary system, because their cases were still dealt with by the police and the courts.

Given the reality of long court delays, communities’ ongoing use of customary dispute resolution may help to reduce the various problems that exist with the formal justice system, by allowing communities to restore balance and make peace between the families while they await trial.

Creating awareness on women’s rights: the case of Oecusse.

Particularly for those living outside town centres, it was generally agreed that more civic education is needed for community members, and women in particular, to understand their legal rights. This applied in all areas of the law and was identified as a key issue for rural women in both Baucau and Bobonaro.⁹¹ FGD participants in Bobonaro identified lack of information on the law as it relates to cases of domestic violence as the single most important obstacle for women’s access to justice in the municipality. While increasing numbers of domestic violence cases in the courts show that civic education efforts are making some headway, respondents agreed there are still many women outside the town centre who do not know their basic rights in regard to land and inheritance, child maintenance, or domestic violence.⁹²

For civic education efforts to be successful, not only should the information be given to women and men, but it should be explained in such a way that community members consider it appropriate to

their circumstances. In this respect, the experience in Oecusse is worth noting as it appears that civic education for domestic violence has taken a slightly different approach to other municipalities. While stakeholders recognised in all three municipalities and regions that when a domestic violence case is lodged with the police, it may still in practice be ‘resolved’ via customary dispute resolution, it seemed to be only in Oecusse where this reality was openly acknowledged in civic education efforts. Rather than the typical explanation that cases should not be dealt with via customary dispute resolution and must by law be referred to the police, civic educators in Oecusse have openly acknowledged the important role of culture and customary authority in the community, explaining that local processes may continue to go ahead, but that as public crimes they should also be dealt with via the formal justice system.

Judging from comments made by a variety of respondents, including community members, civil society representatives, prosecutors and the judge of Oecusse, this approach was generally met with approval.⁹³ As one NGO representative explained, nearly everybody now understands that cases of domestic violence must be taken to the police:

in the past, domestic violence was resolved only in the community. Now, when domestic violence is fairly minimal, like a slap, sometimes they will resolve in the family. But when it’s a beating... the community from suku to the regional level know that that is a criminal case and they always go to the police, and through the formal process to the courts.⁹⁴

This approach of acknowledging the role of culture and customary dispute resolution has laid the groundwork for active and positive engagement with customary and *suku* authorities, using them as ‘community champions’ to encourage the implementation of the law in their community. One *ex-xefe suku* described how he worked for years, conducting civic education meetings at the

91 Interview, Belun Coordinator & Mediator, Baucau, 11 December 2017; interview, Coordinator Uma Pas, Baucau, 11 October 2017; FGD women victims & complainants, Bobonaro, 10 November 2017; interview, xefe suku Holsa, Bobonaro, 8 November 2017; interview, Gender Focal Point Municipal Administration, Maliana, 7 November 2017; interview, women’s advocate Atabae, Bobonaro, 8 November 2017; interview, Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017.

92 Interview, xefe suku Holsa, Bobonaro, 8 November 2017; interview, Public Prosecutor Bobonaro, 9 November 2017

93 Interview, Alfela Lawyer, Oecusse, 13 November 2017; interview FFSO lawyer, Oecusse, 13 November 2017; interview, former xefe suku Bobometo, Oecusse, 16 November 2017; interview, community police council member, Oecusse, 16 November 2017.

94 Interview, Director Maneo, Oecusse, 15 November 2017

aldeia level, coordinating with the police to identify communities with higher levels of violence, and often contacting the police directly if they become aware of a domestic violence incident.⁹⁵ Similarly, a community member described how she works with customary authorities in resolving disputes, but also commonly rings the police if she becomes aware of a domestic violence incident.⁹⁶ She described that neighbours called the police because they heard problems in the house next door, and feared violence was taking place.⁹⁷

The active engagement of local authorities is important at a few different levels. Local authorities can act as community champions and have a strong positive impact for effective civic education. In addition, this engagement opens the door to positively influencing how customary practices are implemented in the community. Customary governance and dispute resolution is not static: like any other system of governance, it may change if there is the right impetus. As a civil society representative explained, because they begin by acknowledging local authorities' important role in the community, their civic education and capacity building program is generally well-accepted, opening up possibilities for local authorities to learn about the law, and adapt how they implement customary dispute resolution in the community.⁹⁸

Role of *Suku* Authorities as bridge between customary and formal legal systems

While it is important to actively engage local authorities and to recognise the importance of customary dispute resolution in communities, *suku* authorities require a slightly different approach. As discussed previously, while *suku* authorities may draw on customary legitimacy because they come from the 'right' family, they are not traditional or customary authorities. They are elected local authorities who draw their legitimacy from the state, operating in accordance with Law 9/2016. As such, their legal role should be to refer public crimes to the police, rather than attempt to adjudicate themselves.

Because they work closely with both, *suku* authorities occupy an important 'bridging' role between the state and customary authorities. Under Articles 5 and 6 of Law 6/2016 they have the legal competency to keep the peace and to promote the resolution of conflicts that arise in and between communities, meaning they may mediate in case of semi-public crimes or civil matters. The law does not, however, specify how they should do this: whether it should be in the form of mediation, arbitration, or follow a different style of dispute resolution altogether. Because there is no clear legal definition, in practice this role more closely approximates arbitration.⁹⁹ This is an issue that should be addressed, and which is discussed in more detail in Section III of this report.

Role of Suco Police Officers

Alongside civic education and active engagement with local authorities, another important area for improvement relates to the role of the Suku Police Officers (OPS) as they accompany and provide security for customary and non-customary ADR. The role of the OPS is to keep the peace at the community level, and nearly all respondents reflected positively on their work in this regard, explaining that when they accompany ADR processes everyone understands that they are there as strictly neutral observers. This function was described by one OPS as follows:

We are not involved in customary process or mediation... The xefe suku or konsellu suku ask us to participate [in *tesis lia*/mediation] but not in order to resolve cases: the konsellu suku resolves it.... together with the xefe suku, we go to the suku and collect data... Our role is to ensure security so that the process doesn't lead to conflict.¹⁰⁰

The vast majority of OPS are men, with only 2% of OPS being women.¹⁰¹ The research team came across a number of situations where the OPS had accompanied ADR processes for domestic or sexual violence, which as public crimes should have been lodged with the formal justice system. When asked what OPS do in such cases, respondents explained

95 Interview, former xefe suku Bobometo, Oecusse, 16 November 2017; interview, community police council member, Oecusse, 16 November 2017.

96 Interview, community police council member, Oecusse, 16 November 2017. This work took place years before the KPK was formed.

97 Interview, community police council member, Oecusse, 16 November 2017.

98 Interview, Director Maneo, Oecusse, 15 November 2017.

99 Interview, Belun Coordinator & Mediator, Baucau, 11 December 2017.

100 Interview, community police officer, Baucau, 12 October 2017

101 UN Women Timor-Leste, Baseline: Women's Meaningful Participation in Peacebuilding and State-building, 2017..

that they generally explain to people that it is a public crime and what that means, and encourage the victim to make a formal complaint. As a civil society representative explained,

The police always give the option, but it depends on each individual. I see the police give motivation, but the women are dependent on their family, they are not independent. So the decision is also dependent on the family. Some police are women, they try to help, but the women (victims) are not brave enough.¹⁰²

However, in accompanying customary dispute resolution of domestic violence cases, there is a major risk that the presence of the OPS will be seen by community members as legitimising this approach, even if they clearly explain the legal requirements and/or attempt to encourage the victim. In addition, while most respondents put the responsibility on the victim to lodge a complaint and explained the role of the OPS in encouraging the victim to do so, this approach is not in accordance with the law. The law on public crimes is clear that anyone (not only the victim) may lodge a formal case.¹⁰³ For police officers, this becomes an obligation: by law, any police officer who becomes aware that a public crime has been committed must prepare a notification to that effect (initiate a criminal case).¹⁰⁴ Failure to do so is a criminal offence.

The work of the OPS is not easy, and their important role in maintaining peace and bringing the formal justice system closer to the people should be supported and maintained. In order to do their job properly as community police, they must secure the trust of community members and local leaders. However, relationship-building with the community cannot be conducted at the expense of failing to uphold the law. Recognising that customary dispute resolution may operate in parallel with the formal

justice system, the role of OPS in such cases is clear. They may accompany customary and non-customary ADR processes in the community, and in fact should be encouraged to do so. But in cases where they become aware that a public crime has been committed, they are also legally bound to lodge a criminal case.

While it is probable that this approach will simply mean that OPS are no longer invited to accompany such cases, when community members see OPS's practicing actions required by the law, it would have a strong educative impact. This would clarify that even if people choose to *tesilia* in crimes of domestic violence, such crimes must *also* be subject to criminal prosecution. In addition, it is important for prevention: if changes to OPS' practices are accompanied by a strong civic education program, and cases appropriately dealt with in the formal justice system, this may (over time) result in reducing community tolerance for domestic violence. It is therefore important that clear guidelines and codes of conduct are fully understood by OPS to lodge public crimes in the formal justice system, and to support them in clearly explaining their legal obligations as police officers to the community.

Mitigation & Aggravating Factors for Sentencing

A key way in which customary dispute resolution and the formal justice system interact is in the sentencing of offenders who have been convicted of a crime. In deciding on an appropriate sentence, judges have the competency to take into account a variety of mitigating and exacerbating factors, which serve respectively to either reduce or increase the sentence that is imposed. Agreements that are made through customary dispute resolution are taken into account as mitigating factors, along with other possible factors such as whether or not it was the offender's first offence, whether or not the offender confessed, if he or she was cooperative during court proceedings, and others.¹⁰⁵ While judges do not

102 Interview, women's advocate Atabae, Bobonaro, 8 November 2017.

103 Criminal Procedure Code, Articles 211 & 213.

104 Criminal Procedure Code, Article 211(1).

105 JSMP, The courts and Alternative Dispute Resolution, Dili, 2017

state explicitly for court monitoring purposes what impact a previous community resolution has on the outcome of the court proceedings,¹⁰⁶ respondents in this research explained that it is normal practice for judges to reduce sentences if the dispute has already been heard via customary dispute resolution, and a fine has been paid. As one judge explained,

if there is an agreement where a case has been resolved in the traditional system, we judges must respect what they decide, but also try to hear the case from both parties. If they have resolved according to their culture and [a fine has been paid], if there is a written agreement, then the court may simply say that in the future it should not happen again. The court can reduce the sentence and just give a fine or suspended sentence in order to prevent violence from recurring.¹⁰⁷

In practice, for crimes of domestic or sexual violence, this often means that a suspended sentence (often without conditions) is imposed. Judges' preference for applying suspended sentences in cases of domestic violence has been strongly criticised by civil society activists, who argue that judges do not apply the law fairly. Concerns have been raised that judges actively seek potentially mitigating factors, but ignore exacerbating factors such as the severity of violence, even where the victim was permanently disabled from the violence.¹⁰⁸ In addition, they argue, suspended sentences (and particularly those without conditions) might create a perception that the offender has simply been allowed to go free, especially to community members who do not understand the law.¹⁰⁹ This reinforces a general belief in men's entitlement to behave violently with their wives, and undermines efforts to address domestic violence in the country.

Questions of appropriate sentencing depend on how justice is envisioned. This looks at whether justice is more retributive (focusing on punishment of the offender) or restorative (focusing on rehabilitation

of the offender, victim, and community). From the perspective of women themselves, many domestic violence survivors say they want the violence to stop.¹¹⁰ One approach which seems to be reducing rates of recidivism (repeating incidents of violence) has been in Oecusse, where sentencing has been adjusted. In explaining the different approaches that he has tried, a judge in Oecusse explained that he gives suspended prison sentences, in which the offender may return to the community, but is incarcerated if he or she repeats the violence. As he explained, this has been effective in lowering the recidivism rate:

in 2012 when I first arrived in Oecusse, I gave suspended sentences. But offenders said to people that they didn't receive any punishment because they were free. So I started to give [domestic violence] offenders fines instead. But we found that fines are also not good, because both the husband and the wife came together to pay the fine.¹¹¹ After 2013 I started giving suspended prison sentences... and I saw those committing crimes were generally new people. In 2014 there was one person. In 2015, there were two recidivists who I sent to jail because they committed a crime during the suspension period... So, I feel this approach is a bit more effective.¹¹²

As he went on to explain, he has also tried attaching other conditions to suspended sentences, such as requiring an offender released on parole to give rice to feed his children every month, but such behavioural conditions are more difficult to implement because the court doesn't have the capacity to monitor for compliance, and other institutions have not taken on this role. As a result, he has mainly given suspended penal sentences which can be monitored from the court. This approach has met with approval from other stakeholders, who explained that the approach is simple enough for people to understand, and that

106 Ba Distrito (2016) *Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis*, 9.

107 Interview, Judge Baucau District Court, 12 October 2017.

108 Interview, Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017.

109 Interviews: Coordinator Uma Pas, Baucau, 11 October 2017; Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017.

110 FGD women victims & complainants, Bobonaro, 10 November 2017; FGD women victims & complainants, Baucau, 12 December 2017; FGD women victims & complainants, Oecusse, 17 November 2017.

111 Interview, judge REAO Court, Oecusse, 15 November 2017

112 Interview, judge REAO Court, Oecusse, 15 November 2017

the few cases where a man has been sent to prison shocked people and educated men and the rest of the community, warning them against reoffending.¹¹³

The use of suspended sentences for crimes of domestic violence is a murky area. While it is common practice for sentences to be mitigated when customary agreements are in place, the problem is not solely with the use of suspended sentences; it lies also in biased decision-making. Statistics show that in 2016, 80% of domestic violence convictions resulted in suspended sentences, as opposed to 50% for all other types of crimes.¹¹⁴ This is a major difference in treatment between different types of

crimes. As such, there are clearly deeper issues to review in considering judges' bias in sentencing for domestic violence versus other types of crimes.

It is also recognised that while suspended sentences may not be ideal, the formal justice system is unable to deal with the case load that it faces, which means that customary dispute resolution has an important role to play while people await trial. The challenge, therefore, is for sentencing to be approached so that it recognises customary agreements, while also having a measurable impact on reducing the incidence and recurrence of domestic violence.

113 Interview, Alfela Lawyer, Oecusse, 13 November 2017; interview FFSO lawyer, Oecusse, 13 November 2017.

114 JSMP (2017), *Sentencing and Domestic Violence: Suspending prison sentences with conditions*.

PRINCIPLES FOR RIGHTS-BASED MEDIATION (NON-CUSTOMARY ADR)

As discussed previously, there is no single approach to ADR in Timor-Leste. Instead, ADR is carried out by a mixture of local authorities, government bodies, civil society organisations, legal aid providers and others, using many different sets of guidelines of varying levels of quality that are used to guide mediators' work. As the Government of Timor-Leste is working on drafting legislation to govern this important area, there is an opportunity to learn from existing experience and create mechanisms and approaches that will improve women's access to justice.

Such mechanisms and approaches do not need to be developed from scratch, as there are already some good guidelines that are being used which reflect and uphold the basic principles of mediation: voluntary participation, equality of treatment, impartiality of the mediator, and genuine agreement between the parties on the resolution. However, there is room for improvement in creating a governing law, harmonising different approaches, and including mechanisms that will enhance women's participation.

Reflecting the reality that many women do not understand their basic rights and/or are frightened of the process and/or face potential repercussions if they speak openly during mediation, gender-sensitive mechanisms are necessary to ensuring that basic mediation principles are substantively met, rather than simply being formal in nature.

In revising existing mediation guidelines to make them more responsive to the needs of both women and men, research results indicate a few key areas to improve women's participation in mediation, and to improve ADR outcomes for women in Timorese communities. The following recommendations are

a starting point for taking forward the findings from this initial research.

Key Recommendations:

- **Amend Suku Law 9/2016 to clarify *suku* dispute resolution role as providing mediation only, and clearly define what is meant by mediation.**
- **Develop gender-responsive mediation guidelines and training materials specifically adapted for *suku* authorities (tailored to diverse levels of education).**
- **Recognise an existing body, or create a new body, to provide gender-responsive monitoring & support to mediators, to ensure their dispute resolution processes follow basic mediation principles and are sensitive to the needs of diverse women and men.**

Encouraging Women Disputants' Active Participation

While all respondents perceive that women and men have equal access to ADR processes, in practice it is known that women are less likely to speak openly in these processes than men. This is for a variety of reasons, including possible intimidation from the other party, fear of community judgement and social stigma, shame and fear of consequences in speaking about sensitive issues, social conditioning which makes her distrust that she can openly speak (and be heard), and others. As a result, positive steps must be taken to encourage women disputants to speak, beyond simply giving them the opportunity during proceedings. Respondents who were responsible for conducting customary and non-customary ADR explained that often female mediators were more effective in encouraging women to speak during the

proceedings.¹¹⁵ As one respondent, a member of the community policing council, explained,

I am a woman, so I go particularly [to help] other women, because they are always victimised... you need to understand her condition, she's traumatised and can't speak, so I as mediator must speak a lot in order to give her courage to speak. Because I see lots of men just ignore women... Maybe if she can't speak to the group, she can speak to me so that I can then speak for her in front of everyone.¹¹⁶

The effectiveness of female mediators was also repeated by other respondents (both male and female), including an *ex-xefe suku* who explained that he commonly asks women to accompany him in dispute resolution, specifically so they can help in encouraging the women to speak.¹¹⁷

To encourage women's active participation, respondents also emphasised the importance of training mediators, at two levels. For male leaders who use variations on customary approaches (eg. *suku* authorities or others), this may mean clearly explaining and working with them to understand and apply the principles of mediation, including giving equal speaking opportunity to men and women. For mediators who understand participants' formal right to equality, this means also clarifying that giving equal time to speak is not enough: they must actively encourage women to speak. As a civil society representative explained,

Often, they just give time and if the woman doesn't speak, they say ok, it's done. They don't try to encourage or urge her to speak. Because many women are not brave enough to just speak up, they just stay silent, so if we don't urge her, we don't get anywhere.¹¹⁸

Such encouragement might include speaking separately to the woman before proceedings to get her accustomed to speaking about the issue, allowing sufficient time for her to speak, working on

mediators' communication approaches (speaking softly, less assertively), and others. Training in such techniques should also be accompanied by ongoing support & monitoring for mediators.

Key Recommendations:

- **Encourage the recruitment and use of female mediators for ADR processes;**
- **Train, support & monitor mediators in actively encouraging women to speak during proceedings;**
- **Support women's organisations to provide assistance in preparing women who will be participating in ADR processes, so they are equipped with information on their rights and the process.**

Accompaniment by Women's Groups/NGOs

Women FGD participants in both Oecusse and Bobonaro identified as a priority that women's representatives should accompany women during ADR processes. Accompaniment for women was also recommended by other respondents, including mediators and civil society representatives. Specifically, respondents recommended that accompaniment should come from either women's groups dedicated to do this work, or from women's NGOs. When asked whether women who have been elected to the *suku* council representatives should be given this role, it was explained that they would not be appropriate, as they are often inactive in the community. In addition, as *suku* council members, they must report to the *xefe suku*, and might not be able to carry out this role independently.

Accompaniment by women's groups/NGOs in ADR processes would provide a number of benefits. They could act as role models, providing alternative perspectives to the gossip and social stigma that women may be subjected to by their family and in the community. In the lead-up to and during proceedings, they could give the woman disputant support and advice, helping her to present her case

115 Interviews: national mediator DNPCC, Bobonaro, 7 November 2017; Director Maneo, Oecusse, 15 November 2017; community police council member, Oecusse, 16 November 2017; former *xefe suku* Bobometo, Oecusse, 16 November 2017.

116 Interview, community police council member, Oecusse, 16 November 2017.

117 Interviews: former *xefe suku* Bobometo, Oecusse, 16 November 2017; Director Maneo, Oecusse, 15 November 2017.

118 Interview, Director Maneo, Oecusse, 15 November 2017.

clearly and in full. They could help her to understand her legal rights, so that she can make an informed decision when discussing different 'options' to resolve the issue. And they could monitor mediators themselves, ensuring that they carry out their role according to the basic principles of impartiality, voluntary participation and equality of treatment, and in compliance with the law and basic human rights standards. Crucially, in order for these benefits to be realised, their role in the proceedings would need to be formally recognised, and they would need to have the right to intervene if mediation is not being carried out properly.

Key Recommendations:

- **Support women's groups/NGOs to accompany women participants in ADR processes;**
- **Develop and pilot a formal system recognising women's groups/NGOs' accompaniment of women disputants during mediation to ensure they are recognised as legitimate participants.**

Putting Women's Safety First

Considering that customary authorities continue to *tesli lia* in cases of domestic violence, for improved complementarity, this may involve the customary dispute resolution and the formal justice system operating in parallel. However, for non-customary ADR providers, they should not mediate in domestic violence cases.

It is also recognised that civil disputes or conflicts do not occur in a vacuum: women's stories shared during this research clearly demonstrate that even for cases that appear to be non-violent in nature, such as disputes over land or child maintenance, there is a possibility that violence has also been part of the extended dispute. As such, the safety and decisions of women disputants must be prioritised. Mediation should be conducted in a safe environment, possibly accompanied by (preferably women) OPS and KPK if they exist in the *suku*, to ensure there is no intimidation

or bullying during proceedings. Where appropriate, steps should also be taken to secure women's safety after proceedings – possibly by clearly informing both parties that violence is illegal and that violent conduct during or after the mediation will result in criminal charges. Women should also be referred to appropriate NGOs or service providers for support, ensuring the woman and those supporting her have clear and easy access to the police if violence occurs following mediation.

Key Recommendation: Develop clear mechanisms for mediators, police and service providers to coordinate in protecting women's safety before, during and after mediation.

Mediation Venue

It is common for customary and non-customary ADR provided by *suku* authorities to be conducted in an open environment, with many community members who are not involved in the dispute also in attendance, including children.¹¹⁹ This is also an issue with the mobile courts, where cases may be heard in open proceedings in the Administrative Post or Municipal offices.¹²⁰ The openness of the proceedings negatively affects women disputants and witnesses, at times making them subject to community gossip, social stigma, and possible violence and intimidation, so that a woman is much less likely to speak openly and clearly, particularly in cases where she is ashamed or frightened. Respondents recounted many cases where, even if the woman was given equal opportunity to state her case during the dispute resolution process (and clearly had a case to share), she instead chose to stay silent.¹²¹ In response to this issue, some NGOs have established small mediation houses where they can keep proceedings private, which has shown a strong positive impact in encouraging women to clearly put forward their case during proceedings.¹²² Some of these NGOs have built mediation houses for their local area only, as was the case with Oecusse-based MANEO. A national NGO

119 Interviews: Belun Coordinator & Mediator, Baucau, 11 December 2017; Director Maneo, Oecusse, 15 November 2017.

120 Interview, xefe suku Holsa, Bobonaro, 8 November 2017

121 Interview, community police council member, Oecusse, 16 November 2017; interview, former xefe suku Bobometo, Oecusse, 16 November 2017; interview, Director Maneo, Oecusse, 15 November 2017; interview, Fokupers Uma Mahon Coordinator, Bobonaro, 7 November 2017; interview, women's advocate Atabae, Bobonaro, 8 November 2017; interview, national mediator DNPCC, Bobonaro, 7 November 2017.

122 Interview, Director Maneo, Oecusse, 15 November 2017.

(CEPAD has also built mediation houses called 'Uma Dame' with one built in six municipalities: Maliana, Aileu, Ermera, Manatuto, Baucau and Manufahi.

Key Recommendation: Ensure disputants can choose their preferred venue for mediation and mediation is conducted in a private venue.

Provision of Mediation 'Options' Within the Legal Framework

The final step in the mediation process is for the mediator to facilitate parties to identify possible options or suggest 'options' for the parties to consider as possible resolutions to their dispute. Suggesting options is a necessary step in ensuring the parties can independently decide whether the outcome will work for them, while also considering that they may be 'stuck' in their conflicting positions and options can help them find a possible resolution to which they can both agree to.

However, there is a risk that the options the mediator puts forward may not appropriately reflect a female disputant's legal rights and may in fact reproduce existing inequalities between the two parties. Because the mediator is looking for a possible outcome that will be agreed to by both, in cases where the male disputant is perceived to be adamant on his position and the female disputant is seen to be more amenable, there is a risk that the focus will be on moving the woman away from her rightful claim. This might be the case, for example, if the mediator suggests a compromise rather than a 'win-win solution'. For instance, an option of dividing disputed land between two parties might be proposed when the female disputant can legally claim 100%. If a woman doesn't know her rights under the law, there is a serious risk that the mediation will result in her signing away her legal rights.

Mediation is a process of negotiation and meeting the needs of the parties to a dispute. Ideally, it is conducted where parties can come to the mediation process with equal voice and knowledge. As such, the parties must be willing to shift from their conflicting positions and come to a mutually-agreed resolution. However, parties must have a basic knowledge of their legal rights in order to make a free and informed decision, and mediators should not encourage an option which would be in clear breach of one party's rights in order to find a common ground. As such, it is important that mediators are properly trained in providing options that reflect people's legal rights, and that they clearly explain those rights to both parties. Parties should also understand that they are not bound by any option and have the right to reject an option without negative consequences.

Key Recommendations:

- **Mediators should clearly explain parties' rights to the disputing parties before and during the mediation process;**
- **Train mediators in developing options that approximately reflect parties' legal rights, and communicating these basic rights to the parties, before and during the mediation.**

APPENDIX 1:

LIST OF INTERVIEWS & FGDs

BAUCAU: Key Informant Interviews

Gender	Position	Institution	Date of Interview
F	National Mediator	DNPCC	12 October 2017
F	National mediator/Suco Chief	DNPCC/ Soba	13 October 2017
M	Mediator	DNTPS	12 October 2017
F	Coordinator of Uma mahon	Uma Pas	11 October 2017
M	Judge	Baucau District Court	12 October 2017
M	Legal officer	ALFeLa	13 October 2017
M	Public Defender	Office of Public Defender	12 October 2017
M	Coordinator and Mediator	Belun	11 December 2017
M	OPS	Community Police	12 October 2017

FGD (10 women participants): 12 December 2017

BOBONARO: Key Informant Interviews

Gender	Position	Institution	Date of Interview
F	Coordinator of Uma Mahon	Fokupers	7 November 2017
M	Suco Chief	Holsa, Maliana	8 November 2017
F	Women Advocate	Atabae	8 November 2017
F	Victim	Memo	8 November 2017
F	National Mediator	DNPCC	7 November 2017
M	National Mediator	DNPCC	9 November 2017
M	Gender Focal Point	Municipal Administration	7 November 2017
F	Victim	Holsa	9 November 2017
F	Complainant	Holsa	8 November 2017
M	Prosecutor	Public Prosecutor	9 November 2017

FGD (12 women participants): 10 November 2017

OECUSSE: Key Informant Interviews

Gender	Position	Institution	Date of Interview
F	Director	Pradet	14 November 2017
F	Lawyer	Alfela	13 November 2017
F	Director	MANEO	15 November 2017
F	Complainant	Palaban	14 November 2017
M	Child Protection Officer	MSS	14 November 2017
M	Former Suco Chief	Suco Bobometo, Oesilo	16 November 2017
F	Member of KPK	Suco Bobometo, Oesilo	16 November 2017
M	Mediator	DNTPS	15 November 2017
M	Mediator	DNPCC	13 November 2017
F	Coordinator uma mahon	FPWO	16 November 2017
M	Judge	REAO Court	15 November 2017
F	Community Police	PNTL	15 November 2017
F	Complainant	Interview at Alfela	17 November 2017
F	Women Advocate	Naimeko	16 November 2017
F	Complainant	Oesilo	16 November 2017
M	Lawyer	FFSO	13 November 2017

FGD (9 women participants): 17 November 2017

APPENDIX 2: FGD RESULTS

Following is a list of issues identified by women victims and complainants (FGD participants), based on their analysis of what most needs to be addressed to improve access to justice for women in their community. The FGD participants prioritised the issues from most to lesser importance, following a participatory voting methodology.

No	Focus Group Discussion: Oecusse
1	Need men to accept responsibility for the needs of the children
2	Prosecutors need to seek in-depth story from victims
3	Need to examine the problems of alimony if men are imprisoned and abandon the family
4	Need a group of women to provide accompaniment/support during traditional hearings /judgements
5	Need the community to be willing to act as witnesses (5,6,7 have the same value)
6	Victims need to properly understand the roles of justice institutions
7	Suco chiefs need to improve their approach (not imposing fines on women victims)

No	Focus Group Discussion: Oecusse
1	Community lacks information regarding violence, DV and LADV (majority identify this issue as first)
2	Judges don't make decisions based on the law and the women's situation
3	NGOs/women groups need to participate in process of traditional hearing/ judgements
4	Need to regulate polygamy (4 & 5 have the same value)
5	Need monitoring system for cases of abandonment
6	Courts are a long way away (6 & 7 have same value)
7	Judges don't allow women to speak, don't listen to them
8	Culture/customary law/lisan only blames women
9	There is no process if a police officer becomes a DV perpetrator

No	Focus Group Discussion: Oecusse
1	Government/Courts need/s to follow-up on abandonment cases when decision is not followed
2	Need training to prevent DV and need to coordinate between church and Government
3	NGO that provide support to victim need to continue follow up (for DV case)
4	Need to provide another condition while on suspended sentence
5	Prosecutors need to take active action if the perpetrator does not present (several times)
6	Police need to be more active in the investigation process (do not ask victim to find suspect)
7	Courts need to provide clear information and explain the decision as well as provide the copy of decision in Tetum

LIST OF REFERENCES

- Ba Distrito (2014), *Baseline Survey: Local Governance and Access to Justice in Timor-Leste, Dili*. Counterpart International: Timor-Leste.
- Ba Distrito (2016) *Community Dispute Resolution in Timor-Leste: A Legal and Human Rights Analysis*. Counterpart International: Timor-Leste.
- Babo-Soares, D. (2004) "Nahe Biti: the Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor", *The Asia Pacific Journal of Anthropology*, 5(1) April 2004, 15-33.
- Boavida dos Santos, A. and da Silva, E (2012) 'Introduction of a Modern Democratic System and its Impact on Societies in East Timorese Traditional Culture', *Local-Global Journal*, vol 12.
- CEPAD (2014), *Women's Access to Land and Property Rights in the Plural Justice System of Timor-Leste*. CEPAD: Dili, Timor-Leste.
- Cummins, D. (2014) *Local Governance in Timor-Leste*, Routledge: London & New York
- Cummins, D. (2012) *Ami Sei Vitima Beibeik: Looking into the needs of domestic violence victims*. The Asia Foundation: Dili, Timor-Leste.
- Government of RDTL, *Timor-Leste Strategic Development Plan 2011-2030*. Government of RDTL: Dili, Timor-Leste.
- Government of RDTL, *Justice Sector Strategic Plan for Timor-Leste 2011-2030*. Government of RDTL: Dili, Timor-Leste.
- Grenfell, L. (2006) "Legal pluralism and the rule of law in Timor-Leste", *Leiden Journal of International Law*, 19(2), 305-337.
- JSMP (2015) *Overview of the Justice Sector 2015*. JSMP: Dili, Timor-Leste.
- JSMP (2017) *Sentencing and Domestic Violence: Suspending prison sentences with conditions*. JSMP: Dili, Timor-Leste.
- JSMP (2017) *Courts and Community Dispute Resolution*. JSMP: Dili, Timor-Leste.
- Khan, N. & Hayati, S. (2012) *Bride Price and Domestic Violence in Timor-Leste*. Fokupers: Dili, Timor-Leste.
- Kirk, T. (2014) *Legal Aid Lawyers and Paralegals: Promoting Access to Justice and Negotiating Hybridity in Timor-Leste*. JSRP and The Asia Foundation: Dili, Timor-Leste.
- Mearns, D (2002), *Looking Both Ways: Models for Justice in East Timor*. Australian Legal Resources International: Canberra, Australia.
- Miranda, S. (2011). *Relatório Género e Agricultura em Quatro Distritos de Timor-Leste (Bobonaro, Ermera, Manatuto e Viqueque)*. Secretaria de Estado para a Promoção da Igualdade: Dili, Timor-Leste.
- Narciso, Henriques, Tilman (ND), 'Land and Gender in Matrilineal Timor-Leste', available online at <https://dspace.uevora.pt/rdpc/bitstream/10174/7097/1/LAND%20AND%20GENDER%20IN%20MATRILINEAL%20TIMORLESTE%20FINAL.pdf> (accessed 20 March 2018).
- Ride, A. (2016) Involving Participants in Data Analysis. In D. Bretherton and S. Fang Law (Eds.), *Methodologies in Peace Psychology*. Springer: New York.
- The Asia Foundation (2013) *Timor-Leste Law and Justice Survey*. The Asia Foundation: Dili, Timor-Leste.
- The Equality Institute on behalf of the Asia Foundation (2017), *Understanding Violence Against Women and Children in Timor-Leste: Findings from the Nabilan Baseline Report. Main Report*. The Equality Institute: Dili, Timor-Leste.
- United Nations, *A Practitioner's Toolkit on Women's Access to Justice Programming, 2018*
- UNDP (2013) *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: Dili, Timor-Leste.
- World Health Organization (2001), *Putting Women First: Ethical and Safety Recommendations for Research on Domestic Violence Against Women*. WHO: Geneva.

Timor-Leste Legislation

Criminal Procedure Code.

Land Law: Law No.13/2017.

Law Against Domestic Violence: Law No. 7/2010.

New Statute of Public Defender: Decree Law No.10/2017.

Penal Code: Decree Law No. 19/2009.

Suku Law: Law No. 09/2016.

International Law

International Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

UNSCR 1325 on Women, Peace and Security (2000).



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