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Suku Councils' Role in Effective Local Governance

Review, Considerations and Recommendations

Counterpart International
USAID funded Ba Distrito project

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SECTION A: UNDERSTANDING THE SUKU COUNCIL

Background

In the lead-up to revision of Law 3/2009, the Ministry for State Administration has requested USAID-funded program, Ba Distrito, to undertake an analysis of the potential impacts, both positive and negative, of different proposed legal status for the *suku* council. To this end, a consultant was engaged by Ba Distrito from 9 June 2014 until 20 June 2014, to undertake a review of Law 3/2009 and proposed legal options for *suku* council status, contextualised in the Timorese local governance environment and broader political realities.

As has been recognised by previous studies, the question of *suku* council legal status, and associated responsibilities, is complicated, as the council essentially operates at the interface of customary governance norms that are still embraced by communities, as well as carrying important responsibilities delegated by the state.¹ This combination of customary and state responsibilities means that there are also activities that are carried out by and through the *suku* council that are essentially ‘invisible’ to law and policy-makers. These functions, while often not recognised as part of the state’s field of reference, are nonetheless indirectly relied on by the Government of Timor-Leste (GoTL), as councils fill in essential gaps in service delivery, and also carry out other functions which allow them to gain and maintain the trust of the community.² The perceived responsiveness of the *suku* council to community needs, and capacity to represent the community to external stakeholders, in turn allows the *suku* council to garner sufficient local legitimacy in solving local problems, and organising their community.³

The key aspects to be reviewed were the *suku* council’s roles and responsibilities in relation to: (i) service delivery, (ii) natural asset regulation, (iii) accessing state-derived entitlements, (iv) conflict resolution and (v) domestic violence prevention. This analysis is provided in Section B of this report.

In Section C, this report considers implications for the different legal options as follows:

- (a) remaining with the status quo, where, under Law 3/2009 and clarified by the Court of Appeal’s decision in 2009, *suku* councils are defined as “traditional organisational structures”, “intermediate bodies” which existed “prior to the state itself”. They are not considered public entities, and therefore are not part of the GoTL structure.
- (b) specifically defining *suku* councils as private associations in accordance with Articles 186 to 192 of the Civil Code; and
- (c) specifically recognising *suku* councils as local power, under the Local Power provision, Art 72 of the RDTL Constitution.

Drawing on the findings presented in Section B and C, and combining this with other research, Section D presents recommendations for the revision of Law 3/2009, based on the following themes: harmonization with existing legislation; improved representative local governance; increased citizen participation (including equal participation by women and youth); more realistically defined roles and responsibilities of *suku* councils, reflective of current functionality

¹ UNCDF (2009), *Building an Efficient & Democratic Relationship between Sucos and Municipalities in Timor Leste: Analysis & Recommendations, Local Governance Support Program*, UNCDF, Dili, Timor-Leste

² UNCDF (2009), *Building an Efficient & Democratic Relationship between Sucos and Municipalities in Timor Leste: Analysis & Recommendations, Local Governance Support Program*, UNCDF, Dili, Timor-Leste

³ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

and the government's priorities; clarity of roles and responsibilities of *suku* councils in relation to conflict resolution and domestic violence prevention; improved service delivery to the *suku* level, and incorporation of accountability mechanisms.

The Timorese local governance environment

Suku leadership has been a central element of Timorese governance since pre-colonial days. Throughout the various iterations of Portuguese colonisation, Indonesian occupation, UNTAET administration and now independent Timorese government, *suku* authorities have held prime importance, effectively acting as a 'bridge' between community members and those who wish to engage with them.⁴ In contemporary Timor-Leste, *suku* leadership continues to enjoy high levels of legitimacy with community members.⁵ There are a number of reasons for this. They live with communities, so are considered more able to represent communities' interests to government. They are considered to primarily accountable to communities, because they are directly elected. And their long history means that they are deeply embedded in Timorese governance consciousness, often seen as forming the basic building blocks for other, broader systems of governance.⁶

Contemporary *suku* councils are sometimes referred to as "traditional authorities", however this is a misrepresentation of their place in the Timorese governance landscape. *Suku* councils are intimately linked with *lisan*⁷ and people's cultural identity in the *suku*, however they are not one and the same thing. The impact of customary governance and authority on the *suku* council varies from one place to the next, depending for example, on whether the *suku* is urban or rural, whether it is a 'new' *suku* formed in Indonesian times or has existed since Portuguese colonial consolidation, and various other local historical factors.⁸ Historically and culturally, the centre of Timorese life has been small, kin-based groups, bound together through hierarchical systems of mutual exchange and governed via *lisan*.⁹ These groups have their own traditional authority structures, with leaders receiving recognition through customary modes of inherited authority, balanced by some meritocratic elements which vary from one place to the next. Throughout the centuries, these systems of governance have operated in parallel with the governance structures of the external rulers, at various times being either reinforced or undermined by the imposed power structures—resulting in various forms of political hybridity that continue to be reflected in contemporary local governance arrangements.¹⁰ The interface that developed between *lisan* and the law of the colonisers was porous, as it is today, which means there were many different ways in which communities could adapt to external pressures while maintaining the core of who they were and are as a people.¹¹

⁴ Cummins, D (2010), *Local Governance in Timor-Leste: The Politics of Mutual Recognition*, PhD thesis, The University of NSW, Australia; Davidson, K. 1994, *The Portuguese Consolidation of Timor: the Final Stage, 1850-1912*. Unpublished PhD Thesis, University of New South Wales, Sydney

⁵ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

⁶ Research by Dr Deborah Cummins, conducted in a project with the Berghof Foundation 2010-2012 (chief investigators Volker Boege, Anne Brown and Louise Moe, University of Queensland).

⁷ *lisan*, also referred to by the Indonesian term *adat*, refers to customary law and governance but is in fact much broader, encompassing morality and spirituality. For the purposes of this report, *lisan* is used to refer to customary law and governance only.

⁸ Tilman, M. (2012), 'Customary Social Order and Authority in the Contemporary East Timorese Village: Persistence and Transformation', *Local-Global Journal*, vol. 12, pp. 192-205.

⁹ Hicks, D. (1983), 'Unachieved Syncretism: The Local-Level Political System in Portuguese Timor, 1966-1967'. *Anthropos*, vol. 78, pp. 17-40; Farram, S. (2004), *From 'Timor Koepang' to 'Timor NTT': A Political History of West Timor, 1901-1967*. Unpublished PhD Thesis, Charles Darwin University, Darwin.

¹⁰ Boavida da Santos, A. & 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, pp. 206-220.

¹¹ Boavida da Santos, A. & 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, pp. 206-220.

In this respect, contemporary *suku* councils are better understood as hybrids rather than as traditional bodies.¹² The council is a body that is formed through the Law of Timor-Leste, *suku* council members are directly elected by community members with the election carried out by state electoral bodies, and there are various elements of the council membership that are specifically intended to be ‘modernising’ influences: in particular reserved seats for women and young people¹³, and the expectation that the council operate as a “collegial and advisory body”¹⁴ to the *xefe suku*¹⁵, cutting through traditional, hierarchical modes of leadership. Even for the *suku lia-na’in*¹⁶ who is appointed rather than elected, there are many other non-elected *lia-na’in* who operate in the *suku*. Local leaders in many parts are clear that these non-elected *lia-na’in* exercise different functions, and that the *suku lia-na’in* therefore cannot simply be understood as a ‘customary’ or ‘traditional’ authority.¹⁷ Nonetheless, in the contemporary Timorese governance environment in which *lisan* continues to play a vital role, the *suku* council often works closely with customary authorities in carrying out their duties, and community members commonly seek to elect those with customary authority to the position of *suku* leader.¹⁸ In more conservative communities, the *xefe suku* is seen as continuing the role of the *liurai* (king), who demand that the elected *xefe suku* fulfil customary notions of local authority.¹⁹ However, in other communities, the term *xefe suku* may be used interchangeably with *kepala desa*, the local chief during Indonesian times, who clearly exercised state functions.

The interaction between *suku* councils and traditional authorities varies from one *suku* to the next, depending on the particular needs of the community, and also changes over time as new influences and ideas of legitimate governance enter the villages.²⁰ The legitimacy that *suku* authorities can claim in the community comes primarily from their directly election into office, closely followed by the expectation that they be primarily accountable to the community, representing community interests to the Government.²¹ While it is true that many communities continue to elect *xefe suku* according to whether they can command cultural legitimacy, community members are also clear that direct elections are extremely important to them.²² The beauty of direct election is that it allows communities to choose according to their particular needs, allowing flexibility for the different political needs of different communities, and flexibility for their changing governance circumstances. Regardless of how the *suku* council is understood - as the term ‘hybrid’ is still not settled in the academic literature - **the importance of the *suku* council lies in its policy ‘thickness’,** based on the long history of *suku*-level leadership and the fact that it provides the most important interface between communities and external stakeholders, including the GoTL.

There are two important implications for this understanding of the *suku* council. First, it should be recognised that the historical embeddedness of community leadership and its links with culture does not mean that these dynamics are set in stone. Local governance can and does change—sometimes dramatically. Customary governance is in the process of changing, just as state governance can change. This means that legislative amendments need to **appropriately intersect** with existing

¹² Research by Dr Deborah Cummins, conducted in a project with the Berghof Foundation 2010-2012 (chief investigators Volker Boege, Anne Brown and Louise Moe, University of Queensland).

¹³ Article 5(2) Law 3/2009

¹⁴ Article 5(1) Law 3/2009

¹⁵ chief of the *suku*, comprised of a number of *aldeia* or villages.

¹⁶ *lia-na’in*: literally translates as “owner of the word”, responsible for the maintenance, correct interpretation and implementation of *lisan* in the community, including mediation of disputes in accordance with customary law.

¹⁷ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

¹⁸ Cummins, D. and Leach, M. (2012), "Democracy old and new", *Asian Politics and Policy*, vol. 4, no. 1, pp. 89-104.

¹⁹ Cummins, D. and Leach, M. (2012), "Democracy old and new", *Asian Politics and Policy*, vol. 4, no. 1, pp. 89-104.

²⁰ Tilman, M. (2012), ‘Customary Social Order and Authority in the Contemporary East Timorese Village: Persistence and Transformation’, *Local-Global Journal*, vol. 12, pp. 192-205; Boavida

²¹ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

²² The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

local governance norms, building on existing sources of community strength. This represents the best use of existing state and local resources, and is also the policy path that is most likely to facilitate a positive government ‘presence’ in the *suku*, as agencies carry out their various service delivery functions.

Secondly, it does not mean that for customary governance to function, it must be formally recognised and incorporated into the state structure. Customary governance exists regardless. As the Court of Appeal recognised, traditional authorities existed prior to the state itself.²³ To formally recognise customary or traditional norms of governance is a fundamentally political decision - and it should be understood that to recognise custom through state legislation is also to change it, to fix it in place, and to impose a single structure on diverse modes of *lisan* and community norms. Whether or not the GoTL chooses to recognise traditional law or governance through state legislation, it is important to recognise the presence of customary governance as it forms part of the governance environment in which people operate.

International legal principles of recognition

The principle of ‘recognition’ comes from international legal principles on respecting and preserving Indigenous rights to self-determination, including the preservation of traditional rights to land, cultural heritage and customary governance, religion and language. Its applicability is somewhat disputed according to different definitions of ‘Indigenous’, however it is generally understood to have some level of applicability across all post-colonial situations.

Its applicability in the Timorese context is debatable. While other national contexts in which the government presence is relatively strong vis-a-vis local identities, there may be a good argument for explicitly recognising traditional structures in order to balance the extreme power of the state to ‘homogenise’ different communities. However, the bigger issue in the current Timor-Leste context is the ‘gap’ which exists between the Timorese state and communities, and the need for the GoTL to appropriately intersect with communities, share power and provide much-needed services.

Beyond international legal principles and Constitutional requirements to recognise and respect tradition, there is also an important practical element for policy-makers to consider. Culture and customary governance is not only a ‘good’ in its own right. *Suku* leaders source legitimacy through the cultural ‘services’ they provide to communities. If these functions are not respected, the state loses the most important route in to communities, which will negatively impact on state-society relations including ideas of citizenship and service delivery.

To facilitate this positive interrelationship between communities and the state, it is important for legal instruments to provide sufficient space for allowing communities to embrace their traditions and cultures, whilst also being in line with Timor-Leste’s law and human rights obligations.

²³ Relatorio 2/Const/2009/TR: 9

SECTION B: ROLES AND RESPONSIBILITIES EXERCISED BY SUKU COUNCIL

Service delivery

Levels of activity in relation to service delivery and other responsibilities vary significantly, depending on the capacity and willingness of *suku* leaders to take on the various roles that are expected of them. For more active *suku* leaders, their day-to-day activities with regard to service delivery are quite broad, including coordinating the delivery of services to community members, undertaking local planning for particular decentralised development programs, administering administrative funds and increasingly carrying out some responsibilities for program funds such as their obligations as members of KPA²⁴ for PNDS²⁵, resolving community disputes, coordinating with the police and others if conflict breaks out, playing a role in local, customary regulations for local resource management, and various other functions. Law 3/2009 defines *xefe suku*, *xefe aldeia* and *suku* council responsibilities under Articles 10 to 14 in broad, loose terms. Article 10 introduces the functions of the *suku* leader and *suku* council as “carrying out activities” in peace and social harmony, population census and registration, civic education, promotion of the official languages, economic development, food safety, environmental protection, education, culture & sports, assistance in maintenance of social infrastructures such as housing, schools, health centres, opening of water wells and communications. Articles 11 and 12 lay out the responsibilities of *xefe suku* and *suku* council in equally broad terms, and Articles 13 and 14 provide for the functioning of the *suku* council and *xefe aldeias*.

Under Article 11, the responsibilities of the *xefe suku* are described as coordinating *suku* council decisions, carrying out “continuous” planning with the community, and cooperating with the Municipal Administration and Government representatives on the procedures to be adopted in carrying out the *suku*’s activities. In addition, they are responsible for local dispute resolution, with particular duties relating to the prevention of domestic violence and protection of victims, requesting intervention from security forces when needed, providing financial and annual report on *suku* activities, as well as a catch-all phrase: “exercise such other duties as are consistent with the nature of their duties, or as are assigned by the Government or the Municipal Administration”.

Under Article 12, the responsibilities of the *suku* council are a mixture of supporting the *xefe suku* in carrying out his or her responsibilities, as well as carrying specific responsibilities in identifying, planning and monitoring activities in the fields of health, education, environment, employment and food safety promotion, promoting the principle of equality, promoting respect for the environment, ensuring respect for *suku*’s customs and traditions, and various other responsibilities including a similar catch-all phrase of “cooperate with the Government and the Municipal Administration in implementing plans and activities aimed at promoting the development of the *suku*”.

The legal responsibilities of the *suku* council do not stop at Law 3/2009, however. The broad nature of these duties and functions legally entitles various Government Ministries and Agencies to develop their own laws and policies guiding specific service provision, and placing particular expectations and rights on the *suku* leadership with regard to this service provision. For example, the Timor-Leste Fisheries legal framework (Decree law 6/2004) puts in concrete form the *suku* council’s responsibilities to protect the environment, and promote food security. Article 6, (a) and (d), states that the Government should involve community leaders and fishing groups when designing fisheries management plans and establishing marine spatial plans. Article 10 states that

²⁴ KPA: *Komisaun Planeamentu no Akontabilidade*, or Planning and Accountability Commission, a *suku*-level body that decides development priorities, and then oversees the implementation of projects under PNDS (see below).

²⁵ PNDS: *Programa Nasional Dezenvolvimentu Suku*, or National Suku Development Program, a Community-Driven Development program which began in 2013, providing block grants to *suku* to provide for small-scale infrastructural projects

certain areas may be managed under local management systems enacted by community leaders and fishing groups.

It is common for different sectoral legal frameworks to specify the formation of a local group in the *suku* who work together with members of the *suku* council, for example water management groups, seed groups, PNDS village councils, and others. It is likely that as the government continues to extend its reach into the *suku*, and the government itself expands, creating new programs, Departments and Ministries, these groups will continue to multiply locally. Each of these groups has different rights and responsibilities, according to the specific provisions of the policy instrument which guides project selection & planning, implementation, and operations & maintenance. Some frameworks are very specific on the role of *suku* council, such as PNDS specification that *suku* council will be part of KPA, exercising certain duties and not others. Others are less so. Sometimes the requirements only apply to some *suku* - for example, the responsibility of Dili *suku* councils in organising the community to carry out *limpeza urbanu* (Ministerial Diploma No. 8/2014). Often, the roles for *suku* council are limited to organising the community to participate, assisting or guiding planning activities, and assisting in operations and maintenance. For more 'busy' *suku* (often those closer to the district centre), the responsibility to be involved in multiple groups, attending multiple government & NGO group meetings, can accumulate beyond the capacity of *suku* council members to manage.

The use of local groups, when done well, is a good modality to encourage participatory approaches to program and service delivery. However, it also carries a coordination 'cost' in integrating between multiple groups, either causing a drain on officials or *suku* council in attempting to coordinate between different activities locally while also conforming to different program requirements—or, more commonly, carrying an opportunity cost of un-integrated local planning. It also causes a drain on the community, as the limited pool of active, capable community members are increasingly called upon to be members of multiple groups. The issues of integration therefore apply at two levels of governance. At the district level, there is a need for integration of program requirements, which will be a major task for the new District Managers and administrators. At the community level, also, there is a need for coordination between the different groups.

This legal framework, in which responsibilities are broadly defined across multiple instruments, means that there is a major disjuncture between the resources, capacities and powers of the *suku* council, and their legal responsibilities that accumulate locally. Across the board, *suku* councils state that they are not paid sufficient incentive for the many different responsibilities that they are expected to carry. Understandably also, most *suku* councils note that the expectations under the law are overwhelming, which is exacerbated by inadequate resourcing and training to carry out this work.²⁶ This is especially so when it comes to provisions such as "promotion of national languages", or "promoting the principle of equality", in which it is unclear what activities they should in fact be carrying out.²⁷ Because there is still limited state 'reach' into the villages, in practice *suku* councils simply do what they most able to and most inclined to carry out, according to what they see as most relevant. The areas in which they perform most strongly continue to be what has historically been the 'core' functions of *suku* leadership: 'organising the community' and 'resolving local problems'.²⁸

In addition, there is also a more 'invisible' aspect to the *suku* council's contribution to service delivery: resolving disputes that arise as a result of the service delivery. This can be extremely time-

²⁶ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

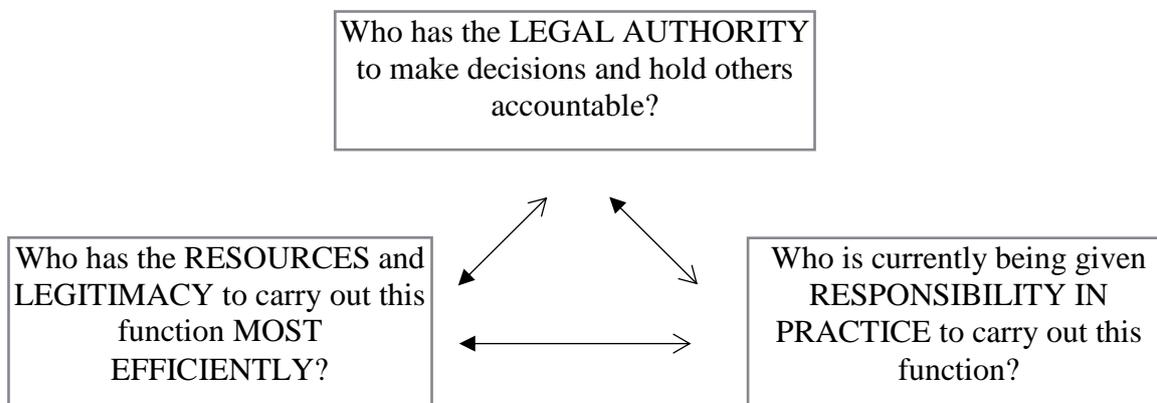
²⁷ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

²⁸ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste; Cummins, D (2010), *Local Governance in Timor-Leste: The Politics of Mutual Recognition*, PhD thesis, The University of NSW, Australia

consuming, and, when money is involved, difficult to manage. The difficulties that may arise can be seen in the experience of recent decentralised development programs, PDL (*Programa Dezenvolvimentu Lokal*) and PDD (*Pakote Dezenvolvimentu Desentrilizadu*).²⁹ In some situations, where the *suku* council has no real control over how projects are implemented - for example, where they undertake day-to-day monitoring, but are unable to make their voices heard when they wish to make a complaint - there is frustration when community members blame them. This adversely impacts on their legitimacy with the community. There is strong community dissatisfaction with *suku* council mediation of issues regarding development and other activities implemented by or through *suku* council. Many community members report that they complain to *suku* council members, but the issue is only addressed if construction is impeded or resulting in violence.

In practice, it is common for there to be disharmony between which body is expected to carry out local service delivery, and which body has the legal authority, resources and capacity/legitimacy to effectively carry it out. There are many situations in which government officials will push back onto the *suku* council responsibilities that should not properly rest with them. This can be seen, for example, in issues of planning where the community is stopped from putting in a project request under eg. PNDS because they have already put in the same request some time ago under a different program, but have not heard any response. In such situations, it is not uncommon for the *xefe suku* to be advised that he or she must coordinate with the relevant government agency, find out where the backlog is, and get things moving again. It is clear that the *suku* council is not in the best position to be able to do this. It is also not uncommon for *suku* leaders to complain that government officials ‘use’ them as a type of insurance with the community. While they are expected to assist the government officials in organising the community to carry out different activities, they are unable to influence the implementation to improve local delivery of services.

A necessary correlation to the unclear definition of *suku* leader and *suku* council responsibilities is that *suku* councils simply choose to carry out those functions that they are most comfortable with. It is in the government’s interest to more clearly define their expectations, in accordance with the capacity, resources and authority that are given to the *suku* council. In particular, the responsibility to ‘coordinate’ with the GoTL under Articles 10 to 14, would benefit from more specific analysis, clearly defining how power and responsibility is shared. At issue is the question of where government or other agencies’ responsibility ends, and *suku* council responsibility begins. Without such a clear definition, based on a realistic understanding of what activities *suku* councils have the power and capacity to implement, and what are best left to government officials, there will continue to be program failure at implementation stage. Developing appropriate and reasonable responsibilities for service delivery requires the capacity to harmonise between three main areas:



²⁹ The Asia Foundation (2012), *Community Experiences of Decentralised Development*, Dili, Timor-Leste

It is likely that the level of power (and therefore appropriate rights, responsibilities and resources) that is granted to the *suku* council will ultimately depend on the GoTL's decision on whether or not the council should be recognised as local power.

Natural asset regulation

Environmental protection

Article 10 states that the *suku* council and *xefe suku* may carry out activities in the field of environmental protection. Under Articles 11 and 12, however, there is no mention of the *xefe suku*'s specific responsibility for environmental protection and natural asset regulation. Under Article 14, the *xefe aldeia* has the power to 14(c) implement *suku* council decisions regarding the village, (d) resolve minor disputes, and (e) promote respect for the law and cooperate in pursuing social stability. The *suku* council's responsibility is specified as 12(c) identifying, planning and monitoring activities that are carried out in the field of environment, and (f) promoting respect for the environment. Beyond these broad clauses, there is no further clarity of the *xefe suku*, *xefe aldeia* or *suku* council's specific role in regulating natural assets.

Because of the broadness of these articles, the legal responsibility of *xefe suku* and *suku* council in regulating natural asset regulation depends on other enabling legislation relating to the environment and use of natural assets, which gives rights and responsibilities to *suku* leadership. For example, in practice, much regulation is done according to customary processes, which may or may not be supported by state authorities. The *xefe suku* and *suku lia-na'in* in particular commonly work to support *tara bandu* ceremonies, a local customary institution which places obligations and prohibitions on specified behaviour. As this is a customary institution, and so within the purview of customary leaders (who may or may not also sit on the *suku* council), *suku* council members are clear that they play a supporting role to the customary leaders who lead the *tara bandu* ceremonies.³⁰ However, depending on the level of customary legitimacy they can claim in the *suku*, and also their capacity to source external support for more expensive (larger) *tara bandu*, they may take a very active role in preparations for these ceremonies. The local force and legitimacy of *tara bandu* varies, depending on the history of the community, whether it is seen locally to follow the 'right' processes, and involve the 'right' people. In many places, it is still very strong, and is used in both urban and rural areas, to varying degrees of success.

Tara bandu is not merely a community 'agreement': it sources its legitimacy through customary law and associated sacrifices and sanctions, and so it is seen locally to hold real power. There have been various attempts at revival of *tara bandu*. There has been at least one instance noted in 2010 of a 'new' *suku* (*suku* Bairo Pite, in Dili), which lacks the traditional authority structures, attempting to revive the practice by approaching a neighbouring *liurai* to adopt customary authority over them and so allow them to continue this practice.³¹ It is unclear how sustainable this effort has been.

Given its legitimacy in many communities, and in particular its focus on environmental and natural asset regulation, *tara bandu* has attracted significant interest from various external actors seeking to make use of it.³² It is not uncommon for local leaders to say that they want to do a *tara bandu* for specific local issues, but they have put in an application and are waiting for someone to fund it. However, it has also rightly been noted that to co-opt the institution - in particular to provide external funding for *tara bandu* ceremonies - can negatively impact on local buy-in because it

³⁰ Cummins, D (2010), *Local Governance in Timor-Leste: The Politics of Mutual Recognition*, PhD thesis, The University of NSW, Australia

³¹ Tilman, M. (2012), 'Customary Social Order and Authority in the Contemporary East Timorese Village: Persistence and Transformation', *Local-Global Journal*, vol. 12, pp. 192-205.

³² Babo-Soares, D. 2004 '*Nahe biti*: The Philosophy and Process of Grassroots Reconciliation (And Justice) in East Timor', *The Asia Pacific Journal of Anthropology*, vol. 5, pp. 15-33.

misses the vital step of different families contributing to the ceremony, thus demonstrating their commitment to the regulations being agreed.³³ This weighs against the other side of the argument, in which it is pointed out that particularly for inter-*suku* problems such as violence between communities, the ceremony is big and too expensive for them to bear on their own.³⁴ For these communities, the seriousness of the problem means it *should* attract external interest and support. This issue was highlighted in the Naktuka case in Oecusse in which local leaders were asking for support on a cross-border *tara bandu*, in which there are problems with ex-militia based across the border in Indonesia, burning people's houses in Timor-Leste. The Asia Foundation and the Ministry for Foreign Affairs are working with communities a community dialogue and *tara bandu* that will help them to address this cross-border issue.

It has also been noted that an over-reliance on *tara bandu* rather than broader participatory processes can also translate into a reproduction of existing inequalities, particularly relating to gender. The most obvious examples are *tara bandu* that incorporate domestic violence provisions (now illegal under the Law Against Domestic Violence 2010).³⁵ But this issue can also become apparent in seemingly more innocuous settings - for example, in local regulations on harvesting practices which may adversely impact on women's work.³⁶

Dispute resolution relating to land or other natural resources

Under Article 11 and 14, *suku* leaders are also responsible for resolving 'minor disputes' in the village. In practice, use of land and other natural resources is a common source of conflict in development projects, and community life more generally. Together with the *xefe suku*, it is common for *xefe aldeia* and *suku lia-na'in* to mediate land and other disputes. It is generally understood that sensitive land and natural resource issues should not be arbitrated: when asked to do so by community members, *suku* council members attempt to mediate, and if they are unable to arrive at consensus with the conflicting parties they will generally refer it to the subdistrict level of governance, and from there to district and national level. The national body of DNTP is empowered through Law 1/2003 to resolve land disputes. But nearly all cases that reach DNTP have already gone through customary mechanisms, indicating the need to use those systems first.

Accessing state-derived entitlements

Social transfers are currently provided by the government in the form of orphan's assistance, widow's assistance, payments to the disabled and elderly and payments to veterans. Because the *suku* council is not part of the government structure, *suku* leaders are only responsible for collecting information on who is eligible in their *suku*. They provide this to the relevant authorities at subdistrict level (with, for example, veterans lists being compiled by someone who is different to the relevant MSS (Ministry for Social Solidarity) official who collects and disburses orphan's, widow's and elder payments). There have been many complaints regarding people's rights to receive veterans' payments. Once the list is compiled, this is then (in theory) checked by the relevant official, who will enter this person into the system. Payments are disbursed by the MSS official in the subdistrict. For those who are unable to walk to the administration building (for

³³ Cryan, M., (2008), *The Causes and Effects of the 'Traditional Law' policy vacuum in Timor-Leste: An NGO perspective and a case study of the revival of Tara Bandu*, unpublished MSc thesis, University College Dublin, December 2008

³⁴ Research by Dr Deborah Cummins, conducted in a project with the Berghof Foundation 2010-2012 (chief investigators Volker Boege, Anne Brown and Louise Moe, University of Queensland).

³⁵ Cryan, M., (2008), *The Causes and Effects of the 'Traditional Law' policy vacuum in Timor-Leste: An NGO perspective and a case study of the revival of Tara Bandu*, unpublished MSc thesis, University College Dublin, December 2008

³⁶ Pinto, R (forthcoming), *Natural Resource Management in Post-Conflict and Fragile State: Case Study from Timor-Leste*, Conservation International, Dili, Timor-Leste

example disabled or elderly), they have the right to designate someone else - generally a family member - to collect the payment on their behalf.

Conflict resolution

Article 10(a) states that *suku* leader and *suku* council may carry out activities in the field of social harmony. Article 11(c) gives the responsibility of *suku* leader as “favouring the settlement of minor disputes involving two more *suku* villages”. A similar provision exists for *xefe aldeia* in Article 14. There is no recognition of *suku* council responsibilities in conflict resolution in Law 3/2009. In practice, however, the common institutional figures at community level for resolving conflicts are: head of family and their *lia-na'in*, *aldeia* chief, *suku* chief, *katuas* (elder) and/or *lia-na'in*, other members of *suku* council, subdistrict administrator and police. In some cases, the church may also play a role in mediating disputes. Some of these figures are members of the *suku* council, others are community leaders outside the *suku* council, and others are representatives of the state. As the focus of *lisan* is on restoring balance to the community, the most appropriate person to resolve a conflict is generally decided by consensus between the two conflicting families; for more vulnerable members of the community, such as domestic violence victims, this can mean that others are making conflict resolution choices on their behalf.

Local conflict resolution follows the principle of subsidiarity, meaning that the focus is on finding the right person to resolve the dispute who is as ‘close’ as possible to the disputants. For example, in a dispute between members of the same family, it is likely that this will be taken first to the family *lia-na'in* or the *xefe uma kain* (chief of the extended family household). In terms of process, disputes follow the local ‘line of command’ going up from authorities in household, *aldeia*, to *suku*, to subdistrict administrator and police (wherein it enters the formal system). This line of command is actively enforced by the *suku* chief, who will only decide cases that were considered first by *lia-na'in* and *aldeia* chief. In practice, it is also supported by local police, who explain they do not have the capacity to deal with all disputes that arise in the *suku*.³⁷ Particular programs that are implemented at the local level also have their own dispute mechanism practices in place, which may be used to resolve issues that are related to program implementation.

The two local institutional mechanisms that are generally described by local leaders In theory at least, if a case is ‘big’ enough and recognised locally as a violent crime, it will be taken directly to the police. However, even very serious domestic violence cases are often kept ‘in the family’, and may not even be taken to *suku* council members. It is common for cases to stop with the family *lia-na'in*. And it is still common for those cases that go beyond the family to be resolved through local authorities. There is increasing understanding on the part of *suku* council members that they should refer domestic violence cases to the police, however this often does not translate into practice as it works against local norms in which the family unit is fundamental to customary structures of community and so needs to be maintained. On the flip side, it is also common for local leaders to express disappointment in the formal system and asking for more assistance and coordination, for example, in cases where a suspended sentence is given but the *xefe suku* is not advised that the offender will be returning to the community.

³⁷ The Asia Foundation (2012), “*Ami Sei Vitima Beibeik*”: Looking to the Needs of Domestic Violence Victims, Asia Foundation, Dili, Timor-Leste; Cummins, D (2010), Local Governance in Timor-Leste: The Politics of Mutual Recognition, PhD thesis, The University of NSW, Australia; Marriot, A. (2008), ‘Justice in the Community, Justice in the Courts: Bridging East Timor’s Legal Divide’, in Mearns, D. & Farram, S. (Eds.) *Democratic Governance in Timor-Leste: Reconciling the Local and the National*. Darwin, CDU Press.

Different local authority figures are considered more appropriate for resolving different types of issues. Corruption, assault or land disputes with another *suku* are more likely to be taken to the police. Land disputes with another household are least likely to be taken to the police. Given the sensitivity of the issue and the need for local and historical context, land disputes are always considered first by customary authorities. This has strong support from community.

Domestic violence prevention, protection and monitoring

Suku leaders' responsibilities for domestic violence prevention fall under Article 10(a) carrying out activities relating to peace and social harmony, Article 11.2(c) promoting creation of mechanisms to prevent domestic violence, and (d) supporting initiatives aimed at monitoring and protecting domestic violence victims and punishing the aggressor. The Law Against Domestic Violence specifies that instances of domestic violence must be treated as a public crime, and dealt with by state authorities. While it lists those who have a positive obligation to refer domestic violence crimes to the state, it is silent on whether *suku* leaders *must* refer these matters to the police. However, this legal gap is filled in by Article 11.2 (e) of Law 3/2009, which states that the *xefe suku* is responsible for reporting crimes which occur in the community, and domestic violence is defined as a public crime.

In practice, while there are some government and NGO programs that teach people their obligations to refer under the Law Against Domestic Violence, specific preventative programs are extremely limited. There is as yet limited understanding on the best methods to successfully prevent domestic violence in the Timorese context. There are some poster campaigns, haphazard local NGO campaigns, and perhaps individuals such as VPU³⁸ officers or prosecutors taking it upon themselves to visit the villages and run meetings to educate people on their rights and responsibilities with regard to domestic violence. For district referral networks, cases generally only attract attention after they have occurred. There is often limited rural penetration of these networks, which are based in the district centres. The most successful activities relating to domestic violence appear to be when there is good coordination between the external stakeholder and local leaders - in particular, *xefe suku* - lending external trainers greater legitimacy, and allowing them to reach more villagers.

Given the reality of limited, un-integrated programs relating to domestic violence prevention, it is unclear how the *suku* leadership can fulfill its mandate under Article 11 regarding promoting the creation of mechanisms relating to domestic violence prevention, protection and monitoring. Any realistic program to address domestic violence must certainly work together with the *suku* leadership, but needs to be led by those external stakeholders with the resources and capacity to do so, educating and empowering *suku* leadership. A good example of coordination might be, for example, informing *suku* leaders when convicted domestic violence offenders are given suspended sentences, and/or released back into their community. Without such information, *suku* leaders are often caught off-guard when an offender reappears and causes problems. In the context of haphazard prevention campaigns and activities run by responsible agencies, and given the very private nature of domestic violence in which it mainly stays in the 'private' realm of the family, it is unclear what can be expected of the *suku* council prior to the violence occurring - or even to protect a victim from recidivism.

In practice, it is only once the violence has already occurred, and the case is brought to the attention of the *xefe aldeia* or *xefe suku*, that they tend to take action. In practice, as well, the violence must be fairly severe before it is taken to these authorities.

³⁸ VPU: Vulnerable Persons Unit, a unit in the Timor-Leste that supports victims of domestic violence.

SECTION C: OPTIONS FOR LEGAL STATUS OF SUKU COUNCIL

This section considers the possible implications for the three different legal options for *suku* council status that were raised by the policy forum³⁹ assisting the Ministry for State Administration. These are:

- A. specifically defining *suku* councils as private associations in accordance with Articles 186 - 192 of the Civil Code;
- B. specifically recognising *suku* councils as local power, under the Local Power provision, Art 72 of the RDTL *Constitution*; or
- C. remaining with the status quo, under Law 3/2009 and clarified by the Court of Appeal's decision in 2009.

Ba Distrito recognises that this decision on the status of *suku* councils is a fundamentally political decision, to be undertaken by the Government of Timor-Leste. As such, this analysis does not purport to recommend one option over the others.

Constitutional Parameters

The RDTL Constitution lays out the foundational principles informing the political organisation of Timor-Leste, providing the basis for decentralisation, and, by association, *suku* councils:

- Section 72.1 on local power reads “Local power is constituted by corporate bodies vested with the objective of organising the participation by citizens in solving the problems of their own community and promoting local development, without prejudice to the participation of the State”.
- Section 72.1 establishes that “The central government should be represented at the different administrative levels of the country”.
- Section 63.1 on political participation provides that “Direct and active participation by women and men in political life is a requirement of, and a fundamental instrument for consolidating the democratic State.”
- Section 70.1 on political party participation states: “Political parties shall participate in organs of political power in accordance with their democratic representation based on direct and universal suffrage.”
- Section 137.2 also prescribes the following: “The Public Administration shall be structured to prevent excessive bureaucracy, provide more accessible services to the people and ensure the contribution of individuals interested in its efficient management”. This means that the model cannot significantly add to bureaucracy, but should nonetheless provide for more accessible services.

³⁹ The policy forum was an informal group of government officials and advisers from the Ministry of State Administration; donors including Australian Aid and USAID; international organizations including the World Bank and UNCDF; and NGOs including The Asia Foundation and Counterpart International brought together to discuss revisions to the *suku* law.

Option A. Defining *Suku* Councils as Private Associations: Key Potential Impacts

This option which was advanced by the forum entails recognising the *suku* as a collective private entity which would be regulated by the law which establishes it, and subsidiarily according to the Civil Code of Timor-Leste. According to this option, the entire *suku* would make up the private association, and the *suku* council would comprise their elected representatives.

Political parties

One of the recognised benefits to this option is that it does not attract political party participation. It is not “local power” as stipulated according to Section 72 of the Constitution. This is in accordance with the express wish of many community members during the mandate of the first *suku* council, who wished to avoid the divisions in communities that political parties can cause.

Perceptions of representativeness

The legitimacy of *suku* councils as representatives of the community is closely tied to their direct election by community members, and their perceived capacity to represent the communities’ interests first.⁴⁰ As a result, community members and *suku* council members commonly state they would prefer to stay outside the government structure, to avoid the potential for primary lines of accountability being moved from the community to the government.⁴¹

Connection to the State

As a private association, membership of *suku* is voluntary, which means that either citizens of the *suku* must ‘opt in’ to the *suku*, or alternatively they can voluntarily ‘opt out’.

In the Timor-Leste context, the *suku* is defined inexactly (see also Section D of this report). In pre-colonial days, it was defined by customary relationships negotiated through family relationships and connection to the land of their ancestors. This was changed during Portuguese and then Indonesian times, where communities were forcibly moved and territorial boundaries imposed which did not necessarily correspond with customary understandings of community. It is probable that the capacity to opt in or opt out will further confuse current definitions of the *suku*, as people choose to opt in to customary rather than residential affiliations. On the one hand, this can be a positive for people as they reaffirm their customary ties, which are still extremely important for them. But on the other hand, if service delivery is pegged to residence in a particular *suku*, this may cause real problems in bringing services, and the government, closer to the people according to the GoTL’s obligations under Section 137.2 of the RDTL Constitution.

More concerningly, it will also open the door to various separatist and sometimes militant groups that exist in the rural areas⁴² to opt out, and use it as an opportunity to proclaim their independence from the State. Legally of course, they continue to be citizens of Timor-Leste, but the voluntary nature of *suku* affiliation means that the governance body which is ‘closest’ and potentially most relevant to them will be weakened. This will also have indirect impacts on the citizenship rights of those who do not themselves have the capacity to make these decisions for themselves (for example, children). As a major problem in Timor-Leste continues to be the large ‘gap’ between communities and Government, the private nature of the association and voluntary membership essentially weakens the possibility of utilising the *suku* council to strengthen this state-society relations.

⁴⁰ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

⁴¹ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

⁴² See for example Cummins, D (2010), *Local Governance in Timor-Leste: The Politics of Mutual Recognition*, PhD thesis, The University of NSW, Australia; Scambary, J. (forthcoming), “In Search of White Elephants: The Political Economy of Resource Income Expenditure in East Timor”, CAS

Capacity to carry out service delivery

The status of *suku* as private association need not limit their capacity to carry out particular services on behalf of, or in coordination with, Government Ministries. It is possible for Ministries to devolve particular functions to the *suku* council as elected representatives of the private association, through legislation relating to those sectoral activities - much as they do now. In addition, responsibility to represent all *suku* residents can be secured, for example, by writing into the enabling legislation that *suku* councils are required to deliver these functions and services to all citizens in the *suku*, not only those who have opted into the *suku*. In practice, however, this may be challenged. There is a possibility of misuse or complication, given the inexact definition of who in fact 'belongs' to a *suku*. It is also possible that their requirement to represent all *suku* residents may be challenged in the courts.

Place in the governance environment

Under this option, the *suku* councils' functions in assisting and/or carrying out service delivery will be enunciated through different pieces of legislation, according to the sector (eg. specific functions with regard to health will likely be specified in legislation from the Ministry for Health, functions with regard to education will be specified in Ministry for Education legislation.) This makes for a more ad hoc approach to service delivery and planning.

In addition, it puts the power for deciding modes of engagement for service delivery in the hands of relevant line Ministries, so long as it is in accordance with relevant clauses in the *suku* legislation that facilitate government interaction. As a private association, which does not hold the authority of local power, it will be extremely difficult to clearly articulate in the *suku* council legislation *how* *suku* councils are expected to exercise service delivery functions (for example, where their responsibilities of coordination end, and government responsibilities for service delivery begin) in a sufficiently robust fashion.

As a result, under this option it seems likely in practice that modes of engagement will be decided primarily according to Ministerial needs and perspectives rather than community perspectives. Depending on the detail of how the *suku* council legislation is drafted, and the *suku* council's capacity to legitimately refuse to accept specific responsibilities, it may open the door to unrealistic and un-integrated expectations being placed on *suku* council members that are not appropriate to their resources, capacities, or legal authority.

Accountability

As an association, they will have legal personality. Presuming it is properly articulated in the enabling legislation, they can be sued, held accountable for financial mismanagement, and for decision-making which is against the rights of its members. As this option gives the *suku* council legal personality, it would allow the *suku* council to be able to manage a budget, and be held accountable for expenditure.

It is unclear the extent to which those who do not choose to opt in to the *suku* can hold them to account for discriminatory decision-making, if decisions are made for the benefit of members and to the detriment of non-members.

Conflict resolution and domestic violence responsibilities

Most disputes, including domestic violence, continue to be resolved locally, using customary methods that *suku* council members are also sometimes involved in. The status of the council is unlikely to change this reality. The enabling legislation can clearly state that they must carry out this function also in accordance with the Law of Timor-Leste and international human rights obligations.

Resourcing of suku councils

The different proposed status for *suku* councils is not linked to the resources they are given to carry out their role: regardless of their legal status, they will not become public servants and attract associated rights, including remuneration rights. The GoTL retains the right to decide how much to provide to *suku* council members in the form of incentives, and other resources required to carry out their role. As a general statement and recommendation, it is clear that *suku* councils need better resourcing and proper capacity development to do their jobs and do it well.

Option B. Recognising the Suku Council as Local Power: Key Potential Impacts

This option entails recognising the *suku* council under Section 72 of the RDTL Constitution as a Local Power, which makes them a public entity.

Political parties

As a public entity exercising government functions, this option would attract the participation of political parties. As noted above, this is contrary to the wishes that people were expressing during the mandate of the *suku* council under Decree law 5/2004. The main complaints that were expressed at this time were in relation to perceptions of discriminatory treatment by national level political parties exercising government office - for example, relating to the distribution of hand tractors,⁴³ and the divisive impact of political parties on community harmony and understanding of legitimate leadership based on their place in the community.⁴⁴ As the security situation has changed in communities since this time, it is possible that there might be greater resilience in coping with the divisive impact of political parties locally.

Perceptions of representativeness

There are concerns amongst community members and *suku* council members that entering the government structure will entail moving primary lines of accountability away from the community and to the government. This may occur in practice, and is something to guard for, as it is important that the *suku* council is a positive force in improving state-society relations.

However, legally, the issue of balancing accountability to community members, the GoTL and other external stakeholders is dependent on how different relationships and accountabilities are articulated in the enabling legislation. The capacity to acknowledge the *suku* council as carrying out government functions openly allows for legislation to be drafted that will clearly articulate *suku* councils' rights and responsibilities in this regard, and outline appropriate modes of engagement and expectations, in a way that would be much more difficult for private associations (see 'Place in the Governance Environment', below).

Connection to the State

Recognising the *suku* council as local power, if the legislation appropriately takes community needs into account, could positively impact on villagers' understanding of themselves as citizens of the

⁴³ Research by Dr Deborah Cummins, conducted in a project with the Berghof Foundation 2010-2012 (chief investigators Volker Boege, Anne Brown and Louise Moe, University of Queensland).

⁴⁴ Cummins, D (2010), Local Governance in Timor-Leste: The Politics of Mutual Recognition, PhD thesis, The University of NSW, Australia

Timorese state. It is a legal and governmental ‘bridge’ between the majority of the population, who continue to engage mainly in their own small communities, and the government.

However, it is unclear what impact entering the government structure will have on the *suku* council’s legitimacy with community members. While the Government may conceivably benefit by association with the relatively high levels of legitimacy that the *suku* council enjoys with community members, it may also be that communities’ perceptions of *suku* council legitimacy will be diminished. This will depend on the details of the legislation, and will also depend on community ideas, needs and realities that are difficult that make it difficult to predict. It is essential, if this option is taken, that every effort be taken to ensure that the *suku* council retain its capacity to properly represent their community, rather than being seen as ‘only’ an instrument of government.

Capacity to carry out service delivery

There will be a clear mandate for the *suku* council to carry out service delivery, according to the roles and responsibilities outlined in the law.

Place in the governance environment

A key difference, potentially, in recognising the *suku* council as local power, lies in their engagement with GoTL. If the opportunity is taken in the drafting of *suku* council legislation to clearly define modes of engagement in relation to the carrying out of Government responsibilities, which are appropriately reflective of *suku* council resources, capacities and legal authority, it may go a long way towards clarifying this relationship. If the legislation is well-drafted, to take into account the needs of communities and community leadership as well as Government, it can clearly state what the *suku* council’s responsibilities in service provision are, what they are not, and how they are expected to engage across different Governmental Ministries. It potentially provides for a more coherent approach, which seems less possible when defining them as private associations.

Accountability

As a Local Power, the *suku* council will be clearly accountable for exercising their functions, and working and collaborating to meet community members’ citizenship rights.

Conflict resolution and domestic violence responsibilities

Most disputes, including domestic violence, continue to be resolved locally, using customary methods that *suku* council members are also sometimes involved in. The status of the council is unlikely to change this reality. There is a possibility that as a Local Power, the GoTL will be ultimately responsible for the decisions that are made. However, the enabling legislation can clearly state that they must carry out this function also in accordance with the Law of Timor-Leste and international human rights obligations, including an explicit responsibility for *suku* council members to report all domestic violence cases to the police.

Resourcing of suku councils

In line with other jurisdictions that constitutionally recognise Local Powers, it appears that legal recognition of *suku* councils as Local Power will not automatically entitle *suku* council members to remuneration and other benefits in line with that received by civil servants employed on a full-time basis. This is a common misunderstanding expressed by *suku* council members (probably stemming from Indonesian occupation), who consider that entering the government structure would mean similar salaries and benefits to that received by civil servants.⁴⁵ The Government of Timor-Leste

⁴⁵ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

would continue to have the right to decide appropriate remuneration for *suku* council members, in line with the responsibilities that they carry out. As a general statement and recommendation, it is clear that *suku* councils need better resourcing and proper capacity development to do their jobs and do it well.

Option C. Retaining the Status Quo: Key Potential Impacts

This option entails keeping the legal definition of *suku* councils under Law 3/2009, with clarification from the Court of Appeal. This would essentially mean putting off the decision as to the exact legal status of the *suku* council, as there is currently a level of legal uncertainty as to how far the service delivery and other functions of the *suku* council can be pushed. Under this option, *suku* councils are defined as “traditional organisational structures”, “intermediate bodies” which existed “prior to the state itself”. They are not public bodies, and therefore not part of the government structure. However, they are also not a private association as described in Option A, as membership of the *suku* is not voluntary in the sense that there is no opt in or opt out clause.

A possible advantage to this approach is that of sequencing. As decentralisation policies and legislation is currently being worked up, this would allow the development of these laws and policies before following through with *suku* council revision. However, the correlating negative aspect to this is that it misses a window of opportunity to properly define *suku* council status, and potentially align levels of resourcing, responsibility and legal authority in a manner that will assist them in carrying out their role. Putting off the decision also carries the possibility that decentralisation will be implemented on the presumption that *suku* councils will retain their current ambiguous status, closing policy and analytical thinking to other potential approaches.

Political parties

There is no participation of political parties, as per community members’ preference (see discussion under Options A and B).

Perceptions of representativeness

The *suku* council generally enjoys high levels of legitimacy with the community, who perceive them as community leaders, directly elected by them to represent their needs.⁴⁶ However, their capacity to connect with government in a substantive sense is limited.

Connection to the State

The in-between status of *suku* council as not government, but also not private associations in the sense described in Option B, means that this option does not carry the potentially negative impacts on citizenship that Option B carries, in which separatist groups can voluntarily opt out. It seems likely that the effect on people’s feelings of citizenship and relationship to the Timorese State will be neutral, much as it is now, and more dependent on the capacity of the Government of Timor-Leste to appropriately engage and become a positive force in communities.

Suku councils are clear that they are currently not Government representatives. Therefore, the relatively high levels of legitimacy that they enjoy with community members does not carry over to a feeling of connection with the Government.

⁴⁶ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

Capacity to carry out service delivery

Law 3/2009 has the *suku* council carrying out various service delivery functions, listing sectoral areas that they carry out activities. However, there is a broad disjuncture between responsibilities that are put on *suku* councils for service delivery, and the resources, capacities and authority that they are given to do this work. If this option is chosen, it is strongly recommended that relevant clarifications be made in relation to where *suku* council responsibilities end, and government agencies' begin (see Section D of this report).

Place in the governance environment

Under the current law, *suku* councils are overwhelmed by the different expectations that are placed on them by different line Ministries as well as with programs run through the Ministry for State Administration. Similarly to Option B, the responsibilities that are put on the *suku* councils are through various laws, policies and programs for each sectoral area. This results in an ad hoc approach to planning, and to *suku* council responsibilities more generally. If this option is chosen, it is strongly recommended that provisions be put in place that will set out the general modalities of engagement, and expectations to be put on *suku* councils that are reflective of their resources, capacities and authority. However, similarly to Option B., it is unclear how much the Law would be able to go into this, as it clearly specifies that the *suku* council is non-government (and clauses laying out specific government-type functions would be contradictory.)

Accountability

As the *suku* council does not have legal personality under the current legislation, *suku* council members can only be held accountable for the management of funds in a personal capacity. While it does not deny the possibility of giving the councils budgets to manage - as, for example, the community councils created by PNDS have a similar issue - it limits this possibility, because of associated legal uncertainty.

Conflict resolution

Same as Options A and B.

Resourcing of suku councils

Same as Options A and B.

SECTION D: RECOMMENDATIONS ON REVISION OF LAW 3/2009

Defining the *suku*

Taking into account that the legal revision of Law 3/2009 is envisaged to include community leaders and their election, as well as defining the *suku*, it is important to consider the *suku* as both defined by territory and by population. Since Portuguese times, there have been efforts to define the *suku* territorially, however this has not corresponded with communities' cultural understanding of affiliation and identity, tied together by *uma lisan*⁴⁷. Efforts during both Portuguese and Indonesian times to define the *suku* territorially resulted in populations being cut off from their 'felt' community of identity, through which important customary relationships continue to be maintained. This has resulted in a deep sense of trauma in some communities, who still reflect on the cultural impact of these decisions, tearing customary communities apart.⁴⁸

In contemporary Timor-Leste, while maps exist that delineate different *suku*, these boundaries are often not exact. This has been the cause of many land disputes. In addition, it is common for community members to choose to align themselves with their *suku* of origin, rather than their *suku* of residence. In practice, it falls on community members to decide how they wish to identify themselves on the electoral roll. As many *xefe suku* note, this results in *suku* populations that are small and scattered, which makes meeting their obligations for service delivery difficult. It also makes keeping accurate statistics difficult.⁴⁹

The sensitivity of potentially interfering with customary understandings of community or identity by defining them territorially demands that policy and legal interventions proceed with the utmost caution, and only with very good reason. Currently, *suku* are defined inexactly, through a mixture of territorial and population considerations—reflected in Article 3 of Law 3/2009, defining the *suku* as a “community organisation formed on the basis of historic, cultural and traditional circumstances, having an area established within the national territory and a defined population”. Unless it is necessary to improve service delivery through specific affiliation with *suku*-of-residence, it is strongly recommended that particular issues and conflicts that arise be dealt with on a case-by-case basis, in a process that is also sensitive to the local historical and cultural needs of the community.

In addition, it is worth noting the very real differences in community realities and the needs of urban versus rural communities from their *suku* leadership. Some key differences revolve around the often relative homogeneity of rural *suku*, as compared to urban *suku* that are typically characterised by heterogeneity. Another key difference is the greater expectation of urban residents for government to directly deliver services to their community, carrying with it a potential to take into account economies of scale in responding to community demands. This carries the question of how relevant *suku* development plans are an urban setting versus development plans that are integrated at subdistrict or higher levels of governance. This issue is already important in Dili, and becoming more important as centres such as Baucau and Maliana are becoming more urbanised.

Resourcing of the *Suku* Council

Currently, the *suku* council is responsible for a wide range of responsibilities - some of which overlap with government responsibilities - and with limited resources to assist them in carrying these out. However, beyond the incentives that are provided by the Ministry for State Administration, it is unclear exactly how much goes to different *suku*, as some line Ministries also

⁴⁷ *uma lisan*: sacred house, a centre for customary relationships through which families relate to each other

⁴⁸ Cummins, D (2010), *Local Governance in Timor-Leste: The Politics of Mutual Recognition*, PhD thesis, The University of NSW, Australia

⁴⁹ Cummins, D (2010), *Local Governance in Timor-Leste: The Politics of Mutual Recognition*, PhD thesis, The University of NSW, Australia

provide resources to *suku* council for carrying out particular activities.⁵⁰ It is recommended that once the political decisions of *suku* council status, and associated delegation of responsibilities to *suku* council members are made, that resourcing for *suku* councils be reviewed, taking into account the various income streams from different sectors of the Government.

Preamble

While the values through which the *xefe suku* and *suku* council operate are somewhat articulated through the roles of different authority figures, these broad statements of *xefe suku* and *suku* council responsibilities has been confusing for council members. It is recommended that a preamble articulate the values embodied in the working of the *suku* council. This will provide a basis for interpretation of specific articles, and allow the removal of broad provisions in *xefe suku* and *suku* council responsibilities that are difficult to operationalise. It is recommended that a statement be included in the preamble which includes:

- recognising the important place of customary governance and tradition in the *suku*;
- respect for international obligations of human rights and the Law of Timor-Leste;
- respect for the environment; and
- respect for equality.

It is recommended that the broad responsibilities of *suku* council under Article 12 be removed: 12 (e) 'promote respect for the principle of equality', 12 (f) promote respect for the environment, and 12 (g) promote respect for the *suku*'s customs and traditions.

Electoral system

Package (closed list) system. While it is acknowledged to be a cheaper electoral system to implement, there is broad discontent with the package system. Community members state that it has reduced *suku* leaders' representativeness and capacity. It has adversely impacted on women and young people holding reserved seats, as it has shifted the balance of power from *suku* council members to the *xefe suku*, by giving the *xefe suku* the power to choose his or her preferred council members, prior to election.⁵¹ It has also meant that community members cannot vote for both their preferred *xefe suku*, and *xefe aldeia* if they are on separate lists. To address this issue, there are three possible options for consideration:

- A. Individual voting for individual council members be re-instituted (following the model under Decree Law 5/2004). This would represent the most ideal solution, increasing levels of participation and accountability in community leadership. However, it is also the most expensive solution.
- B. STAE be responsible for facilitating individual election of *xefe suku* and *xefe aldeia*. *Xefe suku* may then be responsible for facilitating community elections of other *suku* council members. This ensures STAE-run elections of the most influential figures on the *suku* council, but also carries the possibility of corruption and misuse of power for election of other council members.

⁵⁰ For example, urban *sukus* in Dili district are given responsibility and resources to coordinate their community in carrying out *limpeza urbanu* or "urban sanitation" by the Ministry of State Administration (Ministerial Diploma No. 8/2014)

⁵¹ The Asia Foundation (2013), *Reflections on Law 3/2009: Community Leaders and Their Election*, Dili, Timor-Leste

C. STAE be responsible for facilitating individual election of *xefe suku*. *Xefe suku* then be responsible for facilitating community elections for *suku* council members. This carries the most possibility of corruption and misuse of power.

Application of suggested revision: Articles 21 and 22

Eligibility

In addition to the candidacy limits specified in Article 19, given the importance of the position of *xefe suku* it is recommended that the *xefe suku* require a basic competency in numeracy and literacy in one of Timor-Leste's official languages. While literacy and numeracy are ideal qualifications for all *suku* council members, in recognition of current realities in Timor-Leste's villages, this should apply as a legal obligation to the *xefe suku* only.

Operation of the *suku* council

Article 13 lays out how the *suku* council operates vis-a-vis the members of the council. The requirement of one-person one-vote under Article 13(2) is to be commended and should be retained as enhancing the representativeness of the *suku* council, and in particular the inclusion of women and young people holding reserved seats.

It is recommended that Article 13 be expanded to include a positive requirement for all *suku* council members and the *xefe suku* to report on their monthly activities, for discussion, and if necessary, approval by the council.

Application of suggested revision: Article 13

Downwards accountability

Under Article 11.2 (f) *xefe suku* is required to submit to the approval of the *suku* council the annual financial report and annual report on activities carried out. Under Article 12, the *suku* council is responsible for accounting to the Ministry of State Administration for the resources received from the General State Budget.

In practice and given current capacities, the *xefe suku* and *suku* secretary take responsibility for accounting and reporting. It is recommended that the provisions be amended to reflect this reality. It is recommended that the *xefe suku* be required to submit the report to *suku* council for discussion, and that this must be approved and signed off by *suku* council members.

To encourage greater transparency, is recommended that there be a requirement to publicly post and archive the report, and that there be an annual public meeting and requirement to publicly announce and display the report to the community.

Application of suggested revision: Articles 11 and 12

Incentives

Under Article 15, there is currently discrimination between the incentives that are paid to *xefe suku* and *xefe aldeia*, and other *suku* council members. *Xefe suku* and *xefe aldeia* are entitled to a attendance fees for *suku* council meetings, and a fixed allowance to cover their work between meetings. Other *suku* council members are entitled to attendance fees for meetings only. This sends the clear message that other *suku* council members are not to be paid for their work between meetings, diminishing the possibility of encouraging them to take on an expanded role. This has a particular impact on young people and women on the *suku* council.

It is recommended that *xefe suku* and all *suku* council members be paid according to the same structure. Power will continue to rest with the government in determining how much each council member should receive in total, allowing for differentiation according to their responsibilities.

As *suku* council members rightly note a disjuncture between the levels of responsibility they are expected to assume, and the overall resourcing they receive to carry out these duties (including both incentives to pay for their efforts, and resources provided to carry out their work effectively), it is also essential that the incentives paid be revised to properly reflect the responsibilities they are given. Appropriate levels of resourcing will be dependent on the level of responsibility and authority which is ultimately granted to the council.

Application of suggested revision: Article 15

Intersectoral integration

Intersectoral integration of different groups and plans from line ministries needs attention. This applies not only to district level, which will be the responsibility of District Managers under the structure for Administrative Pre-Deconcentration. *Suku* also need to coordinate between different *suku*-based groups, to ensure a coherent approach to community planning and most effective use of available resources. There are two options:

- A. clearly state that *suku* council is responsible for coordinating the different groups, requiring sectorial groups to coordinate with the *suku* council. This would need to be adequately resourced. Broader participation could be achieved by requiring regular town hall meetings. Expectations of results for this encouraging broad community engagement should be low to begin with, but would set the stage for the future.
- B. clearly state that a government official at subdistrict level is responsible for coordination of the different groups, together with relevant *suku* council.

Application of suggested revision: New Article(s) to be considered

Roles and responsibilities of women and youth representatives, *ferik*⁵²-*katuas* and *lia-na'in*

The roles of these different members on the *suku* council are currently combined, which has been confusing. It is recommended that Article 12 be removed, and replaced with specific Articles that outline the roles of women's representatives, youth representatives, *ferik-katuas*, and *lia-na'in*. In particular, this will provide a legal basis for encouraging women and young people's levels of activity in the *suku*, and the *suku* council (see below).

Application of suggested revision: Article 12

Encouraging women's political participation

Law 3/2009 provides for gender quotas, with three women occupying reserved seats on the *suku* council. However, in practice these women have been largely inactive in their role, and, as discussed above, the package system of voting has undermined their place even further. This is partly due to patriarchal attitudes and low levels of capacity for women who are ill-accustomed to exercising public office. However, it is also also reflective of the unclear roles that women are to play as members of the *suku* council, in a customary governance environment in which women largely cannot play a role in local dispute resolution, and are unable to implement projects if they do

⁵² *ferik*: female elder

not receive external funding.⁵³ For these women to exercise leadership, they require a clear role which will satisfy community needs.

It is recommended that the Law clearly specify a separate portfolio (statement of responsibilities) for women's representatives in representing women's and children's interests in the *suku*, and, working together with the *xefe suku*, assisting in the coordination of activities that are for the benefit of women and children in the *suku*. This provides the opportunity in the future to pursue appropriate capacity development. The idea is that over time, these representatives can become the point person for particular programs that impact on women and children in the *suku*.

Unrelated to the law, but very relevant to women's local political participation, it is strongly recommended that Government, UN and NGO projects aimed at encouraging women candidates for the position of *xefe suku* begin their capacity development and education programs much earlier than they currently do. In the lead-up to the 2009 elections, SEPI and UNWomen only rolled out their programs two to three months prior to the election itself. It is likely that they used the calling of the election as a 'trigger' for their programming, however for maximum impact it is needed much earlier.

Application of suggested revision: New Article to be added

Young people

As discussed above, the package system of voting has undermined the place of young people holding reserved seats even further, as it has removed the possibility for people to vote for their preferred (most capable and legitimate) candidate to hold this position.

Similarly, it is recommended that the Law clearly specify a separate portfolio (statement of responsibilities) for young people's representatives in representing young people's interests in the *suku*, and, working together with the *xefe suku*, assisting in the coordination of activities that are for the benefit of young people in the *suku*. This provides the opportunity in the future to pursue appropriate capacity development. The idea is that over time, these representatives can become the point person for particular programs that impact on young people in the *suku*.

It is also recommended that the Law correspond with the standard definition of youth in this law with other existing laws.

Application of suggested revision: New Article to be added

Ferik/Katuas

Similarly, it is recommended that the Law clearly specify a separate portfolio (statement of responsibilities) for *ferik/katuas* in representing elderly people's interests in the *suku*, and, working together with the *xefe suku*, assisting in the coordination of activities that are for the benefit of the elderly in the *suku*. The idea is that over time, these representatives can become the point person for particular programs that impact on elderly people in the *suku*.

It is also recommended that the Law correspond with the standard definition of elder in this law with other existing laws.

Application of suggested revision: New Article to be added

Xefe suku and xefe aldeia responsibilities

⁵³ Cummins D. (2011), 'The Problem of Gender Quotas: Women's Representatives on Timor-Leste's Suku Councils', *Development in Practice* 21:1, pp. 85-95

The statement of responsibilities for *xefe suku* and *xefe aldeia* under Articles 11 and 14 are extremely broad, and difficult to operationalise. In particular, there have been issues relating to their positive responsibilities regarding community planning, service delivery, dispute resolution and domestic violence.

Community planning processes

Article 11.2 (a) requires the *xefe suku* to “promote a continuous consultation and discussion process with the whole community on the planning and execution of community development programs”. Article 14(h) requires the *xefe aldeia* to “promote the consultation and discussion between the village inhabitants on all matters in connection with the community life and development, and report to the *suku* council. Research conducted in 2011 clearly demonstrates that the participatory planning processes that were envisaged as being part of the council’s obligation to create a *Planu Dezenvolvimentu Suku*, or *Suku* Development Plan (PDS) were largely not carried out. Instead, the *xefe aldeia* articulated the needs of his or her *aldeia* in a *suku* council meeting, which were then incorporated into the plan. A major reason for this was lack of resources to pay for the costs (meals, transport) of community meetings in every *aldeia*.⁵⁴

In addition, there are many complaints that the programs that are offered through various line Ministries do not reflect what has been put into the PDS.

It is recommended that the requirement of “continuous consultation and discussion process with the whole community...” be more clearly defined, in line with resources available to conduct consultation processes. There are three main options:

- A. Specify *xefe suku* and *suku* council responsibility to carry out annual participatory planning for the *suku*, and providing earmarked funding that will pay the costs of these planning meetings in each *aldeia*; or
- B. Specify *xefe suku* and *suku* council responsibility to create annual plans, as representatives of the *suku*, with a requirement for at least two town hall meetings with community members who wish to contribute ideas on the *suku* development plan, providing earmarked funding that will pay the costs of these meetings at the *suku* level; or
- C. Specify *xefe suku* and *suku* council responsibility to create an annual PDS on their own, as representatives of the community. There should be a requirement that this be posted on the notice board outside the *suku* office.

Application of suggested revision: Articles 11 and 14

Service delivery

Realistic expectations of *suku* council service delivery are essential. The service delivery functions of the *suku* council needs to be more clearly delineated and made more specific. Expectations of coordination with Government officials need to be clearly delineated in line with current resourcing, authority and capacities of *suku* councils. Currently, education levels of *suku* council members are fairly low, and those with higher levels of education are not attracted to the limited incentives that are paid. For effective service delivery, there needs to be coherence between the three areas: (i) who has legal power to carry out a function and provide sanctions, (ii) who is in a position to do it most efficiently and effectively, and (iii) who in practice is given responsibility to carry it out. This means either:

⁵⁴ The Asia Foundation (2012), *Community Experiences of Decentralised Development*, Dili, Timor-Leste

- A. clearly state that *suku* councils' functions are limited to organising the community, and solving local problems (traditionally their core functions), removing their expanded roles as identifying, planning and monitoring the carrying out of service delivery across sectoral areas identified in Articles 10, 11 and 12. A simple statement of their duties in organising and solving problems can then be used by relevant Ministries in developing their own laws and procedures to stating *suku* councils' role in organising the community for their particular event(s). This is more aligned with the approach of recognising them as Associations.
- B. keep *suku* councils' functions in this expanded role, and give increased authority and resources for them to effectively carrying out planning and monitoring under sectoral areas, which would mean a reduction in the autonomy of line Ministry extension officers in the *suku*. This is more aligned with an expanded approach of recognising them as Local Powers under Section 72 of the RDTL Constitution, and could not legally occur if they were recognised as Associations.

If the decision is taken to not move some of these specific government responsibilities for service delivery onto the *suku* council, it is recommended that reference to sectoral obligations under Articles 10 and 12 (eg. education, health, employment, environment, food safety, etc.) be removed.

Application of suggested revision: Articles 10, 11, 12 and 14

Operations and maintenance

Article 10 gives *xefe suku* and *suku* council responsibility for assistance in the maintenance of social infrastructures, such as housing, schools, health centres, opening of water wells, roads and communications. A clear point of weakness in decentralised development programs has been ensuring adequate provisions for operations and maintenance of infrastructure, once it has been built.⁵⁵ This listing, however, is essentially a combination of public and private infrastructures, which spans across multiple Ministries and programs. In addition, research has demonstrated that unless a sense of 'ownership' is nurtured in the process, and for more expensive repairs specific funding and clear guidelines are provided, it is difficult for the people to self-organise, fund-raise and take on responsibility for the infrastructure.⁵⁶

Given that a number of community programs are currently implemented which may only give *xefe suku* and *suku* council a peripheral role, it is unreasonable to expect *suku* councils to take on responsibility for maintenance. It is recommended that this broad provision be removed. If necessary, it can be replaced with a provision which gives *xefe suku* and *suku* council responsibility for cooperating with government officials in carrying out their responsibility with regard to operations and maintenance.

Application of suggested revision: Article 10

Dispute resolution

Articles 11 and 14 outline and distinguish the responsibilities of *xefe suku* and *xefe aldeia* with regard to dispute resolution. As this clause is essentially relying on pre-existing modes of dispute resolution in the community, and these practices vary from one *suku* to the next (also involving non-elected local leaders), it is recommended that both clauses in Articles 11 and 14 be replaced with a simple statement: "resolve minor disputes in the *suku*, in accordance with local processes and in line with obligations under the Law of Timor-Leste and international human rights obligations".

⁵⁵ The Asia Foundation (2012), *Community Experiences of Decentralised Development*, Dili, Timor-Leste

⁵⁶ The Asia Foundation (2012), *Community Experiences of Decentralised Development*, Dili, Timor-Leste

Application of suggested revision: Articles 11 and 14

Domestic violence responsibilities

Article 10 gives *xefe suku* responsibilities for carrying out activities relating to social harmony, Article 11.2(c) makes them responsible for promoting creation of mechanisms to prevent domestic violence and Article 11.2(d) makes them responsible for supporting initiatives aimed at monitoring and protecting domestic violence victims and punishing the aggressor.

In line with Law Against Domestic Violence definition of domestic violence as a public crime, it is recommended that the power of “punishing the aggressor” be removed.

It is recommended that their role in local customary processes, under the power of maintaining social harmony, be explicitly recognised. This recognition of customary law should be balanced with a requirement that *suku* councils (not just *xefe suku*) report to the police **all** domestic violence cases that are brought to their attention.

As *suku* leaders are not in a position to carry out preventative or protective activities on their own (except for individual members in a personal capacity), it is recommended that their responsibility for prevention or protection be reworded making them responsible for “assisting in coordinating the community to participate in domestic violence preventative or protective activities that are being run in the *suku*.”

Application of suggested revision: Articles 11 and 14

SECTION E: INTEGRATION/HARMONISATION WITH OTHER LAWS AND PROGRAMS

There are a number of programs and plans that intersect with the *suku* council, and which will need to be harmonised, ultimately depending on the status and provisions for *suku* council in the new or amended legislation that is adopted. There is no real difference in impact of the three proposed options for status of *suku* council (private association, local government, or status quo) in relation to how these other programs operate. However, there may be some changes required depending on the amendments that the Government of Timor-Leste chooses to incorporate in the new or amended legislation, and whether they impact on the balance of power that is currently negotiated between *suku* councils and government programs. Harmonisation will certainly be needed to deal with changes in terminology. The following articles and sections may need attention:

- National Strategic Development Plan: Regarding responsibilities for domestic based violence, p.28; specific provisions related to sectoral activities of line Ministries (for example, regarding primary health, p. 35-36, or agricultural extension officers, p. 188).
- National Plan for Suco Development program (PNDS): Articles 14 and 15.
- Integrated Plan for District Development (PDID): Articles 14, 15, 22 and 27.
- The Organic Structure of Administrative Pre-deconcentration: Articles 27.1 (e), and Articles 68 to 71.