



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

Justice Update

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Suspended sentences in cases of domestic violence according to the Penal Code of Timor-Leste

The Timor-Leste Penal Code provides for five types of sentences that differ in their severity. These are prison sentences, fines, community service, admonishments and accessory penalties.

The Criminal Law in Timor-Leste also adheres to normative principles regarding penalties and restrictive measures and establishes them as fundamental principles in the Penal Code.

These principles include the principle of legality (as the most fundamental principle in the doctrine of the Penal Code), retroactive principle (principle of non-retroactivity), principle of humanity, principle of proportionality and principle of culpability as well as other principles. However, in this document the use and implications of these principles in practice are not discussed in detail.

Article 62 of the Timor-Leste Penal Code provides optional preferences on penalties and restrictive measures.

This article states that “*whenever a sentence of deprivation of liberty and another penalty that does not involve deprivation of liberty are alternatively applicable, the court shall give preference to the latter, whenever the latter adequately and sufficiently fulfils the purpose of the penalty*”. In practice this provision provides a lot of room to the courts to freely exercise their role and to use their discretion in accordance with their conviction and the tendency of the judge/court to choose an appropriate penalty in the cases that proceed to court, including cases of domestic violence.

Specific types and characteristics of domestic violence

As we know, the Law Against Domestic Violence came into force in July 2010. Article 35 of the Law Against Domestic Violence refers to the Penal Code in relation to crimes that are specifically provided for in the following articles:

- Mistreatment of a disabled person (Article 153 of the Penal Code), mistreatment of a spouse (Article 154 of the Penal Code), mistreatment of a minor (Article 155 of the Penal Code), and other forms of aggravation (Article 156 of the Penal Code); and

- Homicide (Article 138), aggravated homicide (Article 139), termination of pregnancy (Article 141) simple offences against physical integrity (Article 145), serious offences against physical integrity (Article 146), torture or other cruel, degrading or inhuman treatment (Article 167), sexual coercion (Article 171), rape (Article 172), child prostitution (Article 175), sexual abuse of a minor (Article 177), sexual acts with an adolescent (Article 178) sexual abuse of a person incapable of resistance (Article 179).

These crimes will be considered as domestic violence if they are committed in the ‘family’ context according to specific characteristics, as set out in Articles 2 and 3 of the Law Against Domestic Violence.

Acts that have a psychological impact and are of an emotionally and mental nature such as threats, coercion and serious coercion (Articles 157-159 of the Penal Code) are not considered to be domestic violence even if they occur in the context and scope of the family, because these acts are not included in Article 35 of the Law Against Domestic Violence.

The most important aspect of the Law Against Domestic Violence is that domestic violence is a ‘public crime’ as set out in Article 36. This means that the victim does not need to make a complaint about the crime to initiate the investigative process and prosecution.

Common forms of domestic violence

Types of maltreatment characterized as domestic violence that are normally experienced by female victims include: being slapped, punched, kicked, pushed onto the ground and stomped on, having their hair pulled, being slammed into a wall and being choked.

Tools/instruments used

In addition to the use of hands and feet as the standard means of committing domestic violence, JSMP also notes that defendants use pieces of wood, pipes/steel, knives, spears, belts and cables.

Consequences

These acts cause victims to suffer bruising, serious injuries that require stitches, teeth that are knocked out or become loose, black eyes, broken bones or dislocations/disabilities, bloody mouths and noses, and serious injuries that require hospital care.

Formal charges

Most or nearly all of these acts are only prosecuted under Article 145 of the Penal Code regarding simple offences against physical integrity. As a consequence, the processing of these cases will result in the suspension of a prison sentence or the penalty of a fine.

JSMP has also monitored cases of sexual violence in the family, such as incest. However, these cases might only represent a small portion of the actual violence that occurs in the family.

Between July 2010 and June 2013 JSMP observed cases of murder involving the serious maltreatment of a spouse (including simple homicide and aggravated homicide), which represent 15 percent of murder cases observed by JSMP during this period.

In addition, psychological harassment such as being humiliated, insulted and controlled are part of a victim's day to day life.

Suspended sentences vs domestic violence as a public crime

JSMP acknowledges that judges/courts have the discretion (freedom to prioritize) when choosing a penalty that is most appropriate in accordance with their conviction and aim of the penalty being handed down against the defendant/convicted person. However JSMP expresses the following concerns:

1. There is still no mechanism to ensure that a convicted person fulfils his obligations when serving a suspended prison sentence;
2. When suspended prison sentences are handed down against a defendant no other obligations are imposed on the defendant during the period of suspension;
3. In addition, the consideration of mitigating circumstances during trials generally only looks at the interests of the defendant and ignores the interests and rights of the victim regarding justice.

For example, most of these considerations mention that: the defendant cooperated with the court, expressed regret, is a first time offender and is the only breadwinner of the family (although in fact often it is the female victim who struggles very hard to provide for the children day and night).

4. Suspended prison sentences can create the impression and public perception that domestic violence is not considered to be a public crime. In particular, cases involving the serious maltreatment of a wife only result in suspended prison sentences.
5. In practice, it is difficult to differentiate between cases of maltreatment involving domestic violence, ordinary maltreatment, serious maltreatment and serious maltreatment against a spouse because these cases only result in a suspended prison sentence or a fine.

JSMP Observations

JSMP has observed that often there is a lack of consistency in the articles used and the application of penalties. In certain cases JSMP has observed that particular incidents have fulfilled the conditions/elements of Article 154 of the Penal Code on serious maltreatment against a spouse, however only a suspended prison sentence has been imposed.

In several cases of domestic violence defendants have used a knife, machete or spear to attack the victim or their spouse, however they have only been charged with Article 145 of the Penal

Code on simple offences against physical integrity, or if they have been charged with serious maltreatment of a spouse, during the examination of evidence the charge has been changed to simple offences against physical integrity and in the end a suspended prison sentence has been imposed.

JSMP is concerned because instruments such as “knives, machetes, wood, steel and spears” that have been used to attack victims have the serious potential to take the life of the victim.

JSMP believes that it would be more appropriate to charge the defendants with attempted murder or serious offences against physical integrity, not simple offences against physical integrity.

JSMP has observed that although offences may not have been committed repeatedly, defendants have committed these crimes in public locations or in front of many witnesses, or the victim has been pregnant, or the victim has been beaten and suffered bleeding and has received hospital treatment, or the victim has been beaten on the body with a piece of wood until the wood has broken, or a spear has been thrown at the victim, but the defendants have only been charged with simple offences against physical integrity.

JSMP also notes that since the Law Against Domestic Violence has been enacted, no defendant in a case involving the serious maltreatment of a spouse has been given a prison sentence, and in most cases suspended sentences are imposed.

Recommendations:

1. It is necessary to establish a mechanism to control defendants while they are serving their suspended prison sentence;
2. The suspension must be accompanied by other obligations to ensure that the defendants are aware that suspended prison sentences are a form of punishment;
3. The consideration of mitigating circumstances must be proportional to the physical and psychological suffering of the victim;
4. Cases involving the serious maltreatment of a spouse and serious offences against physical integrity should result in prison sentences.

For more detailed information, please contact:

Luis de Oliveira Sampaio

Executive Director of JSMP

Email: luis@jsmp.minihub.org

info@jsmp.minihub.org

Landline/Mobile: 3323883 | 77295795

Website: www.jsmp.tl