



# ADDRESSING GENDER-BASED VIOLENCE IN TIMOR-LESTE A MANUAL FOR LEGAL AID LAWYERS

## VOLUME 1: THE LEGAL FRAMEWORK



**USAID**  
HUSI POVO AMERICANO



JUDICIAL SYSTEM MONITORING PROGRAMME  
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL



**The Asia Foundation**



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## **FOREWARD BY HER EXCELLENCY SECRETARY OF STATE FOR THE PROMOTION OF EQUALITY**

It is with pleasure that I write a few words to introduce this publication of a Gender-Based Violence Legal Manual for private lawyers produced by The Asia Foundation for the Judicial System Monitoring Program's Victim Support Service with support from the United States Agency for International Development (USAID).

The Secretary of State for the Promotion of Equality welcomes efforts to support the application and enforcement of laws to prevent gender-based violence. In 2010 the National Parliament passed the Law Against Domestic Violence recognizing that domestic violence is a long standing problem and one of the most complex social issues of our time. The enactment of the Law Against Domestic Violence is a step in the right direction towards addressing structural gender inequalities that underlies the disproportionately higher level of violence that is committed against women and children.

In accordance with Article 25 of the Law Against Domestic Violence, every victim of domestic violence now has the right to legal assistance by a Public Defender or private lawyer irrespective of the victim's financial capacity to retain a lawyer. Conversely, private lawyers now have a recognized legal right to accompany the victim of domestic violence at every stage of the criminal prosecution process. Engagement of the victim in the prosecution of crimes is essential to ensuring a meaningful and just outcome for the victim, the community and the state.

Private lawyers play a crucial role in promoting gender equality through their assistance to, and representation of victims of gender-based violence. We believe it is imperative that private lawyers equip themselves with a solid understanding of the legal framework for the prosecution of gender-based violence crimes, as well as the practical skills to provide meaningful legal assistance to victims.

The passage of laws is only the first step to addressing social inequalities. It is the ongoing application of laws to real-life cases and the meaningful enforcement of laws through the justice system that will see long-term changes. Private lawyers alongside police, prosecutors and judges all play a key role in addressing gender-based violence through the justice system. Our office remains committed to continuing to work together with all those seeking to address the challenges of gender-based violence in Timor-Leste.



**Dra Idelta Maria Rodrigues**

**Her Excellency Secretary of State for the Promotion of Equality**



## ACKNOWLEDGEMENTS

With the production of this practical manual on providing legal assistance for victims of crimes of gender-based violence, The Asia Foundation (the Foundation) is proud to contribute to the many activities underway to eliminate gender-based violence in Timor-Leste.

Violence against women and children remains prevalent in the country with 38 percent of women claiming to have experienced violence at some point in their lives. There are positive signs however, in particular the promulgation of the Law Against Domestic Violence in 2010 has made it clear that domestic violence is a crime and has significantly increased the responsibility of the state to protect women and children and prosecute crimes of domestic violence. With the promulgation of the law, Timor-Leste has also recognized the need for legal assistance for the victims of domestic violence. Without such support, women, and in particular children, face significant hurdles in seeking prosecution for crimes committed against them and for being protected from ongoing violence.

This manual seeks to provide guidance to those lawyers assisting women and children victims of gender-based violence crimes. Volume One of the manual lays out the legal framework in Timor-Leste in relation to gender-based violence, while Volume Two provides a practical step-by-step guide to lawyers. The manual was produced at the request of the non-governmental organization Judicial System Monitoring Programme (JSMP), a long term implementing partner of the Foundation's USAID-funded Access to Justice Program. Apart from being Timor-Leste's leading legal NGO, providing critical commentary on the development of the judicial system in the country, JSMP provides free legal services to women and children subjected to gender-based violence, through its Victim Support Service (VSS). VSS was founded in 2005 and has grown to become a national service with an annual client base of around 250 clients. The service provides critical support to women and children who are taking the brave step of wanting to see justice for the crimes committed against them.

While VSS remains the only specialized legal support service for women, the organization is fortunately not alone in providing legal assistance to women and children victims of violence. Community legal aid organizations across the country, including Fundasaun Edukasaun Comunidade Matebian (ECM), LBH-Liberta and Fundasaun Fatu Sinai Oecusse (FFSO) are also providing legal services and the Foundation hopes that this manual will assist them and other organizations in their endeavors.

The Foundation has many individuals and organizations to thank for their support and collaboration in developing the manual. First and foremost, the Foundation would like to express appreciation to USAID who has funded our Access to Justice Program in Timor-Leste since October 2002 and through which this manual was produced. The manual was written by Carolyn Graydon, and reviewed by Ruth Hugo. Foundation Legal Officer Lillian Dang managed the production of the manual, including incorporation of technical comments. The manual benefitted from collaborative discussion and input from other agencies and organizations working on gender-based violence, including the Justice Facility, UNFPA, the United Nations Mission in Timor-Leste (UNMIT), and the Association of Lawyers of Timor-Leste (AATL). Critical technical input was provided by Bernardo Fernandes, Legal Adviser to the Judicial Training Centre. The Foundation would like to thank the Prosecutor-General, Her Excellency Dra. Ana Pessoa for her technical comments on the manual and her support for the Foundation's capacity building and legal education

activities. The Foundation would also like to thank the Secretary of State for the Promotion of Gender Equality, Her Excellency Dra Idelta Rodrigues, for endorsing the manual and the provision of technical comments on the draft manual from her office.

Finally the Foundation thanks the legal aid lawyers who will use this manual to help women and children seeking justice for the crimes of violence perpetrated against them. We hope the manual meets your needs.

**The Asia Foundation, Timor-Leste**





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# PART 1: INTRODUCTION

## 1.1 Purpose of the Gender-Based Violence Legal Guideline

This Gender-Based Violence Legal Manual (Volume 1: Legal Framework) aims to provide private lawyers with a sound understanding of the legal framework for the prosecution of gender-based violence offences. To ensure that this Manual is practical and accessible, the author has sought to provide clear and simple explanations of the relevant substantive laws, analysis and procedures. This Legal Guideline should be used in conjunction with Volume 2 on the step-by-step guide to representing victims.

While the Public Prosecutor represents victims of gender-based violence in the tribunal in criminal proceedings, lawyers can still provide legal advice and support to victims of gender-based violence. The Law Against Domestic Violence enacted in 2010, states that a victim in domestic violence proceedings must be accompanied by a lawyer or a Public Defender (Article 25 of the Law Against Domestic Violence). Lawyers can also represent victims in civil proceedings.

This legal guideline aims to equip private lawyers with:

- Understanding of the nature of gender-based violence
- Understanding of the legal framework for gender-based violence crimes
- Understanding of the roles of judicial actors
- Understanding of the criminal prosecution process for cases of gender-based violence
- Options for pursuing clients' economic and social interest

## 1.2 Definitions

### 1.2.1 What is 'gender'?

What is the difference between men and women? There are two ways of categorizing differences between men and women. They are 'sex difference' and 'gender difference'.

'Sex' difference refers to the physical or biological difference between women and men. For example women can have babies and men cannot have babies. These are 'sex' differences in the bodies of women and men.

'Gender' difference refers to social views of the difference between women and men. For example men are better leaders than women, men make better managers than women or men should earn more money than women. These are social ideas about the role and position of women and men and do not relate to any physical or biological difference between women and men.

Gender- roles are based on the society's attitudes and assumptions about men, women, boys and girls. This can lead to discrimination against women and girls as they are deemed less powerful than men and boys in society. It is important to understand when something is a 'sex difference' and when something is a 'gender difference'.

Sex-based role	Gender-based role
Giving birth (female)	Caring for young children (seen as women's responsibility but can be done by either)
Breast feeding (female)	Driving trucks (seen as man's responsibility but can be done by either)
Growing a beard (men)	Mechanic (seen as man's responsibility, but can be done by either)

### 1.2.2 What is 'violence'?

'Violence' can be a physical act or non-physical act which causes harm. For example physical violence can include hitting someone, killing someone or causing physical injury to someone. Non-physical violence can include psychological violence such as causing fear or the threat of harm.

### 1.2.3 What is Gender- Based Violence? (GBV)

Gender-based violence (GBV) refers to violence directed at a person because of their gender role. GBV disproportionately affects women due to the social views and values that perceive women to be less powerful than men. Perpetrators of GBV are usually in positions of power, control or trust over their victims. GBV is usually done for the purpose of controlling and demeaning the victim.

Some forms of GBV receive widespread societal support and are seen as normal, for example acts of domestic violence when a husband 'disciplines' his wife. Others are condemned everywhere, such as the serial rape and murder of women. Thus GBV includes a wide range of behaviours which enjoy varying levels of local and international condemnation. This is a key issue when developing legal strategies to address GBV.

GBV can be sexual, (such as sexual assault), psychological (such as threats, harassment, constant insults, causing humiliation, or causing emotional harm to the victim) or financial, (such as withholding essential resources or impeding the victim from working). Many victims of gender-based violence say that the psychological aspects of being constantly threatened, degraded or insulted, can be more damaging and far-reaching than physical injuries. Usually GBV involves several kinds of violence together, often as a continuous pattern, and often within the context of an ongoing relationship. These characteristics make it especially difficult to address effectively through the criminal justice system which are primarily designed to deal with 'one-off' incidents between strangers.

While women and girls are disproportionately the victims of gender-based violence, men and boys can also be victims. For example, bullying between boys, parental abuse of boys, trafficking or forced prostitution of boys or men, attacks on gay men, acts of sexual assault or abuse against boys, are all examples of gender-based violence against males.

Examples of gender-based violence are more often directed at girls and women include spousal violence, sexual assault (most often by persons known or related to victims, but also by strangers, or in situations of armed conflict) forced marriage, underage marriage (which results in child rape), female infanticide, trafficking and forced prostitution.

### 1.2.4 Different names for gender-based violence

While 'gender-based violence' is the broad term used in major international documents, other names are sometimes used interchangeably (such as 'gender violence') to describe similar behaviors, but which emphasize different aspects of the violence. This can be confusing and no labels are perfect. For example, 'gender-based violence' captures the gender element of the violence but not the fact that women are the majority of victims. 'Violence Against Women' covers a wide range of violent behaviors against women,

but excludes the broader concept of targeting due to gendered roles or performances, which can also apply to men.

The terms ‘sexual violence’, ‘rape’ and ‘sexual assault’ overlap and intersect. To clarify:

- ‘Rape’ is a particular form of ‘sexual assault’;
- ‘Sexual violence’ is broader than ‘sexual assault’ as it also covers non-physical sexual behaviors which are still ‘violent’;
- “Sexual offences” are any sexually-related crimes in the Penal Code.

#### **1.2.4 What is a criminal prosecution?**

Criminal prosecution refers to the process by which the Public Prosecutor institutes and conducts, on behalf of the State, action against the accused person for indictable offences under the criminal law. The criminal prosecution process is set out in the Penal Procedure Code 2008.

In a criminal prosecution it is the role of the Public Prosecutor to order the initiation of criminal proceedings, conduct the investigation or inquiry, prepare the indictment and prove the indictment to the court. The role of the judge is to take all relevant information into account in deciding the facts of the case, and then applying the law to decide whether the defendant is guilty or innocent. If the defendant is guilty, then the judge must decide upon the sentence, again following the instructions of the law on what factors must be taken into account.

Victims are characterized as assistants to the public prosecutor. Victims cannot have separate legal representation in court because they are represented by the public prosecutor (Article 72(1) CPC). This means that most things the victim wishes to put forward in court in support of their case, must go through the prosecutor. Therefore the relationship between the victim’s lawyer and the prosecutor is very critical to the victim’s case.

### **1.3 Overview of Challenges in Prosecuting GBV**

The role of criminal prosecution is to prosecute and punish offenders where their guilt is proven. Punishing offenders creates a public example and aims to deter others from committing the same crime. The State, represented by the Public Prosecutor brings the case, against the suspect. The judge/s then decides whether or not to convict the suspect for the crime.

Civil compensation can be claimed by the victim, either as part of a criminal prosecution, (via the prosecutor) or by the victim lodging a separate civil proceeding in the court. In relation to civil compensation, the judge decides whether the harm as claimed by the victim, is proven, and then decides what amount of compensation is payable by the defendant.

There are many barriers to successful prosecution of GBV cases which result in only a small proportion of cases ever being brought to court, and even fewer resulting in conviction. Barriers to successful prosecution include:

Social and cultural attitudes to GBV which can affect a victim’s ability or desire to pursue her case with the courts and elsewhere.

- GBV such as spousal abuse or incestuous sexual assault, are often seen as problems to be dealt with by the family. Strong family and community pressure can prevent victims complaining to the police, or withdrawing from the process before it is complete.

- Some victims (especially of domestic violence) do not realize what they have experienced is wrong and against the law. Even if they do, many do not know how to seek help, what help is available or cannot physically access it. Even those that do know their rights and have access to the process, might still decide it is not worth complaining to the police when they weigh up the potential benefits versus the social and economic risks.
- Complaining to the police can challenge victims' own sense of identity. Because of gendered roles, it is hard for victims to feel they can be both 'good' wives, mothers or daughters, as well as protect themselves from violence through using criminal justice processes.
- Shame or embarrassment is another strong barrier as society often makes victims feel ashamed or complicit in what has happened to them.

When cases are reported to the police, victims are often let down by the bureaucratic administration of justice. Victims may lose confidence in the formal justice process and will not try to seek help again.

- Many police share community views on whether cases are 'serious' enough to warrant prosecution. Some do not take victims' complaints seriously or follow the proper procedures. Instead, they refer GBV cases back to customary law processes, mediate cases themselves or simply do not notify the prosecutor or collect evidence. The same problems can arise by prosecutors or judges who downplay the seriousness of GBV because it is normalized and tolerated in the broader community.
- Lack of police resources and poor investigation skills can make it hard to collect evidence required to convict the perpetrator.
- Prosecutors have large case back-logs and may not have time to give cases the attention they deserve.
- The court process can be alienating, demanding and traumatic for victims of violence, especially women. Judges' understanding of GBV is limited and can lead to inappropriate acquittals or low sentences or suspended sentences.
- The process takes so long, leaving victims in limbo and often still at risk of further violence or without social and economic security. The outcomes are uncertain and do not address the spectrum of social and economic hardships that victims also face.

#### **Basic tips on representing victims of GBV:**

- Always remember how difficult it is for victims of GBV to pursue justice, and be patient, sensitive and compassionate.
- Never promise more than you can deliver. You must earn your clients' trust by behaving reliably and always following up on any promises made.
- Provide realistic, practical and detailed advice using language your client can understand. Give your clients an overview, but also prepare your clients thoroughly for each stage of the process.
- Demonstrate your professionalism and respect for your clients, as these are the best ways to encourage, support and empower them to seek justice.

## Note: Part 1



## PART 2: THE RDTL CONSTITUTION

The Constitution of Timor-Leste sets out a number of fundamental rights and freedoms of its citizens which form the basis of the laws of the country including the decisions of the Courts.<sup>1</sup> You may refer to relevant Constitutional provisions in your written or oral submissions to prosecutors or the courts, and outline how they are relevant to the facts of your client's case.

Those provisions most relevant to Gender-based Violence are:

- Responsibility of the State to 'create, promote and guarantee' the effective equality of opportunities between women and men (Article 6 (j) RDTL Constitution).
- Equality before the law. No one should be discriminated against on the basis of gender or marital status (Article 16(2) RDTL Constitution).
- Women and men have the same rights and duties in all areas of family, political, economic, social and cultural life (Article 17 RDTL Constitution).
- Children are entitled to special protection from all forms of abandonment, discrimination, violence, oppression, sexual abuse and exploitation (Article 18(1) RDTL Constitution).
- The right to life (Article 29 RDTL Constitution).
- The right to personal freedom, security and integrity (Article 30(1) RDTL Constitution).
- Prohibition on torture and cruel, inhuman or degrading treatment (Article 30(4) RDTL Constitution).
- The right to honour, good name and reputation, and privacy of his or her personal and family life (Article 36 RDTL Constitution).
- Marriage must be by 'free consent' and on terms of full equality (Article 39(3) RDTL Constitution).
- Pregnant women shall be especially protected during pregnancy and after delivery (Article 39(4) RDTL Constitution).

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<sup>1</sup> Article 2 of the Constitution states that all laws of the country must comply with the Constitution.

## Note: Part 2

## PART 3: GENDER-BASED VIOLENCE OFFENCES

### 3.1 Penal Code and the Law Against Domestic Violence

The **Penal Code** (Decree Law No.19/2009) came into effect on 8 June 2009 and revokes the Indonesian penal code which no longer applies (Article 2, Penal Code). The Penal Code sets out, amongst other things, the legal definition of crimes. The **Penal Procedure Code** (Decree Law No.13/2005) establishes the legal framework for the prosecution of individuals (and corporate entities where specified) for criminal acts.

The **Law Against Domestic Violence** (Law 7/2010 7 July 2010) establishes the legal regime applicable to the prevention of domestic violence and protection and assistance to victims of domestic violence.

#### 3.1.1 Definition of domestic violence

Domestic violence is violence that happens between family members or intimate partners (Article 2(1) Law Against Domestic Violence).

**Forms of** domestic violence include physical violence, sexual violence, psychological violence, and economic violence (Article 2 Law Against Domestic Violence):

Physical violence	Sexual violence
<p><b>Article 2(2)(a):</b> Physical violence is understood as any conduct which offends bodily integrity or physical health.</p> <p><u>Examples:</u> acts of hitting, slapping, using physical force, using a weapon to cause physical harm to the victim.</p>	<p><b>Article 2(2)(b):</b> Sexual violence is any conduct that induces the person to witness, maintain or participate in unwanted sexual relations through intimidation, threats, coercion or use of force, or which limits or nullifies the exercise of sexual and reproductive rights. This applies even within a marriage.</p> <p><u>Examples:</u> force sex, acts of sexual relief, no consent, sex with a minor.</p>

Psychological violence	Economic violence
<p><b>Article 2(2)(c):</b> Psychological violence is understood as any conduct that causes emotional damage and reduces self-esteem in order to degrade or control the actions, behaviors, beliefs and decisions of others by threat, embarrassment, humiliation, manipulation, isolation, constant vigilance, systematic persecution, insult, blackmail, ridicule, exploitation, limiting the right to travel or otherwise adversely affecting psychological health and self-determination.</p>	<p><b>Article 2(2)(d):</b> Economic violence is understood as any conduct that involves retention, partial subtraction, or total destruction of personal items, working instruments, impeding work inside or outside the home, personal documents, goods, values and rights or economic resources, including those designed to meet the personal needs and the needs of the household.</p>

**Family members** includes people who are married or used to be married, people who live together like husband and wife, children of the husband and wife or children belonging to just the husband or children belong to just the wife and a person who is part of the family household because of the work they do for the family (Article 3 of the Law Against Domestic Violence)

<p><b>Spouses or former spouses (Article 3(a))</b></p> <p><u>For example:</u> People who are married in Church, through civil process or in traditional process.</p>	<p><b>People who live or have lived in conditions similar to that of spouses, even without Cohabitation (Article 3(b))</b></p> <p><u>For example:</u> People who have lived together like husband and wife but have not formerly married.</p>
<p><b>Ascendants and descendants of both or only one spouse or whomever is in the situation described in the preceding paragraph, provided they are in the same context of dependency and family economy (Article 3(c)).</b></p> <p><u>For example:</u> Children of either the husband or the wife.</p>	<p><b>Any other person who is in the same context of dependency or family economy, including whoever carries out continuous and subordinate domestic labor activity(Article 3(d)).</b></p> <p><u>For example:</u> Adopted children or someone who does ongoing work within the house for the family.</p>

### 3.1.2 The crime of domestic violence

A crime of domestic violence is committed if the act is a crime under the penal code and stated as a domestic violence crime under Article 35 of the Law Against Domestic Violence.

Article 35 sets out two categories for domestic violence crimes:

- **Category A:** Criminal acts falling under articles 153, 154, 155 and 156 of the Penal Code are automatically crimes of domestic violence (Article 35(a) of the LADV).
- **Category B:** Criminal acts falling under articles 138, 139, 141, 145, 146, 167, 171, 172, 175, 177, 178 and 179 are crimes of domestic violence if the circumstances described in Article 2 of the Law Against Domestic Violence exists (Article 35(b) of the LADV). That is, if in addition to meeting the Penal Code requirements there is also physical, sexual, psychological or economic violence in a family context.

The Law Against Domestic Violence supplements the Penal Code by identifying particular Penal Code offences as crimes of domestic violence (Article 35 of the LADV). Most importantly, this status:

- Changes semi-public crimes to public crimes which can be prosecuted without a complaint from the victim (Article 36 of the LADV).
- Requires that all victims of ‘domestic violence’ crimes have legal assistance (Article 25 of the LADV).
- Gives the court additional options to require perpetrators to live away from the family home or have no contact with the victim as a pre-judgement measure (Article 37 of LADV) or as part of a sentence (Article 38(2) Law Against DV).
- Requires the provision of services for victims including refuge, maintenance, health care, information about the law.
- Places obligations to meet victims’ needs upon the State and service providers including police, prosecutors, medical professionals, lawyers and refuge workers.

### 3.2 Articles under the Penal Code which can be used for GBV.

The following are articles under the Penal Code that may apply to cases of gender-based violence. Crimes are public crimes unless state as semi-public crimes:

<b>KILLINGS</b> Most forms of GBV intentionally causing death, should be charged under the offence of Aggravated Homicide (Article 139 Penal Code).			
<b>Penal Code Offence</b>	<b>Elements of crime</b>	<b>Penalty</b>	<b>Plus - Crime of domestic violence?</b>
<b>Homicide (Art. 138)</b>	<ul style="list-style-type: none"> <li>To kill another person;</li> <li>With intent to kill.</li> </ul> <p>Definition of “intent” (Article 15 Penal Code), if perpetrator ‘intends’ to kill (Article 15(1)), if death is a ‘necessary consequence’ of perpetrator’s act (Article 15(2)), or if death is a ‘possible consequence’ and perpetrator aware of this (Article 15(3)).</p>	8-20 years imprisonment	Yes. If Article 138 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence)
<b>Aggravated Homicide (Art. 139)</b>	<ul style="list-style-type: none"> <li>To kill another person (as above); but</li> <li>Where circumstances are particularly terrible.</li> </ul> <p><b>Applies to murders committed by close family members (Article 139(g)) which includes victims who are the spouse, child, (including adopted), parent, grandparent, aunt/uncle, or person living with the perpetrator where there is unequal power relationship.</b> The law considers it more serious to kill close family members than strangers or others.</p> <p>Killing is also ‘aggravated’ where killing method puts others at risk or <b>is particularly</b></p>	12-25 years imprisonment	Yes. If Article 139 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).

	<b>cruel</b> (Article 139(a)), relies on tricking the victim (Article 139(b)), <b>involves financial gain</b> or is <b>done for the pleasure of killing or sexual gratification (Article 139(c))</b> , is done <b>to cover up or obstruct justice</b> for another crime, (Article 139(d) and (j)), is <b>done with at least 24 hours of premeditation</b> (Article 139(f)), or <b>involves a vulnerable victim who is young, old, sick or disabled</b> , (Article 139(h)).		
<b>Manslaughter (Art. 140)</b>	<ul style="list-style-type: none"> <li>To kill another person;</li> <li>By negligence.</li> </ul> <p>‘Negligence’ defined in Article 16 as ‘failing to proceed with caution’, when death is a possibility of action, but the perpetrator does not accept or realize this (Article 16(1).</p> <p>‘Gross negligence’ where perpetrator ‘failed to observe elementary duties of prudence required’ (Article 16(2)).</p>	<ul style="list-style-type: none"> <li>Max 4 years imprisonment or fine</li> <li>Max 5 years imprisonment if there is gross negligence.</li> </ul>	No.

#### **DOMESTIC VIOLENCE AGAINST ADULTS**

Below are the key provisions which can be used in cases of **spousal domestic violence**. Most of these offences can also be used between other family members, or between non-family members.

**Choice of charge: ‘Mistreatment of spouse’ (Art. 154) will usually be the best charge in cases of spousal abuse** (and the one prosecutors are required to choose under Article 42 Penal Code – see Part 4.1.2). It is a more serious charge than the general offence against physical integrity (Article 145) as it includes ‘mental mistreatment’. Where serious/permanent injuries occur against a spouse, Art 154 also offers heavier penalties than Art 146 (see aggravation due to results under Article 156).

Except for where special provisions apply, such as in violence against a spouse, child or other vulnerable person, Art 145 or 146 will be the most common charges for physical domestic violence between other family members, and Article 157 (threats) and Article 158-9 (coercion/duress) for non-physical violence.

Offence	Elements	Penalty	DV Law
<b>Mistreatment of spouse (Art. 154)</b>	<ul style="list-style-type: none"> <li>Any person who inflicts <b>physical or mental mistreatment or cruel treatment</b>;</li> <li>upon a <b>spouse or de facto spouse</b>.</li> </ul>	<ul style="list-style-type: none"> <li>2- 6 years imprisonment</li> <li>3-10 years imprisonment</li> </ul> <p>Where harm causes harm to the body or health of another person which deprives victim of organ or limb, or seriously or permanently disfigures them, or affects their longer term work capacity, intellectual capacities or reproductive potential, or causes permanent illness or incurable mental disorder or endangers their life.</p> <ul style="list-style-type: none"> <li>5 - 15 years imprisonment (Article 156)</li> </ul> <p>Where death occurs</p>	Yes. If Article 154 of the Penal Code is satisfied (Article 35(a) of the Law Against Domestic Violence).
<b>Serious offences against physical integrity (Art. 146, 147)</b>	<ul style="list-style-type: none"> <li>Any person who causes harm to the body or health of another person;</li> <li>which deprives victim of organ or limb, or seriously or permanently disfigures them, or affects their longer term work capacity, intellectual capacities or reproductive potential, or causes permanent illness or incurable mental disorder or endangers their life.</li> </ul>	<ul style="list-style-type: none"> <li>2- 8 years imprisonment (Article 146)</li> <li>If harm intentionally caused, up to 5 years imprisonment (Article 147(a))</li> <li>If harm negligently causes death, 1-6 years imprisonment (Article 147(b)).</li> <li>If intentional harm causes death by negligence, 4-12 years imprisonment (Article 147(c)).</li> </ul> <p><i>See Article 16 for definition of negligence.</i></p>	Yes. If Article 146 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).  No (Art.147)
<b>Simple offences against physical</b>	<ul style="list-style-type: none"> <li>Any person who causes harm to the body or health of another person.</li> </ul>	<ul style="list-style-type: none"> <li>Up to 3 years imprisonment or fine.</li> </ul>	Yes. If Article 145 of the Penal Code is satisfied and the acts also

<b>integrity (Art.145, 148)</b>	Semi-public offence which relies upon victim 'complaint' to be prosecuted unless the offence takes place in circumstances of domestic violence.	<ul style="list-style-type: none"> <li>• If harm caused by negligence, up to 1 year imprisonment or fine (Article 148(1)), or</li> <li>• If there is 'gross negligence', up to 2 years imprisonment or fine, (Article 148((2))</li> <li>• If the negligent act results in serious bodily harm, up to 3 years imprisonment (Article 148(3)).</li> </ul> <p><i>See Article 16 for definition of negligence.</i></p>	<p>occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).</p> <p>No (Art.148)</p>
<b>Kidnapping (Art. 160)</b>	<p>Person who unlawfully detains, arrests, maintains detention or <b>confines</b> another person.</p> <p>(Could be used if one family member confines another to the house or some other place).</p>	<ul style="list-style-type: none"> <li>• Up to 3 years imprisonment or fine or</li> </ul> <p>If detention is longer than 72 hrs; is committed by use of violence, torture or other cruel/degrading treatment; perpetrator negligently causes death or suicide; victim is person exercising public, religious or political authority; or deprivation of liberty is promoted, authorized or endorsed by perpetrator who is public perpetrator or member of political organization, 2-8 years imprisonment</p>	No.
<b>Abduction (Art. 161)</b>	Where person by means of violence, threat or deceit is transferred from one place to another with intention to commit crime of sexual exploitation, assault or abuse (Article 161 (b)).	<ul style="list-style-type: none"> <li>• 4 to 12 years imprisonment</li> </ul> <p>If detention is longer than 72 hrs; is committed by use of violence, torture or other cruel/degrading treatment; perpetrator negligently causes death or suicide; victim is person exercising public, religious or political authority; or deprivation of liberty is promoted,</p>	No.

		authorized or endorsed by perpetrator who is public perpetrator or member of political organization, 5 to 15 years imprisonment.	
<b>Threats (Art. 157)</b>	<ul style="list-style-type: none"> <li>Person who by any means threatens another person with commission of a crime;</li> <li>to cause fear or undermine person's freedom of decision making.</li> </ul> <p>Semi-public crime reliant upon complaint by victim.</p> <p>(Could be used to capture some 'psychological' domestic violence between non-spousal family members).</p>	Up to 1 year imprisonment or fine	No.
<b>Coercion (Art. 158)</b>	<ul style="list-style-type: none"> <li>Any person who uses violence or threats of serious harm;</li> <li>which compels another person to do/not do something under duress.</li> </ul> <p>Semi-public crime reliant on complaint.</p> <p>Again, could also be used to capture some 'psychological' domestic violence between non-spousal family members (E.g. if father-in law violently or threateningly demands that his daughter-in law performs her 'domestic duties' in a particular way to his liking, or he threateningly demands she not leave the house, visit her own family or talk to male friends in the neighbourhood)</p>	<ul style="list-style-type: none"> <li>Up to 2 years imprisonment or fine</li> </ul> <p>If threat was to commit crime against victim with up to 3 year sentence; victim is a particularly defenceless person (i.e. young, old, pregnant, with disability); perpetrator is abusing office; or victim is public official, up to 3 years imprisonment or fine</p>	No.
<b>Serious</b>	<ul style="list-style-type: none"> <li>Coercion (see above)</li> </ul>	<ul style="list-style-type: none"> <li>Up to 3 years imprisonment or a fine.</li> </ul>	

<b>Coercion (Art. 159)</b>	<ul style="list-style-type: none"> <li>Through the threat of a crime punishable with penalty of imprisonment exceeding 3 years; or</li> <li>By an official seriously abusing his or her office; or</li> <li>Against a person who is particularly defenseless, by virtue of age, deficiency, illness or pregnancy;</li> <li>Against any of the people referred to in subparagraph i) of article 139,</li> </ul>		
<b>Rape (Art. 172)</b>	<ul style="list-style-type: none"> <li>Any person who <b>uses, violence, serious threat, or makes a person unconscious or unable to resist (i.e. drugged or drunk)</b></li> <li><b>to force the victim</b> to have vaginal, anal or oral sex or put other objects in victim's vagina or anus.</li> </ul> <p><b>Applies equally between spouses or others in intimate relationships.</b></p> <p>This is unfortunately a <b>narrow definition</b> of rape which requires the use or threat of force to achieve intercourse, rather than just focusing on whether the person consented to sex or not. However the issue of 'consent' is still relevant in determining whether 'force' was used and is defined in <b>Article 47 Penal Code.</b></p> <p>'Consent' must be <b>informed</b> and <b>given freely</b> and <b>honestly</b> for it to count. It can be freely withdrawn at any time 'before</p>	<ul style="list-style-type: none"> <li>5- 15 years imprisonment. or</li> <li>5-20 years imp. if perp. abuses authority from family relationship, guardianship/ward or hierarchical economic relationship OR has abused position of authority in institution, OR victim is unconscious or incapable due to disability, illness or age OR if victim less than 17 years old. (Article 173(d))</li> <li>Penalty up by one-third (1/3) if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, OR the victim is the child, (including adopted), niece, nephew sibling, or living with perpetrator in similar relationship or where there is a hierarchical economic or work-related dependence. (Article 182)</li> </ul>	<p>Yes. If Article 172 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).</p>

	<p>the execution of the act' (Article 47(2)). This means before the act is completed. (For example, if a woman freely agrees to have sex with a man but changes her mind during sex (i.e. penetration has already commenced), if the man uses force to continue, it is still rape.</p> <p><b>If the perpetrator does not know if consent has been given, they are still guilty</b> and punishable with the penalty for an 'attempt' <b>BUT consent can be presumed if it was reasonable in all the circumstances</b> for the perpetrator to assume the person would have consented in those circumstances (Article 47(4)&amp; (5)).</p> <p><b>Consent can only be given by someone over 16 years old AND has capacity to judge its meaning.</b> (Article 47(3)).</p> <p>'Consent' to an act which is illegal and considered offensive is not possible. (Art 47(1))</p>		
<b>Sexual coercion (Art. 171)</b>	<ul style="list-style-type: none"> <li>Any person who uses, violence, serious threat, or makes a person unconscious or unable to resist (i.e. drugged or drunk)</li> <li>to compel victim to endure 'any act of sexual relief'.</li> </ul>	<ul style="list-style-type: none"> <li>2-8 years imprisonment. or</li> <li>4-12 years imprisonment if perpetrator abuses authority from family relationship, guardianship/ward or hierarchical economic relationship OR has abused position of authority in institution, OR victim is unconscious or incapable due to disability, illness or age OR if victim less than 17 years old.</li> </ul>	Yes. If Article 171 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).

		(Article173(d)) <ul style="list-style-type: none"> <li>Penalty up by 1/3 if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, OR the victim is the child, (including adopted), niece, nephew sibling, or living with perp. in similar relationship or where there is a hierarchical economic or work-related dependence. (Article182)</li> </ul>	
<b>DOMESTIC VIOLENCE AGAINST CHILDREN</b>			
<b>Offence</b>	<b>Elements</b>	<b>Penalty</b>	<b>DV Law</b>
<b>Mistreatment of minor (Art. 155 &amp;156)</b>	<ul style="list-style-type: none"> <li>Any guardian or person responsible for upbringing or custody of child under 17 years, and causes harm to child's body or health or inflicts physical, mental or cruel treatment</li> </ul> OR <ul style="list-style-type: none"> <li>subjects child to exploitation, dangerous work, OR slavery, OR involves the child in prostitution</li> </ul> OR <ul style="list-style-type: none"> <li>as the subject of pornography OR recruits/offers child role in trafficking drugs.</li> </ul>	<ul style="list-style-type: none"> <li>2-6 years imprisonment Or</li> <li>if perpetrator uses child for begging, max. 3 years imprisonment</li> <li>3-10 years imprisonment where loss of organs, limbs, work capacity or long term or irreversible physical or mental damage to victim (Article146)</li> <li>5-15 years imprisonment If death, <b>(Article 156 Penal Code)</b></li> <li>Penalty up by 1/3 if victim is child, (inc adopted), grand-child, or sibling of perpetrator.</li> </ul>	Yes. If Article 155 of the Penal Code is satisfied (Art 35(a) of Law Against Domestic Violence).  Yes. If Article 156 of the Penal Code is satisfied (Art 35(a) of Law Against Domestic Violence).
<b>Child (&gt;14) Rape Art. 177(1)</b>	<ul style="list-style-type: none"> <li>Any person who practices vaginal, anal or oral sex with a minor aged less than 14 years</li> <li>consent irrelevant</li> </ul>	<ul style="list-style-type: none"> <li>5-20 years imprisonment</li> <li>Penalty up by 1/3 if victim less than 12 years old OR victim acquires</li> </ul>	Yes. If Article 177 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law

	<ul style="list-style-type: none"> <li>also applies between non-relatives such as where neighbour rapes a child under 14yrs</li> </ul>	venereal disease or HIV OR victim attempts or commits suicide, <b>OR the victim is the child, (including adopted), niece, nephew sibling, or living with perpetrator in similar relationship or where there is a hierarchical economic or work-related dependence (Article182).</b>	Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).
<b>Child (&gt;14) sexual abuse (Art. 177(2))</b>	<ul style="list-style-type: none"> <li><b>Any person</b> who practices <b>any act of sexual relief</b> with child <b>less than 14 years</b>.</li> <li>consent irrelevant.</li> <li>Also applies between non-relatives such as where neighbour practices an act of sexual relief with a child under 14 yrs.</li> </ul>	<ul style="list-style-type: none"> <li>5-15 years imprisonment for other sexual acts with minor under 14 years old.</li> <li><b>Penalty up by 1/3 if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, OR the victim is the child,(including adopted), niece, nephew sibling, or living with perp. in similar relationship or where there is a hierarchical economic or work-related dependence (Article182).</b></li> </ul>	Yes. If Article 177 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).
<b>Sexual acts with child 14-16 (Art. 178)</b>	<ul style="list-style-type: none"> <li><b>Any adult</b> who practices <b>any sexual act</b> with child aged <b>between 14-16 years</b> old</li> <li>consent irrelevant</li> <li>In cases of <b>rape, Art 172</b> would be used which includes higher penalty (5-20 years) <b>where victim less than 17 years old (Article173 (d)).</b></li> </ul>	<ul style="list-style-type: none"> <li>Up to 5 years imprisonment.</li> <li><b>Penalty up by 1/3 if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, OR the victim is the child, (including adopted), niece, nephew sibling, or living with perp. in similar relationship or where there is a hierarchical economic or work-</b></li> </ul>	Yes. If Article 178 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).

		related dependence (Article182).	
<b>3.2.4 DOMESTIC VIOLENCE AGAINST OTHER VULNERABLE PERSONS</b>  These provisions target cases where violence is directed at other vulnerable (often female) household members. For example, victims might be more distant female family members being supported by extended family, informally ‘adopted’ domestic servants, or women family members who suffer physical or mental disability. Women are generally socially and economically weaker than men, especially those women who are ‘marginal’ or peripheral household members. These peripheral economically dependent female household members and those who are old, sick or disabled, are even more vulnerable to sexual abuse and other forms of violence such as abandonment and therefore enjoy targeted legal protection.			
Offence	Elements	Penalty	DV Law
<b>Mistreatment of disabled person (Art. 153)</b>	<ul style="list-style-type: none"> <li>Any person responsible for custody, guardianship, education or employment of a particularly vulnerable disabled person (<b>due to illness, age, pregnancy, disability</b>),</li> <li>Who harms their <b>health</b> or <b>causes physical, mental or cruel mistreatment</b>.</li> </ul>	<ul style="list-style-type: none"> <li>Imprisonment 2-6 years,</li> <li>3-10 years imprisonment if harm causes loss of organs, limbs, work capacity or long term or irreversible physical or mental damage to victim</li> <li>If harm causes death, 5-15 years imprisonment</li> <li><b>Up 1/3 if victim is spouse (incl. <i>de facto</i>), child (incl. adopted), sibling, parent (inc. adopted) or grandparent of perpetrator.</b></li> </ul>	Yes. If Article 153 of the Penal Code is satisfied (Art 35(a) of Law Against Domestic Violence).
<b>Abandonment or exposure (Art. 143)</b>	<ul style="list-style-type: none"> <li>Any person who, <b>intentionally, endangers the life</b> of another person by exposing them to situation where they <b>are unable to ‘protect’ him/herself</b> (Ar. 143(a)).</li> </ul> <p><b>OR</b></p> <ul style="list-style-type: none"> <li><b>where perpetrator is responsible</b> for protecting/caring/assisting a person</li> </ul>	<ul style="list-style-type: none"> <li>1-6 years imprisonment</li> <li>2-8 years imprisonment if victim is seriously harmed, or</li> <li>If the victim dies, 5-15 years imprisonment</li> <li><b>Penalties up 1/3 if victim is a spouse (incl. <i>de facto</i>), child (incl. adopted),</b></li> </ul>	No.

	who is defenceless by reason of age, physical impairment or illness and abandons them (Article 143(b)).	<b>parent, grandparent or sibling of the perpetrator.</b>	
<b>Sexual abuse of person incapable of resisting (Art. 179)</b>	<ul style="list-style-type: none"> <li>Any person who practices <b>any sexual act</b></li> <li>with unconscious or person incapable by illness or disability.</li> </ul>	<ul style="list-style-type: none"> <li>4-12 years imprisonment.</li> <li>Penalty up by 1/3 if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, <b>OR the victim is the child,(including adopted), niece, nephew sibling, or living with perp. in similar relationship or where there is a hierarchical economic or work-related dependence (Article182).</b></li> </ul>	Yes. If Article 179 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).
<b>Sexual fraud (Art. 180)</b>	<ul style="list-style-type: none"> <li>Any person who fraudulently takes advantage of mistaken identity, and</li> <li>practices vaginal, anal or oral coitus with another person. Semi-public crime; depends on victim filing a complaint.</li> </ul>	<ul style="list-style-type: none"> <li>Max 3 years imprisonment</li> <li>Penalty up by 1/3 if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, <b>OR the victim is the child, (including adopted), niece, nephew sibling, or living with perpetrator in similar relationship or where there is a hierarchical economic or work-related dependence (Article182).</b></li> </ul>	No.
<b>ABUSE FOR ECONOMIC GAIN</b>			
<b>AGAINST CHILDREN</b>			
<b>Offence</b>	<b>Elements</b>	<b>Penalty</b>	<b>DV Law</b>
<b>Child trafficking</b>	<ul style="list-style-type: none"> <li>Person who recruits, assigns,</li> </ul>	<ul style="list-style-type: none"> <li>8-20 years imprisonment</li> </ul>	No.

<b>(Art. 163 &amp; 164)</b>	<p>purchases, transports, transfers, houses or receives child <b>under age of 17</b>,</p> <ul style="list-style-type: none"> <li>• to <b>exploit</b> them.</li> <li>• Consent of victim is irrelevant.</li> </ul> <p>“Exploit” means prostitution or other sexual exploitation, forced labour, slavery or similar practices, or extraction of organs.</p>	<ul style="list-style-type: none"> <li>• 12-25 years if purpose is for sexual exploitation OR if <b>victim is under 17 years</b> old OR if the victim is in or travelling to foreign country OR if the victim is also forced to commit crimes (Article 164, Aggravation.).</li> </ul>	
<b>Sale of Children (Art. 166)</b>	<ul style="list-style-type: none"> <li>• In cases not falling under ‘human trafficking’ any person who sells or transfers a child to another for any sum, exchange, reward or advantage.</li> </ul>	<ul style="list-style-type: none"> <li>• 4-12 years imprisonment if victim is under 17 years old</li> </ul>	No.
<b>Child prostitution (Art. 175)</b>	<ul style="list-style-type: none"> <li>• Any person who, even with ‘consent’ of the victim, commits any acts of sexual exploitation with victim less than 17 years old (pimping).</li> <li>• Sexual exploitation is defined in Article 174 as ‘Any person, who for profit or livelihood promotes, facilitates or by any other means contributes to another person engaging in prostitution or sexual acts’.</li> </ul>	<ul style="list-style-type: none"> <li>• 4-12 years imprisonment;</li> <li>• 5 to 15 years imprisonment if victim is abandoned OR acts out of economic necessity OR if violence, serious threats or coercion used against victims OR if victim ‘displaced’ to another country, OR if perpetrator withholds victim’s identity document/s.</li> <li>• Penalty up by 1/3 if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, OR the victim is the child,(including adopted), niece, nephew sibling, or living with perp. in similar relationship or where there is a hierarchical economic or work-related dependence. (Article182)</li> </ul>	Yes. If Article 175 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic Violence).

<b>Child pornography (Art. 176)</b>	<ul style="list-style-type: none"> <li>Any person who for sexual purposes, uses, exposes or represents a victim aged less than 17 years performing any sexual activity, whether real or simulated,</li> <li>Or exhibits the sexual activity or sexual organs of a minor (uses child pornography) or produces, distributes, imports/exports, offer, sells or possesses child pornography or record of child pornography.</li> </ul>	<ul style="list-style-type: none"> <li>3 to 10 years imprisonment;</li> <li>Penalty up by 1/3 if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, OR the victim is the child, (including adopted), niece, nephew sibling, or living with perpetrator in similar relationship or where there is a hierarchical economic or work-related dependence (Article 182).</li> </ul>	No.
<b>AGAINST ADULTS</b>			
<b>Offence</b>	<b>Elements</b>	<b>Penalty</b>	<b>DV Law</b>
<b>Human Trafficking of adults (Art. 163 &amp; 164)</b>	<ul style="list-style-type: none"> <li>Person who recruits, assigns, purchases, transports, transfers, houses or receives person over age of 17,</li> <li>to <b>exploit</b> them,</li> <li>and does so by using threats, force or other forms of coercion, (kidnapping, fraud, trickery, abuse of power or situation of vulnerability, or by economic arrangement).</li> <li><b>Consent of victim is irrelevant (Art 163(4)).</b></li> </ul> <p>“Exploit” includes but not limited to prostitution or other sexual exploitation, forced labour, slavery or similar practices, or extraction of organs (Art 163(3)).</p>	<ul style="list-style-type: none"> <li>8-20 years imprisonment</li> <li>12-25 years imprisonment if purpose is for sexual exploitation OR if the victim is in or travelling to foreign country OR if the victim is also forced to commit crimes. (Article 164)</li> </ul>	No.

<b>Sale of persons (Art.166)</b>	<ul style="list-style-type: none"> <li>In cases not falling under ‘human trafficking’ any person who sells or transfers a person to another for any sum, exchange, reward or advantage.</li> <li>Consent of victim is irrelevant if perpetrator is in position of power or authority over victim.</li> </ul>	<ul style="list-style-type: none"> <li>2-8 years imprisonment</li> <li>4-12 years imprisonment <b>if through abuse of authority from family relationship</b>, ward, guardianship or hierarchical/economic/labor-related dependence OR through abuse of perpetrator’s position in institution, OR if victim is unconscious or incapable due to disability, age, illness etc.</li> </ul>	No.
<b>Enslavement (Art. 162)</b>	<ul style="list-style-type: none"> <li>Any person who puts a person into slavery or uses a slave.</li> </ul> <p>A slave is a person who is under control of another on basis of property or other ‘right’.</p>	<ul style="list-style-type: none"> <li>8-20 years imprisonment</li> </ul>	No.
<b>Sexual exploitation of another (Art. 174)</b>	<ul style="list-style-type: none"> <li>Any person who for profit or livelihood promotes,</li> <li>facilitates or contributes to engaging another person in prostitution or sexual acts (pimping).</li> </ul> <p>Sexual exploitation is defined in article 174 as: Any person who for profit or livelihood promotes, facilitates or by any other means contributes to another person engaging in prostitution or sexual acts.</p>	<p>3 to 10 years imprisonment</p> <p>4 to 12 years imprisonment, if victim is abandoned OR acts out of economic necessity OR if violence, serious threats or coercion used against victims OR if victim ‘displaced’ to another country, OR if perpetrator withholds victim’s identity document/s.</p> <p>Penalty up by 1/3 if victim acquires venereal disease or HIV OR victim attempts or commits suicide, OR the victim is the child, (including adopted), niece, nephew sibling, or living with perpetrator in similar relationship or where there is a hierarchical</p>	No.

		economic or work-related dependence (Article 182).	
<b>CRIMES BY WOMEN</b>			
<b>Offence</b>	<b>Elements</b>	<b>Penalty</b>	<b>DV Law</b>
<b>Infanticide (Art. 142)</b>	<ul style="list-style-type: none"> <li>A mother who kills her child during childbirth or soon after while still 'under the disturbing influence' of childbirth.</li> <li>Can be charged where woman not eligible for defence to murder of 'insanity,' but kills because she suffers from post-natal depression.</li> <li>Can also be charged instead of murder where shortly after birth, woman kills baby for reasons such as she cannot care for child or faces dire social consequences for having child outside socially sanctioned relationship.</li> </ul> <p>Given that abortion is not available, (see below) this lesser charge in lieu of murder, is some acknowledgement of the social burden borne by women who suffer unwanted pregnancy and birth.</p>	<ul style="list-style-type: none"> <li>3-10 years imprisonment</li> </ul>	No.
<b>Termination of pregnancy (Art. 141)</b>	<ul style="list-style-type: none"> <li>A crime is committed where a pregnant woman consents to or causes an abortion to be performed upon herself.</li> </ul> <p>An earlier version of the law (Decree-Law 19/2009 into effect on 8 June 2009)</p>	<ul style="list-style-type: none"> <li>Max 3 years imp.</li> </ul>	Yes. If Article 141 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic

	<p>permitted abortion to prevent ‘serious and irreversible harm to body or physical or mental health’ to the woman. This would have covered for example, a victim of rape who became pregnant or a woman who was borderline suicidal. This broader exception was struck down by the Parliament (Law 6/2009 into effect 16 July 2009) who substituted it with the narrower provisions.</p> <p>As has been well documented globally, the availability of legal abortion is key to preventing the deaths of many women who otherwise risk dying following non-medicalised procedures, or kill their babies after birth, because of the huge social costs to women of unwanted pregnancy. For further information and reading see Suzanne Belton, Andrea Whittaker and Lesley Barclay, <i>Maternal Mortality, Unplanned Pregnancy and Unsafe Abortion in Timor-Leste: A Situational Analysis</i>, Alola Foundation and UNFPA, 2009.</p>		Violence).
<b>OTHER CRIMES POSSIBLY RELEVANT TO GBV</b>			
<b>Offence</b>	<b>Elements</b>	<b>Penalty</b>	<b>DV Law</b>
<b>Torture or cruel, degrading inhuman treatment (Art. 167)</b>	<ul style="list-style-type: none"> <li>Any police, prosecutor, judge, prison or other guard who commits torture or cruel, degrading or inhumane treatment,</li> <li>in order to get a confession or</li> </ul>	<ul style="list-style-type: none"> <li>2-8 years imprisonment</li> <li>5-15 years imprisonment if especially bad torture is used (ie severe beatings, electric shock, simulated execution, sexual abuse or serious threats against</li> </ul>	Yes. If Article 167 of the Penal Code is satisfied and the acts also occur in the circumstances described in Article 2 of the Law Against Domestic Violence (Art 35(b) of Law Against Domestic

	<p>information or to punish or intimidate that person.</p> <p>‘Torture or cruel, degrading or inhumane treatment’ means any act inflicting severe physical or psychological suffering, strain or using drugs to affect victim’s decision making or free-will (for example, sedation). Acting under orders is not a defence.</p> <p>Any officer/authority must report torture if they become aware another officer (superior or subordinate) is carrying out torture, or face imp. 1-6 years. (Article 169)).</p> <p>While international jurisprudence has established that perpetrators of ‘torture’ can be private citizens, Art 167 is narrower and makes it pretty clear that the perpetrator must be an official as per above. For example, where a woman detainee or prisoner is raped or sexually abused by police or a prison guard whilst in custody.</p>	<p>family members) OR if perp. habitually commits torture (Article 168)</p> <ul style="list-style-type: none"> <li>• 5-20 years imprisonment if treatment results in death or suicide of victim (Article 168)</li> </ul>	Violence).
<p><b>Sexual exhibitionism. (Art. 181)</b></p>	<ul style="list-style-type: none"> <li>• Any person who <b>publicly disturbs another</b> person</li> <li>• by <b>committing acts of a sexual nature</b> (For example, where a man exposes himself or masturbates in the presence of a group of women on the street.)</li> </ul> <p>Semi-public crime; depends on victim filing a complaint.</p>	<ul style="list-style-type: none"> <li>• Max 3 years imprisonment or fine.</li> <li>• Penalty up by 1/3 if victim less than 12 years old OR victim acquires venereal disease or HIV OR victim attempts or commits suicide, OR the victim is the child, (including adopted), niece, nephew sibling, or living with perp. in similar relationship or where there is a hierarchical economic or work-related dependence. (Article 182)</li> </ul>	No.

## Note: Part 3



# PART 4: THE PROSECUTION OF CRIMES

## 4.1 Composition of Crimes

### 4.1.1 Public and Semi-Public Crimes (Article 106 Penal Code)

- Public crimes are those the criminal prosecution of which does not depend on a complaint being filed.
- Semi-public crimes are those which depend upon a complaint being filed within 6 months of the incident occurring (Article 108 Penal Code). Complaints can be filed by the victim or by certain other persons, with the police or the Public Prosecution Service (Article 49 Penal Procedure Code). Under Article 214 Penal Procedure Code complaints can be filed by:
  - The victim (defined in Article 71 Penal Procedure Code);
  - If the victim dies without having lodged or waived a complaint the surviving spouse (including *de facto*) and the descendants or, if there are none, to the progenitors, siblings and their progenitors, except where any of these persons has taken part in the crime;
  - Where the victim is unable to exercise the right to complain on grounds of a mental disorder or for being aged less than 16 years, that right shall belong to his or her legal representative or if there is none, the surviving spouse (including *de facto*) and the descendants or, if there are none, to the progenitors, siblings and their progenitors, except where any of these persons has taken part in the crime.
- Implicit or implied waiver of a complaint means that the complaint cannot be lodged at a later stage. Similarly withdrawal of a complaint precludes the complaint from being lodged again in the future (Article 216 Penal Procedure Code).
- In semi-public crimes, the judge is permitted to try to reconcile the victim and the defendant (Article 262 Penal Procedure Code).
- After much debate, it was decided that all the crimes defined in the Law Against Domestic Violence are public crimes (Article 36 Law Against DV). Most importantly, Article 145 of the Penal Code (simple offence against physical integrity), often used in GBV cases and previously hampering their prosecution because dependant on complaint of the victim, became a public crime if committed in a family context (Article 35(b) of the LADV).
- The only crimes which could involve GBV which are semi-public crimes are:
  - Simple offences against physical integrity (Article 145 Penal Code - but if committed in family context then it is a public crime as per Article 2, 35 & 36 of the Law Against Domestic Violence, and Article 148 Penal Code)
  - Reciprocal offences against physical integrity (Article 151 Penal Code)
  - Threats (Article 157 Penal Code)
  - Coercion (Article 158 Penal Code)
  - Sexual fraud (Article 180 Penal Code)
  - Sexual exhibitionism (Article 181 Penal Code)

### 4.1.2 Selecting the charge where multiple crimes may apply (Article 42 Penal Code)

- If the same acts can be prosecuted under several different provisions, then only one crime can be prosecuted and it will be the one that is **most specific** (Article 42(a) Penal Code) and **most extensive and most complex** (Article 42(c) Penal Code) to the particular acts. For example, a husband beating his wife could meet the elements of common assault (Article 145) as well as mistreatment of spouse (Article 154). Article 42 of the Penal Code says that prosecution would occur under mistreatment of spouse because it is more specific to the acts and a more serious charge (i.e. higher maximum penalty).
- However **where more than one crime is committed**, then a perpetrator can be charged with **multiple related offences**. For example, if a man beats his wife and then rapes her, he can be charged with rape (Article 172) and mistreatment of spouse (Article 154) if there is two separate acts (see Article 35 (1) Penal Code).
- Where the prosecutor files an indictment but the judge/s do not believe that the elements of the crime in the indictment are made out on the facts as put, **the court is required to inform both the prosecutor and the defence, to give the prosecution the opportunity to amend the indictment** to include other charges, which can be more or less serious than the ones in the original indictment (Art. 274 Penal Procedure Code). The court should not simply proceed with the trial on inappropriate charges and then fully acquit the defendant when they could have been convicted on other charges (as they cannot be retried on the same facts due to double jeopardy).

### 4.1.3 Forms of crime

- **Preparatory acts:** cannot be prosecuted (Article 22 Penal Code)
- **Attempts:** can be prosecuted when a person has **decided to commit a crime**, and **has tried to start** committing the crime but has **been stopped for reasons beyond their control** (i.e. someone else intervening) (Article 23 Penal Code) (for example, a man grabs a woman, rips off her clothes and is about to rape her when he is interrupted by someone, and runs away).
  - Attempts can **only be prosecuted for crimes of 3 years** or more imprisonment, and receives a **reduced sentence** compared to had the crime been completed (Article 24 Penal Code).
  - **Not an 'attempt' if the perpetrator voluntarily desists from crime**, (Article 26 Penal Code) including if perpetrator desists but is part of a group who then go on to commit the crime (Article. 27 Penal Code). Remorse: **If the crime does not involve violence or serious threats**, and the **perpetrator remedies the situation before the crime is reported**, then perpetrator **gets lesser sentence, or possibly none at all** (Article 28 Penal Code).

### 4.1.4 Degrees of involvement in crime

Aside from primary actors, perpetrators can also be prosecuted if they have instigated or been complicit in a crime, (for example as an accomplice). See Article 29-33 Penal Code.

## 4.2 Exemption from Criminal Liability

There are two key exemptions from criminal liability:

- **Minors under 16 years are exempt from criminal liability (Article 20 of the Penal Code).** For persons 16-21 years old, there are specific provisions concerning sentencing.
- **Persons with mental disorder are exempt from criminal liability (Article 21 of the Penal Code).** This is because the individual may not comprehend the unlawfulness of the act or is in a position of significantly diminished capacity to appreciate the unlawfulness of such an act. The person must have been in position of insanity before the commission of the act.

## 4.3 Causes for Exclusion (Defences)

There are two main causes for exclusion from criminal liability:

- Exclusion of unlawfulness
- Exclusion of guilt

### 4.3.1. Causes for Exclusion of Unlawfulness (Article 43-47 Penal Code)

- **Exclusion of unlawfulness (Article 43 Penal Code):** An act is not unlawful if committed in exercise of a right or performance of a duty, in legitimate defense, a state of justifying need or with consent.
- **Legitimate defense (Article 44 Penal Code):** An act committed as the necessary means to repel an imminent or present unlawful attack on legally protected interests of the perpetrator or of a third party. This can also be referred to as 'self-defense'. Self-defence is important in cases of GBV where the victim fights back and causes injuries or kills.

*For example, a man is strangling his wife who manages to pick up a knife from the table and push it into his back and kill him. The threat is of an imminent attack and the response is proportionate because it is likely he will kill her without her intervention. But if he has slapped her over the face and she responds by stabbing him to death with a kitchen knife, she can still be prosecuted for murder because the force used was not proportionate, but she would get a lower sentence.*

The threat also needs to be of an **imminent** or **present** attack.

*For example, if a husband had been violently abusing his wife for years, and she waits until he is asleep and then kills him with an axe, she can still be charged with murder (or even aggravated murder if premeditation more than 24 hours (see Article. 139(f) Penal Code) because the threat was not of an imminent or present attack, even if her response was proportionate.*

- **State of justifying need (Article 45 Penal Code):** If act is committed as appropriate means to avert a present danger that threatens legally protected interests of the perpetrator or a third party. However, the interest safeguarded must be superior to the interested sacrificed AND it is reasonable to impose the sacrifice of the interest of the victim.

*For example - if someone was going to burn down a house you could restrain them (technically an assault in other circumstances).*

- **Conflict of duties (Article 46 Penal Code):** It is not unlawful for a person to commit, in the case of conflict in performance of legal duties or legitimate orders from an authority, a duty or order of equal or superior value to that sacrificed. Duty to obey hierarchical superiors ceases when it leads to the commission of a crime.
- **Consent (Article 47 Penal Code):** Consent can only be given by someone who is over 16 years of age and has the necessary discernment to judge its meaning and scope at the moment consent is given.

Consent may be expressed by any means revealing a free, honest and informed will of the holder of the protected legal interest, and it may be withdrawn any time before the execution of the act.

There is a presumption of consent when the situation in which the perpetrator is acting, reasonably permits him or her to suppose that the holder of the legally protected interest would have effectively given consent to the act.

If consent is not known to the perpetrator than he/she shall be punishable with the penalty applicable to attempt.

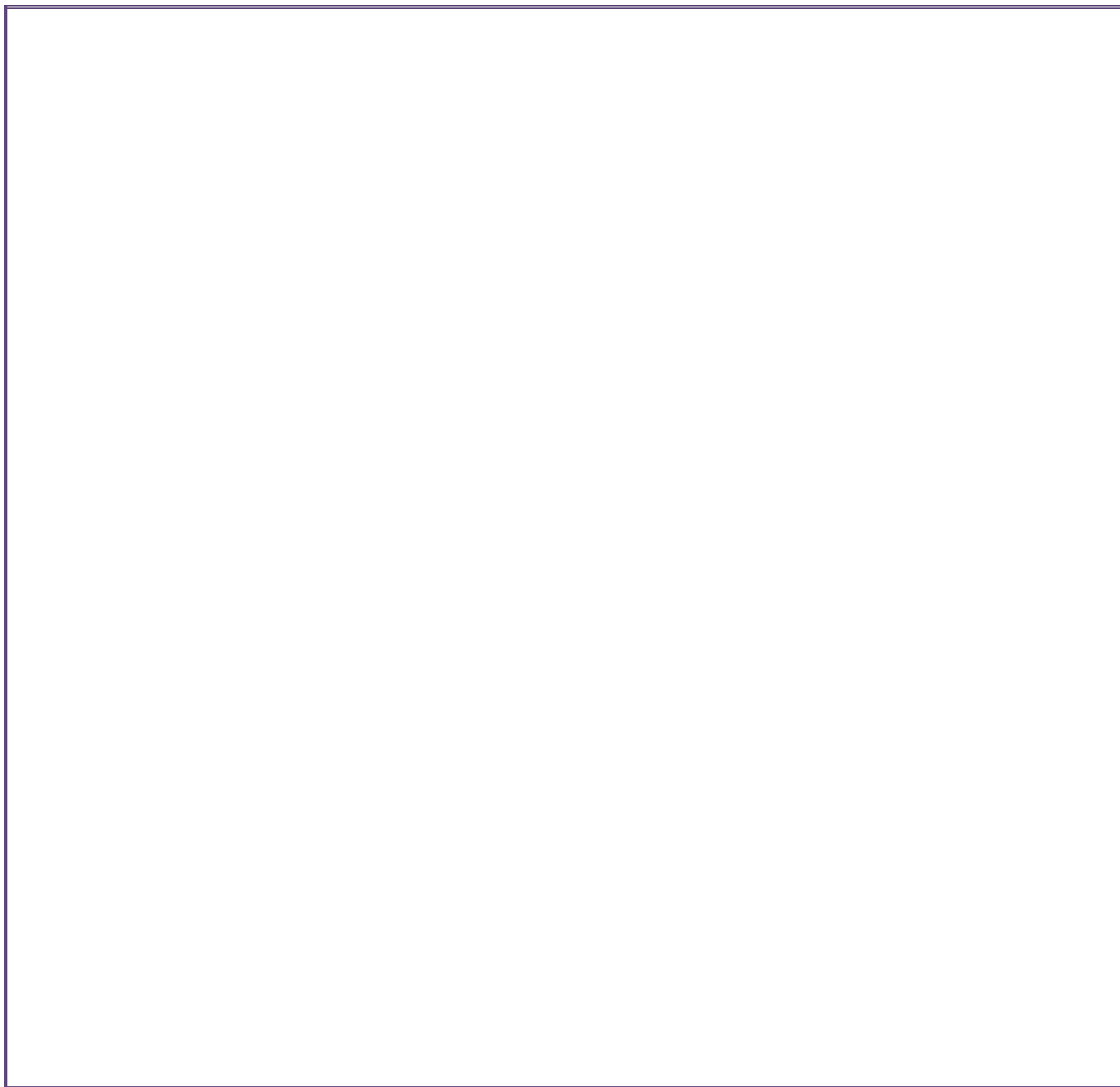
#### 4.3.2. Causes for exclusion of guilt

- **Excess of legitimate defense (Article 48 Penal Code):** If an act is committed in self-defense but is excessive to that required for the defensive action then the act is still unlawful but the perpetrator may receive a reduced sentence.
- **Exculpatory state of need (Article 49 Penal Code):** A person will not be prosecuted where they commit a crime as the only “reasonable” way to avoid a real danger to the ‘life, physical integrity, honour or freedom’ of that person or another (Article 49(1)). If the danger is to something else (i.e. property), then the perpetrator can still be prosecuted but will get a reduced sentence, or even possibly, none at all (Article. 49(2)).
- **Exculpatory undue obedience (Article 50 Penal Code):** A public servant who obeys an order not knowing that it leads to commission of a crime, acts without guilt, if the unlawfulness of the act is not evidence from the circumstances surrounding it.

#### 4.4 Statute of limitations

- Crimes cannot be prosecuted if they occur too long after the incident. The length of time depends upon the seriousness of the offence.
- Offences with maximum sentences of **more than 12 years imprisonment** must be prosecuted **within 20 years** of when they occurred (Article, 110(1)(a) Penal Code).
- Offences with sentences between **7-12 years imprisonment** must be prosecuted **within 15 years**. (Art. 110(1)(b) Penal Code).
- Offences with sentences of **3-7 years imprisonment** must be prosecuted **within 8 years**. (Article. 110(1)(c) Penal Code) or **>3 years, within 4 years**. (Article. 110(1)(d) Penal Code).

## Note: Part 4





# PART 5: ROLES OF JUSTICE ACTORS

## 5.1 Role of the Police

- The roles of police are **to prevent crime, proactively gather reports of crime, to provide collected information/evidence to the prosecutor** (Article 55 Penal Procedure Code and **in crimes under Law Against DV, within 5 days** of the incident, Article 24(2)(e) Law Against Domestic Violence), **identify perpetrators**, (see Article 53 Penal Procedure Code which allows police to detain suspect for max 12 hours for identification purposes), **to take steps necessary to preserve evidence, and to cooperate with requests of the prosecutor** (Article. 52 CPC).
- Police are also obliged to **intervene in crimes which are ongoing** and have the power to search premises and **arrest and detain suspects without a court order** when:
  - the crime is in progress/immediate aftermath such as a chase (*flagrante delicto* Article 218 Penal Procedure Code); OR
  - the penalty for the crime is greater than 3 years (Art. 194 Penal Procedure Code) AND there is evidence suspect plans to escape AND judge's intervention could come too late (Art. 218 and 219 Penal Procedure Code).
- In all other instances, police require a warrant for arrest issued by a court (Article 220 Penal Procedure Code).
- Police authorities and the Public Prosecution Service, or other agencies with a similar status, may order the arrest of the defendant other than in *flagrante delicto* where (Article 220(2) Penal Procedure Code):
  - a) pre-trial detention is admissible;
  - b) there exist strong indications that the defendant is preparing to escape legal action;
  - c) in an emergency and dangerous situation, the judge's intervention would come too late.
- The police are **required to present an arrested suspect to court as soon as possible, and within 72 hours** (Article 217 Penal Procedure Code). If this time expires, police must release him (Article 223(1)(b) CPC).
- Note that if police intervene *flagrante delicto* and the offence is for less than 5 years imprisonment, the 72 hour hearing can be held as a summary trial and the case completed under the **expedited trial process** (Article. 346-350 Penal Procedure Code). **This is a very useful and under utilized mechanism for achieving a speedy outcome which is so critical to victims of GBV.**
- Where the crime falls under the Law Against DV, police are required to undertake additional roles including:
  - follow up on reports of domestic violence received from hospitals and victim support services;
  - inform the victim of his/her rights;
  - refer victim to a shelter or support centre if s/he wishes;

- ensure the victim receives any medical, psychological or psychiatric assistance necessary; and
- prepare a report containing detail of the steps taken, and evidence collected to the prosecutor, within 5 days of the incident.
- If the victim is poor, police must also provide a summary report to the Public Defender within 5 days of the incident (Article 24(1) and (2) Law Against DV).

### 5.1.1 Complaints against police

- Police are required to be diligent and ‘handle in a timely manner any request, claim or complaint made to him or her’ (Art 10 (d) Disciplinary Regulation of National Police of East Timor) and ‘not exceed his or her authority derived from his or her rank or post’ (Article 11 (2)(d) Disciplinary Regulation of National Police of East Timor). *Please note these regulations are currently under review.*
- Lawyers can make complaints against individual police at the relevant professional disciplinary body (Article 36 Disciplinary Regulation) who can face disciplinary action if they fail to perform functions (such as failing to notify the prosecutor of a crime reported to them, mediating a domestic violence case themselves or referring a case to customary law), or if their demeanor and attitude suggests they are not taking victims’ complaints seriously.
- If a police action or inaction constitutes a crime, the criminal complaint should be filed with the prosecutor (Article 38 Disciplinary Regulation). In that case, disciplinary proceedings may be suspended till the criminal case concludes (Article 36 Disciplinary Regulation).

## 5.2 Role of the Prosecutor

Prosecutors are ‘holders of criminal action’ and their function is to **receive claims, order the initiation of criminal proceedings, conduct the investigation/enquiry, request intervention of judges to assist investigation, prepare and sustain the indictment, lodge appeals, promote the execution of court judgments, perform other acts in their competency** (Art. 48 Penal Procedure Code and Art. 3 Statute of the Public Prosecution Service.)

This includes presenting victim’s claims for **civil compensation**. Article 72(2) Penal Procedure Code requires the prosecutor to inform the victim that they can bring a civil compensation claim separately if they wish to do so. If the victim does not expressly declare their intention to file a separate civil claim, the Prosecutor must include the victim’s claim of civil compensation in the indictment (Article 72(3) Penal Procedure Code).

Where the crime falls under the Law Against DV, prosecutors have extra obligations including (Article 28 Law Against DV):

- To provide direct assistance to victims who approach them;
- To inform victims of their rights and how to exercise them (especially through the services of the Public Defender if they are poor);
- To refer victims to the hospital or to shelters in cases where referrals have not already been made.

Prosecutors must also facilitate the exercise of victims’ other rights such as the requirement that they have legal assistance for offences under the Law Against Domestic Violence. Article 25 of the Law Against DV requires that a lawyer or Public Defender **accompanies** the domestic violence victim during

all legal proceedings. This means that **you should insist upon your right to be present during any meetings between the victim and the prosecutor, and abort the meeting and make a complaint against the prosecutor if they will not admit you.**

### 5.2.1 Complaints against prosecutors:

- As with mechanisms for complaints against private lawyers, there are mechanisms for complaint against Public Prosecutors under the Criminal Procedure Code and the Statute of the Public Prosecution Service.
- Prosecutors must exercise their duties **independently and lawfully** (Art. 2 Statute of the Public Prosecution Service) and **can be disqualified** from handling a case if they are **closely related to a party, or if they have re-existing involvement** in a case (i.e. same grounds as for disqualification of judges (Art. 51(1), 39 & 40 CPC). If you believe the prosecutor is closely related to a party or biased due to some previous involvement in the case, and if she/he does not disqualify themselves, you can make a complaint to her/his superior (Art. 51(2) CPC).
- If you believe the prosecutor has engaged in **professional misconduct** (such as excluding you from an interview with your client) you can complain to the **Superior Council for the Public Prosecution** which is competent to decide complaints and disciplinary proceedings against prosecutors (Art. 17(a)(b) Statute of the Public Prosecution Service).

## 5.3 Role of the Judge

- Judges must be **independent and follow only the Constitution, the laws and their own conscience** (Art. 121(2) RDTL Constitution).
- Judges must follow the law in conducting court proceedings. This includes imposing necessary interim measures to protect victims and evidence while the case is ongoing, and respecting the rights of the defendant.
- Judges must take all relevant information into account in deciding the facts of the case, and then applying the law to decide whether the suspect is guilty or innocent. If the defendant is guilty, then the judge must decide upon the sentence, again following the instructions of the law on what factors must be taken into account (Art 278 Penal Procedure Code).
- Judge/s are the sole decision makers, and while they often try to take the views of victims into account in sentencing, a **victim's agreement to the punishment is not required**.
- Judges are also **required to decide on compensation claims by victims** where it has been claimed via the prosecutor (Art. 278(8)(g) Penal Procedure Code).
- The court shall, in a convicting sentence, specify the grounds on which the choice and extent of the penalty applied are based, indicating, where applicable, when and how the sentence is going to be served, other duties imposed upon the convict and the duration thereof, as well as the status of the convict in regards to any restrictive measures (Article 282 Penal Procedure Code).

### 5.3.1 Complaints against judges:

- If a victim or her lawyer believes that a decision of a judge is **incorrect or unfair**, it can only be dealt with through the **appeals process**. **The victim does not have an independent right to appeal against the decision of guilt, innocence or sentence, but must do so through the prosecutor** (Article 289(a) Penal Procedure Code).
- Victims **may be able to appeal** against **decisions on civil compensation** (Art 289(c)) as a 'person who has to defend any right affected by the decision.'
- Victims have a right to complain that a **judge is not impartial** (Article 41(2) Penal Procedure Code). Specific grounds needs to be established and an application for disqualification must be

made within 8 days of the victim becoming aware of the disqualification grounds (See Penal Procedure Code Article 38 - 45).

- Complaints **against judges' professionalism, or conduct** can be considered by the **Superior Council of the Judiciary** who have competence to consider complaints and exercise disciplinary action over judges (Article 15(1)(a)(b) Statutes of Judicial Magistrates – Law 8/2002.)

## 5.4 Role of the Victim

- Victims are characterized as assistants to the public prosecutor. **Victims cannot have separate legal representation in court because they are represented by the public prosecutor** (Article 72(1) Penal Procedure Code). This means that most things the victim wishes to put forward in court in support of their case, must go through the prosecutor. Therefore the relationship between the victim's lawyer and the prosecutor is very critical to the victim's case. **However, aside from representation in court, a victim's lawyer can and should vigorously represent them in every other context.**

## 5.5 Rights of victims to participate in legal process

There are some important exceptions to the rule that the prosecutor represents the victim in court, where the victim has rights separate from the prosecutor. Many of them are very useful and powerful tools for ensuring the interests of your clients are properly represented and met. It is therefore critical that victims' lawyers know these rights well and are confident to use them, so they can properly represent their clients.

### 5.5.1 Right to a lawyer

In all crimes arising under the Law Against DV, the victim has a right to assistance in legal proceedings by a lawyer or Public Defender, irrespective of their ability to pay for legal services (Article 25, Law Against DV). In cases not under Law Against DV, victims do not have a legal entitlement to separate legal assistance however lawyers should still try to provide assistance wherever possible.

### 5.5.2 Right to request witness protection measures

The Protection of Witnesses Law empowers victims (and thus their lawyers) to directly request the court to order protective measures be put in place. There is no need to wait for prosecutors to do so. Measures can be ordered to protect the identity of the witness.

In serious cases (more than 5 years imprisonment) or in cases entailing guardianship of minors additional measures can be ordered such as reimbursement for costs to give evidence, protection in a safe room at the court, temporary or ongoing police protection, new identity documents and relocation of the witness and close family members within Timor-Leste or abroad (See Protection of Witnesses Law, Article 4, 19 & 21).

### 5.5.3 Right to consult the case file and access documents

Victims have a right to the case file and other documents on the same footing as the accused and their defence counsel (Article 77 Penal Procedure Code). This is a very important and powerful tool for monitoring the actions of the prosecution, and for rebutting the information the defence intends to rely upon.

Lawyers representing victims should routinely use this right and always request a full copy of the case file from the prosecutor.

#### 5.5.4 Right to Provisional maintenance

In all crimes arising under the Law Against DV, the prosecutor **or the victim** can, at any time, make a request to the court (either court considering criminal proceeding or civil court) for an order regarding provisional maintenance (Article 32(1) Law Against DV). **Critically, where the defendant has no means, the provisional maintenance must be paid by the Government** (Article 32(3) Law Against DV). Scope and nature of this Government support will be further defined in a Ministerial Order to be issued by the Ministry of Social Solidarity (Article 33 Law Against DV).

#### 5.5.5 Right to request victim give early evidence

The victim has the right to request that they give their evidence and be questioned early, so they don't have to wait for the trial (Article 230(1) Penal Procedure Code). This is a very valuable tool for clients who are traumatised and for their well-being and recovery, need to get their involvement in the case over with, as quickly as possible. **Lawyers for victims should contact the court and request this arrangement directly and do not need to wait for the prosecutor to do so** (Article 230(2) Penal Procedure Code).

Victims also have a **right to participate in any hearing where early evidence is taken** (Article 230(3) Penal Procedure Code). This is a way for the victim's lawyer to have the opportunity to represent the victim when they give their evidence (rather than the prosecutor in a normal trial).

#### 5.5.6 Right to review decision to prosecution close file

- The victim has the right to have a prosecutor's decision to close a prosecution file internally reviewed (Article 235(4) CPC).
- If a prosecutor closes a file and you believe the investigation has not been conducted thoroughly or that there was enough evidence to proceed to trial, then if your client wants the case to proceed, you should always request for re-assessment.
- If new elements relevant to the investigation arise, prosecutor **must** re-open enquiry – either at own initiative or upon request victim (Article 235 (3) CPC)).

#### 5.5.7 Right to be informed by Court

Victims have the right to be informed about the progress of their case by the Court. This includes the right to be informed:

- when the indictment has been filed or when a case has been closed through order of dismissal (Article 237 CPC);
- of the day of the scheduled hearing (Article 240 CPC);
- where the Court decides to inspect the crime scene, the victim has the right to be notified of the date and time of this inspection (Article 145 CPC).

Notices of indictment, dismissal of the case and orders indicating the date for trial must be delivered by hand to the victim themselves. All other notifications can be made to the victim's lawyer if the victim so elects (Article 92 CPC).

#### 5.5.8 Right to challenge impartiality of a judge or prosecutor

Victims have an independent right to challenge the impartiality of a judge or prosecutor (Article 41(2) Penal Procedure Code with respect to judges and Article 51(1) with respect to Prosecutors).

The grounds for challenging impartiality are where the judge or prosecutor has (Article 39 CPC):

- a close family relationship to the victim or perpetrator;
- previously been involved in the case as a public prosecutor, police officer, public defender or expert;
- a close family member involved in the proceeding in any capacity; or
- been or should be a witness in the proceeding.

The procedures for challenging impartiality of judges are contained in Article 42 (2) of the Penal Procedure Code. The procedure for challenging impartiality of prosecutors is to file a claim with their superior in the prosecution service (Article 51(2) Penal Procedure Code).

#### 5.5.9 Right to participate in examining crime scene

The victim has the right to be notified of the courts intention to inspect the crime scene and to participate in that inspection in order to provide clarifications and draw the court's attention to any relevant facts (Article 145 Penal Procedure Code).

### 5.6 Lawyer's Roles in Securing Victims' Rights

In GBV cases, the prosecutor represents the victim in criminal proceedings (Article 72(1) CPC). However, the victim's lawyer **can assist the victim in all aspects of their case other than representation of the victim's case in court.**

For example the victim can request to have a lawyer present during all procedures involving the victim **(police interviews, prosecutor interviews, court hearings and especially the trial, even when it is closed from the public).** Where the court decides that the hearing is closed and excludes the victim's lawyer, the lawyer should advise the victim of her options, the consequences of those options and if the victim wants assist her to file a request with the court that her lawyer be allowed to attend. Lawyers can explain to their clients that they cannot provide adequate legal advice to their client if absent from court proceedings.

In DV cases the victim *must* be accompanied by a lawyer or public defender in all legal proceedings (Article 25(1) Law Against DV).

In addition to ordinary professional obligations, **lawyers assisting victims of crimes under the Law Against DV are legally required to** (Article 25(2) Law Against DV):

- report DV to police where it does not breach client confidentiality;
- give case progress updates to victims, witnesses and family members, (again without breaching confidentiality to client);
- monitor the work of police, prosecutors and courts in relation to case;
- advise clients of services and make relevant referrals; and
- inform client of relevant laws.

## Note: Part 5



# PART 6: CRIMINAL PROCEDURES RELEVANT TO PROSECUTION OF GBV

## 6.1 Reporting crime

### 6.1.1 Who can Report a Crime?

- Victims have standing to report crimes, both public and semi-public (Article 71 Penal Code).
- Complaints regarding semi-public crimes need to be lodged within 6 months of ‘holder of right to complain becoming aware of fact and its authors, or from the day victim dies or date victim becomes legally competent to do so’. If a complaint is not lodged within this time frame the right to lodge a complaint will lapse (Article 215 Penal Procedure Code).  
An accusation may be made by any citizen in connection with a public crime and may be filed with the police (who must provide it to the prosecutor) or directly with the prosecutor (Article 213 Penal Procedure Code).

### 6.1.2 Mandatory reporting of crime, especially those under Law Against Domestic Violence

- **Police** who learn a crime has been committed **must immediately prepare a notification**. They cannot choose not to report the matter (even if victim does not want this) (Art 211 Penal Procedure Code).
- It is also **compulsory for civil servants or public agents** to prepare a notification to the police if **in the course of their work** they become aware that a crime has been committed (Article 211(2)). Again, this applies to teachers, medical staff etc who must compulsorily report crimes they become aware of, even if the victim does not consent. For example, if a child tells her teacher she has been sexually abused by her uncle, the teacher must report it to the police even if the child does not want him or her to.
- Articles 22(c)(d) and (e) of the Law Against DV make it clear that the **hospital service must compulsorily report to police or prosecutor incidents of domestic violence**. **Social assistance services are also required to report crimes under the Law Against DV to the police ‘in compliance with the Code of Professional Ethics’** (Art 23(c) Law Against DV).
- **Lawyers and staff at shelters are not mandatorily required to report crimes of domestic violence to the police if that breaches client confidentiality** (Article 25(2)(b) and Article 19, Law Against DV).

## 6.2 Legal effect of victim withdrawing complaints

### 6.2.1 Introduction: Reasons why victims withdrawn their complaints

There are a range of reasons why victims may withdraw their complaints during the investigation and trial process. Some DV victims do so because the purpose of reporting to the police was to demonstrate their seriousness in taking action against violence to their partner, without necessarily wanting ongoing consequences. Once their husband has had a ‘scare’, the purpose has been achieved, and the victim withdraws. **This is a legitimate strategy for women seeking to improve their power or bargaining position within the relationship, as a way of preventing or reducing violence.**

While lawyers should be supportive of continuing prosecutorial action, there is often little that lawyers can do to change the mind of those falling within this group until the ‘next time’ when the victim may be willing to press further with prosecution.

Victims often ‘test the water’ and gradually build confidence to follow through on a criminal prosecution. This is to be expected given the difficulty for victims of what prosecuting a husband or other family member can mean to their lives. **Your trustworthiness as a reliable and realistic source of information will be one of the key determinatives of whether and how far victims press for justice ‘next time’.**

Many victims withdraw complaints because they are subject to family or community pressure. Lawyers should **explore ways of taking the pressure off victims by meeting with opposing relatives** and trying to persuade them that the victim’s decision is valid. Where this fails, **try to identify other local sources of support for victims’ justice decisions (especially those with cultural authority such as *lian nian* or *Chefe Aldeia/Suco*, male relatives or *ferik* (female elders))** who could publicly defend the victims’ decision to pursue state justice, or at least provide moral support to the victim within their home village. **Ultimately, it is up to victims to decide what is best for them at that time. Your job as a lawyer is to provide them with clear, accurate advice about the consequences of withdrawing their claim, particularly the fact that the claim cannot be re-lodged at a later date.**

### 6.2.2 Withdrawing a complaint of a semi-public crime

- A complaint concerning a particular incident which has been withdrawn **cannot be re-lodged later** (Article 216(1) Penal Procedure Code). This does not mean that victims cannot lodge complaints for future or other incidents.
- **A complaint can be withdrawn at any time up until the judge hands down a first-instance sentence** (Article 216(2) Penal Procedure Code i.e. once case has been sentenced or is on appeal, complaint cannot be withdrawn, but can be at any time prior to this)
- With respect to semi-public crimes, once the withdrawal of a complaint has been validated, **the suspect is acquitted** (Article 216(6) Penal Procedure Code).

### 6.2.3 Withdrawing a complaint of a public crime.

- If a victim withdraws their complaint of a public crime, the criminal prosecution of the crime will still continue. **However, the strength of other evidence available and whether victims can refuse to give evidence** (see below). For example, if there were several independent eye witnesses to the crime, or strong medical evidence, then the evidence may still be strong enough for the prosecution to proceed even if the victim withdraws her complaint.
- As in semi-public crimes, the victim can withdraw their complaint any time before sentencing occurs.
- If the victim has already given evidence, then that evidence can be considered by the court even where the victim withdraws her complaint after this.

## 6.3 Status of victim as witness.

- **Even after a victim has withdrawn their complaint, they may still be summonsed as a witness in the case** (Article 122 Penal Procedure Code).
- Any person formally notified to serve as a witness in a proceeding is under the obligation to **come to Court** on the time and date indicated in the notification (Article 123 Penal Procedure Code), to **stay while required and take an oath. Failure to appear can result in the imposition of a fine or detention** to ensure they are available to appear (Article 90 and 217(2) CPC).
- Witnesses who have been summonsed **are also required to answer questions unless the answers may incriminate the victim/witness** (Article 123 CPC) **OR unless the victim is a particular relation of the perpetrator** (Article 125 CPC).

## 6.4 Article 125 of the Criminal Procedure Code – Non-compellability of Certain Witnesses

- Article 125 of the Penal Procedure Code provides that the Court cannot compel witnesses to give evidence if the witness is a close relative of the defendant or a spouse or is in a relationship analogous to a spouse to the defendant.
- Relatives who **cannot be compelled to** give evidence against a perpetrator include: **spouse, child (including adopted), sibling, parent, grandparent, grandchild, aunt, uncle, niece or nephew** (Article 125(1)(a)). An ex-wife (or equivalent) or de facto current wife cannot be compelled to give evidence concerning events in their marriage/cohabitation (Article 125 (1)(b)).
- **A witness has a right to be informed of their right not to testify if they are relevantly related** (Article 125(2) CPC).
- This provision has previously been misinterpreted by some judges to mean that such relatives CANNOT give evidence against the suspect. This is incorrect. **Any relative can give evidence like any other witness, but they cannot be forced to if they do not want to.**
- However in a recent Court of Appeal decision on October 5, 2011 the Court has interpreted Article 125 of the Penal Procedure Code as to not apply to the victim (Proceeding No. 80/CO/2011/TR).

### Decision summary

(Proceeding No. 80/CO/2011/TR)

#### *Compellability of witnesses and victims and the freedom to choose*

The decision turns on a witness and a victim's freedom to choose whether or not to give evidence to the Court during a criminal proceeding. The Court reasoned that a witness's obligation to tell the truth under Article 125 of the Penal Procedure Code may conflict with the witness's natural sense of loyalty to the defendant. Therefore the Court will grant a **witness the right to choose whether or not to give evidence**. However, there is **no reason for granting the victim the freedom to choose whether or not to testify**. Further there are strong reasons not to grant the victim such a freedom of choice. Giving the victim the right to choose whether or not to give evidence may end up leading to the same effects produced by a renunciation or a desistance of complaint in the case of semi-public crimes. The effect of which, undermines the public nature that is assigned to the crime. Therefore, Article 125 of the Penal Procedure Code (right to refuse to testify) does not apply to victims. The Prosecutor can compel victims to give evidence.

- This decision has received a mixed reception. On the one hand it has been well received by those working to support victims of gender-based violence. By compelling the victim to give evidence (by denying the victim the right to refuse to give evidence under Article 125 PPC) the prosecutor can obtain compelling evidence to successfully prosecute the defendant for the alleged crime.
- On the other hand this decision has been criticized as a radical interpretation of the law based on a policy argument rather than the application of law. The criticism relates to the fact that the court has denied the victim the right to refuse to give evidence on the grounds that it would undermine the public nature of the crime. The Court found that granting the victim the right to choose whether or not to testify had the same effect as allowing the victim to choose whether

or not to pursue their complaint in a semi-public crime. This has undermined the prosecution of many domestic violence and gender-based violence cases in the past.

- This decision is not binding on district courts, meaning that the district court judge can choose not to follow this decision. But if the district court decision is appealed, then the Court of Appeal will be bound to follow its previous decision.
- Also it is not yet clear whether this decision applies only to cases of domestic violence or applies more broadly to other gender-based violence cases that are not cases of domestic violence.

## 6.5 Witness Protection

### 6.5.1 Witness Protection under the Law Against DV

In cases falling under the Law Against DV, **whenever necessary, courts can ‘apply procedural measures’ to protect witnesses and victims** (Article 39 Law Against DV). Such measures can include ‘no contact’ and ‘residence’ orders, where the perpetrator is ordered not to contact the victim or required to live elsewhere (Article 37 Law Against DV). See also section on ‘interim protective measures’ below).

### 6.5.2 Witness Protection under the Criminal Procedure Code

In all criminal cases, the CPC provides that;

- where a victim or witness is asked to positively identify the perpetrator in a **line-up**, (usually conducted at a police station) and **may be intimidated or harassed** for doing so, **identification should – if possible- be done without the victim or witness being seen by the suspect** (Art 163(4) CPC); and
- **the defendant may be removed from the courtroom** for some time if his presence is inhibiting or intimidating a victim or another witness (Article 253 CPC) but must hear the reading of a sentence (Article 253(5) CPC).

### 6.5.3 Witness Protection under the Protection of Witnesses Law

In 2009 Timor-Leste passed a new law on The Protection of Witnesses (‘Law on PW’). In the case of domestic violence, a witness protection order may be granted if the court deems it is necessary to protect people with knowledge of the facts of the proceedings (Article 39 of the DV law).

It may be argued that a victim, although identified as a separate category of persons under the Penal Procedure Code, would fall within the definition of someone with knowledge of the facts of the proceedings. In addition, the Witness Protection Law (Law No.2/2009) defines a witness as:

*‘[A]ny person, notwithstanding his/her status towards procedural law, is in possession of information or knowledge necessary to the disclosure, apprehension or evaluation of facts subject to investigation and which are likely to present a danger to himself or spouse, relatives in the ascending line, children or siblings and other persons close to the witness’* (Article 2 of the Protection of Witness of Law).

Therefore, a victim may be considered a witness for the purpose of the Witness Protection Law if she has a) knowledge of the facts subject to investigation and b) as a result of this knowledge there is a likelihood of danger to her and her family members or persons close to her. The victims’ lawyers need only to establish a ‘likelihood’ or ‘probability’ of danger, which is a lower proof threshold than reasonableness. I.e. the individual is more probably than not to be in danger.

So far this law has rarely been used to protect victims of GBV. **It is the responsibility of victims' lawyers to request protective measures from the court where the victim believes that they are necessary.**

The law allows for witnesses' **identity** (i.e. voice and appearance) **to be concealed when they give evidence**, (Article 4(1) Law on PW) or that they be permitted to **give evidence by teleconference from another location**, (Article 5(1) Law on PW).

For more serious cases (where the crime alleged has a penalty <5 years imprisonment) or where criminal offence entails guardianship of minors, sporadic measures of security can be imposed (Article 19 Law on PW). During the enquiry phase, these measures can be ordered by the prosecutor either of their own initiation or on the request of the victim's lawyer or the police (Article 19(2) Law on PW). After the inquiry is completed these orders must be made by the Judge presiding at the request of the Public Prosecutor (Article 19(2) Law on PW). These Sporadic Protection Measures can include (Article 19(1) Law on PW):

- **being permitted to provide a false address during legal proceedings;**
- **being reimbursed for costs of displacement to give evidence;**
- **being protected in a safe room at the court or police station while trial proceeding;** and
- **being granted police protection** (for witness and close family).

Witnesses (and their close family members) may benefit from a Special Security Program during and after the trial where (Article 20 Law on PW):

- the relevant offence has a penalty greater than 5 years;
- there is a serious danger to their lives, physical or psychological integrity, or freedom;
- their testimony constitutes an essential contribution to the ascertainment of the truth.

Where the witness is eligible for a Special Security Program, this program can include the following measures of protection and support (Article 21(2) Law on PW):

- **police protection;**
- **new identity documents;**
- granting a new place to live in the country or abroad;
- **free relocation of witness and family within country or abroad** for set period, coverage of living expenses; and
- changes in body/appearance of witness (i.e. **cosmetic surgery or disguise**).

**Discussion:** In cases of family violence, the identity of the witness is usually already clear thus provisions to conceal the identity of a witness are unlikely to be helpful. **However in other cases of GBV such as trafficking or forced prostitution, concealing the identity of the witness will be a very important element of the case** and necessary to persuade witnesses to testify.

**Measures such as police protection or relocation under new identities might be the only way for the victims of particularly serious spousal violence or organized crime to be able to escape severe risks to their lives.** Relocation in-country seem unlikely to be capable of achieving its goals due to the very small and close knit nature of Timor-Leste.

## 6.6 Interim Restrictive/ Protective Measures

A key role of victims' lawyers is to **actively ensure that adequate protective measures are in place for the victim during protracted pre-trial and trial periods.**

### 6.5.1 Preventative detention

Preventive detention can be ordered only if four requirements are met:

- there is **reasoned fear of flight**, or that **investigation will be disturbed** or of continuance of committing crime (Article 183 CPC);
- the proceeding relates to a crime which can be **punishable with more than 3 years imprisonment** (Article 194(1)(a) CPC);
- there is **strong evidence** that the accused committed an intentional crime (Article 194(1)(a) CPC); AND
- imposition of other coercive measures would be **inadequate or insufficient** (Article 194(1)(b) CPC).

Pre-trial detention **can last for one year until indictment filed, or up to two years until first instance decision or three years where an appeal is ongoing**, or three and a half if the appeal relates to constitution issues. Length of detention in all categories **can be extended for an additional 6 months where judge finds case particularly complex** (Article 195 CPC). Preventative detention **must be reviewed every 6 months** (Article 196 CPC).

#### 6.6.2 'No- contact' and residence orders

In cases of crimes under the Law Against DV, the trial judge can order a **perpetrator live away from family residence and have no contact with the victim** wherever there are **reasonably foreseeable signs domestic violence may occur again** (Article 37 Law Against DV).

#### 6.6.3 Bail.

Bail may be available to defendants charged with offences **punishable with imprisonment**, in such circumstances the defendant **pays a sum of money to court which is forfeited if the defendant breaks conditions**. (Article 187 & 189 CPC)

#### 6.6.4 Reporting requirements

Defendant facing charge punishable with more than one year imprisonment can be required to report to police or court on a regular basis (Art 191 CPC).

#### 6.6.5 Travel/movement restrictions.

Defendant facing charge punishable with imprisonment of <3 years can be prevented from travelling overseas, or from leaving their area of residence (Article 192 and 193 CPC).

#### 6.6.6 Rights of victims to protection at safe house.

The Government has an **obligation** to establish a national network of support centres for victims (Article 15 Law Against DV) which can;

- **Provide temporary accommodation** to the victims and their children whenever they cannot remain in their homes for security reasons. (Article 16(1)(a) Law Against DV); and
- Ensure **psychological and/or medical care, social assistance and legal support** appropriate to the situation of the victim

#### 6.6.7 Right of victims to Maintenance

- **Remember that victims need you to actively pursue protection from the economic consequences of the legal case.** Lack of economic security is a key reason why victims drop out of the process.

- In all crimes arising under the Law Against Domestic Violence Right, the prosecutor **or the victim** can, at any time, make a request to the court for an order regarding provisional maintenance (Article 32(1) Law Against DV).
- **Critically, where the defendant has no means, the provisional maintenance must be paid by the Government** (Art 32(3) Law Against DV).

## 6.7 Measures to reduce delay

### 6.7.1 Expedited Procedures

Many victims withdraw their complaints because the process is so long and drawn out, and they are under many pressures. **Lawyers should push prosecutors to use the expedited proceedings wherever they are available** as this is very often in the best interests of the victim.

Expedited trials can be conducted where:

- there is an **arrest in *flagrante delicto***; (perpetrator caught at moment committing an offence); and
- the trial is **related to crime carrying a maximum sentence not more than 5 years imprisonment**.

In such cases, the trial is conducted within 72 hours from the arrest when the perpetrator is first presented to court (Article 346(2) CPC). Trial procedures in these cases are simplified (see Article 346-350 CPC).

Unfortunately most cases of GBV cannot be dealt with under expedited procedures because they involve longer maximum sentences. This issue should become a focus for law reform as delay is the single biggest obstacle to GBV victims persisting with their cases.

### 6.7.2 Other provisions for reducing delay.

Given that delay is a key enemy for many victims of GBV, it is important that their lawyers know all the legal provisions which they can use, in addition to general lobbying and contact, to push the prosecutor to deal with the case expeditiously. These include that:

- **“Procedural acts” must be completed within 5 days**, or 2 days for recording proceedings and issuing warrants except where accused detained and must be performed immediately (Article 79 CPC);
- **Investigations must be completed within 6 months** if the perpetrator is in detention, or one year if not (These limits can be doubled but only in “complex” cases.) (Article 232 CPC);
- **Prosecutors can impose their own timeframe upon police** to complete additional investigations after police completed final report (Article 234(2) CPC. This is useful if the prosecutor is blaming police for the delays. Lawyers should suggest that prosecutors impose a tight timeframe upon police pursuant to law;
- **Prosecutor must file an indictment within 15 days of completion of the investigation** where there is ‘sufficient evidence amounting to a crime and identification of the perpetrator’ (Article 236 CPC);
- **Hearings can only be postponed** or adjourned where **the indictment is amended, new counsel appointed, an essential person or evidence is missing or there is an important issue which has to be settled prior to case continuing** (Article 250, 255, 260 and 274 CPC);
- Absence of prosecutor or defender is not reason for postponement of hearing. Prosecutor must be replaced by another and defender by ‘competent person, preferably a lawyer or law graduate’ (Article 260 CPC);

- It is possible to **change the order for the presentation of evidence**, including witnesses, so as prevent delays (Article 271(1)CPC); and
- Timeframes for the court to issue and **pronounce the decision and sentence of a case should be established within 15 days** (Art 279(3) CPC).

Unfortunately there is no mandated timeframe for scheduling of trial or the date the indictment is to be accepted by court, nor timelines for decisions on appeal.

## Note: Part 6

# PART 7: LEGAL CONSEQUENCES OF GBV CRIMES (PENAL CODE, CPC, DV LAW)

## 7.1 Sentencing general

-Judge decides based on submissions from prosecution and defence. Victims' views can be taken into account via the Prosecutor, **but ultimately, a victim's agreement with a sentence is not necessary.**  
**-Victims are often not adequately prepared for this** as it is different to customary law proceedings where parties have greater control over outcomes and discussions continue until agreement is reached.  
**Your role is to ensure that the victim is adequately prepared.**

## 7.2 Sentencing Options

<b>No death penalty</b>	-Constitution RDTL Article 29(3) and Article 59 Penal Code
<b>Imprisonment</b>	<p>-<b>Minimum</b> length of imprisonment: <b>30 days</b> (Article 66 (1) Penal Code).</p> <p>-<b>No indefinite imprisonment:</b> (Article 59(1) Penal Code )</p> <p>-<b>Maximum sentence 30 years imp.</b> (Article 66(2) Penal Code.)</p> <p>-<b>Alternatives to imprisonment are to be preferred</b> where they are provided for (Art 62(1) Penal Code). I.e. where an offence can be punished by imprisonment or fine, the fine should be preferred, except if fine doesn't fulfil the purpose of penalty (for example a small fine imposed on a rich perpetrator of domestic violence will not act as a deterrent).</p>
<b>General Aggravating Circumstances (Art.52 Penal Code)</b>	<p>-In addition to the range of penalties provided for under each offence, there are also overarching sentencing principle that apply to all crimes that can take the sentence outside of the range provided for in the offence. These are aggravating factors, (which increase the sentence) and mitigating circumstances (which decrease the sentence).</p> <p>-While you should be familiar with all the aggravating circumstances, particularly relevant ones to GBV which cause penalties to be heavier, are:</p> <ul style="list-style-type: none"> <li>○ where the crime is motivated by 'gender', 'sex', 'sexual orientation' (Article 52(2)(e) Penal Code)or</li> <li>○ where the victim is the spouse (inc de factor), parent,(inc adoptive parent) child (inc adopted), of the perpetrator (52(2)(1)Penal Code).</li> </ul> <p>If the perpetrator has committed crimes in the past, this can also be an aggravating factor resulting in a heavier sentence. (See Article 53 on Recurrence and Article 54 on Habitual Criminality, both Penal Code.)</p>
<b>General mitigating circumstances (Art. 55 Penal Code)</b>	A particularly relevant mitigating factor in some cases of GBV is that the perpetrator committed the crime because of circumstances that caused ' <b>violent emotion, obsession or other emotional state of a similar passion, or reacts to provocation by means of an immediate act</b> ' (Ar. 55(2)(b) Penal Code).

Code)	<p>This mitigating factor may be used for example where a husband has found his wife engaged in adultery and kills her and/or her lover.</p> <p><b>Reconciliation with victim:</b> Other relevant mitigating circumstances are: reconciliation between perpetrator and victim (Article 55(2)(g) Penal Code)-this is often very relevant to GBV cases; the perpetrator hands themselves in to police, confesses or provides useful information re the crime (Article 55(2)(d) Penal Code); or undertakes acts to show they are sincerely sorry (Article 55(2)(e) Penal Code).</p>
Extraordinarily mitigating circumstances (Art. 56 Penal Code)	<p>Extraordinarily Mitigating Circumstances refer to circumstances where unlawfulness of perpetrator's conduct, guilt or need for penalty is reduced <b>'to a large extent'</b>.</p> <p>Relevant circumstances include where;</p> <ul style="list-style-type: none"> <li>○ perpetrator's conduct was prompted by <b>'a strong solicitation or temptation from the victim'</b> (Article 56(2)(b) Penal Code);</li> <li>○ <b>'unjust provocation or unwarranted offence'</b> (Art 56(2)(b) Penal Code). <b>perpetrator makes reparation to the victim prior to the first trial hearing (Article 56(2)(c)).</b></li> </ul> <p><b>The effect of 'extraordinarily mitigating circumstances'</b> is to (Article 57 Penal Code):</p> <ul style="list-style-type: none"> <li>○ replace imprisonment with a fine for offences <math>\geq 3</math> years;</li> <li>○ where the minimum penalty is <math>\geq 3</math> years, reduce imprisonment to the minimum possible;</li> <li>○ where minimum penalty is <math>\leq 3</math> years, reduce minimum penalty to 1/5th,</li> <li>○ otherwise, reduce maximum penalty by 1/3;</li> <li>○ For fines, reduce maximum of fine by 1/3 and minimum limit, reduce to legal minimum.</li> </ul>
Suspended Sentences	<p><b>Prison sentences of <math>\geq 3</math> years can be suspended for between 1-5 years</b> (Article 68 Penal Code). This means that the perpetrator is not initially imprisoned but <b>must not commit other crimes and must meet any conditions</b> imposed during the term of the suspension.</p> <p><b>Otherwise (if convicted person is tried and convicted of other crime or if recurrent offender with intent or if fails to comply with rules/duties imposed), the suspension is revoked</b> and the perpetrator must serve the sentence in jail (Article 73 Penal Code).</p> <p><b>Once the suspension period is over, the sentence finishes</b> (Article 74 Penal Code).</p> <p>Suspension can be <b>granted conditional</b> upon perpetrator having to perform:</p> <ul style="list-style-type: none"> <li>○ <b>acts of remorse</b> such as apologise to victim, to pay reparation, to pay the state or a charity institution of importance to the integration of convicted person, perform certain tasks in connection with crime committed etc (Article 69 Penal Code).</li> <li>○ meet other conditions such as not exercising certain professions, visiting certain places, living in certain places, not keeping company with certain persons or periodically appearing before court or reporting to other body (Article 70) or other forms of monitoring (Article 71 Penal Code).</li> </ul>

	<p>Suspended sentences have often been imposed by Courts in Timor in cases of domestic violence where the victim does not want the perpetrator to be sent to jail both to preserve the relationship and the economic situation of the family.</p> <p>Lawyers could request judge to order that the perpetrator pay reparation to the victim or perform a task such as carpenter building shelter for GBV victims as part of the conditions to the suspended sentence.</p>
<b>Fines</b>	<p><b>A sentence of imprisonment of 12 months or less, can usually be replaced by a fine</b> (Article 67(1) Penal Code).</p> <p>-The Law Against DV also requires that for this provision to apply to a crime under that law, the Court must be satisfied that <b>'the security of the victim has been guaranteed, the perpetrator agrees to undergo treatment, or follow-up support services for the victim and such a measure would benefit the preservation of the family unit'</b> (Article 38(1) Law Against DV).</p> <p>Where there are <b>'extraordinarily mitigating circumstances'</b> a sentence of <math>\geq 3</math> years be replaced with a fine (Article 57 (1)(d) Penal Code).</p> <p>If the fine is not paid, the period of imprisonment applies (Article 67(2) Penal Code).</p> <p>In other cases, a fine must be stated in the definition of the offence for it to apply.</p> <p>NB. In GBV cases such as domestic violence, <b>finances may be unpopular with victims as they can also have the effect of punishing the victim as it deprives the family of common resources.</b></p>
<b>'No contact' orders</b>	<p>For crimes falling under the Law Against DV, the Court can also impose a 'no-contact' with the victim sentence upon a perpetrator which can last for up to 3 years if it is <b>thought necessary in addition to the main penalty to prevent further attacks</b> (Article 38(2) Law Against DV).</p>
<b>Community Service</b>	<p>Community service can be given as the sentence if the perpetrator is sentenced to <b><math>\geq 12</math> months imprisonment, or a fine.</b>(Article 79(1) Penal Code).</p> <p>In calculating the amount of community service to be performed, <b>one hour of community service equals one day of imprisonment</b> (Article 78(2) Penal Code) (ie if the perpetrator was sentenced to 6 months imprisonment, he could be given 180 hours of community service instead)</p> <p><b>240 hours community service is the maximum</b> which can be sentenced (Article 78(2) Penal Code).</p>
<b>Admonishment (oral reprimand)</b>	<p>Court can sentence perpetrator to 'admonishment' if: <b>maximum penalty <math>\geq 3</math> years imprisonment or fine AND court satisfied that perpetrator has made reparation, is a first time offender, and that admonishment will be sufficient to prevent future crime by perpetrator</b> (Article 82 CPC).</p>
<b>Appeals</b>	<p>Victims do not have the right to appeal (Article 289 CPC).</p> <p>Appeals of either verdicts for individual crimes or sentences must be made by the prosecutor on the victim's behalf.</p> <p>The defendant can appeal the verdict or sentence. Where only the defendant appeals, the appeal cannot result in a heavier sentence than the first decision (Article 293 CPC).</p>

	<p>Appeals must be lodged within 15 days of the date of notification of the decision or from date from which considered notified (Article 300(1) CPC).</p> <p>There are no legal timeframes for decisions on appeal and the process is very long.</p>
<b>Legal effect of appeals.</b>	<p>An appeal suspends the original court's sentence (Art 298(1) CPC). (ie if imprisonment, it will not begin until the appeal is heard). The court has to decide whether continuing detention throughout the appeal period is justified and lawful. If the suspect is released, you may need to ensure that appropriate interim protective measures for the victim are in place and continued during the appeal period (ie 'no-contact' orders etc).</p> <p>If the perpetrator is in detention and is successful upon appeal, then:</p> <ul style="list-style-type: none"> <li>– the case may be the subject of a re-trial, (Article 313 CPC ) and the court will have to consider whether detention remains justified;</li> <li>– the appeal judge or review judge can acquit the perpetrator, who if detained, will be immediately released. (If acquitted by review court, perpetrator may be eligible for compensation payable by the state, (Article 320(1));</li> <li>– the appeal judge may re-affirm the original court's verdict and sentence in which case the original sentence begins; or</li> <li>– the appeal judge may impose a new sentence, which is likely to be shorter/less serious.</li> </ul>
<h3>7.3 Early release possibilities</h3>	
<b>Parole: (Early release)</b>	<p>-Parole can be requested if sentence is for longer than 6 months, <b><u>after perpetrator has served half his sentence</u></b> (Article 331(1) CPC).</p> <p>-It can be granted where perpetrator has <b>shown good behavior in custody and capacity and willingness to re-adapt self to society</b> (Article 332 CPC).</p> <p>-If parole not granted earlier, it must be granted where perpetrator has served 5/6ths of sentence. (Article 64(2) CPC).</p> <p>-<b>Many victims will not be aware of parole provisions, so you should explain that whatever custodial sentence the perpetrator gets, they will likely be released after half.</b> This is an exceedingly generous parole regime.</p>
<b>Pardons/ Commutations of sentences</b>	<p>-<b>The President</b> of the RDTL has the power to <b>pardon (exonerate) and commute (shorten) sentences</b> 'after consultation with the government' (Article 85(i) of the Constitution RDTL).</p> <p>-The Constitution does not provide any grounds or guidance as to how this discretionary power should be exercised.</p> <p>-Unfortunately the common exercise of this power has undermined the rule of law and independence of the judiciary in Timor-Leste.</p>

## Note: Part 7



# PART 8: INTERNATIONAL STANDARDS

## RELATING TO GBV

### 8.1 International standards most relevant to GBV

The Constitution of RDTL incorporates into domestic law, treaties ratified by the Government and international customary law.<sup>2</sup> It also invalidates any domestic laws which clash with ratified international standards.<sup>3</sup> This means that the standards provided in Conventions are laws in the same way that the Penal Code is a law, and they must be used and applied by the Courts. The Courts need to gradually gain experience in using international standards. You can help them and your clients by referring to these binding international standards and explain how they are relevant to your client's case when you are advocating for your clients with prosecutors, or making submissions in court.

#### 8.1.1 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified by Timor-Leste in 2003. It contains a range of provisions relevant to victims of GBV including:

- CEDAW prohibits all forms of discrimination against women (Article 2 CEDAW).
- CEDAW does not define or explicitly prohibit GBV, however the CEDAW Committee has recognized GBV as a form of discrimination<sup>4</sup> bringing it within *Article 2* of CEDAW.
- Customary laws or cultural practices must also comply with CEDAW. CEDAW requires states to 'take measures to modify or abolish 'existing customs and practices which constitute discrimination against women' (Article 2(f) CEDAW), and 'modify the social and cultural patterns of conduct of men and women' to eliminate prejudices and practices based on the idea that women are inferior to men, or gendered roles (Article 5 CEDAW).
- CEDAW requires that women be treated equally before the law (Article 15 CEDAW).
- CEDAW prohibits forced marriages (Article 16(b) CEDAW), betrothals or marriages of children (Article 16(2) CEDAW) and extends to women the same rights as men during marriage and divorce, (Article 16(c) CEDAW), and as parents. (Article 16(d) CEDAW).
- CEDAW Optional Protocol which Timor-Leste has also ratified; contains a complaints mechanism so that individual women who have suffered discrimination or other rights violations under CEDAW can bring a case before the CEDAW Committee.

#### 8.1.2 Convention on the Rights of the Child (CRC)

Timor-Leste ratified the Convention on the Rights of the Child in 2003. This means that the provisions of the treaty apply in Timor-Leste including:

- The "Best interests of the child" are to form the primary basis for decisions in all actions concerning children. (Article 3 CRC),
- Prohibition against discrimination on the basis of gender, (Article 2 CRC)
- Prohibition on trafficking of children. (Article 35 CRC) and on all forms of sexual exploitation and sexual abuse (Article 34 CRC)
- Children have a right to participate in all judicial or administrative processes affecting them and their views are to be given due weight in accordance with age and maturity of child (Article 12 CRC). Therefore lawyers of child victims should represent the child's views, if

<sup>2</sup> See RDTL Constitution, Art. 9(1) and (2).

<sup>3</sup> RDTL Constitution, Art. 9(3).

<sup>4</sup> CEDAW Committee, General Recommendation 19, 11<sup>th</sup> session 1992, point 7.

child is mature and capable of expressing his/her views – see Volume 2: Step-by-step guide to representing victims.

### **8.1.3 International Convention for Civil and Political Rights (ICCPR)**

The International Convention for Civil and Political Rights was ratified in 2003.

- Prohibition upon discrimination on the basis of sex (Article 2(1) ICCPR)
- This prohibition upon sex discrimination is absolute and can never be relaxed or made a lesser priority for other reasons (Article 4(1) ICCPR).
- Right to an effective remedy (Article 2(3)(a) ICCPR).
- Equality before the law (Article 14 ICCPR)
- Right to be free from cruel, inhumane or degrading treatment (Article 7 ICCPR)

### **8.1.4 Convention Against Torture (CAT)**

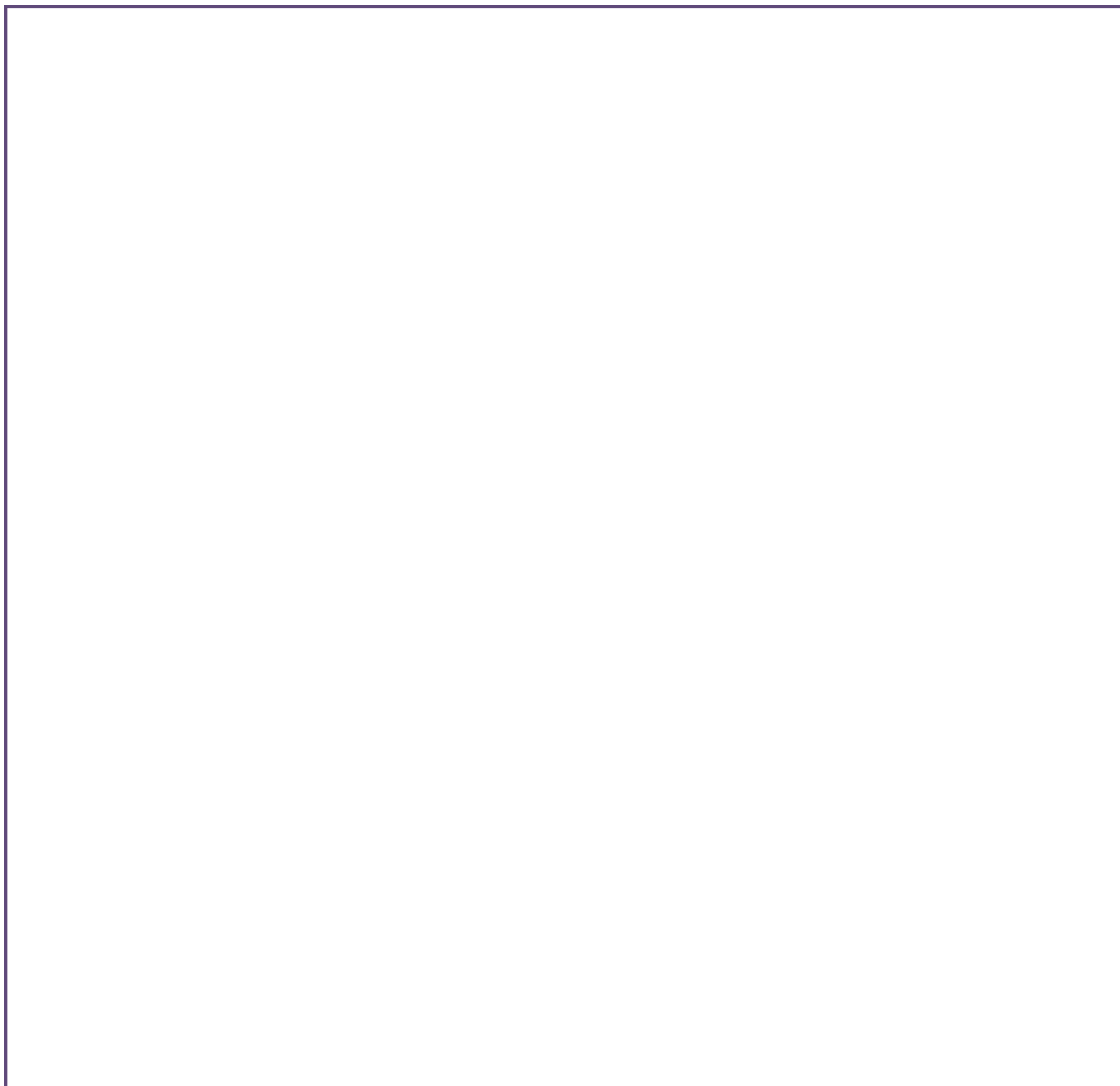
The Convention Against Torture was ratified in 2003.

- Prohibition upon torture by acts or omission of State (Art. 2(1)). It has been argued that in some situations domestic violence or other acts of GBV constitute ‘torture’<sup>5</sup> because the state fails to protect victims from this treatment by private citizens (ie usually the victims’ husbands.)
- The prohibition against torture will may be relevant where the perpetrator of gender based violence is a state actor such as police, military, prison guard or teacher in a government school.

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<sup>5</sup> Copelon, Rhonda Intimate Terror: Understanding Domestic Violence as Torture, Ch 5, (ed) Cook, Rebecca J Human Rights of Women: National and International Perspectives, University of Pennsylvania Press, Philadelphia, 1994, p120

## Note: Part 8





# PART 9: PROTECTING VICTIMS' SOCIAL AND ECONOMIC INTERESTS

## 9.1 Introduction.

- Aside from supporting victims through the criminal prosecution process, a good lawyer will focus on the victim's broader needs. Victims' lawyers should use the law to pursue client's social and economic interests too. Victims of GBV may commonly need advice about maintenance rights, divorce/separation and custody issues.
- Lawyers should also think about non-legal measures which could ease the victim's social problems. For example, a good lawyer will also liaise with local justice authorities or other community members to mitigate stigma against the victim and to generate local support for her justice decisions.

## 9.2 Civil compensation as part of criminal law proceeding

A victim can seek compensation as part of a criminal law proceeding. Combining the compensation claim with the criminal case makes it much easier for the victim, as they do not need to lodge a separate civil case, and the compensation decision should hopefully be made quicker.

Civil compensation for loss and damage resulting from a crime **is obligatory** and is assessed and decided at the same time as the criminal case, **except where the victim chooses to file a separate civil claim** (Article 104 Penal Code) **OR** where the court decides to refer the civil compensation claim to the civil court on the basis that it is very complex and will delay the criminal trial (Article 72(4) CPC).

The prosecutor **must** represent the victim in her compensation claim. As soon as the identity of the victim is identified/becomes known, **the prosecutor must inform her of her right to civil compensation** and ask her whether she wants the compensation claim to be included in the criminal proceeding. (Article 72(2)(a) CPC). If the victim does not reply within 8 days, **civil compensation will be automatically** considered as part of the criminal proceeding (Article 72(2)(b) CPC).

- The prosecutor **must actively seek out information relevant to the civil compensation claim, in the investigation process** (Article 225 CPC).
- The prosecutor **must include the elements for deciding civil compensation in the indictment** (Article 72(3) CPC).
- The judge **must include a decision regarding civil compensation as part of the sentence** (Article 281(3)(b) CPC).

**Even where a suspect is acquitted of the criminal matter, they can still be liable for civil compensation to the victim** (Article 284 CPC).

- The calculation of compensation is decided under rules of civil law (Art 104(2) Penal Code).
- Paying compensation to victims is prioritized over the perpetrator paying fines (Article 105 Penal Code).

**Enforcement of civil compensation sentences has been a difficulty** in Timor-Leste because it is argued that enforcement of a civil compensation order in a criminal proceeding still requires a separate proceeding in the civil court (For example, difficulties with compensation to family members of police murdered by F-FDTL soldiers in 2006).

Note that the Article 12 of the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* creates an obligation for the State to pay restitution where the perpetrator cannot be identified or has no means. While this is not a binding document it could be used to advocate for law reform.

### 9.3 Civil compensation as a separate civil claim

- The Superior Council for Magistrates has handed down a direction that courts give priority to criminal over civil cases which mean that it is likely a civil compensation claim will progress more quickly if it is attached to a criminal claim.
- **Waiver of application fees.** Application fees to lodge a civil court proceeding can be waived where financial hardship is demonstrated. The RDTL Constitution guarantees that 'Access to courts is guaranteed to all for the defence of their legally protected rights and interests' and 'Justice shall not be denied for insufficient economic means' (Article 26 RDTL Constitution).

### 9.4 Obligations to support: maintenance/alimony and provisional maintenance

#### 9.4.1 Victims of crimes under the Law Against DV

- **Are entitled to maintenance** for as long as they prove they need it, if they are the **spouse, de facto spouse, non-cohabiting partner or ex-spouse, child or parent of the offender** (Article 29 Law Against DV).
- The amount of maintenance is decided by taking into account the perpetrator's ability to pay, the victim's needs and the victim's ability to contribute to living costs (Article 30 Law Against DV).
- Maintenance agreements can be made or varied between the parties, or by the Courts (Article 31 Law Against DV).
- **If the perpetrator has no means to pay maintenance, the court may grant provisional maintenance paid for by the Ministry of Social Solidarity (Article 32(1) and (3)).** This is very important, as many perpetrators have no means and victims, knowing that, have been discouraged from trying to get maintenance. Provisional maintenance is not intended to be long-term maintenance but a temporary mechanism to support victims to pursue their case.
- **Victims' lawyers can request a maintenance order from a court deciding the criminal proceeding at any time (Article 34(1) Law Against DV or under Civil Procedure Code Article 831).**

### 9.5 Providing referral for victims in need to advice on family law: divorce "judicial separation" property division and child custody

- Family law is a specialist area of law and is in a state of transition in Timor-Leste because the applicable law remains the Indonesian Civil Code until the new Civil Code comes into force.
- You should refer clients in need of this advice to a specialist family lawyer; one with a proven track record of assisting victims of GBV through these processes, which are unfortunately no straight-forward and can take long periods to be resolved.

## Note: Part 9



## PART 10: CONCLUSION

Whilst Timor-Leste does have a strong legal framework for the prosecution of gender-based violence crimes, particularly domestic violence, it is up to legal practitioners to ensure that their clients are able to access all relevant protections and remedies under the law. We hope that this legal manual will be helpful in assisting you to identify, understand and apply the relevant laws to cases of gender-based violence. A sound understanding of the relevant substantive laws and procedures is essential for any private lawyer representing victims of gender-based violence.

Please refer to **Volume 2 of this Legal Guideline for a ‘Step-by-step guide to representing victims’**. The ‘Step-by-step guide’ aims to provide a clear explanation of the ethical and professional obligations you hold as a private lawyer and the practical steps you can take when providing legal assistance to victims of gender-based violence.

We hope that Volume 1 and 2 of this Legal Guideline will be a valuable tool for you in providing effective legal assistances to victims of GBV.



## Note: Part 10