

The Courts and Alternative Dispute Resolution



JUDICIAL SYSTEM MONITORING PROGRAMME PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

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The Judicial System Monitoring Programme (JSMP) was established on 28 April 2001 for the purpose of monitoring the trial and judgment process of the Indonesian Ad Hoc Court in relation to the violation of human rights and the Special Panel for Serious Crimes in Timor-Leste. Today, JSMP is the principal NGO in Timor-Leste that monitors the justice system and advocates for legality, transparency, accountability, and strengthening the state of law.

JSMP's vision: democratic society which guarantees justice and human rights for all people. JSMP's mission: to work in the spirit of collaboration to promote and protect democracy, law, justice and human rights through monitoring, legal outreach, and advocacy. The U.S. Government, through USAID, works in partnership with the government of Timor-Leste to support broad-based and effective development.

Since 2001, USAID has provided over \$318 million in development assistance to Timor-Leste. USAID supports Timor-Leste in its efforts to build a more prosperous, healthy, and democratic country through programs that foster inclusive and sustainable economic growth, especially in the agriculture sector; improve the health of the Timorese people, particularly women and children; and strengthen the foundations of good governance—all areas which are highlighted in Timor-Leste's Strategic Development Plan 2013-2030.

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EXECUTIVE SUMMARY

This report evaluates the complementary relationship between the formal justice system and community dispute resolution that exists in the community.

Timorese society has undergone an evolution and transformation from a traditional society that has utilised traditional practices from the very beginning, and these practices have been adopted to address and find solutions to social problems that occur in the community.

In practice it is apparent that these two systems - formal justice and informal justice, often have a complementary relationship in their application. JSMP's research demonstrates that the formal justice system often considers community based dispute resolution that is directed and led by community leaders as a mitigating factor in judicial decisions. The research also revealed that court-based conciliation is an important tool for reducing the burden on the court system. For a period of five months, between January – May 2017, JSMP observed approximately 108 cases. In 26 of these cases the courts considered a case which had already been dealt with at the community level. In 82 cases, the court itself attempted conciliation to resolve the dispute.

Article 2 (4) of the Constitution of the Democratic Republic of Timor-Leste (C-RDTL) on sovereignty and constitutionality expressly recognises and values the norms and customs of Timor-Leste that are not contrary to principles enshrined in the Constitution and other legislation. In particular, Article 123(5) of the Constitution emphasises that non-judicial practices of dispute resolution should be formalised in the law. There is no law yet to regulate or "institutionalise" non-judicial dispute resolution, but this article emphasises the importance of community based dispute resolution mechanisms, including traditional dispute resolution, that have continued to exist as Timorese society has evolved. It is important that a policy of institutionalising community based dispute resolution mechanisms provides clarity in relation to public concerns about crimes that the local authorities or community leaders have the competency to deal with. They must also make clear what impact a community-based resolution has on judicial proceedings: this is particularly so for public crimes, because in those cases formal proceedings cannot be terminated simply because agreement has been reached between the victim and suspect.

In addition, there are other relevant laws, such as the Penal Code (PC) the Criminal Procedure Code (CPC), and Law No. 09/2016, 8 July, amended by Law No. 3/2009 on Community Leaders, which also establishes recognition of the role of dispute resolution conducted by non-judicial authorities. This report identifies cases that were previously resolved at the community level that have been validated or legitimised by the formal justice system.

Importantly, the formal justice system is currently facing significant pressure in terms of human resources and this impacts on pending cases, and as a consequence the formal justice process takes longer, so community based dispute resolution can be a relevant means to respond to this situation.

In addition to resolution which occurs in the community, a very large number of cases are resolved by conciliation led by a judge, once the case reaches court. This research has found that during the examination phase the Public Prosecution Service also has the competence to validate the agreement of parties, leading to the end of proceedings in respect of minor (semi-public) crimes. This means that the Public Prosecution Service can promote efficient resolution of cases involving semi-public crimes. This is because the law grants authority to the Public Prosecution Service to do so during the examination process. Article 216 (3) of the Criminal Procedure Code states that where the desistance becomes known during the investigation, it is the responsibility of the public prosecutor to validate it, and this responsibility rests with the presiding judge of the court where the desistance becomes known during the trial. JSMP considers that the limited resources of the justice sector could be best used if cases are resolved at the earliest time. This can be achieved by use of the Public Prosecution Service to validate agreement, rather than waiting for the case to reach court.

Whether mediation occurs in the community, or conciliation occurs before a judge, in JSMP's opinion, for the process to be fair on the victim, it is necessary for the victim to have in-depth and accurate information in order to make an informed decision. For example, before receiving money or other compensation from the defendant through conciliation, it is important that the victim understands what civil compensation might be possible if the matter proceeds to trial. For victims that place a value on the defendant being punished, it is also important that the victims truly understand what sentences are possible if the matter proceeds to trial before agreeing to withdraw the complaint in the context of conciliation. As discussed by JSMP below, sometimes this can be a challenge because victims normally don't have a lawyer to provide them with information and advice during this process.

Based on this research JSMP presents the following conclusions and recommendations for consideration when seeking resolution through traditional customs or through the formal justice system. These recommendations are aimed at increasing protection and providing results that are fair to both defendants and victims.

How the courts deal with community justice

Community based resolutions are positive and play an important role in the judicial process in Timor-Leste. In relation to how the courts deal with agreements made by the parties at the community level, JSMP research shows that in most cases the courts use information from this process for consideration as mitigating circumstances, in accordance with the law. However in a few cases JSMP has observed that the courts used the information in a way not permitted by the law. JSMP also observed that the law is not clear on how agreements made at the community level impact on the role of

the courts in deciding civil compensation. For this reason JSMP makes the following recommendations:

1. Urges the parties involved in such resolution processes, and the courts in particular, to consider and respect the presumption of innocence of the defendant and not to use resolutions that are achieved at the community level to undermine presumptions that are inherent in the criminal process.
2. Recommends for the courts not to use resolutions achieved at the community level, or attempts by the parties to seek resolution, as a basis for modifying criminal charges.
3. Develop guidelines or clarify the law on the methods, procedures and crucial issues relating to the courts' role and power when judging cases resolved at the community level; especially issues relating to civil compensation and the power of the courts to provide validation when community based processes are not fair to the parties.

Conciliation at the courts

JSMP recognises the value of conciliation through the courts and respects the fact that judges are seeking ways to resolve more cases using this method. However, at the same time JSMP believes that the courts, the Public Prosecution Service and others play an important role in ensuring that the parties make informed decisions during the conciliation process.

JSMP also believes that in many cases there is an opportunity to achieve resolution and validation before the matter reaches the courts and this can save time and resources and make the process easier and more accessible for the parties.

For this reason JSMP makes the following recommendations:

4. The Public Prosecution Service and the courts need to clearly explain the consequences of conciliation carried out by the courts so that victims have a clear understanding about the options available to them, and if they will be beneficial or not, before they withdraw their case.
5. During the *dilijénsia* process the Public Prosecution Service needs to clearly explain the proceedings relating to each crime. In addition, an explanation should be provided that Article 216 (3) states that for cases involving semi-public crimes the Public Prosecution Service can also validate settlements, not just the courts. Community leaders, the police or others involved in the community dispute resolution need to obtain information about this process so they can also make recommendations to the parties to present the outcome of such resolutions to the Public Prosecution Service for validation during the investigative phase;

6. During the *dilijensia* process the Public Prosecution Service needs to clearly explain about what penalties the defendant is likely to receive and the civil compensation civil that victims are likely to receive;
7. Legal officers at the Public Prosecution Service need to receive intensive training and supervision to ensure that the *dilijensia* process is of high quality and is fair.

General recommendations

As JSMP found in its report on the Legal Aid Statute in Timor-Leste, for ordinary citizens to have access to justice, it is crucial to ensure legal aid for everyone. This also applies to those who participate in alternative dispute resolution such as at the community level as well as conciliation. However, based on JSMP's observations, in many cases victims do not have access to a lawyer or public defender. Therefore, JSMP recommends that:

8. The Government needs to ensure that legal aid is provided to victims by lawyers and public defenders so that victims can be represented during the entire process.

I. INTRODUCTION

Timor-Leste is a democratic nation based on the rule of law which functions in accordance with the law. This means that the system of governance in this nation is based on the Constitution or laws that reflect fundamental principles such as a State that is fair, guarantees and protects human rights, and has checks and balances provides access to all.

According to the rule of law the courts play a crucial role in implementing the law and resolving disputes between individuals. However, this does not mean that all disputes can be resolved through a judicial process at the courts. Actually, in the current context of Timor-Leste, it is necessary to explore other avenues to reduce pressure on the limited resources of the formal justice system in order to use alternative dispute mechanisms to resolve some disputes, when the law allows.

Alternative dispute resolution or non-judicial resolution has many forms, such as community based resolution, and mediation carried out by civil society or the Government or lawyers, conciliation and commercial arbitration¹. However, the Judicial System Monitoring Program (JSMP) has observed that in Timor-Leste there are two alternative mechanisms that many people have access to. These two alternative mechanisms are:

- (a) Mediation processes² in the community
- (b) Conciliation³ through the courts

Research shows that alternative dispute mechanisms that are used to deal with disputes outside of the formal trial process are very important in Timor-Leste.⁴ However, there has been no research to date to examine how these processes are connected to the formal justice system in practice. For this reason, JSMP has carried out this research to inform the public on how the formal justice system (the Courts) considers alternative resolution: and in particular, community dispute resolution that the parties engage in before going to court as well as conciliation through the courts.

This report is based on the following research:

- Analysis of monitoring carried out by the JSMP in the four district courts over a five month period, January – May 2017;

¹ Counterpart International: Report on Community Dispute Resolution in Timor-Leste: <http://www.counterpart.org/wp-content/uploads/2015/10/Community-Dispute-Resolution-in-Timor-Leste-TET-sml.pdf>

² Mediation which involves family members or local leaders in the community.

³ Conciliation initiated by Public Prosecutor Service or by the Court under article 216 (3) of the Criminal Procedure Code.

⁴ Idem: <http://www.counterpart.org/wp-content/uploads/2015/10/Community-Dispute-Resolution-in-Timor-Leste-TET-sml.pdf>

- Analysis of information obtained through interviews with defendants and victims, or both, during a five month period between January – May 2017;
- Case studies drawn from JSMP’s ongoing monitoring work, including in recent years.

This data was analysed in accordance with the legal context of Timor-Leste, especially with reference to the Constitution of the Democratic Republic of Timor-Leste (C-RDTL, or Constitution) as the main law and other specific laws such as: the Penal Code (PC), Criminal Procedure Code (CPC), and Law on Community Leaders. JSMP has also referred to international human rights that are also applicable in Timor-Leste pursuant to Article 9 of the Constitution which provides for the application of international law.

II. THE SCOPE AND OBJECTIVES OF COMMUNITY DISPUTE RESOLUTION, AND CONCILIATION THROUGH THE COURTS, AS WELL AS THE LEGAL CONTEXT AND PRACTICE

Before discussing JSMP's findings, this section will explain the general background of the two non-formal (extra-judicial) dispute resolution measures, as well as how these measures are connected to the formal justice system according to the law.

A. Community-based resolution

Although there is no specific statistical data, normally community-based dispute resolution that is conducted according to Timorese customs involves family members from both parties, customary elders and local authorities.

Also, JSMP observed that the district courts of Dili, Baucau, Suai and Oecusse consider community-based dispute resolution not only in cases characterized as semi-public⁵ but also in cases characterized as public crimes.

Article 106 (3) of the Penal Code on the nature of crimes states that semi-public crimes are those crimes the prosecution of which may only be initiated after the right to file complaint has been exercised. For many cases, the Penal Code states that “prosecution depends on the filing of a complaint” and this means that the crime is semi-public. In practice most of these cases carry a penalty of less than 3 years in prison or a fine.

⁵ Article 106 (2) of the Penal Code states that public crimes are those the criminal prosecution of which does not depend on a complaint being filed. Furthermore, Article 106 (3) states that semi-public crimes are those the prosecution of which may only be initiated after right to file complaint has been exercised.

Those cases which are not semi-public are public. They are prosecuted even if there is no complaint filed. Some cases characterized as public crimes are resolved at the community level according to Timorese custom or other alternative traditional mechanisms the result in an agreement or consensus; for example the defendant harms the victim and redresses the victim's loss, however the law does not allow for the case to be closed at the request of the victim (or defendant). For this reason, according to the law the police or the Public Prosecution Service must continue investigating and prosecuting the matter and must forward it to the court to proceed to trial. The outcome of the community based dispute resolution conducted by the parties will be considered by the court as mitigating circumstances (circumstances that reduce the penalty against the defendant) when the court decides the matter. Meanwhile, in contrast, cases involving semi-public crimes can be closed by the police or the Public Prosecution Service if the two parties agree to have the case closed and therefore the victim withdraws the complaint.

B. Conciliation through the Courts

Normally in cases characterized as semi-public crimes, before commencing the examination of evidence the court will ask the parties to seek conciliation pursuant to Article 262 of the Criminal Procedure Code concerning attempts at conciliation⁶.

This is normally called a mechanism of restorative justice⁷. This is because the aim of formal justice is not only to punish an offender or put him in prison, but to try and reconcile the parties, and to give them harmony and to repair the relationship that has been damaged and to restore good relations.

Based on JSMP's observation at the courts in relation to semi-public crimes a range of outcomes are possible:

1. The victim voluntarily wishes to withdraw the complaint unconditionally, for example because of a family relationship or because they are neighbours or because they have already made an agreement before the trial commences.
2. The victim wishes to withdraw the complaint with the condition that the defendant must apologise to the Court, and the defendant must redress the damage caused by the defendant's behaviour, and the defendant agrees;
3. The defendant rejects the conciliation demanded by the victim because he has no capacity to pay or compensate the victim, and such cases will proceed to trial; and
4. The victim does not wish to withdraw the complaint and wants the case to proceed to trial.

⁶ Article 262 (1) of the Criminal Procedure Code on attempts at conciliation states that before proof begins to be produced, in a crime the criminal proceeding of which depends on the lodging of a complaint, the judge may seek to reach conciliation between defendant and the aggrieved person.

⁷ Restorative justice means a process that uses dialogue and mediation to obtain a fairer and more balanced agreement for the victim and the defendant for the crime that has occurred. Restorative justice relates to repairing the relationship between the two parties through a mutual agreement. The victim can explain the loss suffered and the defendant has the opportunity to provide compensation for the victim's suffering.

When conciliation does not produce results – meaning that the two parties have not reached an agreement – the case will proceed to trial. Meanwhile, if the conciliation produces results (an agreement is reached), pursuant to Article 266(2) of the Criminal Procedure Code, the judge needs to consult and hear from the prosecutor before validating the agreement.

In other cases the parties sometimes have an agreement that they have entered into previously, at their own initiative, or that was achieved through a community-based process. When this occurs the conciliation process at the courts can be used to validate the existing agreement.

In JSMP's opinion, for this process to be fair on the victim, it is necessary for the victim to have in-depth and accurate information in order to make an informed decision. For example, before agreeing to receive money or other compensation from the defendant through conciliation, it is important that the victim understands what civil compensation might be possible if the matter proceeds to trial. For a victim who places a value on the defendant being punished, it is also important that the victim truly understands what sentences are possible if the matter proceeds to trial before agreeing to withdraw the complaint in the context of conciliation. As discussed by JSMP below, sometimes this can be a challenge because the victim normally doesn't have a lawyer to provide him or her with information and advice during this process.

A. In practice

As mentioned above, based on JSMP monitoring at the courts, community dispute resolution involves local authorities, customary elders, and family members of the two parties, and in some cases only the family members of the two parties are involved.

In these processes it is important that the parties involved in the resolution understand the restrictions placed on the power of each person who leads such dispute resolution.

In the report from '*Ba Distritu*' (now named '*Mai Munisípiu*'), it was found that people need to have a better understanding of the restrictions placed on their power during dispute resolution. They need to properly understand that community leaders, customary elders or family members do not have the power to determine a person's criminal responsibility or to stop proceedings in cases involving public crimes (including in cases of domestic violence). In addition, community members and community leaders need to understand basic principles on the fairness and independence of dispute resolution.

Based on JSMP's experience when facilitating training for village leaders across Timor-Leste, it is apparent that some community leaders (not all) still consider crimes

of domestic violence to be “a private family matter”. For this reason, after the problem is resolved, village chiefs do not refer the case to the police because they consider the outcome of the alternative dispute resolution to be final, as the two parties have reached an amicable settlement and apportionment of blame. JSMP believes that this process does not educate society on how to deter the crime of domestic violence. For this reason it is crucial to disseminate information to villages about the crime of domestic violence.

Village chiefs need to have regular training to obtain adequate knowledge on the nature of domestic violence as a public crime. This will help village chiefs and village councils to refer cases of domestic violence or public crimes to the relevant institutions or service providers to obtain assistance appropriate to each case, so that they can work together with customary elders to resolve problems in accordance with Timorese customs to ensure peace and harmony between the parties. However, this does not mean that when there is an amicable agreement and apportionment of blame that the village chief has the power to close a case involving a public crime. For cases involving public crimes (including domestic violence), the village chief is obliged under the law to forward the case to the formal justice system even when the two parties themselves agree to close the case.

The *'Mai Munisípiu'* report that provided a Summary of Access to Dispute Resolution in Communities in Timor-Leste also recommended that communities be educated on what means they can use to close cases involving minor crimes. If victims and defendants resolve a matter, victims need to understand how they can withdraw their complaints, and that they don't have to wait until the case goes to court to withdraw a complaint.

JSMP's observation at the courts shows that in cases involving semi-public crimes the courts normally promote attempted conciliation for crimes such as making threats, larceny, property damage, fraud as well as simple offences against physical integrity, reciprocal offences against physical integrity and others.

This process occurs before commencing the examination of evidence. The conciliation process normally is initiated and promoted by the court, but this conciliation can only obtain results if the victim agrees to withdraw the case; for example the defendant apologises and promises not to repeat such acts in the future. Based on this process and after hearing the final recommendations of the prosecution and defence, the court will validate the settlement.

Considering that the formal justice system in Timor-Leste is currently facing serious challenges relating to limited human resources, JSMP believes that cases involving semi-public crimes do not need to be taken to court if the Public Prosecution Service predicts that the settlement of this case will eventually be validated. This is because the law allows victims to withdraw their complaints at the Public Prosecution Service.

Even so, the initiative to withdraw a complaint totally depends on the victim. It is important for victims to have adequate and correct information about their decision to withdraw their case. JSMP has observed that in some cases involving semi-public crimes victims have told the court that they want to proceed with the case through the courts to educate defendants not to repeat their actions in the future.

a. Relevant principles and legal basis⁸

The next section will discuss the relevant principles and legal basis concerning alternative dispute resolution:

- *Timor-Leste Constitution*

Article 2 of the Timor-Leste Constitution on sovereignty and constitutionality states that:

“The State shall recognise and value the norms and customs of Timor-Leste that are not contrary to the Constitution and to any legislation dealing specifically with customary law”.

The Constitution recognises the value of Timorese customs that have been around since ancient times that continue to exist until now. However, the Constitution itself emphasises that these customs may not be contrary to human rights principles in the Constitution as well as international laws that have been ratified and also other legislation.

In addition, Article 123(5) of the Constitution reinforces means and ways for the non-judicial resolution of disputes. This article allows for the institutionalisation of alternative dispute resolution through the law. No law yet exists to regulate or 'institutionalise' non-judicial resolution of disputes.

Even though there is no specific legislation to regulate customary law, competencies and legal consequences, it is important to consider the need to develop a mechanism to define and harmonise these practices and ensure that these practices are in accordance with the norms established in the Constitution. Also, the customary practices that exist in Timor-Leste vary from one district/community to another, and therefore it is necessary to explore a mechanism that can represent all of these existing practices in a uniform manner.

⁸ Counterpart International: Report on Community Dispute Resolution in Timor-Leste: <http://www.counterpart.org/wp-content/uploads/2015/10/Community-Dispute-Resolution-in-Timor-Leste-TET-sml.pdf>

The State has tried to harmonise traditional justice and formal justice. In 2008, the Government of Timor-Leste through the Ministry of Justice collaborated with UNDP to conduct research on traditional justice across the country. However, there have been no results to date in the form of specific legislation that can provide specific recognition to norms and customs.

- ***Penal Code***

The Penal Code also implicitly guarantees community dispute resolution. Even though the Penal Code itself does not clearly define community dispute resolution, however Article 55 (2)(g) on general mitigating circumstances states that general mitigating circumstance may include, inter alia, the following: g) reconciliation between victim and perpetrator. Also the Penal Code gives further consideration to the extraordinary mitigating circumstances if the perpetrator makes reparation of damage caused or diminishes its effects, at any time in the proceeding but before the date of the first trial hearing (Article 56 (2)(c)).

This shows that the courts or the formal justice system recognise that previous reconciliation initiated by the parties before competent authorities can be a mitigating factor when the court determines a sentence.

JSMP's observations have shown that in many cases the parties enter into an amicable agreement in accordance with Timorese custom before the matter proceeds to trial, which can be in the form of a written or verbal agreement. Resolution by the way of written agreement is sometimes included by the parties in the case file, or sometimes presented to the court at the commencement of formal proceedings. When a verbal resolution has been made, the parties convey this orally to the court and the court can also give this consideration in its final decision.

- ***Criminal Procedure Code***

The CPC regulates the procedures of the formal justice system, including among other things the competencies and relationships between the judicial institutions as well as procedures relating to formal justice norms and mechanisms. The CPC implicitly gives minor consideration to community dispute resolution that is legalised by the courts with the validation of the agreement made by the parties at the community level.

Article 216 ((2) and (3))⁹ of the CPC on waiving and desisting from a complaint states that a victim can desist from a complaint and the Court can consider this admissible

⁹ Article 216.2 of the CPC states that desistance from a complaint is admissible until such a time as the first-instance sentence is handed down, and no opposition having been filed by the defendant is a condition for validating the desistance. 3 – Where the desistance becomes known during the

and may endorse it provided there is no opposition from the defendant. However, if the defendant objects then the trial must continue.

Subsection (3) of Article 216 of the CPC states that validation can be provided by the Public Prosecution Service and the courts. The competence to validate a withdrawal of complaint by the parties depends on the procedural phase of the matter. When the parties agree to withdraw a complaint during the investigative phase the Public Prosecution Service has the competence to validate the withdrawal of complaint, but if the matter has proceeded to trial, the judge handling this process has the competence to validate it.

In such cases, in addition to providing validation and settling the matter, the court can also determine civil compensation. In most of these criminal cases the victim also has the right to receive civil compensation. The CPC establishes a presumption that civil compensation will be dealt with as part of the criminal process (the judge will use discretion) unless the victim decides otherwise. Technically speaking, to initiate a separate civil procedure, within eight days from receiving information about his/her rights, the victim must declare his/her intention to submit a request for a civil proceeding. However, there are no provisions in the CPC to prevent a victim/applicant and defendant from resolving civil compensation even when the victim does not submit a formal request for a civil proceeding.

This applies equally to public crimes and semi-public crimes. Therefore, victims of public crimes can decide themselves how to proceed with civil compensation, including deciding to enter an agreement with a defendant. For this reason, it appears there are no provisions in the CPC to prevent the parties in a case involving a public crime from using an informal justice mechanism to determine civil compensation.

Research conducted by *'Mai Munisípiu'* and *Belun* includes additional interviews in their report on Summary of Access to Dispute Resolution in Communities in Timor-Leste, whereby *'Mai Munisípiu'* and *Belun* concluded that many community members lack an understanding about the difference between criminal and civil cases.

This research found that communities tend to view and treat all cases as a single dispute, and do not understand that one case can have criminal and civil components, and that these two components aren't always dealt with at the same time. It is possible that this limited knowledge and understanding about the difference between public crimes and semi-public crimes is due to a lack of simplified public education programs that aim to explain complex legal concepts in a way that is easy to understand.

investigation, it is the responsibility of the public prosecutor to validate it, and this responsibility rests with the presiding judge of the court where the desistance becomes known during the trial.

Communities now believe that serious crimes (public crimes) need to be reported to the police, and non-serious crimes (semi-public crimes) can be resolved in the community. In other words, we can say that communities believe that the distinction between these two terms will determine how cases are taken to different forums for dispute resolution.

In fact, the CPC does not allow the use of a separate forum to determine criminal responsibility in relation to cases involving semi-public crimes, however the CPC states that only the formal courts have the competence to handle and decide criminal justice. Therefore this provision clarifies that informal mechanisms never have any competence to decide criminal cases. However, as explained above, informal justice mechanisms can always facilitate the resolution of matters concerning civil compensation, even if the case involves a public crime.

The content of the CPC is broad and detailed, however it does not recognise the fact that many criminal cases are dealt with in the community using a range of means. In addition, there is no systematic framework established to divert small cases for informal resolution, even though (as mentioned above) in many cases involving semi-public crimes the parties resolve the matter through conciliation or agreement. In this context the CPC represents a missed opportunity to establish a definition on the role of the community and the benefits of community resolution in appropriate cases. Ideally, the CPC¹⁰ could:

- Expressly provide that communities may resolve claims for civil compensation and take steps to restore community harmony, even while a criminal prosecution is ongoing for the same incident;
- Make clearer that in cases of semi-public crimes, a complainant may withdraw a complaint and thereby terminate the criminal proceedings. The CPC could give recognition to the possibility of this occurring through a community resolution, and could include procedures for systematically considering local settlements as a means by which this may occur (where done in accordance with due process and duly recorded in writing and signed). Under the current framework a further process of verification by prosecutors is necessary before a complaint can be withdrawn;
- Set out minimum standards to be applied where informal justice mechanisms resolve civil compensation claims and/or lead to a decision to withdraw a complaint in a semi-public case;
- Make explicit and clear the impact on criminal proceedings where other aspects of the case have already been dealt with through informal justice procedures. This should include making clear the impact on guilt or innocence, on sentence (in the event of a conviction), and on civil liability.
- Currently none of these questions are dealt with explicitly by the CPC.
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There are no provisions in the CPC that address the question of applying informal justice in the community to impose sanctions on a person who has violated local

¹⁰ Counterpart International: Report on Community Dispute Resolution in Timor-Leste <http://www.counterpart.org/wp-content/uploads/2015/10/Community-Dispute-Resolution-in-Timor-Leste-ENG-sml.pdf>; page 13.

regulations/norms. The CPC does not allow for local proceedings to impose punishments or penalties for criminal acts. As emphasised above, the CPC states that only the formal courts can administer or handle criminal proceedings.

- ***Law on Community Leaders***

Law No. 09/2016, 8 July, amending Law No. 3/2009 on Community Leaders and their Election, in Article 5 (1) on duties states that, they shall:

- a) Contribute to social cohesion and national unity;
- b) Guarantee peace and social harmony in the community;
- c) Promote the fair resolution of social conflict occurring within the community or between villages;
- d) Defend, ensure, and promote traditional customs and practices of the community;
- e)...

Principally, in relation to the community dispute resolution mechanism, Article 6 (1) of Law No. 9/2016 sets out a number of competencies of village chiefs and community leaders. These competencies include:

- a) Promoting the resolution of conflicts that arise between community members or between sub-villages, in accordance with the traditions and practices of the community and with respect to the principle of equality;
- b) Promoting and defending the “*knua*” as a fundamental element of cultural identity of the Timorese people;
- c) Preserving the existence of the *uma-lulik* or *uma lisan* in the community;
- d)...

The specific competencies and roles given to community leaders shows the State's recognition of the important role played by community leaders in preserving the cultural values of Timorese society. However, the Law on Community Leaders highlights that during this process the community leaders need to also respect universal principles of equality and non-discrimination and apply them. This means that when resolving cases at the village level if the two parties wish to resolve their case in accordance with Timorese customs and involve the local leaders/authorities, then all people need to be treated equally without discriminating against them on the basis of sex, religion, skin colour, age, and social status. Village chiefs need to ensure that resolution in their community must contribute to peace and harmony in society.

Therefore it is important to ensure that village chiefs and community leaders have adequate knowledge of each relevant crime to avoid creating confusion in the community. Principally, the intervention of community leaders cannot oppose or be in conflict with the formal justice procedures established by the State.

III. CASE STATISTICS BASED ON JSMP MONITORING

This report covers JSMP research, specifically relating to cases where the parties have already resolved their case at the community level as well as cases resolved by the courts through conciliation or the normal trial process.

For five months, between January – May 2017, JSMP conducted specific monitoring of 108 cases. These have comprised 26 cases where the parties had already resolved their matter at the community level and thereafter the matter went to trial. In the other 82 cases, the courts have attempted conciliation. From these 82 cases, the court achieved conciliation in 74 cases and validated settlements, however the other 8 cases proceeded to trial because there was no agreement between the two parties.

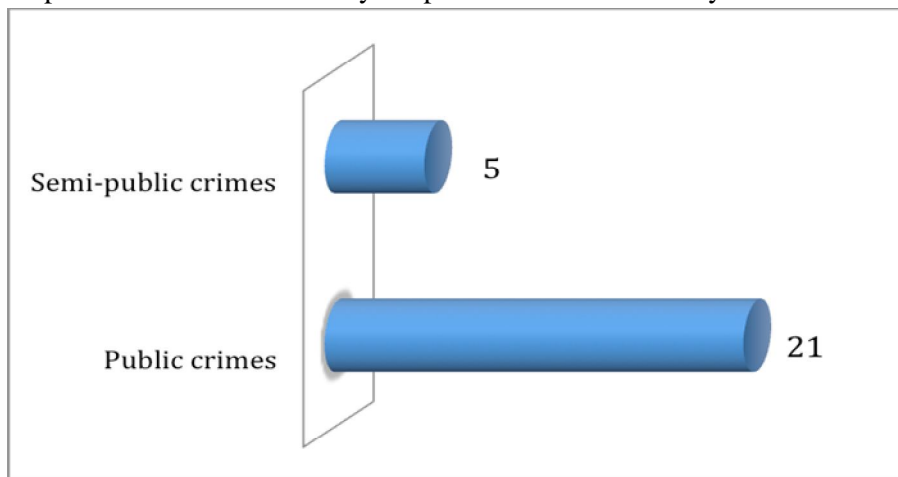
a. Cases that have been resolved prior to a trial process

Based on the results of monitoring conducted by JSMP between January – May 2017, in 26 cases the parties resolved their case at the community level prior to a trial process.

Table I: The cases resolved by the parties at the community level:

Type of crime	Total number of crimes
Public crimes	21
Semi-public crimes	5
Total	26

Graph I: The cases resolved by the parties at the community level:



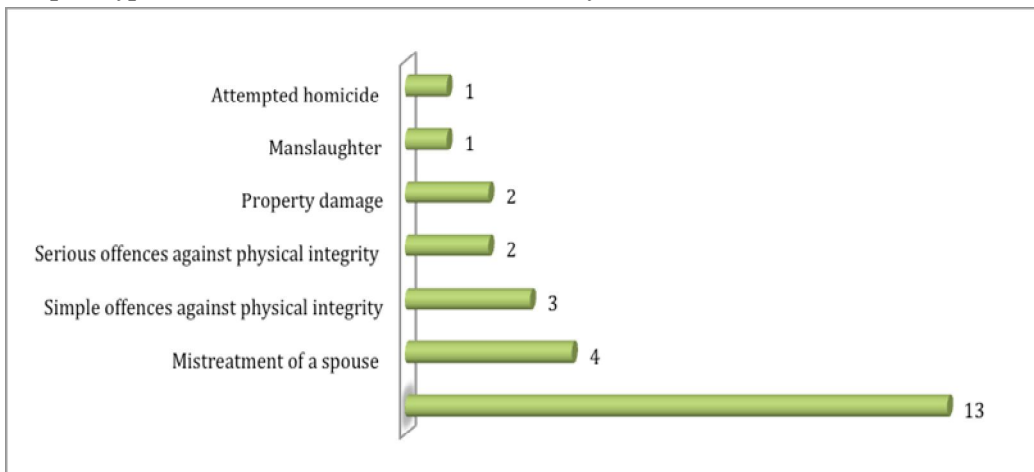
From these 26 cases, there were 21 that involved public crimes and 5 that involved semi-public crimes. These crimes included 17 cases characterized as domestic

violence (13 cases involving simple offences against physical integrity characterized as domestic violence and 4 cases involving the mistreatment of a spouse), 3 cases involving simple offences against physical integrity, 2 cases involving serious offences against physical integrity, 2 cases of property damage, 1 case of manslaughter and 1 case of attempted homicide.

Table II: Types of cases resolved at the community level

Type of case	Articles from the Penal Code	Number of cases
Simple offences against physical integrity characterized as domestic violence	Articles 145, 2, 3, 35(b) of the PC and Article 36 of the Law Against Domestic Violence	13
Mistreatment of a spouse	Articles 154, 2, 3, 35(a) of the PC and Article 36 of the Law Against Domestic Violence	4
Simple offences against physical integrity	Article 145 of the PC	3
Serious offences against physical integrity	Article 146 of the PC	2
Property damage	Article 258 of the PC	2
Manslaughter	Article 140 of the PC	1
Attempted homicide	Articles 23, 138 of the PC	1
Total		26

Graph: Types of cases resolved at the community level



b. Cases resolved through the courts

Based on the results of monitoring carried out by JSMP from January – May 2017, there were 82 cases resolved at the courts through conciliation but from these 82 cases, there were 8 cases where conciliation was not achieved, and they proceeded to trial.

These 82 cases all involved crimes characterized as semi-public and included simple offences against physical integrity (41), simple offences against physical integrity and threats (2), reciprocal offences against physical integrity (4), property damage (12), property damage and threats (1), threats (15)¹¹, failure to fulfil an obligation to provide food assistance (3), larceny and property damage (2) and simple offences against physical integrity and property damage (2).

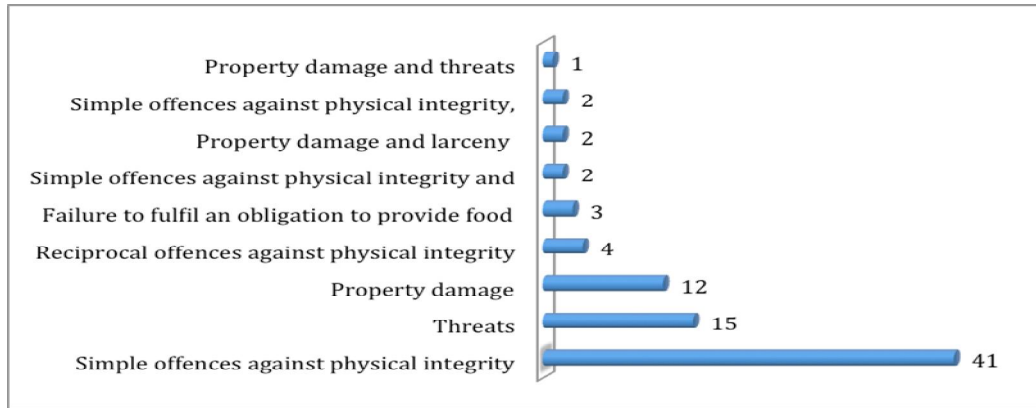
Table III: Types of cases characterized as semi-public observed by JSMP:

Type of case	Articles from the Penal Code	Number of cases
Simple offences against physical integrity	Article 145 of the PC	41
Threats	Article 157 of the PC	15
Property damage	Article 258 of the PC	12
Reciprocal offences against physical integrity	Article 151 of the PC	4
Failure to fulfil an obligation to provide food assistance	Article 225 of the PC	3
Simple offences against physical integrity and threats	Articles 145, 157 of the PC	2
Property damage and larceny	Articles 251, 258 of the PC	2
Simple offences against physical integrity, property damage	Articles 145, 258 of the PC	2

¹¹ From these 15 cases, there was one case of simple offences against physical integrity characterized as domestic violence and threats. JSMP considers that the court only validated a settlement for the crime of making threats. This is because the crime of making threats is not included as a crime of domestic violence. To date, JSMP has advocated that the crime of making threats and property damage should be capable of categorization as a crime of domestic violence in the Law Against Domestic Violence (LADV), because these crimes occur frequently in the household sphere, however until now these efforts by JSMP have not been successful.

Property damage and threats	Articles 258, 157 of the PC	1
Total		82

Graph II: Cases where the courts attempted conciliation:



As discussed above, there are different judicial approaches for dealing with crimes characterized as public and semi-public. For cases involving crimes characterized as semi-public, the normal practice is that before proceeding to trial the judges of the court will attempt conciliation between the two parties and if the parties enter an amicable agreement consideration will be given to compensation for damages, and the court will validate the withdrawal of complaint. However, for public crimes there is no possibility of promoting conciliation and the courts proceed to trial as per normal, even if the parties have already resolved the question of compensation and by agreement.

IV. HOW THE COURTS DEAL WITH COMMUNITY JUSTICE

JSMP monitoring and research carried out over a five month period has shown that in many cases the parties have achieved a resolution before their case has been registered with the court. This occurs because when there is an incident the parties don't just take the matter to the police, but they also seek other means to explore possible solutions to their problems. The parties resolve their disputes in accordance with Timorese custom, and the two parties enter into an amicable agreement. Normally mechanisms for customary resolution are speedier and more responsive in comparison with the formal justice process.

During the trial process, especially the examination of evidence, the parties have an opportunity to tell the court about the results of the resolution they have already achieved and who is involved in this process. The parties can provide the results of the resolution in the form of a written agreement but if they have no written

agreement the two parties need to inform the court. Research conducted by JSMP shows that in most cases the defendant and the victim refer to a community process during the trial.

Whilst conducting its research JSMP tried to find out how the courts considered information about community processes when settling cases. As stated above, the law allows the courts to consider this information to be a relevant circumstance in such cases.

Pursuant to Article 55 (2g) and Article 56 (2c) of the Penal Code, the court can consider amicable agreements and compensation given for damages as mitigating circumstances when the court issues its decision. However the law also requires the court to apply specific guarantees to protect persons accused of committing a crime. For example, these guarantees include a person's right to the presumption of innocence¹². In the interest of ensuring the principle regarding the presumption of innocence, JSMP believes the court cannot use community based resolution to decide on a person's guilt or innocence.

a. Conviction or acquittal and punishment

Based on JSMP's observations, in most cases the defence requests for the court to consider community based resolution as a mitigating circumstance. From the 26 cases involving discussion about the community based process, in 19 cases the defence submitted that this is a relevant consideration in relation to the mitigating circumstances.

JSMP also observed that from 26 cases involving discussion about the community based process, the judges used this information as follows: in most cases (19), the court referred to this information as mitigating circumstances. However in 5 cases the court validated an amicable settlement between the parties (for semi-public crimes) and in 2 other cases the courts did not really refer to the information provided by the parties about community based resolution (the defendant tried to have the matter resolved but the victim did not accept this and in another case the matter was resolved but the defendant repeated his actions so the victim gave back the goods and money that the defendant had given to the victim's family).

JSMP is concerned that in some cases the courts have not only considered the community based process as a mitigating circumstance relevant to the penalty, but also as facts relevant to the type of crime. This problem is evident in the following case study:

¹² Article 34.1 of the Timor-Leste Constitution on guarantees in criminal proceedings states that anyone charged with an offence is presumed innocent until convicted.

Case study

Case involving the crime of property damage. In this case, the defendant wanted to pay for damage he caused to the village hall but the village authorities did not agree and wanted the case to be dealt with under the formal justice system. After the trial the court ordered the defendant to pay a fine of US\$150.

In this case, the public prosecutor accused the defendant of committing the crime of property damage and violence, however after the examination of evidence the defence requested for the court to amend the charge to that of property damage considering that the defendant wanted to provide compensation for the damage he had caused, but the village authorities did not agree. In its decision the court agreed with the request from the defence to amend the charge to that of property damage and considered that the defendant had demonstrated good will to try and resolve this problem and that this was a mitigating circumstance even though the victim did not agree.

JSMP is concerned that actually the law does not allow the court to amend the charge based on what happens during an (attempted) community based resolution. The charges need to be based on the incident and the evidence, as well as the elements of the crime set out in the Penal Code. The behaviour of the defendant after the incident cannot affect the charges applicable to a crime. This is only relevant to the penalty.

Even though the courts have occasionally used information about community based resolution in a way that is not permitted by the law, the aforementioned statistics also show that the courts used this information in 26 of the 108 cases (24%) when considering mitigating circumstances. This shows that in most cases the courts use this information in a way that is permitted by the law.

b. Compensation

As explained above, the CPC allows for the court examining a criminal case to also determine civil compensation for the victim to be given by the convicted person. The law presumes that these two processes will be held concurrently and therefore in practice when victims receive compensation through the courts it is normally determined as part of a criminal case.

Therefore it is also relevant to consider how community based resolution that has been held prior to trial can impact on a court's decision regarding civil compensation.

Even though the court considers the results of community based resolution in its decision as a mitigating circumstance (Article 55(2) of the PC) the code does not provide guidance about how previous reconciliation will affect civil compensation.

In JSMP's experience the courts sometimes consider the results of the community based resolution and use this basis to decide what is fair for the parties, including regarding compensation. Therefore the conclusion can be drawn that the courts don't feel it necessary to order further compensation because it has already occurred at the community level. Or, in other situations, it might happen that the courts feel that the compensation paid according to a community based agreement is not sufficient, as demonstrated in the following case study.

Case studies

In 2015 JSMP monitored a case of sexual abuse¹³. In this case the courts convicted the defendant and imposed a prison sentence of 13 years and ordered him to pay compensation to the victim of US\$3,000. In this case, before the trial commenced the two parties resolved the matter according to Timorese custom and the defendant gave US\$2,000 as compensation to the family of the victim. The court did not consider this US\$2,000 because the money was not given to the victim, but rather to the family of the victim. Therefore in its final conclusion the court decided to not only impose a prison sentence of 13 years on the defendant, but also ordered him to pay separate compensation to the victim totalling US\$3,000.

Things become much more difficult if the court feels that the results of community based resolution give too much compensation to the victim. One example is a case of property damage¹⁴ monitored by JSMP. In this case the two parties had already resolved the matter amongst the families and the defendants paid US\$800 for damages caused to the victim. However, after the examination of evidence the court amended the charge of property damage because the goods damaged by the defendants were only valued at US\$275.

In this situation the parties had already made an agreement so it was not clear if the court was supposed to adjust the amount of compensation to achieve a fair outcome.

¹³ JSMP Press Release: http://jsmp.tl/wp-content/uploads/2015/01/TribunálSuaiKondenatinan13KazuVSeksualHasoruLabarikMINOR_TETUM.pdf

¹⁴ JSMP Press Release: http://jsmp.tl/wp-content/uploads/2017/03/SumariuKazuTribunálBAUCAU_Tetum3.pdf

The CPC also does not clearly explain if the court has the discretion to refuse to validate a community based settlement if it feels that the agreement is unfair.

JSMP has observed that not all cases resolve at the community level guarantee a fair process. For example in the aforementioned case the defendant paid compensation that was higher than the damage caused. Even if we reject and condemn the behaviour of the defendant, decisions still need to reflect the gravity of the harm suffered.

Therefore, even where cases involving public crimes have been resolved according to Timorese custom or between the families, guarantees are still necessary in order to ensure fairness. JSMP recommends that in the future it is important to clarify the law on this issue to make it clear what the courts are supposed to do in such situations. For example, the law should clarify whether the courts have the power not to validate unfair agreements made by the parties, and whether the courts can make adjustments to agreements to ensure that resolutions are fair.

V. CONCILIATION AT THE COURTS

a. General information about the conciliation process at the courts

Article 262 (1) of the CPC on attempts at conciliation states that before proof begins to be produced, in a crime the criminal proceeding of which depends on the lodgement of a complaint, the judge may seek to reach conciliation between defendant and the aggrieved person.

Based on JSMP's observations during this period of monitoring, in most cases the parties did not request conciliation; the judge initiated this process and explained the process to the parties including the legal basis that relates to attempted conciliation. Based on JSMP's observation over a 5 month period, the courts initiated this process in all 82 cases monitored in which conciliation was attempted.

The conciliation process at the courts is speedy. From the cases observed by JSMP, often the conciliation only took about 30 minutes. In comparison with trials, this is clearly quite a short amount of time.

b. Does conciliation achieve results?

For five months JSMP observed 82 cases where the courts attempted conciliation. From these 82 cases, there were 7 cases where the two parties agreed and already had a settlement that had not been formalised and the courts only needed to validate the settlement. In 75 cases when the two parties appeared before the courts they had not yet resolved their dispute. In 67 of these cases the courts achieved conciliation

between the parties. In the other 8 cases, the courts tried conciliation but did not manage to obtain the agreement of the two parties and the matter proceeded to trial.

Cases where the courts validated agreements made by the parties

From the 82 cases in which the court attempted conciliation, in 7 cases the courts validated agreements made by the two parties. Based on JSMP's observations the court validated settlements where the defendant had apologised and promised not to repeat such acts against the victim in the future, either after the incident or at court. In other cases victims wanted to withdraw their cases because they were related or neighbours with defendants.

JSMP observed that a number of cases dealt with by the court through conciliation actually involved disputes where the two parties managed to resolve the matter prior to appearing in court. Some people could consider this a positive result, because it shows that people have the possibility of resolving their disputes on their own (with assistance from the community) and they don't need to use a lot of the courts time or resources to go to trial.

However, JSMP is also concerned that cases like reach the courts even though the two parties have resolved their dispute and the victim wanted to withdraw the complaint. Actually, Article 216 of the Criminal Procedure Code provides a formal channel for the victim to withdraw a complaint during the investigative phase, and it is not necessary to wait until the case goes to court. If a case has not yet gone to court, the Public Prosecution Service has the competence to validate an agreement made by the two parties or the victim's decision to withdraw the complaint (Article 216(3) of the CPC).

JSMP considers that this could be quite advantageous. For example: prosecutors, public defenders, judges and court officers have to spend time preparing a large number of cases that actually don't need to go to court. If the victim's decision to withdraw a complaint can be formalised more quickly, there is the possibility of saving State money and reducing court expenditure. Therefore the Court can concentrate on trying those cases that actually need to go before the court and will be able to try them quicker. Parties to a case can also benefit because they don't need to lose time going to court.

JSMP considers that there are a number of ways to strengthen the implementation of Article 216. On one hand, when the Public Prosecution Service has contact with the victim, especially during the inquiry process¹⁵, the Public Prosecution Service needs to explain to the victim that there is a possibility of withdrawing a complaint before going to court and the Public Prosecution Service can formalise it. At the same time

¹⁵ Inquiry process and identification of the victim and defendant before the Public Prosecution Service.

other people in the community can play a role in providing information to the victim – for example community leaders and community police or community police officers. The Minister of Justice can provide education to officials to ensure that they understand the law and procedures relating to these matters and have the capacity to disseminate information to people in the community that have a dispute or are victims of semi-public crimes.

Cases not yet resolved where the courts have tried to achieve resolution through conciliation.

As explained above, from a total of 82 cases observed in which conciliation was attempted at court, in 75 cases the parties had not yet achieved resolution. In 8 of these cases the courts attempted conciliation but did not achieve an agreement.

In five of these 8 cases the defendant rejected the request and demands of the victim and in the other 3 cases the victim did not want to withdraw the complaint even though the court attempted conciliation. These cases were as follows:

In 5 cases the defendant rejected the request and demands of the victim:

1. Property damage, the victim requested civil compensation of US\$500,
2. Simple offences against physical integrity, the victim requested for the defendant to pay civil compensation of US\$400, and
3. Larceny and property damage, the victim requested for the defendant to provide compensation to the victim of US\$75.
4. Simple offences against physical integrity, the victim requested for the defendant to pay civil compensation of US\$100, but the defendant was only able to pay US\$50 and the victim rejected this offer.
5. Simple offences against physical integrity, the victim requested civil compensation of US\$5,000, and the defendant rejected this request.

3 cases where the victim did not want to withdraw the complaint even though the court attempted conciliation:

1. Crime of property damage, the victim did not want to withdraw the complaint because the defendant was not a first time offender (repeated acts);
2. Crime of threats, the victim did not want to withdraw a complaint because the defendant continuously threatened the victim
3. Simple offences against physical integrity, the victim wanted the process to continue to establish the truth.

In 5 of these 8 cases the court attempted conciliation but was unable to reconcile the parties because the defendant did not agree with the amount of compensation

requested by the victim. The other three cases proceeded to trial because the victim wanted court to issue a decision to educate the defendant.

There were different reasons why victims rejected conciliation. For example, the victim in a case involving simple offences against physical integrity did not want to withdraw the case because the victim wanted to establish the truth. Meanwhile, the victim in a case involving property damage considered that the defendants had repeated their actions on numerous occasions, so the victim wanted to establish the truth.

These reasons show that some victims place their full confidence in the formal justice system. Victims believe that only the courts can process their case and issue a fair decision. Also, victims want to teach defendants to avoid crime and also to send a message to the public that there are consequences of committing a crime, and offenders have to answer to the courts.

Conversely, JSMP's observations in this area show that in many cases victims are willing to withdraw their complaint through the conciliation process. In most of the cases in which the courts attempted to conciliate a case which had not yet been resolved, they were successful (67 out of 75 cases). JSMP believes that this can be interpreted very positively because it shows that the courts regularly try conciliation in semi-public cases, and often achieve a result. Therefore in these many cases it was not necessary to conduct a formal trial that would require resources, time and cause individuals to feel anxious/concerned or angry. However, at the same time it is important to investigate if the conciliation process is the best approach that is fair on the parties.

c. Is conciliation fair on the parties?

Although JSMP observed that the conciliation process has some benefits, this process also needs to be fair to the parties.

In particular, JSMP believes it crucial that the victim is able to decide whether or not to withdraw their complaint, and when the victim is properly informed he/she can make this decision. Before making this decision the victim needs to understand that this will close the case, and there will be no punishment against the defendant, or civil compensation. The victim also needs to understand, at least in a general sense, about the possible outcomes if the matter proceeds to trial. For example, the victim needs to know if he/she will obtain civil compensation if the case proceeds to trial? *How much* civil compensation? It is also important for the victim to know if the defendant is punished, exactly what type of punishment the defendant might receive. This will provide an opportunity to the victim to make an informed decision to wait for trial or accept what the defendant is willing to pay through a community based process.

However, JSMP's observations show that based on the current system and the reality that exists in Timor-Leste, victims face many challenges in obtaining this information.

Firstly, many victims have no lawyer or public defender. In the cases of conciliation observed by JSMP, in almost all cases the victims have no private lawyer or public defender.

In fact, the Timor-Leste Constitution guarantees that every person has access to the courts for the defence of their legally protected rights and interests; and also states that justice shall not be denied for insufficient economic means (Article 26). Many people interpret that this article guarantees the right to legal aid, including for the parties to a civil case. However, in practice when the civil compensation process is dealt with at the same time as the criminal matter, the victim normally does not have access to a private lawyer or public defender. This is especially so in cases involving conciliation (and therefore which concern semi-public crimes), as these victims do not benefit from Article 25 of the Law Against Domestic Violence which grants victims of domestic violence the right to receive free legal assistance.

As victims don't have a lawyer or public defender representing them, the role of the Public Prosecution Service is even more important. The CPC states that the Public Prosecution Service “represents the victim in criminal proceedings” (preamble, paragraph 3). In almost all cases the Public Prosecution Service has contact with the victim. During investigations the Public Prosecution Service engages in a process of “*dilijénsia*” with the victim. In the cases it has observed JSMP has had the opportunity to conduct interviews with victims in 8 cases. From these cases all of the victims participated in the *dilijénsia* process. Three victims said that they participated in the *dilijénsia* before a prosecutor and five other victims said that they participated in an examination with a justice official at the Public Prosecution Service.

This *dilijénsia* process provides an opportunity to the Public Prosecution Service to provide important advice and information to the victim. However, based on JSMP's observation this aspect of the process is not very strong. During its research JSMP tried to gather information from victims of domestic violence about their comprehension of the process they were involved in. Results from these interviews show that most of them cannot demonstrate that they have knowledge or clear expectations about the process before the courts and the compensation possible. This could mean that the Public Prosecution Service normally does not provide this information, or it could mean that the victims don't really understand what the Public Prosecution Service is conveying to them. In addition to the aforementioned problem, another problem that has an impact is when the *dilijénsia* is carried out by legal officers. This is because legal officers do not have the same legal qualifications as prosecutors, and in JSMP's opinion, there will be a larger risk that they will not be able to help victims understand the process and the possible outcomes.

JSMP recommends for the Public Prosecution Service to give priority to ensuring that during the *dilijensia* process victims receive clear and complete information so they can make an informed decision about conciliation. This includes information about: the conciliation process and its impact on criminal and civil cases and what results are possible if the matter goes to trial (including penalties and amount of compensation). JSMP also recommends for legal officers to receive intensive training and supervision to ensure that the process is fair. JSMP also recognises that the human resources of the Public Prosecution Service are quite limited, so sometimes from the assistance of legal officers is necessary. However, to guarantee that all processes can run smoothly, and are of good quality and fair, wherever possible the prosecutors should carry out the *dilijensia* process themselves so that the aforementioned problems are minimised.

VI. CONCLUSIONS AND RECOMMENDATIONS

Based on this research JSMP presents the following conclusions and recommendations to ensure justice for all, whether they seek resolution through traditional customs or through the formal justice system (or both). These recommendations are aimed at increasing protection and providing results that are fair to both defendants and victims.

How the courts deal with community justice

Community based resolutions are positive and play an important role in the judicial process in Timor-Leste. In relation to how the courts deal with agreements made by the parties at the community level, JSMP research shows that in most cases the courts use information from this process for consideration as mitigating circumstances, in accordance with the law. However in a few cases JSMP has observed that the courts used the information in a way not permitted by the law. JSMP also observed that the law is not clear on how agreements made at the community level impact on the role of the courts in deciding civil compensation. For this reason JSMP makes the following recommendations:

1. Urges the parties involved in such resolution processes, and the courts in particular, to consider and respect the presumption of innocence of the defendant and not to use resolutions that are achieved at the community level to undermine presumptions that are inherent in the criminal process.
2. Recommends for the courts not to use resolutions achieved at the community level, or attempts by the parties to seek resolution, as a basis for modifying criminal charges.

3. Develop guidelines or clarify the law on the methods, procedures and crucial issues relating to the courts' role and power when judging cases resolved at the community level; especially issues relating to civil compensation and the power of the courts to provide validation when community based processes are not fair to the parties.

Conciliation at the courts

JSMP recognises the value of conciliation through the courts and respects the fact that judges are seeking ways to resolve more cases using this method. However, at the same time JSMP believes that the courts, the Public Prosecution Service and others play an important role in ensuring that the parties make informed decisions during the conciliation process.

JSMP also believes that in many cases there is an opportunity to achieve resolution and validation before the matter reaches the courts and this can save time and resources and make the process easier and more accessible for the parties.

For this reason JSMP makes the following recommendations:

4. The Public Prosecution Service and the courts need to clearly explain the consequences of conciliation carried out by the courts so that victims have a clear understanding about the options available to them, and if they will be beneficial or not, before they withdraw their case.

5. During the *dilijensia* process the Public Prosecution Service needs to clearly explain the proceedings relating to each crime. In addition, an explanation should be provided that Article 216 (3) states that for cases involving semi-public crimes the Public Prosecution Service can also validate settlements, not just the courts. Community leaders, the police or others involved in the community dispute resolution need to obtain information about this process so they can also make recommendations to the parties to present the outcome of such resolutions to the Public Prosecution Service for validation during the investigative phase;

6. During the *dilijensia* process the Public Prosecution Service needs to clearly explain about what penalties the defendant is likely to receive and the civil compensation civil that victims are likely to receive;

7. Legal officers at the Public Prosecution Service need to receive intensive training and supervision to ensure that the *dilijensia* process is of high quality and is fair.

General recommendations

As JSMP found in its report on the Legal Aid Statute in Timor-Leste¹⁶, for ordinary citizens to have access to justice¹⁷, it is crucial to ensure legal aid for everyone. This also applies to those who participate in alternative dispute resolution such as at the community level as well as conciliation. However, based on JSMP's observations, in many cases victims do not have access to a lawyer or public defender. Therefore, JSMP recommends that:

8. The Government needs to ensure that legal aid is provided to victims by lawyers and public defenders so that victims can be represented during the entire process.

¹⁶ Report on the Legal Aid Statute in Timor-Leste : <http://jsmp.tl/wp-content/uploads/2012/05/SOLA-Report.-Tetum.pdf>