



**JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN SISTEMA JUDISIAL**

Justice Update

Edition : March 2010

Period : March 2010

The importance of having a Domestic Violence Law in Timor Leste

Urgency and rationale for a Domestic Violence Law

There are a range of arguments that support the need to urgently pass the draft Domestic Violence Law, including the dire need for such a law, the socio-economic reality of women, constitutional requirements and state obligations under international law. For this reason JSMP urges and encourages the respectable members of the National Parliament to immediately approve the Draft Domestic Violence Law to fulfill the following obligations imposed on the State of Timor-Leste:

- Article 6 (j) of the Timor-Leste Constitution which states that: *The fundamental objectives of the State shall be ... to create, promote and guarantee the effective equality of opportunities between women and men;*
- Article 9 (2) of the Timor-Leste Constitution which states that: *Rules provided for in international conventions, treaties and agreements shall apply the internal legal system of East Timor following their approval, ratification or in accession by the respective competent organs and after publication in the official gazette;*
- Article 16.1 and 16.2 of the Timor-Leste Constitution which state that: *All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties. No one shall be discriminated against on grounds of color, race, marital status, gender, ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition;*
- Also Article 17 of the Timor-Leste Constitution states that: *Women and men shall have the same rights and duties in all areas of family, political, economic, social and cultural life;*¹
- The CEDAW Convention, and Recommendations of the CEDAW Committee on the initial report from the Government of Timor-Leste which included a special recommendation about access to the courts and violence against women, as highlighted in Recommendation No. 21: “The Committee is concerned that, while women’s access to justice is provided for

¹ Also refer to other constitutional provisions which imply that the state of Timor-Leste is obliged to guarantee and protect its citizens from all kinds of violence as well as other obligations to promote gender equality and participation in the national development process.

by legislation, their ability in practice to exercise that right and to bring cases of discrimination before courts is limited by such factors as illiteracy, language barriers, practical difficulties in accessing courts, the persistence of traditional justice systems, legal costs, lack of information about their rights and lack of assistance in pursuing their rights". Furthermore, in Recommendation No. 22: "the Committee requests the State party to take all appropriate measures to remove impediments women may face in gaining access to justice, and to ensure that the judiciary is familiar with the Convention and the State party's obligations. It urges the State party to provide legal aid services, implement legal literacy programs and disseminate knowledge of ways to utilize available legal remedies against discrimination, as well as to monitor the results of such efforts. The Committee encourages the State party to seek assistance from the international community in order to implement measures that, in practice, will strengthen women's access to justice".

- In addition, in its Recommendation No. 29 on Violence Against Women, the Committee stated: "While noting with appreciation the enactment in 2009 of the Penal Code, which criminalizes sexual crimes as public crimes, and acknowledges all forms of violence as a violation of women's rights to bodily security and integrity and ensures that criminal proceedings do not depend on a formal complaint from the victim, the Committee regrets that the delegation was unable to respond to the Committee's question regarding the criminalization of marital rape under the new Penal Code **and regrets that the enactment of the draft Law on Domestic Violence has been severely delayed.** The Committee is concerned at the prevalence of various forms of violence against women, in particular sexual violence and domestic violence, and the lack of information on the extent of the phenomenon. It is further concerned that cases of violence against women are resolved through traditional methods, including mediation".
- In addition to the various concerns listed by the CEDAW Committee, JSMP also believes that provisions on domestic violence in the Penal Code imply a state obligation to provide maximal protect to women and children, especially victims of domestic violence.

Introduction

The issue of violence against women is a social issue that has been ever present in the history of humankind and continues until this day. Violence against women continues to be a controversial issue and has become increasingly complex of late. The complexity, underlying reasons and characteristics of domestic violence are different from country to country, but it is a phenomenon which occurs everywhere, across all social classes and regardless of educational levels, and this practice also takes place in civilized and developed states. For this reason, the issue of domestic violence is considered to be a universal virus that is of concern for the entire global community. This issue has become increasingly complex and provokes debate on both sides because some countries consider violence against women and children to be a permissible and legitimate practice due to cultural influences and norms that treat women as objects and possessions.

Clearly we all realize and accept that in reality both men and women, as well as children, can become victims of domestic violence. However, research and data indicate that women and

children are more likely to be victimized because of practices that marginalize, discriminate and exclude them from having equal opportunities. Thus, they are placed in positions of extreme vulnerability in society. As a result of their circumstances, many women and children are frustrated, lose hope and are subject to exploitation. They are also more likely to become victims of the misuse of power and face gender-based stigmatization resulting from a wide range of cultural practices and values that continue to flourish in the community. Until now there have been no adequate social, legal or formal mechanisms in place to respond to the violence and psychological pressure encountered by women and children. Although there are a number of legal provisions that may deal with assault to the person, they are open to a wide range of interpretations and have not specifically defined what can be considered as domestic violence.

In reference to the circumstances that lead to domestic violence, many women who become victims choose not to lodge a complaint through the existing legal system, because they do not wish to deal with the psychological burden, and they have limited knowledge of legal procedures. They may also face social stigma, and many view domestic violence as an extremely personal matter or family problem that should not be dealt with in public. Justifiably, many are also concerned that the legal process is full of bureaucracy, and there is a tendency for the victim to be re-victimized.

For the reasons outlined above, even though women want their cases to be resolved, the majority of them choose mediation through traditional processes as a compromise, even though these processes often provide little benefit and often fail to address the interests of the victim. On the other hand, the protection and guarantees provided in the law, especially the criminal law and other provisions on domestic violence, are still far from ideal because the provisions on domestic violence are set out in a very general manner.

Based on monitoring conducted by JSMP, the number of cases of domestic violence and other forms of violence against women continue to increase in all areas within the territory of Timor-Leste. This is evidenced by the number of cases of domestic violence and other types of violence against women that are listed in each court jurisdiction² including cases attended to by the Victim Support Service (VSS)³ that show that violence against women and domestic violence in particular are the most prevalent types of violence in Timor-Leste.

Considering the fact that women are still becoming victims of violence and discrimination in the family sphere and in society, JSMP believes that it is of utmost importance and urgency to establish a formal mechanism to regulate and protect victims of domestic violence and free women from their situations of vulnerability as described above.

² JSMP Report detailing General Observations on the Judicial System/Case statistics on domestic violence.

³ JSMP Report detailing General Observations on the Judicial System/Case statistics on domestic violence cases attended to by the VSS.

Provisions and constitutional basis

As a democratic state based on the rule of law,⁴ Timor-Leste has an obligation to protect and guarantee that all citizens have the same rights and freedoms without discrimination in accordance with the principles set out in the Constitution of the Democratic Republic. These principles include equality before the law,⁵ guarantee of gender equality,⁶ protection of children⁷ and the right to freedom and for every individual to be free from unlawful or harmful treatment.

In addition, the Constitution also guarantees the protection of victims and for the family unit as an integral part of society. Provisions set out in the Constitution provide points of reference for the competent authorities of the state to provide appropriate legal mechanisms to protect their citizens from a wide range of violence and discrimination.

Global changes and demands for human rights protections to be upheld

Even though we acknowledge the importance of preserving, protecting and safeguarding the culture and cultural practices of Timor-Leste as an integral part of the identity and social richness of the community, it is however necessary to reflect on what is contained in the Constitution, namely that some such practices and norms may be in conflict with universal human rights principles observed across the globe. JSMP believes that Timor-Leste has achieved its independence in a period of modernization and globalization and therefore as a democratic nation in the current context there should be no excuse for Timor-Leste to avoid international norms that prescribe the elimination of cultural practices that are out of date and no longer reflect the spirit of the last decade, namely a decade characterized by peace, justice and non-discrimination. Violence and discrimination against particular groups in society constitute a “backward” cultural practice in present day society. Therefore, reactions, arguments and concerns raised in order to defend or preserve cultural values need to be discussed and explored in detail to examine which cultural values need to be preserved and which values are no longer relevant or in accordance with current developments.

Limitations of the provisions on Domestic Violence set out in the applicable law

The Penal Code acts as the primary law and source of reference for all other criminal provisions that deal with domestic violence and assault against others, even though these matters are not dealt with specifically. The Penal Code also does not contain a clear definition of the term domestic violence as developed in the draft Law on Domestic Violence. Even so, there is one article in the Penal Code that refers to “mistreatment of a spouse”.⁸ This article states that “*Any person who inflicts physical or mental mistreatment or cruel treatment upon a spouse or person*

⁴ Articles 1 and 2 of the Timor-Leste Constitution.

⁵ Article 16 of the Timor-Leste Constitution.

⁶ Article 17 of the Timor-Leste Constitution.

⁷ Article 18 of the Timor-Leste Constitution.

⁸ Article 154 of the Penal Code.

*cohabiting with the perpetrator in a situation analogous to that of spouse is punishable with 2 to 6 years imprisonment, if no heavier penalty is applicable by force of another legal provision”.*⁹ However, this article again does not clearly (explicitly) refer to a crime committed in the domestic sphere, but the elements of this provision correspond with the criteria for such a crime. Further, JSMP has observed that in cases where violence has been committed against a spouse there is a greater tendency for the prosecution to apply Article 145 which deals with the lesser crime “simple offences against physical integrity” which is categorized as a crime of complaint.

Timor-Leste’s obligations under international law

- The Universal Declaration of Human Rights sets out principles that guarantee every individual’s right to live in dignity and respects the rights and freedoms of others. As a member of the United Nations, Timor-Leste can not avoid its responsibility as a member of the international community and must adhere to the aforementioned principles. Also, Timor-Leste has ratified international conventions¹⁰ such as the Convention on International and Political rights and the Convention on Economic, Social and Cultural Rights, and in particular the Convention on the Elimination of All Forms of Violence against Women and its Optional Protocol. Furthermore, several articles in CEDAW specifically deal with the elimination of discrimination and violence against women. Namely, Article 2 of CEDAW obliges state parties to adopt laws and other appropriate measures to apply appropriate sanctions to prevent the practice of discrimination against women. This convention states that violence against women is a part of the practice of discrimination against women. Therefore, the said article obliges the government of Timor-Leste as a state party to this convention to adopt laws that prohibit and punish all practices and actions that reflect domestic violence.
- Article 5(a) of CEDAW also obliges state parties to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes. This means that the state of Timor-Leste is obliged to change cultural practices which impede equality between men and women through mechanisms such as approving the Domestic Violence Law.
- Article 16.1 of this convention also reinforces that state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women. This means that the state of Timor-Leste must adopt mechanisms such as the Domestic Violence Law to ensure protection and equality between women and men in the family sphere.

⁹ Official Translation from the President of the Court of Appeal;

¹⁰ Article 9 of the Timor-Leste Constitution.

In addition, the CEDAW Committee in its recommendation No. 19, paragraph 24, recommended that the state party should:

- (a) Carry out effective measures to stop gender based violence in either the public or private spheres;
- (b) Draft a law that provides strong protection to women against violence in the family sphere;

In addition, the CEDAW Committee included an important recommendation in its response to the initial report of Timor-Leste that was submitted in 2009. In paragraph 30, the Committee recommended for the State of Timor-Leste as follows:

“The Committee urges the State party to speedily enact the Law on Domestic Violence and to make it widely known to public officials and society at large and to monitor its effectiveness.”

State parties to this and other conventions are obliged to establish adequate mechanisms to ensure the implementation of the principles contained in each convention. The aforementioned conventions also impose an obligation to establish and create conditions in accordance with the law that will ensure that the aforementioned principles will eliminate traditional practices that conflict with the principles of each convention, including violence and discrimination against women, children and other vulnerable groups.

Concept of Domestic Violence in the Draft Law on Domestic Violence

Article 3.1 of the Draft Law on Domestic Violence sets out the concept or definition of domestic violence, namely: *domestic violence shall mean any act or sequence of acts committed within a family context, by a family member against any member of that family, or by a person with whom a member of that family had an intimate relationship which results, or may result, in physical, sexual or psychological damages or suffering, economic abuse, including threats such as intimidating acts, bodily offenses, aggression, coercion, harassment, or deprivation of freedom.*

The second part of this article emphasizes that domestic violence includes, but is not limited to:

- a) *Physical violence, understood to be any conduct that causes pain, suffering or serious injury, and any other form of maltreatment or physical violence. Sexual violence refers to any conduct of a sexual nature which is committed against a women or person living in the family sphere.*
- b) *Psychological violence refers to any conduct that causes fear and the diminution of self-esteem or capacity to take action, causing despair or other feeling leading to mental or emotional suffering on behalf of the victim.*
- c) *Economical violence refers to any conduct that limits or impedes another person within the family sphere, subjecting them to intimidation so as to perform domestic tasks or work outside of the domestic sphere, to exercise control over that person, or to deny or threaten to deny the provision of financial support to a women or child in accordance with family law, or providing insufficient economic support to a women or child.*

- d) *Cultural and traditional practices that expose women to special risks of violence and abuse, understood to be any conduct that maintains a situation of widespread subordination of women to men and inhibits women from enjoying the condition of equality and to enjoy the same rights as men.*

JSMP believes that this definition is appropriate, because it is able to reflect and respond to all situations, experiences and types of violence that victims have encountered to date. As well as providing clarity on the problematic issue of familial relationships, the draft law also clearly establishes and clarifies types of domestic violence. Previously it was difficult for victims who were subjected to psychological stress resulting from domestic violence or for victims of regular physical assaults to obtain adequate redress, because the applicable law did not contain clear definitions on these issues.

If we analyze the main objective of this draft law, we can see that in Article 1.1 the aim of this law is to create and strengthen mechanisms to prevent violence in the family sphere and to uphold the rights of victims and to also provide legal protection to victims of domestic violence. Subsection 2 establishes the obligation of the state to prevent, investigate and provide recourse for human rights violations, including violence against women committed by government and private institutions. This can be achieved through:

- a. *The establishment of a system to prevent, eliminate and reduce social or familial practices that perpetuate domestic violence.*
- b. *Providing assistance to families and individuals in dangerous or fearful situations to prevent the commission of violence. Prevention efforts aimed at families that are prone to violence to mitigate the consequences of such violence.*

Based on its own interpretation, JSMP believes that this draft law stipulates the criminal consequences for those who commit such crimes, as well as attempting to establish preventative measures against violence and demand a collective responsibility from all state entities and the community to work together to prevent domestic violence in a consistent manner in accordance with international human rights standards.

In addition to establishing preventative and protective measures, there are several other provisions that define the fundamental principles of this draft law.¹¹ Through analysis of these provisions, it is clear that the law has been drafted in order to strengthen the family unit, promote non-violent cultural practices, equality and mutual respect for human beings living in a civilized and modern global community.

The importance of this law

Since this law was initially drafted there has been significant debate about the need for such a law in Timor-Leste, and this process culminated in a vote before the plenary session of the National Parliament. There has been both support for and opposition to this law based on cultural

¹¹ See Article 5 to Article 10, Draft Law against Domestic Violence.

practices and principles that continue to form part of the cultural richness of the people of Timor-Leste. However, as stated above Timor-Leste is a member of the international community and therefore can not avoid its obligation to adhere to democratic values, equality without discrimination, non-violent cultural practices and other humanitarian values embraced by the majority of people across the world by promoting and upholding them as universal values that dictate the interaction of members of the international community.

In addition to the demands of the international community, as a democratic nation based on the rule of law, Timor-Leste has an obligation and institutional responsibility to protect its citizens from all forms of violence and discrimination committed by one group against another. Moreover, the state is also obliged to establish institutional mechanisms to guarantee and protect its citizens from violence or other acts that violate the rights of its citizens. However, when the state is negligent or unable to fulfill its obligations, then the state must establish other mechanisms to punish the perpetrators of crimes. Nevertheless, this should be considered as a last resort if other steps are deemed to be insufficient.

However, the reality is that women and children remain vulnerable in the family sphere, society, the public domain and in other specific areas, and are subjected to violence and suffering (physical, sexual and psychological) regardless of their social status or class. Therefore the Law against Domestic Violence is a rational and positive measure taken by the state to fulfill its obligations to respond to a social phenomenon that has raised universal concern.

It is necessary to point out that if this law is enacted it will not only provide protection to women, but to all individuals living in the family sphere, as set out in the definitions contained in this law. Nevertheless, the reality is that women and children are more vulnerable due to particular social practices, and therefore this law is primarily intended to respond to these circumstances.

JSMP believes that the draft law on domestic violence is crucial and urgent because monitoring conducted by JSMP indicates that cases of domestic violence have continued to increase over time and so far there has been no adequate legal mechanism to respond to this situation. Even though the Penal Code contains several articles that encompass aspects of domestic violence, the provisions in question only contain general definitions and unfortunately are not appropriate for dealing with domestic violence.

JSMP is also concerned that those citizens who are most frequently victimized by violence are extremely vulnerable in all aspects of their private life and thus require protection from the law as well as from state enforced measures, because women and children are an integral part of the community in Timor-Leste who have the right to protection from all forms of violence or actions that violate their personal freedom or integrity.

JSMP strongly refutes the contention of some parties that the draft Law against Domestic Violence will destroy family unity. On the contrary it is aimed at providing fundamental guarantees for the integrity and unity of the family based on respect for human rights principles as set out in Article 5 of this draft law.

JSMP recognizes that justice in Timor-Leste will not be achieved through legal instruments alone, and that it requires a firm commitment from all members of the community to take steps to change social practices over time. Nevertheless, JSMP urges the respectable members of the National Parliament to immediately enact the Law against Domestic Violence in order to provide progressive and comprehensive legal protection to women in Timor-Leste - an important first step in this process.

For more information please contact:

Luis de Oliveira Sampaio

Executive Director of JSMP

Email: luis@jsmp.minihub.org

Telephone: +670 3323883