



**Justice Update
September 2024**

Exploring Modalities of the Penalty of Community Work as an Alternative Form of Sentencing for General Deterrence in Cases of Domestic Violence

“The purpose of applying penalties and security measures is to protect legal interests essential to life in society and the perpetrator's reintegration into the same (Article 61 of the Penal Code).”

I. Introduction

The general concept of a penalty or sentence is to apply a sanction against the convicted person as a consequence of the crime and/or infraction that he/she has committed. Normally penalties are applied with the aim of educating the perpetrator to not repeat such crimes in the future and to educate community members to contribute to general deterrence in the future. The penalties applied by judges will always depend on thorough evaluation of the circumstances and the level of severity in each case and also the evidence produced during the trial.

The Timor-Leste Penal Code establishes modalities for a range of penalties or sentences that constitute main penalties and accessory penalties. Main penalties include prison sentences, fines, community work and admonishment.¹ Whereas accessory penalties include temporary suspension from holding public office, prohibition from holding office, deportation, prohibition from driving and cancellation of permit to carry a weapon.²

The modalities of these penalties (sentences) need to be necessarily adapted to the principles, norms and requirements that guide judges when determining a sentence set out in the Penal Code. The Penal Code also guides that sentences and security

¹ Articles 66-83 of the Penal Code

² Articles 84-89 of the Penal Code

measures that apply must be inspired by the principles of necessity, proportionality and adequacy that are projected towards the goal of general deterrence.

Within the scope of the concept of criminal law, the purpose of applying penalties is to protect legal interests in society and the perpetrator's or convicted person's reintegration into the same, as set out in Article 61 of the Penal Code (PC). Also, penalties serve and function as a legitimate means that are coercive in nature to correct the behavior of the convicted person and possibly repair harm caused by the criminal act.

The penalty or sentence is decisive because the overall role and vision is to strengthen public confidence and expectations; especially to ensure that the formal justice system functions to protect the legitimate rights and interests of citizens, to guarantee social peace and harmony and to promote social justice in society.

Before the Timor-Leste PC came into force in 2009, and Timor-Leste was still using the Indonesian Penal Code with necessary adaptations to principles of human rights (enshrined in the Constitution and the international conventions that have been ratified), JSMP was already conducting monitoring activities in the courts throughout the entire territory. The main aim of court monitoring is to promote and defend a justice system that is transparent, credible, accountable and accessible to guarantee justice for all. During this last decade monitoring activities have been most concentrated and dedicated to cases characterized as gender based violence as the crimes that account for a large proportion of cases dealt with by the Timor-Leste justice system.

During court monitoring in the district courts (now known as courts of first instance), JSMP discovered that there are some gaps in the practices of judicial decision making. These gaps relate specifically to the modalities of penalties applied to cases in the courts. Also, the courts tend to apply suspended prison sentences excessively in most cases of domestic violence. Meanwhile the modality of penalty of community service is absent or non-existent in the decision making practices of the courts, even though this penalty is a modality set out in the main penalties in the Penal Code.

The aim of this Justice Update is to evaluate and examine the effects of these decision making trends and explore options and alternatives that take precedence in the applicable criminal law. This Justice Update will specifically explore the penalty of community work as an alternative to contribute towards strengthening the general aim of penalties that play an important role in protecting legal interests, guaranteeing public peace and promoting social harmony in society.

II. The legal frameworks relevant to the Penalty of Community Work

There are a number of legal frameworks that regulate the functioning and application of the penalty of community work. These laws start with the provisions in the PC and the

Criminal Procedure Code (CPC), and also the Regime on the Execution of the Criminal Law³ which set out the general concept, nature and limitations as well as the associated requirements, institutional coordination between the courts and entities or public organisations and the administrative procedures that need to be met when applying the modality of the aforementioned penalty.

A. Penal Code

The Penal Code has two dedicated articles that regulate the modality of the penalty of community service. Article 78 of the PC discusses the concept and nature of the aforementioned penalty and Article 79 of the PC discusses the basic requirements that are necessary for its implementation.

Article 78 of the PC states that the penalty of community service is a penalty whereby the convicted person needs to provide services free of charge to a public agency or other entity that is public in nature, including the provision that the duration of the work to be provided in its application and the relevant arrangements need to be necessarily adjusted to a flexible time for the convicted person in relation to his/her family.

Meanwhile, Article 79 of the PC establishes the associated requirements that guide the court to apply the aforementioned penalty in two situations: 1) the penalty substitutes a prison sentence not exceeding one year or a fine; and 2) the penalty applied requires the consent of the convicted person.

Based on the notion outlined in sub-section (2) of Article 79 of the Penal Code, the penalty of community service is not automatically implemented when the requirement set out in sub-section (1) of this article is met, because sub-section (2) further requires for the court to obtain the consent of the convicted person. This places the court or the judge in a position of 'uncertainty' and demands an additional requirement to "negotiate" with the convicted person. In other words, the court does not have coercive competence to impose the aforementioned penalty against the convicted person.

In fact, this a challenge, however judges need to be creative in exploring these sanctioning mechanisms with innovative thinking to protect decisions that are oriented towards general deterrence in the community and the protection of victims or injured parties. This demands a strategy and the ability to communicate in a positive manner to convince the convicted person that this penalty is a way to integrate him/her into the community and also as an educative measure to educate society in general about the interests of deterrence.

³ Decree-Law No. 14/2014, 14 May

While this requires judges to use their initiative, these provisions allow the courts to substitute a prison sentence that does not exceed one year or a fine with the penalty of community service. These provisions guide the courts to coordinate with public agencies or other entities in the best interests of the community and set out that one hour of work is equivalent to one day in prison, with a maximum of 240 hours. Even though the law allows the court to use this penalty, however whilst JSMP has been monitoring the courts it is apparent that the courts almost never apply this penalty.

B. Criminal Procedure Code (CPC)

On the other hand, before the CPC was amended, Article 342 of this code set out the basic rules that need to be complied with when executing the penalty of community service.

Article 342 on execution states that:

- 1). The public agency where the convict is required to provide community labour shall, on a quarterly basis or whenever the circumstances so justify, inform the court of the manner in which the sentence is being served.
- 2). If the convicted person refuses to deliver services or a faulty delivery thereof, the agency must inform the court, that shall, before issuing a decision, proceed in accordance with Article 332 on the requirements for granting parole and Article 333 of the CPC on the provisions of revocation of parole.
- 3). Once the period of delivery of services has elapsed and the report from the agency where the services have been provided is attached to the records, the court declares the sentence to have lapsed.

However this article was completely revoked when the National Parliament amended the applicable Criminal Procedure Code with Law No. 15/2023 in May, without anticipating anything about this mechanism. It appears that the legislators anticipated that this mechanism would be incorporated in complementary legislation pursuant to Article 81 of the PC. Unfortunately there are no indications that in the short term there will be any efforts to introduce complementary legislation that the law requires.

Independently from the confusion, ambiguity and inconsistency surrounding these provisions, judges can actually apply the penalty of community service, whilst awaiting complementary legislation to come into force.

C. Regime on the Execution the Criminal Law

The Regime on the Execution of the Criminal Law set out in Decree-Law No. 14/2014, 14 May establishes a range of procedures on the execution of the criminal law including

the regulation of materials relevant to the penalty of community service. This regime practically sets out the administrative and procedural measures clearly and in detail that are necessary in relation to the application of the aforementioned penalty.

Chapter V of this regime, in articles 155-164, clear guidelines are provided about the courts and relevant entities, particularly the role of the Social Reintegration Service, and the coordination, collaboration, follow-up and identification of beneficiary entities, the modality of the service to be implemented, and how to calculate the duration of its implementation.

This means that this regime has identified the public entities that are responsible for accommodating the requirements relating to the implementation of the aforementioned penalty, including planning, proposing timelines, identifying relevant services that are of an educative nature in the community, including obligations and other relevant conditions.

When we observe and comprehensively internalize the provisions of the Regime on the Execution of the Criminal Law, we do not find any reason or justification from the courts to conclude that there are no appropriate mechanisms or no entities available to accommodate such decisions from the courts. The Regime on the Execution of the Criminal Law provides guidelines is clear and details the process on the application of the penalty of community service.

It does not appear that this is the fault of the court or judges alone. JSMP believes that prosecutors on duty who represent the legitimate interests of victims actually assume a strategic and decisive role in all proceedings. Therefore, prosecutors need to play an active role in proposing the penalty of community service when making final recommendations, because on many occasions judges apply the modality of penalty or substitute the main penalty based on the final recommendations of prosecutors.

III. Concerns relating to the absence of appropriate conditions and procedures

Although the law clearly defines and guides the court to apply the penalty of community service, on some occasions JSMP has initiated conversations with judges about the absence of a modality for the aforementioned penalty in court decisions. Even though there is no substantive response based on judicial reasoning, often judges refer to their preference in not choosing this penalty because of administrative issues such as the lack of appropriate conditions and procedures to administer this type of penalty after it has been handed down. The judges often argued that an appropriate mechanism is required to administer, monitor and supervise the convicted person. Also, judges argued that it is necessary to coordinate with the entities available to accommodate the convicted person when this penalty is implemented, to avoid potentially violating the human rights of the convicted person during implementation.

JSMP believes that this is not a response nor a justification that is based on the law – JSMP understands that these arguments are arrangements and interpretations or personal justifications to deflect from the actual matter at hand. As identified in the previous section, in addition to the basic provisions in the Penal Code, the Regime on the Execution the Criminal Law provides clear and detailed guidelines on the process to apply the penalty of community service. JSMP assumes that the main issues and concerns do not relate to having an appropriate mechanism, however the issue is the lack of knowledge or absence of knowledge or judges have not been updated about our current legal frameworks.

Naturally, practical experiences prove that there is no mechanism or system that functions automatically when there has been no experimentation in any actual cases. The courts need to find a way, and need to test out the circumstances, and need to experiment and start with initiatives to find a form that could possibly meet current needs. So that when complementary legislation is discussed and introduced, it can immediately accommodate and adjust the needs that reflect empirical experiences that have been tried to date.

JSMP has also examined other relevant provisions in the general provisions of the Criminal Procedure Code, particularly Article 8 on cooperation between authorities. This article states that all authorities have the obligation to collaborate with the courts to administer criminal justice, when requested by the courts. Sub-section 2 confirms that the collaboration referred to in the previous sub-article takes precedence over any other service. This has the sense and effect that a court notification has imperative force (is mandatory) to oblige other entities to collaborate in the best interests of administering justice. JSMP believes that when the courts have the initiative and desire to experiment with the modalities of the penalty, the courts will have full competence in accordance with the law to demand collaboration from other entities.

When we observe and explore these provisions properly, the option to implement the penalty of community service is wide open to the courts or judges, even though this requires the judges to perform some extra work.

IV. The trends in court sentencing in cases of gender based violence have no deterrent effect

The results (statistics) from monitoring conducted by JSMP in all of the courts show that in cases of gender based violence, and crimes of domestic violence in particular, most often the courts apply suspended sentences and fines.

JSMP reports have continuously asked for attention to be given to these trends because JSMP has highlighted that these sentences do not have any institutional force to have an ongoing effect or deterrent effect against convicted persons and community members to avoid committing further crimes in the future.

A recent report on “Sentencing in Case of Domestic Violence” that was produced in 2017⁴, again reiterated the same issues and touched on concerns about trends in penalties handed down by the courts in cases of domestic violence.

In two previous reports that were published in 2013 and 2015, namely “The Law Against Domestic Violence: Three Years of Implementation and Obstacles” (Report on the Law Against Domestic Violence 2013)⁵ and “The Application of Alternative Sentences in Cases of Domestic Violence at the Oecusse District Court” (Report on Alternative Sentencing 2015)⁶, highlighted concerns about trends in sentencing in cases of domestic violence in the district courts in 2014 and 2015. These reports confirmed that more than 60% of penalties applied by the courts are suspended prison sentences in cases of domestic violence that were monitored until a final decision was handed down.

Then several years later JSMP gathered statistical data over the last three years regarding cases of gender based violence (GBV) that show that there has been no significant changes regarding general deterrence in the community. The prevalence of these penalties/sentences show the same trend, namely that most of these cases result in the same penalties that were handed down in previous years.

Table 1: Total cases of domestic violence where the courts have applied the suspension of execution of a prison sentence between 2021 – 2023

	2021	2022	2023
Types of penalties			
	200	202	140
Suspension of execution of a prison sentence			
	134	158	168

⁴ Sentences and Domestic Violence: Suspension of prison sentences and conditions; <https://jsmp.tl/wp-content/uploads/2012/05/17.12.17-FINAL-Report-on-suspended-sentences-with-conditions-TETUM.pdf>

⁵ The Law Against Domestic Violence: Three Years of Implementation and Obstacles: https://jsmp.tl/wp-content/uploads/2012/05/FINAL_Tetum.pdf

⁶ The application of alternative sentences in cases of domestic violence at the Oecusse District Court: https://jsmp.tl/wp-content/uploads/2012/05/FINAL_JSMP_Sentensa-alternativa_TDO_Nov-20151.pdf

Other types

	334	360	308
Total			

The table above shows that during JSMP monitoring that was carried out for the last three years between 2021 - 2023, the courts continued to favour suspended sentences in comparison with other modalities, even though in 2023 the courts opted for other penalties.

The Penal Code explicitly provides guidelines to determine a sentence – namely when deciding on a sentence, the court/judge must look at the culpability of the perpetrator and the need for deterrence. To determine a particular sentence, the Court will examine all of the circumstances associated with the crime, that is in favour or not in favour of the perpetrator⁷. This means that the court or judge has the obligation to evaluate, analyse, consider, substantiate and foresee that any decision/sentence introduced will have an effect on the convicted person and for the common good of society. The sentence itself must be adapted to correspond with the harm that women have suffered as the result of the violence.

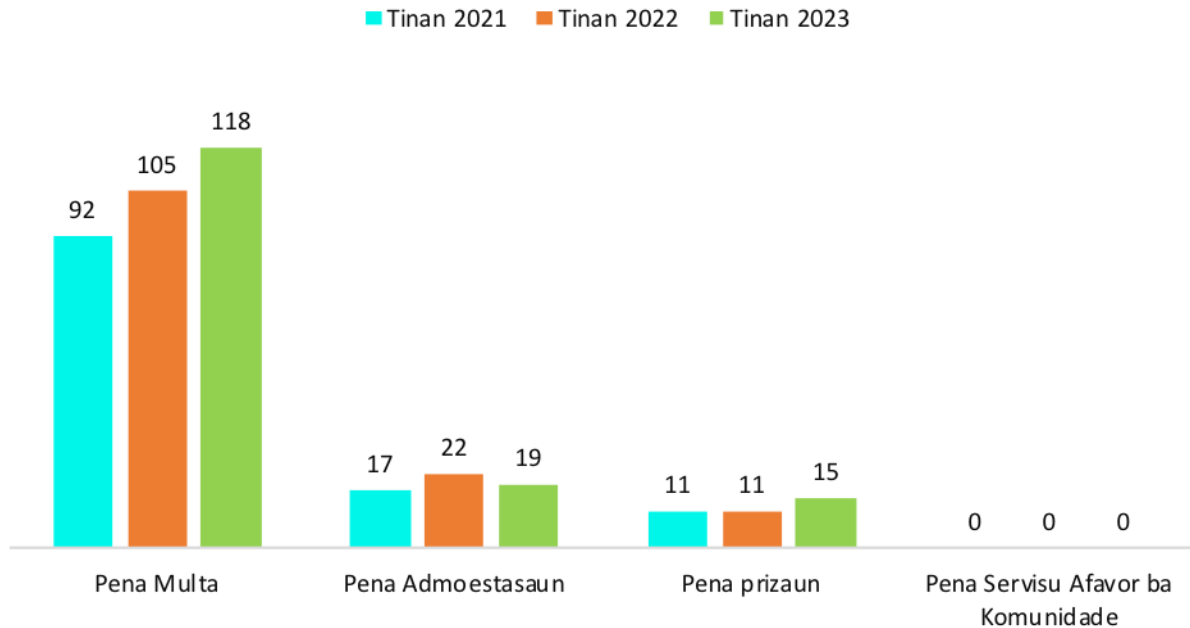
If trends in the penalties imposed by the courts do not show positive progress in transforming behaviour in society as an approach towards general deterrence, then judges need to sensitively and critically explore innovative measures within the scope of sentencing norms provided for in criminal law.

Table 2: Table showing sentencing trends in cases of domestic violence between 2021-2023

No.	Type of decision	2021	2022	2023
1	Fine	92	105	118
2	Admonishment	17	22	19
3	Prison sentence	11	11	15
4	Community Service	0	0	0

⁷ Article 51 (1) and (2) of the Penal Code on general rules on the determination of a penalty.

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The table above shows that during JSMP monitoring between 2021 - 2023, there were no cases where the courts applied the penalty of community service in those cases monitored by JSMP. JSMP also did not observe any substantive legal grounds to justify the absence of this penalty in accordance with the law.

The 2022 JSMP Institutional report⁸ reaffirmed that between 2020 - 2022, cases of GBV continued to be very high, namely between 71% - 75% of all of the criminal cases monitored by JSMP. These facts show that GBV crimes constitute a high percentage of crimes dealt with in the Timor-Leste formal justice system, however justice institutions have not demonstrated any institutional efforts and attempts with a clear vision to respond to this reality.

The justice sector, and the courts in particular, need to consider developing appropriate institutional tools to assess trends in sentences that are imposed. This includes exploring the modalities of penalties set out in the Penal Code as an alternative when other sentences applied by the courts do not have any coercive and binding power to have an effect on society. The courts need to have an institutional culture to assess trends as well as the complexity of each case, so they can design and foresee the most appropriate strategy of intervention according to the circumstances and gravity of each case. This forecasting includes developing and introducing guidelines on

⁸ 2022 JSMP Annual/Institutional Report, pages 12, 13, available at: https://jsmp.tl/wp-content/uploads/Relatoriu-Institucional_TETUM.pdf

penalties/sentences in cases of GBV that JSMP has raised many years ago in its thematic reports and annuals.

Within this context, the courts need to institutionalise practices that allow for assessment and regular dialogue between judges, and provide the space to exercise critical thinking between judges to share their experiences and lessons learned with each other, to allow them to consult with each other or receive feedback, between the presiding judge handling a case and the judge administrator and judges with previous experience, so they receive the necessary support and assistance in a case, without influence and undermining the principles of integrity and impartiality in relation to the presiding judge handling each case.

The judge is the judicial authority who plays an important role in regularly evaluating trends in crimes who presides over trials in the court and imposes penalties against convicted persons. This is truly essential to ensure that the legal/judicial system functions to guarantee that justice is applied in the appropriate manner and has an effect of protecting the legal interests and to promote the maintenance of public order in society which is a major role carried out by the formal justice system.

V. Public perceptions about suspended sentences

During activities to disseminate legal information and training on access to justice at the grass roots level, many communities have questioned and conveyed serious criticism about convicted persons serving suspended sentences outside of prison. In most cases the convicted persons don't understand what a suspended sentence is, and what obligations a convicted person must meet during the period of suspension. This has resulted in some convicted persons serving a period of suspension but continuing to commit crimes, however the suspension has not been revoked or extended. This reality is exacerbated when victims/injured persons and the community don't understand what needs to be done in relation to a convicted person who commits another crime whilst serving a period of suspension.

Even though it is necessary to carefully examine these issues to find out the real answers, probably this trend shows that many convicted persons and community members do not believe or feel that suspended sentences are a form of criminal sanction (punishment). Because in fact, there is no appropriate and strict mechanism to ensure that convicted persons comply with their obligations during the period of suspension.

Meanwhile, on many occasions JSMP had demanded for suspended sentences to include additional obligations or rules of conduct as set out in the Penal Code.⁹ This will

⁹ Article 69 and Article 70 of the Penal Code

provide a lesson and visibility for the convicted person and the community that a suspended sentence is a penalty that substitutes a prison sentence and/or fine which is a sanction or a punishment. This reflects the vision of the Penal Code which provides guidelines that a criminal offence with legal consequences must be applied from a pedagogical perspective to teach and correct the illegal behaviour of convicted persons and to educate other community members in general to avoid and deter crimes in society.

When judges make a decision without the additional considerations and calculations that are necessary – the decision of the judge will only comply with the ordinary requirements of formality, without making a significant change in society. If this continues to occur, the courts will lose their privilege as a “dignified and honourable institution” that is respected in society. In most cases society views the courts with cynicism, because most cases that are taken to the courts only meet the judicial requirements of formality, and do not provide substantial justice that the community is hoping for.

JSMP has also noted another trend, where the type of sentence applied to the criminal act does not correspond with the facts produced during the trial. For example, some cases occur because of a financial motive that leads to violence in the family, however the court imposes a fine on defendants which worsens the financial circumstances of these families. The UN Handbook for Legislation on Violence Against Women (UN Handbook) recommends that fines should not be imposed in cases of domestic violence when judges are aware that this sentence would cause financial difficulties for the woman who has suffered the violence and her children¹⁰. This manual also emphasizes that if a fine has to be imposed, then it needs to be combined with treatment and supervision of the perpetrators.

These facts show that the application of suspended prison sentences have no effect on convicted persons to correct and transform their violent behaviour in society. On the contrary, suspended sentences allow convicted persons to continue to commit violence against women because convicted persons do not believe that a suspended sentence is a penalty or a punishment.

VI. The penalty of community service as an alternative sentence?

In fact, we need to admit that there is no system in the world that guarantees with certainty that a prison sentence or a fine including the penalty of community service has significant force and effect on deterrence. Many examples show that even though in some cases where perpetrators receive a punishment in the form of a prison sentence, however in reality the prison sentence itself doesn't have any force to stop other

¹⁰ *HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN*; p. 50

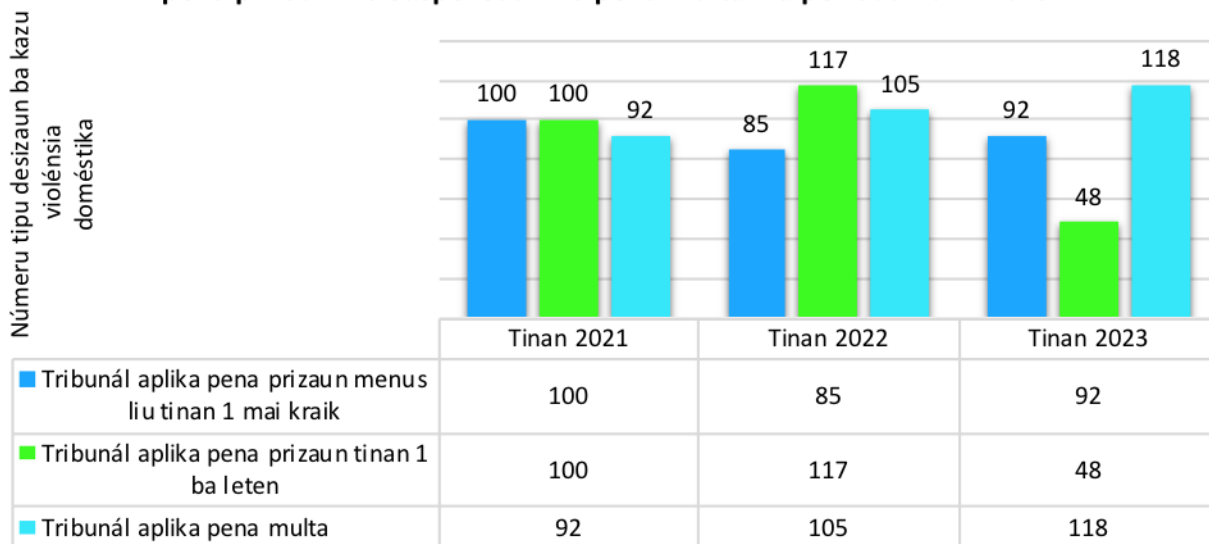
potential perpetrators from committing crimes in the community. There is much criticism about the existence and effect of prison sentences because prison sentences do not have an ongoing effect or deterrent effect to make other persons afraid of committing crimes in the community. We can reflect on this impression and lesson in relation to our context to continue exploring and updating productive modalities that have an effect on deterrence.

Data from JSMP monitoring has confirmed that many cases have met the legal requirements to substitute the penalty of community service, however the courts prefer to apply certain modalities in cases to date.

Table 3: Total decisions in cases of domestic violence where the penalty applied was more or less than one year or a fine between 2021-2023

Types of penalties	2021	2022	2023
The court has applied a prison sentence of less than 1 year	100	85	92
The court applied a prison sentence of 1 year and above	100	117	48
The court applied a fine	92	105	118
Total	292	307	258

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These decisions only reflect the cases monitored by JSMP at the courts. Therefore, this number does not represent the cases tried at all of the courts. JSMP believes that the total number of decisions might be higher than this number.

As discussed in the sections above, the Timor-Leste Penal Code sets out that the court can substitute a prison sentence that is less than one year or a fine with the penalty of community service. It is important that this penalty or sentence adequately represent the aim of the sentence to achieve general deterrence.

The court is an entity that has an institutional role in accordance with the Constitution and the law to administer justice on behalf of the people. JSMP believes that the courts have a moral responsibility to evaluate, examine and regularly reflect to ensure that the application of these penalties are oriented towards the aim of sentencing in accordance with what is set out in the law.

The Penal Code sets out the main modalities of penalties that include the modality of community service. The penalty of community service modality has social-educative dimensions, and when it is applied adequately it can have an ongoing effect or deterrent effect in the community and provide clear lessons that the society can learn, because this penalty also reflects the concept of a sanction and the pedagogic perspective that is adopted by the Timor-Leste Penal Code.

Also, the penalty of community service has social advantages and direct benefits for the community and the state because convicted persons can work for the community free of charge. It is important that his work must be oriented towards the goal of deterrence and to correct the behaviour of perpetrators in society, and the measures need to be realistic

and appropriate and this work needs to match the technical ability of the perpetrator or convicted person.

The Regime on the Execution the Criminal Law provides guidance when choosing this modality of penalty, and the judge will notify the Directorate of Social Reintegration to coordinate with the beneficiary entities in the community and the relevant area of work where the convicted person will provide this service.

In the current context this penalty can cover many aspects that are relevant and pertinent in society, other than what is relevant and pertinent to the convicted person, because members of society will learn from these cases when they are applied effectively. Once again, even though this means that the judges have to perform extra work in order to engage in coordination, and to identify and coordinate with relevant public entities and to supervise and assess the convicted person during the period of community service, this penalty reflects the vision and need for real deterrence.

VII. Conclusions and Recommendations

Conclusions

Based on the observations and findings above, JSMP concludes that the application of the penalty of community service is an optional penalty that judges need to explore because there are a number of provisions and requirements that guarantee and ensure the application of this penalty.

The provisions above allow judges to apply the penalty of community service as a modality of the main penalties that are set out in the Timor-Leste Penal Code.

Considering that the modalities of the penalties that the courts normally apply in cases that come before the courts do not demonstrate an effect on general deterrence, the courts are obliged to review, assess and explore other modalities in the criminal law that can be applied to these crimes, including crimes of GBV.

The courts need to initiate a strategy to coordinate with other entities such as the Ministry of Justice, the Public Prosecution Service and other relevant institutions so that there is understanding and collaboration when the courts make a request with the aim of implementing the aforementioned penalty.

Recommendations

After reflecting on the analysis and setting out the trends in practices observed at the courts, as well as the relevant provisions in the criminal law and the criminal procedure code, we propose the following alternatives:

1. Encourage judges to apply the modality of community service because this penalty is one of the modalities of the main penalties set out in the Penal Code;
2. Encourage the courts to develop guidelines on sentencing in cases of gender based violence, just like the Public Prosecution Service which has introduced a Manual on Gender Based Violence Investigations.
3. Request for the President of the Court of Appeal and the Administrators of the Courts of First Instance to take the initiative to engage in coordination and communication with relevant institutions regarding the implementation of the penalty of community service.
4. Request for the Public Prosecution Service to guide prosecutors to proactively explore and promote the penalty of community service in their final recommendations to encourage judges to choose this penalty in future decision making;
5. Recommend to all institutions to collaborate with the courts if the courts request for cooperation in the interests of justice, especially the application of the penalty of community service;
6. Also request for the Ministry of Justice to develop Complementary Legislation as administrative procedures to guide the implementation of the aforementioned penalty of community service.

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