



JUDICIAL SYSTEM MONITORING PROGRAMME  
PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

## Justice Update

### Differences in the interpretation and application of Article 145 and Article 154 of the Penal Code in cases of Domestic Violence

**March 2023**

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## I. Introduction

JSMP's main program is to conduct monitoring at all the Judicial Courts of First Instance in Timor-Leste, including the Court of Appeal. This is part of JSMP's contribution to the justice sector to ensure the rights of all people to access justice that is effective, efficient and fair, and therefore to also contribute to the reduction of violence in society in accordance with the 2015-2030 Sustainable Goals Development (SDGs), particularly goal 16 on peace, access to justice and effective institutions.

Through this monitoring JSMP monitors all types of cases. However, JSMP places a high priority on cases of gender based violence (GBV), especially violence against women and children and domestic violence (DV).

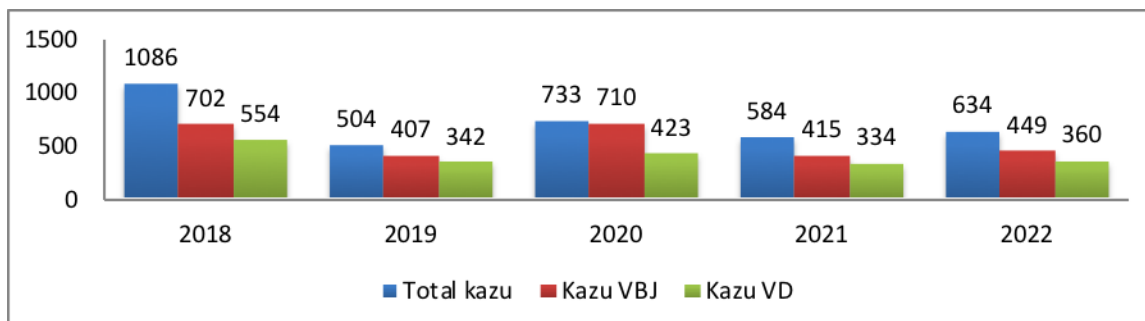
Cases of GBV in general and cases of DV in particular are quite high amongst other types of cases monitored by JSMP and registered to date. In relation to these cases, and in terms of judicial processes, some progress has been noted. In addition there is the issue of the interpretation and application of the provisions of Article 145 and Article 154 of the Penal Code (PC) in cases of DV that have impacted on some decisions that have not been fair or appropriate based on the nature, severity and mitigating circumstances.

The provisions of Article 145 set out the crime of simple offences against physical integrity and the provisions of Article 154 set out the crime of mistreatment of a spouse. In this document JSMP will provide detailed information about cases of GBV and particularly cases of DV as well as the issue of the interpretation and application of these provisions, with a graph, interpretation, case studies and some relevant recommendations for the relevant and competent parties.

## II. Progress and Challenges in processing cases of GBV

During monitoring at the courts and based on the number of cases monitored and registered by JSMP to date, it is evident that cases of gender based violence (GBV) are very high each year, between 70% - 97% and from this total of GBV cases, there are 60% - 84% of cases involving domestic violence (DV) from the total number of cases monitored by JSMP.<sup>1</sup>

Details on the total number of all types of cases, and the number of cases involving GBV and DV that have been monitored by JSMP and noted during the last five years show that cases of GBV and DV are extremely high. Please refer to the graph below.



in relation to the judicial process of these cases, JSMP also discovered that the Public Prosecution Service and the courts to date have done their best to give top priority to prepare indictments, conduct trials and issue decisions in cases of GBV each year. The Public Prosecution Service has created its own mechanism by issuing a circular to advise each prosecutor that they need to process or issue an indictment in 25 cases each month and to include compensation in indictments for cases of GBV. Also, in many cases of GBV the Public Prosecution Service and the courts have applied sentences that are fair and adequate. Some prosecutors and judges have started to display sensitivity towards cases of GBV and progress on many fronts has been achieved, which JSMP is not able to list here.

On the other hand, in addition to the achievements noted by JSMP above, JSMP has also discovered some issues or problems relating to the interpretation and application of the provisions of Article 145 and Article 154 of the Penal Code (PC) by judicial actors, particularly prosecutors and judges.

Based on the results of JSMP monitoring of GBV cases, especially cases of DV, it has been discovered that there is confusion in relation to the interpretation and application of the provisions of these articles which are to be applied in cases characterized as domestic violence, in this context the provisions of Article 145 and Article 154 of the PC. In most crimes of domestic violence, the prosecutors only charge the crime of simple offences against physical integrity pursuant to the provisions of Article 145 of the PC, meanwhile the provisions of Article 154 of the PC on the crime of mistreatment of a spouse are rarely used.

The issue of a lack of uniform interpretation and application has an impact on justice, especially on the parties who are seeking justice. This is because often the courts decide to apply penalties that are different in cases that have the same nature and severity.

### **III. Interpretation and application of the provisions of Article 145 and Article 154 of the Penal Code**

Based on JSMP's observation to date about decisions in cases of DV and analysis of the provisions of Article 145 and Article 154 of the Penal Code, it is evident that the different interpretation and application of the provisions of these two articles has an impact on the application of sentences that are unfair and disproportional (not the same) based on the severity and circumstances of each crime.

Prosecutors and judges tend to improperly formulate their legal basis and charging of cases of domestic violence. Based on the interpretation of judicial actors:

- The common practice is that the provisions of Article 154 of the PC are only applied when there is evidence of a repeated criminal act.
- Even when a case of domestic violence occurs in a very serious manner and form, but the act does not produce a serious effect, for example the victim does not suffer a serious injury or physical disability, then the Public Prosecution Service will only charge Article 145 of the Penal Code.

This is outlined in the JSMP report entitled “Law Against Domestic Violence – Three Years in implementation and Obstacles” which shows that 71 percent (71%) of cases of Domestic Violence are only charged with simple offences against physical integrity pursuant to Article 145 of the Penal Code.<sup>2</sup>

Therefore, JSMP believes that it is important to have proper and uniform interpretation and application in cases characterized as GBV between prosecutors and judges, so that there is no impact on the parties who are seeking justice, especially victims in cases of GBV, particularly cases of domestic violence.

#### **IV. Definition of the crime of mistreatment of a spouse and simple offences against physical integrity in the Penal Code**

In relation to the issue of analysing and interpreting the provisions of Article 145 and Article 154 of the Penal Code, JSMP has used the following table to try to provide a detailed definition of the crime of mistreatment of a spouse as set out in Article 154 and the crime of simple offences against physical integrity as set out in Article 145.

<b>Crime</b>	<b>Simple offences against physical integrity</b>	<b>Mistreatment of a spouse</b>
<b>PC</b>	Article 145	Article 154
<b>Definition</b>	Any person who causes harm to the body or health of another person	Any person who inflicts physical or mental mistreatment or cruel treatment upon a spouse or person cohabiting with the perpetrator in a situation analogous to that of spouse
<b>Penalty</b>	Up to 3 years imprisonment or a fine	2 to 6 years imprisonment.
<b>Subjective</b>	A person who causes harm to	A husband or wife or partner/spouse, if

<sup>2</sup> This report can be accessed at: [https://jsmp.tl/wp-content/uploads/2012/05/Part\\_English.pdf](https://jsmp.tl/wp-content/uploads/2012/05/Part_English.pdf)

<b>element</b>	the body or health of another person	another person cannot be charged with this crime
<b>Objective element</b>	The objective element is the action (punches, strikes, kicks, pushes chokes, drags etc) which causes the (physical) body of the other person to suffer an injury, swelling, redness, bruising or pain	Inflicts physical or mental <i>mistreatment</i> against the wife or husband or spouse
<b>Legal interest being protected</b>	The legal interest being protected by the law in relation to this crime is physical health	Protects the physical and mental integrity of a wife or husband or spouse, and the actions of the defendant do not need to inflict physical suffering on the victim, because mental suffering also fulfils the element of this crime

JSMP notes that the provisions of Article 145 state that prosecution depends on the filing of a complaint however if it occurs in the family context (wife-husband or spouse, parents against a child or a person who is economically dependent on the family) it is considered to be a public crime and allows other people to file a report.

Regarding the provisions of Article 154, often in practice each judicial actor has a different interpretation because the term 'mistreatment' is not specifically defined in the PC. However, judges should interpret mistreatment as "*harmful actions against the physical or mental health, continuous and cause suffering to the victim's physical or mental health (maltreatment/harmful)*". For example berating, swearing, restricting, controlling and putting down, because these actions can inflict mental suffering, therefore it could be considered as the crime of mistreatment of a spouse. This crime does not expressly require an act of repetition, however only requires the defendant's act to cause physically **or** mental suffering **or** cruel treatment against the spouse.

## **V. Analysis of cases**

To reinforce the issue raised by JSMP on the differences in interpretation and application of the provisions of Article 145 and Article 154, JSMP has chosen two cases, whereby JSMP monitored the proceedings and decision at the court on 13 October 2022 to analyse and recommend solutions. The detailed description is as follows:

**1. Crime of simple offences against physical integrity characterized as domestic violence, Case No. 0179/21 DIBCR.**

The public prosecutor alleged that:

- On a day and month that the victim cannot recall, however sometime during 2007, at 5pm, the defendant punched the victim once in the head which caused pain and redness. Prior to this assault, the defendant and the victim argued because the victim told the defendant to look after their young child so that the victim could go to the bathroom, but the defendant did not want to, and then the assault occurred.
- On 21 October 2013 the defendant punched the victim once in the eye which caused bruising, swelling and pain. This case occurred when the defendant told the victim to run (exercise) however the victim said she was tired, therefore the defendant assaulted the victim.
- On 9 September 2021 the defendant punched the victim once in the mouth which caused an injury.
- The defendant violated Article 154 of the Penal Code on mistreatment of a spouse that carries a maximum penalty of 2-6 years in prison.

After evaluating all of the facts, the court disregarded or did not consider the facts that occurred on 21 October 2013 because in this case the court already issued a decision against the defendant of one year in prison suspended for two years with an obligation to periodically appear at the court once a month for one year in 2015.

Meanwhile the court found that the other facts were proven, therefore the court amended the charge from mistreatment of a spouse pursuant to Article 154 of the PC to the crime of simple offences against physical integrity pursuant to Article 145 of the PC in conjunction with Articles 2, 3 (b) and Article 35 (b) of the Law Against Domestic Violence.

Based on these facts that were proven and with consideration of the mitigating circumstances, the court concluded this case and sentenced the defendant to 6 months in prison, suspended for 1 year.

**2. Crime of mistreatment of a spouse characterised as domestic violence, Case No. 0094/21.LIBZT**

The public prosecutor alleged that:

- On 21 September 2021 at 8pm the defendant hit the victim twice on her back. Prior

to this assault, the defendant drank alcohol and asked the victim to tell the defendant about her previous life, so the victim explained about her past life to the defendant, and the defendant became angry and berated the victim and committed the assault against the victim.

- Then on 22 September 2021, at 11:30pm, the defendant pulled the victim's hair and dragged her on the bed and pushed down on her stomach and punched her once on the back. Prior to this assault the defendant and the victim had an argument because the defendant suspected the victim of having a romantic relationship with another man.

The public prosecutor alleged that the defendant violated Article 154 of the Penal Code on the mistreatment of a spouse that carries a prison sentence of 2 years to 6 years together with Articles 2, 3(a), 35(a) and 36 of the Law Against Domestic Violence.

After evaluating the facts, the court found that the defendant guilty of committing the crime against the victim, so the court concluded the matter and sentenced the defendant to 1 year in prison, suspended for 2 years.

Based on these two cases above JSMP has observed that these two cases have the same severity and nature, however the indictments and decisions are different. In the first case registered as Case No. 0179/21 DIBCR, the defendant committed the crime against the victim on three occasions, however at that time he had already had a previous case and he was still serving his sentence, but he then committed another crime against his wife. The evidence of repetition should be considered as an aggravating circumstance, because the defendant committed another act after he was punished for a crime that he committed in 2013.

The court made an amendment based on the request of the prosecutor to change the charge from Article 154 of the PC to Article 145 of the PC, and therefore the court concluded this case and sentenced the defendant to six months imprisonment suspended for 1 year.

Meanwhile in case No. 0094/21 LIBZET, the defendant committed the crime against the victim on two occasions. Based on JSMP' observations, the gravity of this crime is the same as the first case and the prosecutor charged the defendant for the crime of mistreatment of a spouse and in its decision the court sentenced the defendant to 1 year in prison, suspended for 2 years. This penalty does not reflect the minimum penalty set out in Article 154 of the PC which is 2 years in prison.

JSMP observed that in these two cases the facts, seriousness and results were the same however the charges and decisions were different. As stated above, the

requirements of the crime of mistreatment of a spouse are that the act causes physical or mental harm and or cruel treatment against a spouse. In these two cases the perpetrator was the husband, and the victim was the wife, and both of these assaults resulted in physical or mental harm to the victims.

## **VI. JSMP's thoughts on the application of these articles**

Experience shows that these victims are often assaulted by the perpetrators, and some of them suffer depression and trauma when they see the perpetrator, and this shows that the victims suffer greatly in these cases (physical and mental suffering). In all of these situations JSMP believes that it is appropriate to charge the appropriate article and apply a sentence that matches the severity of each of the crimes to educate the convicted person and society to avoid committing such crimes against family members.

Article 154 of the Penal Code does not require proof of repetition for the crime of mistreatment of a spouse, however if the act of the perpetrator causes physical or mental suffering or cruel treatment against a spouse then article 154 is the more specific article to be applied because article 154 of the Penal Code requires the defendant to be a husband or wife or spouse, and the victim must also be a husband or wife and act of the perpetrator must cause physical or mental suffering. In these circumstances JSMP believes that in relation to crimes occurring between spouses the more specific article to be applied is article 154 of the Penal Code on the mistreatment of a spouse.

Article 42 of the Penal Code on concurrence of provisions provides guidance to those preparing the charges on how to draft charges for a situation where more than one legal provision (multiple) can be applied to a crime, namely the following rules apply;

- a) The specific provision shall apply with prejudice to the general provision
- b) The main provision takes precedence over the subsidiary provision
- c) The broadest and most complex provision applies.

With regard to Article 42 of the Penal Code, JSMP believes that Article 154 of the Penal Code on mistreatment of a spouse is the more specific crime, the broadest and most complex in cases of domestic violence involving spouses. It is more specific because it only applies to relationships between spouses, and it is broader and more complex because it does not just specify physical suffering, but also mental suffering. Therefore JSMP requests for prosecutors and the courts to select and guarantee the appropriate provisions in cases of domestic violence in the context of relations between spouses as a serious crime in accordance with the legal framework of Timor-Leste.

## **VII. Conclusions and Recommendations**



## **7.1. Conclusions**

The essence of justice are charges and decisions that reflect the seriousness of each crime and consideration of all of the circumstances associated with the crime. The appropriate charges will contribute towards decisions that are simple, balanced and fair. In cases of domestic violence Article 145 of the PC is more often used than Article 154 of the PC.

The Public Prosecution Service needs to prosecute in a way that represents the legitimate rights of victims and is obliged to carefully analyse all of the circumstances in accordance with legal norms, and needs to take a strong stance in relation to the rights of victims. The courts as the ultimate judicial authority need to consider and analyse all of the circumstances surrounding each crime and comprehensively interpret the law to ensure the rights of victims in accordance with the law, before making a decision in a case.

## **7.2. Recommendations**

Based on the facts and reasons presented by JSMP above, JSMP concludes this document by making some relevant recommendations to the relevant and competent parties, especially the Ministry of Justice, the Courts and the Public Prosecution Service for consideration and for them to take appropriate and necessary action to solve these problems in the future. The recommendations are as follows:

1. Recommend for the Ministry of Justice to develop an annotated version of the Penal Code to help judicial actors to properly and uniformly interpret each crime in the Penal Code so that indictments and decisions are appropriate and fair for those parties who are seeking justice.
2. Recommend for prosecutors, in the preparation of indictments, to choose the specific, broad and complex article in accordance with the requirements of Article 42 of the Penal Code if charging crimes involving spouses.
3. Also recommend for the courts to use their power to change articles in the indictments of prosecutors based on the crime(s) committed by defendants and to select the specific, broad and complex article in accordance with the requirements of Article 42 of the PC if making decisions about crimes involving spouses.
4. Recommend for the Ministry of Justice to develop legal guidelines on the application of penalties to ensure that decisions are appropriate and fair in accordance with the seriousness of each crime.

"This article was sponsored by Together for Equality, funded by KOICA")

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