



**The Asia Foundation**

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LawSchool

# **INTRODUCTION TO CRIMINAL LAW IN TIMOR-LESTE**

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## **Preface to *Introduction to Criminal Law in Timor-Leste***

Timor-Leste has enjoyed over a decade of formal independence. The country's democratic institutions have grown during this period. But, as thoughtful Timorese are quick to point out, much remains to be done. Building viable and professional state institutions takes time. And growing the human resource capacity within those institutions is always a major challenge to new states.

The capacity building imperative in Timor-Leste is both striking and compelling. Establishing state agencies in the first instance is relatively much easier than filling those agencies with effective professionals that uphold their duties and responsibilities. Building the capacity of a pool of Timorese who hold, or may hold, positions within legal and other state institutions is crucial. Likewise, building an educated understanding and awareness of the obligations and responsibilities of key actors within legal institutions, and government institutions more broadly, contributes to setting demands and expectations for performance among the polity. Encouraging professionalized capacity within state institutions, on the one hand, and thoughtful and calibrated demands for performance by citizens, on the other hand, are essential dynamics for the development of the rule of law and a democratic state in Timor-Leste. Institutions of higher learning, such as universities and professional training centres, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This book was produced by the Timor-Leste Legal Education Project (TLLEP). The book seeks to critically engage the reader in thinking about the criminal laws and legal institutions of Timor-Leste, and is based on a model of educational writing first introduced in TLLEP's *Introduction to Professional Responsibility in Timor-Leste* textbook, published in 2011. Founded in March of 2010, TLLEP is a partnership between The Asia Foundation and Stanford Law School. Working with local actors in the Timor legal sector, the project's goal is to positively contribute to the development of domestic legal education and training in Timor-Leste.

The authors of the book focused on writing in clear, concise prose, and on using hypothetical legal situations, discussion questions, and current events. Through this style of writing and pedagogy, the aim is to make the book accessible to the largest possible audience. The book is designed to be broadly accessible to experienced Timorese lawyers and judges, government officials, members of civil society, Timorese students in law, and the international community. This book represents the dedicated efforts of many individuals. Stanford Law School students authored the text and subjected each chapter to an extensive editing process. The authors of this book are Jessica Fox, Katherine Hubbard, Jacqueline Iwata, Zachary Kruth, Hamida Owusu, and Samuel Saunders, all Class of 2014. Stanford Rule of Law Fellow Megan Karsh ('09) provided extensive expert editing of all chapters.

TLLEP has received extensive support from The Asia Foundation and its staff in Timor-Leste: previous Country Representative Silas Everett, current Country Representative Susan Marx, Kerry Brogan, Juliao de Deus Fatima, and a host of other staff. The former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, provided unwavering support to the project. USAID Timor-Leste provided vital financial and programmatic support in earlier phases of the project through its Access to Justice Program.

Finally, this book simply would not have been possible without the many thoughtful and critical insights from Timorese judges, educators and lawyers, and those who work within Timorese institutions. These individuals are too numerous to list here, but among them are faculty, staff, and students from the National University of Timor-Leste (UNTL), including Rector Aurelio Guterres, Law Dean Maria Angela Carrascalão and Vice Dean Tome Xavier Geronimo, and Professor Benjamin Corte Real. We also thank the Judicial Training Center (CFJ), as well as Natalino dos Santos Nascimento, Vice President of Committee A. The text benefited as well from the contributions of the staff of the Ministry of Justice Legislation Unit, the staff of the Women and Children's Legal Aid (Asisténsia Legál ba Feto no Labarik – ALFeLa), especially Lisa Mortimer (then affiliated with ALFeLa), Director Aderito dos Reis of LBH-Liberta, Maria Veronika, JSMP Executive Director, Luis de Oliveira, JSMP Legal Research Unit Coordinator, Roberto da Costa, and members of the Australian Federal Police mission to Timor. We also thank Jose Guterres, Sahe Da Silva, and Jose Teixeira for their insights and assistance.

In addition to this book, TLLEP has already published texts on professional responsibility, constitutional rights, and contracts, and a working paper series on various areas of Timorese Law. The most recent versions of all published texts are always available for download online free of charge on TLLEP's website: <http://tllep.stanford.edu/publications/>

To the students, educators, legal and government professionals that use this book, we sincerely hope that it sparks study and debate about the future of Timor-Leste and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in ensuring the country's future is bright.

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# CHAPTER 1: INTRODUCTION TO CRIMINAL LAW

## CHAPTER OBJECTIVES

- To introduce the concept of criminal law and its importance.
- To identify the sources of criminal law in Timor-Leste.
- To understand the connection between state-sponsored and non-state sponsored criminal justice systems.
- To introduce the main institutions and actors in the criminal justice system.

Criminal law includes regulations that define actions which may be punishable by law. Through the threat of punishment, criminal law governs the interactions in society by discouraging certain behaviours. By defining what actions are criminal and what the appropriate punishments are, criminal law can provide evidence of a society's fundamental values. It defines what is considered socially beneficial behaviour and creates a process for managing individuals who disobey society's rules.

In Timor-Leste, the main source of criminal law is the Penal Code. The Penal Code is a guide for police and prosecutors who want to charge and subsequently try a person for criminal conduct. The Code not only defines the different acts punishable under Timor-Leste's law, but it also describes the possible punishments for each criminal act.

While criminal law may seem relatively straightforward, crime and punishment can become very complex. For instance, suppose Maria threw a rock at Julio and the rock hit Julio in the face. If Maria is caught, should it matter if Maria did not see Julio and therefore never intended to hurt him? What if Maria was throwing the rock out of self-defence because she was scared Julio was going to hurt her? This book will explain how Timor-Leste's law answers these questions.

This textbook examines Timor-Leste's criminal law. It does not address criminal procedure.<sup>1</sup> Instead, this book focuses on the substance of criminal law – the elements of a crime, criminal liability, and the required punishments.

This chapter introduces Timor-Leste's criminal law by discussing four main topics: the history of criminal law in Timor-Leste, the sources of criminal law in Timor-Leste, the objectives and principles of criminal law, and an overview of the criminal justice system in Timor-Leste.

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<sup>1</sup> Criminal procedure regulates the process of catching, charging, trying, and punishing suspected perpetrators.

<sup>2</sup> Ronen, Yael. *Transition from Illegal Regimes under International (Cambridge Studies in International and*

## I. CRIMINAL LAW IN TIMOR-LESTE

### SECTION OBJECTIVES

- To understand the historical context of criminal law in Timor-Leste.
- To understand the importance of criminal law in Timor-Leste.
- To identify the main sources of criminal law in Timor-Leste.

This section examines the historical context of criminal law in Timor-Leste. This section first describes the historical development of Timorese criminal law. Then we will learn to identify the main sources of criminal law in Timor-Leste, and the importance of criminal law in Timor-Leste.

### 1. History of Criminal Law in Timor-Leste

Timor-Leste's criminal law has been shaped by three distinct phases—Indonesian annexation, government by the United Nations Transitional Authority, and independence.

#### *Indonesian Annexation*

Prior to Indonesian occupation, Timor-Leste was a Portuguese colony. The Portuguese arrived in 1511 when Timorese society relied on non-state-sponsored justice systems to resolve conflicts. **Non-state-sponsored justice systems** are the ways to resolve disputes that communities developed over time. These are not created by law, and may even conflict with the state-sponsored justice systems. Although the Portuguese established several settlements, they had a minimal impact on the development of a state-sponsored justice system **State-sponsored justice systems** are the crimes, punishments, actors and institutions established by law to resolve disputes. These will be discussed in greater detail in Section III of this Chapter.

The Portuguese colonial government lacked funds and resources, so matters of justice were left to the established non-state-sponsored justice systems. Despite their lack of involvement in administering justice, the Portuguese did make one major contribution to Timor-Leste's justice system. The Portuguese were strongly opposed to capital punishment (punishment by death). This led to more crimes being punished by fines instead of death. This strong feeling against punishment by death continues to influence criminal law in Timor-Leste.

After the Portuguese departed, Indonesia invaded Timor-Leste on December 7, 1975. This invasion was the beginning of the twenty-four-year Indonesian occupation. Following the passage of Law Undang-Undang No 7/1976, Timor-Leste became a part of the nation of the Republic of Indonesia. Indonesian law became law in Timor-Leste. This meant that Indonesia's Civil Code and Penal Code became the sources of authority for the administration of justice. Indonesian law defined what actions were punishable as crimes, the penalties associated with each crime, and the process of catching, charging, trying, and punishing suspected perpetrators.

But during the Indonesian occupation, the justice system suffered from a lack of funding and the perception of a lack of independence. While Indonesia was responsible for administering justice in all 13 districts of Timor-Leste, many people did not trust the Indonesian authorities. This distrust in the Indonesian-administered justice system was well-placed. As the post-independence Commission for Reception, Truth, and Reconciliation (CAVR) discovered, the justice system itself was corrupt. There were hundreds of cases in which Indonesian judges, security officials, and lawyers conspired to convict pro-independence activists in "sham trials." In these "**sham trials**" the Indonesian authorities would pretend to put on a criminal trial, but justice was intentionally not obtained. This mistrust in authorities and the justice system led to a continued reliance on non-state-sponsored justice mechanisms to resolve disputes and criminal behaviour.

#### *United Nations Transitional Authority*

Timor-Leste voted for independence in August 1999. Soon after this vote, Indonesia withdrew from the country. But Timor-Leste did not actually become independent until May 20, 2002. But because of Indonesia's departure, Timor-Leste had no administration to govern the country until 2002. To address this, the United Nations stepped in to serve as the governing authority until Timor-Leste's official independence.

In October 1999, the United Nations Transitional Authority of Timor-Leste (UNTAET) was established. UNTAET's mandate was "to provide security and maintain law and order throughout the territory of Timor-Leste" (United National Security Council, Resolution 1272 (1999)). This broad mandate gave UNTAET the power to exercise all legislative and executive authority, including enacting new laws and administering justice.

Acting under the authority of the mandate, UNTAET's first regulation stated what the applicable laws would be in Timor-Leste. According to Section 3 of Regulation No. 1999/1, the

laws in force prior to October 25, 1999 (when UNTAET gained administrative authority in Timor-Leste) would continue to apply until replaced by UNTAET regulations or subsequent democratic legislation. However, these laws could not conflict with internationally recognized human rights standards, other regulations and directives issued by UNTAET, or the fulfilment of the UNTAET mandate. Keeping the Indonesian Civil Code and Penal Code as law in Timor-Leste allowed UNTAET to keep law and order during this transitional period. Over the next few years, UNTAET passed additional regulations to assist in the administration of justice—including creating a transitional judicial service commission, creating a public prosecution service, and defining judicial authority by organizing the courts and the rules of criminal procedure.

### Independence

Timor-Leste officially became independent on May 20, 2002. This made the Constitution of the Democratic Republic of Timor-Leste the law in the country. But the Democratic Republic of Timor-Leste still had not drafted other legislation that would define how criminal law would be applied. The Constitution addressed this temporary gap in legislation by stating that previous laws and regulations would continue to apply unless they were inconsistent with the Constitution or the principles established in the Constitution. This meant that, unless specifically repealed by future legislation, the laws under the UNTAET administration would apply. UNTAET had adopted a similar provision to preserve Indonesian laws throughout UNTAET's administration. Therefore, under the Constitution, Indonesia's Civil and Penal Code would continue to be the governing authority until replaced by Timor-Leste's legislation.

#### **What is the Subsidiary Law in Timor-Leste?**

According to Section 165 of the Constitution, “[l]aws and regulations in force in Timor-Leste shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein.” Therefore, determining which laws apply requires defining what laws were in force during the previous administration (UNTAET). In 1999, UNTAET passed Regulation No. 1999/1 to address this exact matter. Section 3 of the regulation stated that: “[u]ntil replaced by UNTAET regulations or subsequent legislation of democratically established Timor-Leste, the laws applied in Timor-Leste prior to 25 October 1999 shall apply in Timor-Leste.” Therefore, the question of what laws apply in the Democratic Republic of Timor-Leste depends on what laws were in force before October 25, 1999.

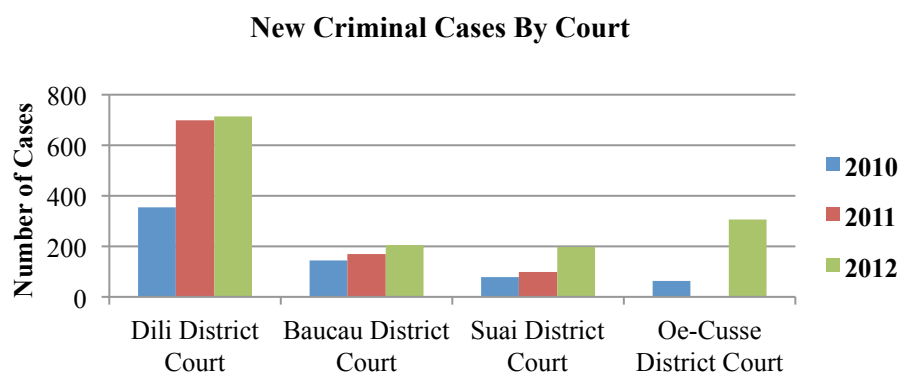
Initially this was assumed to mean Indonesian law. But in July 2003 this interpretation was challenged in a Court of Appeals decision that stated that Portuguese law, not Indonesian law,

was the subsidiary law in Timor-Leste. Among the reasons for this interpretation was “importance to the principle that acts of an illegal regime, including its laws, cannot have legal consequences.”<sup>2</sup> This theory stated that, since Indonesia’s occupation of Timor-Leste was illegal, the laws Indonesia made during occupation were not legitimate and are not enforceable.

For several months this was the most important and confusing issue for the justice system in Timor-Leste. If there is no clear idea of what law is applicable, it is difficult to know how to administer justice. It is also difficult for individuals to know what is and is not illegal. However, in October 2003, the issue was finally resolved by the National Parliament. The Parliament passed Law No. 10/2003. This law confirmed that Indonesian law continues to apply unless revoked or replaced by subsequent laws.

## 2. Contemporary Criminal Law in Timor-Leste

As of 2012, the number criminal cases filed in Timor-Leste’s district courts is increasing. But the specific reasons for the increase are not known. For instance, this increase in the number of cases filed in district courts may be due to an increase in criminal activity in Timor-Leste. But the increase could also be due to an increase in the use of the state-sponsored justice system instead of non-state-sponsored justice systems. Information on the number of criminal cases filed in each district court during 2010, 2011, and 2012 is presented below.<sup>3</sup>



During 2011, the Judicial System Monitoring Programme (JSMP) monitored a total of 392 criminal cases in Timor-Leste. Of the cases it monitored, the most common types of crime (from

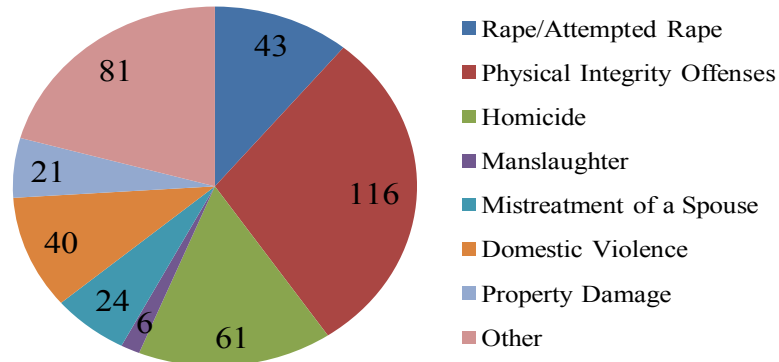
<sup>2</sup> Ronen, Yael. *Transition from Illegal Regimes under International (Cambridge Studies in International and Comparative Law)*. Cambridge, UK: Cambridge University Press, 2011. 180.

<sup>3</sup> Judicial System Monitoring Programme. *2012 Overview of the Justice Sector*. 29-30. <<http://jsmp.tl/wp-content/uploads/2012/05/Overview-of-the-Justice-Sector-2012.pdf>>; Judicial System Monitoring Programme. *2011 Overview of the Justice Sector*. 44-45. <<http://jsmp.tl/wp-content/uploads/2012/06/OJS-2011-English.pdf>>; Judicial System Monitoring Programme. *2010 Overview of the Justice Sector* 33-34. <<http://jsmp.tl/wp-content/uploads/2012/05/Overview-of-Justice-Sector-Report-2010.pdf>>



most common to least common) were: Offences Against Physical Integrity, Homicide, Rape and Attempted Rape, Domestic Violence, Mistreatment of a Spouse, and Property Damage.<sup>4</sup> Below you can see information about the distribution of types of crimes that the JSMP observed.

**2011 Distribution of Criminal Cases Monitored by JSMP**



Looking at the percentages above, it is important to note that these only reflect cases that proceed through the state-sponsored criminal justice system. Some criminal behaviour may never reach the state-sponsored justice system. Instead, some victims may choose to report criminal activity to local leaders or other actors in the non-state-sponsored justice system. Therefore, just looking at court filings may not provide an accurate representation of how frequently crime occurs in Timor-Leste. This is why both state and non-state institutions and actors are very important to Timor-Leste’s overall criminal justice system.

**Key Definition: State vs. Non-State Justice System**

**State-Sponsored Justice System**

The state-sponsored justice system includes the crimes, punishments, actors, and institutions established by law in Timor-Leste. It is also called the formal justice system.

**Non-State-Sponsored Justice System**

The non-state-sponsored justice system includes methods that communities have established over time to resolve disputes. This system is also called the informal justice system or the local justice system. Non-state-sponsored justice systems vary by region. Because these systems are not provided for by law, they may contradict or conflict with the state-sponsored justice system.

<sup>4</sup> Judicial System Monitoring Programme. *2011 Institutional Report*. 18-20. <<http://jsmp.tl/wp-content/uploads/2012/07/Institutional-Report-2011.pdf>>

### 3. Sources of Criminal Law in Timor-Leste

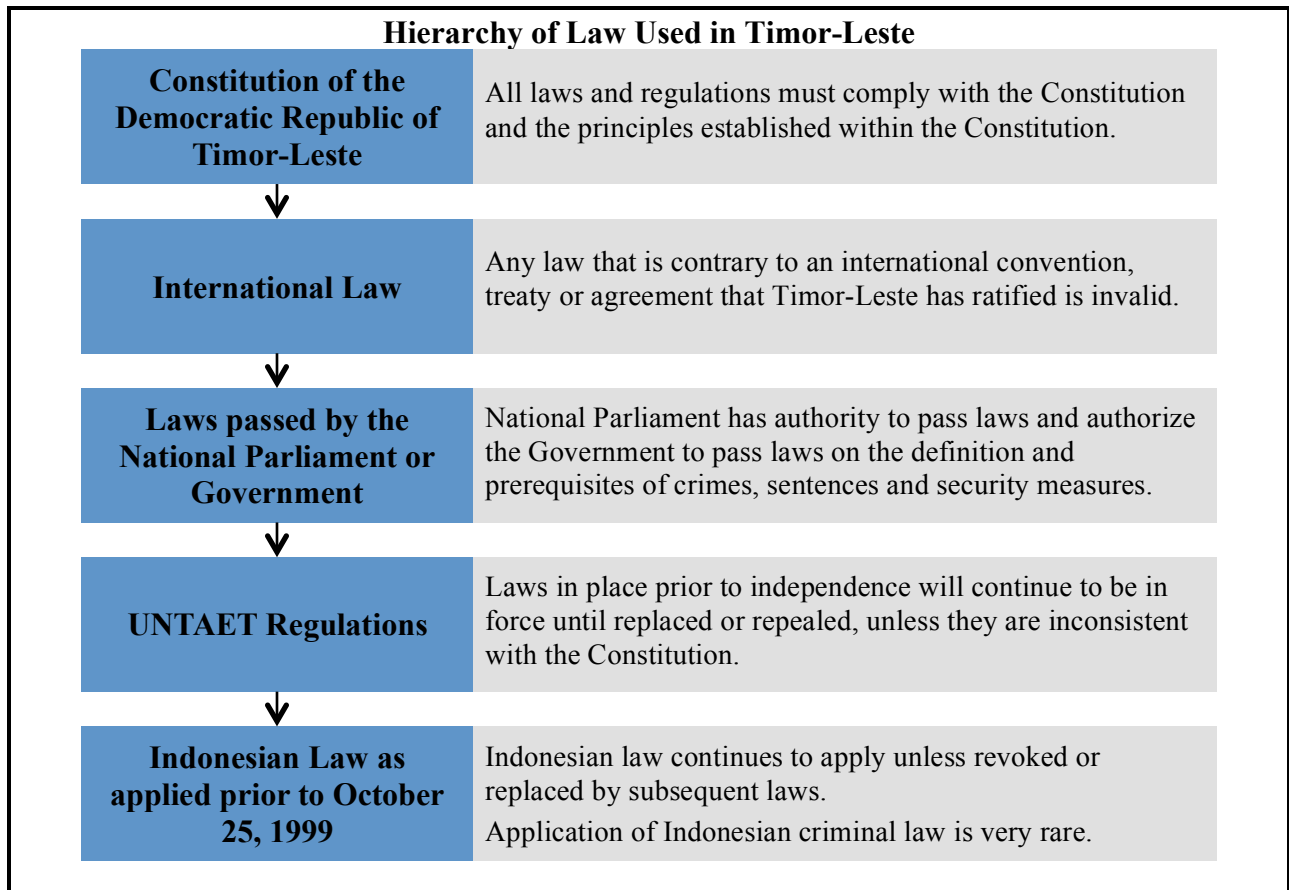
Criminal law in Timor-Leste comes from the Constitution of the Democratic Republic of Timor-Leste. The Constitution identifies and defines many personal rights, freedoms, and guarantees, including the right to life, protections for people involved in criminal proceedings, and limits on how criminal law is applied. For example, Section 31 of the Constitution states that acts can be punished only if they were defined as criminal offences at the time the act was committed.

While the Constitution gives authority for criminal law, it provides no details on the substance of criminal law in Timor-Leste. Instead, Section 95.2(e) of the Constitution states that the National Parliament has the exclusive authority to make laws about rights, freedoms, and guarantees. Additionally, Section 96 states that the National Parliament can authorize the Government to make laws defining crimes, sentences, and security measures. Therefore, Timor-Leste's criminal law exists in separate legislation made by either: (1) the National Parliament, or (2) the Government with appropriate authorization.

Both the National Parliament and the Government are sovereign bodies of Timor-Leste. The **National Parliament** is the law-making branch in Timor-Leste. It drafts and passes legislation. But the National Parliament can delegate the ability to make certain laws to the Government, while keeping a supervisory role. According to the Constitution, the National Parliament is the branch of government with legislative supervisory and political decision making powers. The **Government** is responsible for conducting and executing the general policy of Timor-Leste and is the supreme organ of Public Administration. However, laws drafted by the National Parliament and the Government face Constitutional limits. For example, Section 9 of the Constitution prevents any rule that contradicts international conventions, treaties, or agreements ratified by Timor-Leste from becoming law. Similarly, any law that contradicts the Constitution or principles established in the Constitution cannot become law.

As of 2012, the main source of criminal law within Timor-Leste is the Penal Code of the Democratic Republic of Timor-Leste. The Penal Code defines the different acts punishable under Timor-Leste's law and describes the different penalties for each criminal act. The Penal Code took several years to draft. It was drafted by a commission of Timorese and international experts acting under Government guidance. Draft versions of the Penal Code were distributed from 2003 until the final adoption in 2009. Early in the drafting process, the commission was criticized for

not getting input from the public. But, the final Penal Code fixed this by allowing for the community to comment on the draft.



The Penal Code was approved by the Government in March 2009. It is now the governing authority for criminal law in Timor-Leste. The Indonesian Penal Code is no longer law in Timor-Leste. However, while the Penal Code is the main source of criminal law within Timor-Leste, there are more legislative acts that add to what is stated within the Code. Some of the additional sources include:

- The Law on Domestic Violence: which establishes legal rules for preventing Domestic Violence and protecting and assisting victims of this crime;
- The Criminal Procedure Code: which describes procedures to be followed in criminal cases in Timor-Leste’s justice system;
- Rome Statute of the International Criminal Court: which establishes the International Criminal Court’s role, jurisdiction, and structure. It was adopted by Timor-Leste in 2002.

#### **4. Summary**

Criminal law in Timor-Leste includes both the state-sponsored criminal justice system and non-state-sponsored criminal justice systems. The non-state-sponsored justice systems have evolved throughout the history of Timor-Leste. During both Portuguese colonization and the Indonesian annexation, Timorese relied almost exclusively on non-state-sponsored justice systems to resolve disputes. Given the historical importance of the non-state-sponsored justice systems, it remains important for resolving disputes.

In contrast to the non-state-sponsored justice system, which includes state institutions and actors, is relatively new in Timor-Leste. Development of the state-sponsored criminal law system began under the United Nations Transitional Authority, and has continued through 2012. As of 2012, the main sources of state-sponsored criminal law are: the Constitution, the Penal Code, and the Criminal Procedure Code.

## II. TIMOR-LESTE'S CRIMINAL LAW INSTITUTIONS

### SECTION OBJECTIVES

- To understand the path of a typical criminal case through the state-sponsored justice system.
- To examine the state institutions and actors which make up the state-sponsored justice system.
- To consider the importance of the non-state-sponsored justice systems in Timor-Leste and to identify the main actors in non-state-sponsored justice systems.

This section will introduce the key institutions and actors in the criminal justice system. While the main focus of this book is not criminal procedure, it is important to have a basic understanding of the actors and institutions that use the criminal law you will be studying. You are likely familiar with the state's entities—police, courts, the Office of the Prosecutor-General, the Public Defender's Office, and lawyers. But there are also people and institutions that resolve disputes in the non-state-sponsored justice system. Both state and non-state entities will be introduced below, describing the roles each plays in criminal law.

### 1. State Institutions and Actors

A criminal case in the state-sponsored criminal justice system typically begins when a complaint or crime is reported to the police or public prosecutor. Once a complaint is brought forward, an enquiry begins. An **enquiry** is the investigative phase intended to collect proof and take actions required to demonstrate that a crime has been committed. Public prosecutors oversee the enquiry with police assistance. This process occurs from the time that a complaint is received and can continue through the trial.

After receiving and investigating a complaint, the next step in the criminal process is for a suspect to be arrested. To **arrest** a suspect is to take him out of society and to keep them under supervision. However, according to the Criminal Procedure Code, a suspect may only be arrested if a judge has issued a warrant for the arrest. An **arrest warrant** is a document that a judge gives the prosecutors or police that makes it lawful to violate certain individual rights, such as taking away the suspect's freedom by putting the suspect into custody. The warrant is meant to protect

suspects from unjust detention and arbitrary arrests. Obtaining a warrant requires identifying the person to be arrested, and stating the reasons and purpose for the arrest.

Once a suspect is arrested, he must be presented to the judge for initial questioning within 72 hours. After questioning by the judge, the Public Prosecutor's enquiry continues. Once an enquiry has been completed, the Public Prosecutor must decide whether to dismiss the case or issue a writ of indictment. A **writ of indictment** is a statement written by the Public Prosecutor charging the suspect with a crime. If the Public Prosecutor decides to issue a writ of indictment, the case will proceed to court for a trial. A **trial** is the examination of evidence before a judge to decide the guilt of the suspect. At trial, the suspect is called a **defendant**, and the Public Prosecutor has the burden of proving that the defendant is guilty. Ultimately, after hearing statements by the defendant, witnesses, victims, and experts, the judge issues a decision regarding guilt and applicable penalties.

### The Police

The police are often the first point of contact any victim and perpetrator has with the state-sponsored justice system. The police are responsible for preventing criminal conduct, gathering reports of criminal conduct, tracking down perpetrators, and securing evidence. Upon request, the police must also help the Public Prosecutors during any enquiry on criminal conduct.

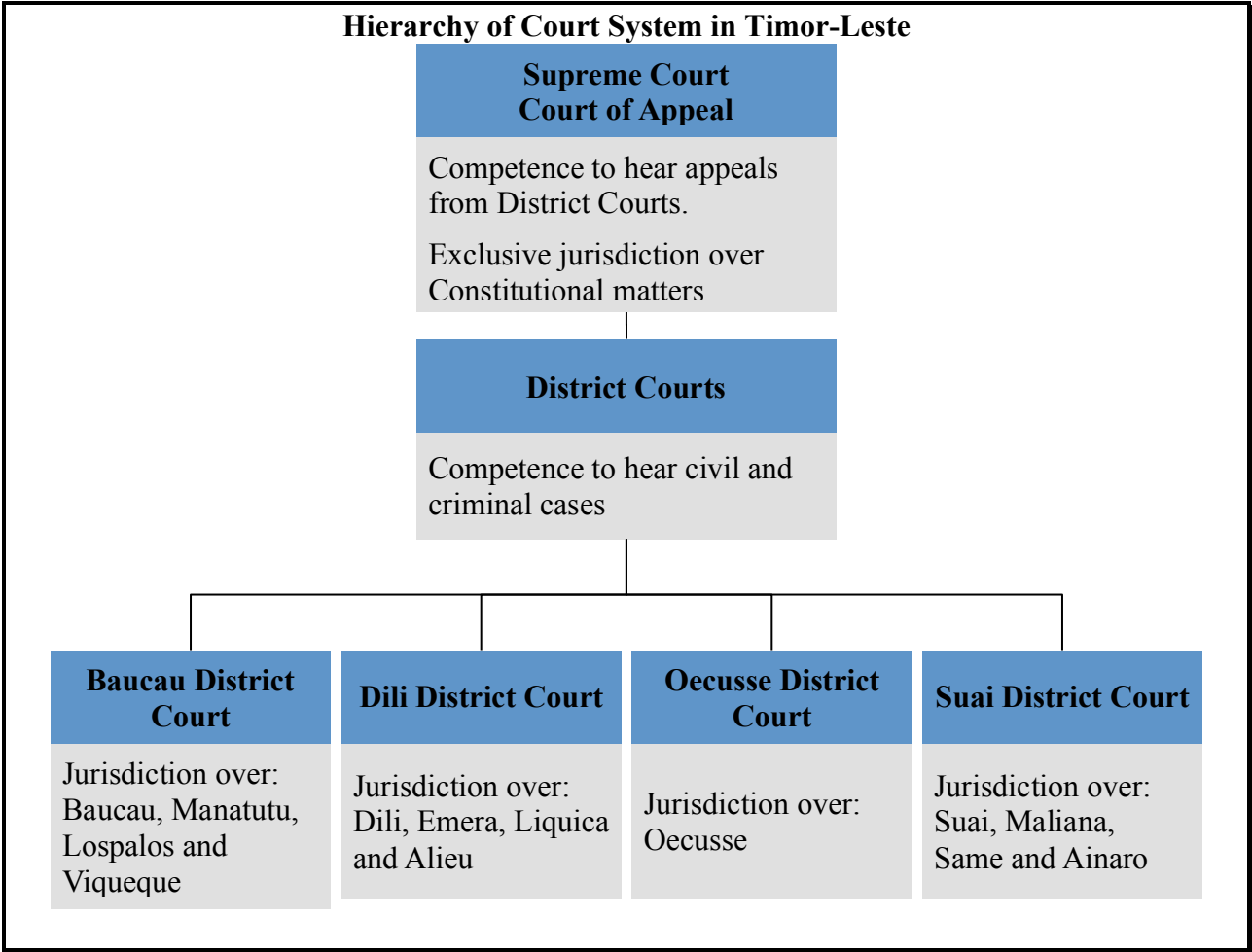
The police serve an important function within the justice system. They help Public Prosecutors by investigating criminal conduct and gathering evidence. But Public Prosecutors largely operate in Portuguese. This makes language a major working barrier between the Public Prosecutors and the police, and this also has an impact on the effectiveness of the police.

### The Court System

Timor-Leste's court system includes: the Supreme Court of Justice and other courts of law, such as the Court of Appeal and District Courts, the High Administrative Court, the Tax and Audit Court, the Military Courts etc. Because we are studying criminal law, we will focus on the District Courts, the Court of Appeal, and the Supreme Court.

Criminal cases typically begin in District Courts. Each District Court has jurisdiction over specified districts. The breakdown of each District Court's jurisdiction can be seen in the image below. A criminal matter that arises is first heard before a judge in District Court that has jurisdiction over the district where the crime occurred. Once a case has been decided at the District Court level, the Court of Appeal can hear an appeal of the case. An **appeal** is when a

prosecutor or defender goes to a higher court to try to reverse the lower court’s decision. The Supreme Court of Justice is the highest court of law in Timor-Leste. Once a decision has been made at the Court of Appeal, either the prosecutor or public defender can appeal this decision to the Supreme Court. But because the Supreme Court is the highest court of the law, the decisions of the Supreme Court are final and cannot be appealed. However, as of December 2012, the Supreme Court of Justice has not yet been created. As a result, the Court of Appeals is acting as the highest court until the Supreme Court of Justice is created.



Within the courts, criminal cases are decided by judges, who “are independent and owe obedience only to the Constitution, the law and to their own conscience” (Constitution, Section 121). Under the Constitution, judges have a security of a permanent position, which cannot be revoked unless provided for by law. If the maximum penalty for the criminal offence being tried is more than 5 years, there will be a panel of multiple judges. Otherwise, one-judge courts will

try a criminal case. In 2011 there were twenty-four judges in Timor-Leste. The number of judges increased in 2012, but there are still a significant number of cases that are waiting for trial in the courts.<sup>5</sup>

In addition to judges, interpreters play a fundamental role in the court system. All court proceedings are to be conducted in an official languages of Timor-Leste—Tetum or Portuguese. However, the fact that all laws are written in Portuguese and most official court documents use Portuguese creates a language barrier. “People who use the formal justice system such as litigators, suspects, victims and witnesses, often don’t understand Portuguese [and a] high number of court clerks and court officials also don’t have a good understanding of technical terms in Portuguese.”<sup>6</sup> Therefore, interpreters are vital to the court system. But in 2011, there were very few interpreters working in the courts. The number of interpreters increased in 2012, but it is a challenge to provide clear and complete interpretations.

#### *The Office of the Prosecutor-General*

The Office of the Prosecutor-General is Timor-Leste’s highest authority in public prosecution. The Office of the Prosecutor-General is responsible for appointing, assigning, transferring, and promoting Public Prosecutors. According to Section 132 of the Constitution, Public Prosecutors are responsible for “representing the State, prosecuting, ensuring the defense of the underage, absentees and the disabled, defending the democratic legality, and promoting the enforcement of the law.” As of 2011, there were 22 public prosecutors in Timor-Leste, 6 of whom were international prosecutors, and 5 of whom were trainee prosecutors.<sup>7</sup> The Prosecutor-General has said that limited prosecutors remained a major obstacle in 2012.

#### *The Public Defender’s Office*

Article 60 of the Criminal Procedure Code provides that all defendants have the right to be assisted by a defender. Under Government Decree-Law 38/2008, a Public Defender’s Office was created to provide full and free judicial and extra-judicial aid to economically underprivileged citizens. The Public Defender’s Office provides their services for free. Therefore, the public defender’s services are limited to citizens who cannot afford a private lawyer. Under Article 5 of the Public Defender’s Office Statute, the Public Defender’s Office can only serve: (1) individuals who request it and declare that they cannot afford a lawyer, (2)

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<sup>5</sup> 2011 Overview of the Justice Sector 17-18.

<sup>6</sup> 2011 Overview of the Justice Sector 19.

<sup>7</sup> Overview of the Justice Sector 2010 23-24.



privately held, non-profit organizations, and (3) all those who are referred by the Court for assigned representation.

As of 2011 there were 19 public defenders in Timor-Leste. Of these, 2 were international public defenders and 6 were trainee public defenders.<sup>8</sup> But the Public Defender’s Office does not have enough resources. For instance, in 2011, the Public Defender’s Office of three districts (Baucau, Oecusse and Suai) did not have internet facilities or a generator. Additionally, the majority of public defenders are present in Dili, with little to no access for other Districts.

*Lawyers*

In Timor-Leste, individuals are not allowed to represent themselves in a trial. Section 34 of the Constitution provides that accused persons have the right to select and be assisted by a lawyer during criminal proceedings. Although accused perpetrators have the right to a lawyer, private lawyers cost money. Thus, unless a Public Defender is assigned to the accused person by the Court, the accused person must pay for her own private lawyer.

In order to regulate the private practice of law, the National Parliament passed a law governing the private legal profession and lawyers’ training. This law established the Legal Profession Management and Discipline Council to manage and discipline the private legal profession. Also, to ensure lawyers are adequately trained and prepared to practice, all lawyers must pass through training courses at the Judicial Training Centre by 2015. As of 2012, only seven lawyers in Timor-Leste had passed through the courses at the Judicial Training Centre.

<b>Overview of the State Institutional Actors</b>				
<b>Courts</b>	<b>Office of the Prosecutor</b>	<b>Public Defenders</b>	<b>Private Lawyers</b>	<b>The Police</b>
Independent judges hear and decide criminal cases.	Represent the State in prosecuting criminal defendants.	Provide free judicial aid to economically underprivileged citizens.	Provide judicial aid at a cost to those who do not qualify for public defenders.	Prevent criminal conduct, capture accused, and assist with evidence and enquiries.

<sup>8</sup> *Overview of the Justice Sector 2010* 24.

## 2. Non-State Institutions and Actors

According to a survey on public attitudes towards law and justice in Timor-Leste, as of 2008, only 18% of respondents have had a case handled in court since independence.<sup>9</sup> Obstacles to accessing the courts have led to the use of non-state-sponsored justice systems. “In addition to physical distance from courts, other obstacles to access to the formal justice system include barriers of awareness, cost, language, and culture.”<sup>10</sup> For instance, the graph presented below shows that Timorese citizens often know little about the state-sponsored justice system.<sup>11</sup>



This lack of legal awareness and the infrequent use of the court system suggest that individuals are relying on other means in non-state-sponsored justice systems to handle their disputes. But non-state-sponsored justice systems do not only handle criminal behaviour. In fact, the disputes that come before these justice systems can include civil and criminal matters, and may also encompass activities or behaviours that are not against the law. A main goal of a non-state-sponsored justice system is to preserve harmony within the community, and so it may address any dispute that threatens that harmony.

Non-state-sponsored justice systems develop within the community over time and can therefore differ across a country. But even though the customs and procedures may vary, all non-state-sponsored justice systems in Timor-Leste are community-focused. Because a Timorese

<sup>9</sup> Everett, Silas. *Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice (2008)*. Asia Foundation, 2008. <<http://asiafoundation.org/resources/pdfs/2008LawJusticeSurvey.pdf>>

<sup>10</sup> United Nations Integrated Mission in Timor-Leste (UNMIT). *An Independent Comprehensive Needs Assessment (INCA), The Justice System of Timor-Leste*. 13 October 2009. 18. <<http://unmit.unmissions.org/Default.aspx?ctl=Details&tabid=12196&mid=15662&ItemID=19541>>

<sup>11</sup> Everett 28.

person's identity is often strongly related to his community, the culture within Timor-Leste emphasizes the group over the individual. So, the non-state-sponsored justice systems are focused on maintaining harmony in the community. The following is an overview of the actors involved in non-state-sponsored justice systems:

#### Family

Family leaders are usually responsible for the first attempts to resolve a dispute. In a dispute that involves two families, the head of each family will try to negotiate a solution to resolve the dispute. If the case remains unresolved, the dispute is brought to the Aldeia Chief.

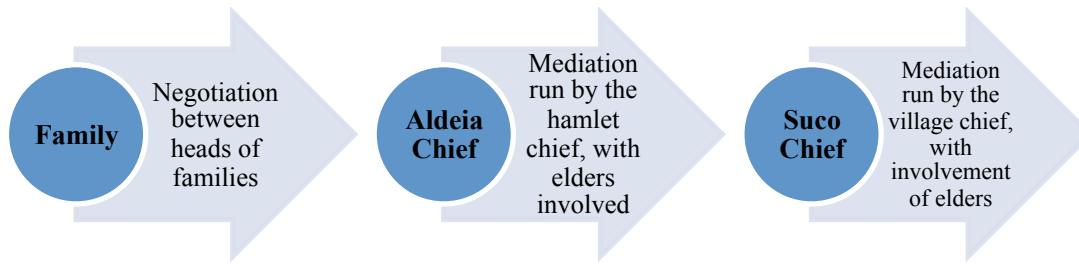
#### Aldeia Chief

An aldeia, or hamlet, is the smallest administrative unit in Timor-Leste. The Aldeia Chief is the elected head of the aldeia. To respond to a dispute, the Aldeia Chief will lead a customary mediation process involving the parties in dispute. During this mediation, the parties provide their version of events. The Aldeia Chief then engages the elders and other respected individuals to decide the remedy and make a settlement agreement. In doing so, the elders typically question the parties and any witnesses, provide moral advice, and refer to any community principles that have been violated. If the case remains unresolved, the dispute is brought to the Suco Chief.

#### Suco Chief

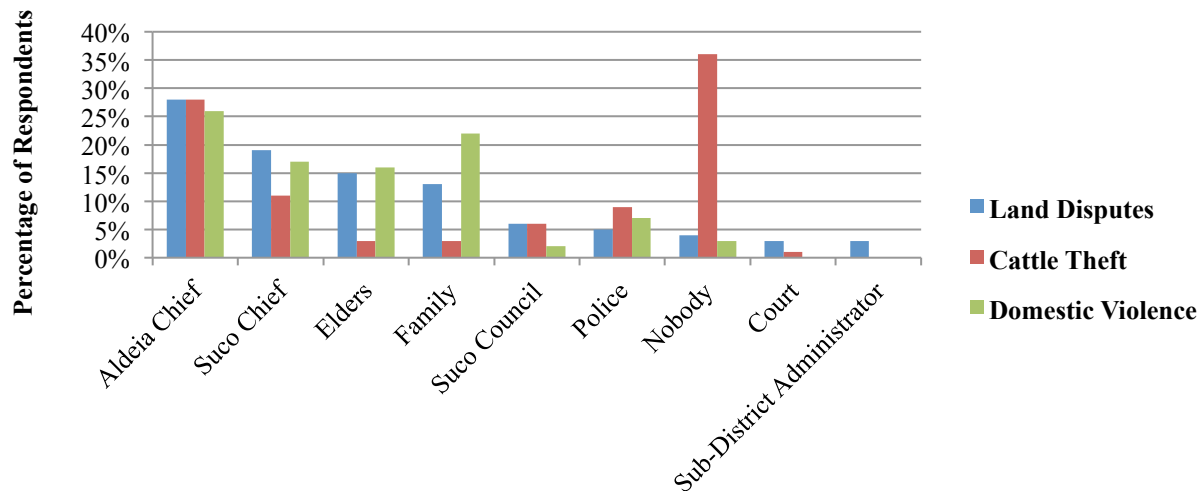
A suco, or village, is the administrative unit between the Aldeia and the sub-district. The Suco Chief is the elected head of the suco. To respond to a dispute, the Suco Chief will conduct a mediation similar to the mediation conducted by the Aldeia Chief. The Suco Chief is assisted by the Suco Council, which is made up of various community members (such as youth, women, respected elders, and spiritual authorities). This Suco Council assists with the questioning, provides moral advice, and refers to any community principles that have been violated. If the case still remains unresolved, the parties can refer the case to the police or to the courts.

### The Path to Local Justice



The illustration above represents the hierarchy for appeals within the local justice systems of Timor-Leste. But this hierarchy is not strict. For instance, in 2008, the most common disputes that arose were land disputes, cattle theft, and Domestic Violence disputes. For each of these disputes, victims often initially reported the dispute to the Aldeia Chief. But some people also skipped the Aldeia Chief and went straight to the Suco Chief, Suco Council, or even state actors.<sup>12</sup>

**First Point of Contact for Disputes**



### Interactions Between State-Sponsored and Non-State-Sponsored Justice Systems

Non-state-sponsored justice systems continue to be an important part of the lives of Timor-Leste’s citizens. Since 2009, the Ministry of Justice has been working “to develop the legal and policy basis for traditional justice and formal justice to complement each other, providing faster and more accessible dispute resolution.”<sup>13</sup> This will not only help improve access to justice, but it will ensure that the non-state-sponsored justice systems follow the principles of the Constitution and other applicable laws in the country.

<sup>12</sup> Everett 49.

<sup>13</sup> Australia Aid. “East Timor Country Report.” Stop Violence: Responding to Violence Against Women in Melanesia and East Timor. 2009. 111.

### **3. Summary**

Timor-Leste's justice system is made up of both state and non-state institutions and actors. The state institutions include the police, the courts, the Public Prosecutors, the Public Defenders, private lawyers, and the courts. The roles and responsibilities of all state actors and institutions are defined by law. The state actors and institutions are relatively new compared to their non-state counterparts.

The non-state actors and institutions are known as the non-state-sponsored justice system. These systems take a community based approach in which elders and other appointed village heads are responsible for resolving disputes. These systems have evolved over time and involve local customs and norms. But because the non-state-sponsored justice systems are not defined by law, they may conflict with principles stated in the Constitution. However, non-state-sponsored justice systems remain a very important part of the criminal justice system in Timor-Leste.

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## CHAPTER 2: ELEMENTS OF A CRIME

### CHAPTER OBJECTIVES

- To understand how the Penal Code uses the four elements of a crime to define specific offences.
- To understand how and when a perpetrator can commit a crime with an action or an omission.
- To learn about the three mental states a perpetrator can commit a crime with: intent, gross negligence, and negligence.
- To explore different theories of causation and how they are used by the Penal Code.

Before we learn about different types of crimes, it is important for us to understand the basic parts of every crime defined in the Penal Code and how these parts are used to establish criminal liability. In this section, we will first learn about the principles of legality and culpability, which are described in the Annex to the Penal Code. From there, we will think about what makes a person guilty of committing a crime. At the conclusion of this section, we will learn how the Penal Code defines crimes using four basic elements and how this matches our intuitions about what makes a person guilty.

The Penal Code Annex describes three major principles: legality, culpability, and humanity (Penal Code Annex, Part II, 3-4). The principles of legality and culpability limit when criminal law can be applied and the penalties that can be imposed on a perpetrator. The **principle of legality** states that an “act or omission may only be considered a crime and punished as such, when and if provided for in law.” The principle of legality means that a person can only be punished if her conduct is a crime defined in the Penal Code.

How are crimes defined in the Penal Code? The Penal Code Annex states that the **principle of culpability** must be followed because “there can be no penalty without guilt.” The principle of culpability means the state can only apply criminal penalties to people guilty of committing crimes. What makes a person guilty of a crime? One answer the Penal Code gives is

that the person's conduct threatened harm to "interests fundamental to life in society." These **fundamental societal interests** include life, personal liberty, physical integrity, and property. These interests are so important to life in Timorese society that they are given special protection by penalizing people who threaten these interests.

It is important that the law is not vague about when someone has committed a crime. For example, a penal code could have a law that says "It is a crime to harm another person's life, personal liberty, physical integrity, and property." Everyone would agree that harming other people is a bad thing to do, but this law is too vague to be used. This phrase does not specifically state what conduct is unlawful. This law would violate the principles of legality and culpability because the government could punish people arbitrarily. Therefore, the principles of legality and culpability require the Penal Code to define guilt in a more precise manner.

When trying to figure out how to define guilt, it may also be helpful to think about when someone is *not* guilty. Suppose Leopoldo and Cecelia live on neighbouring farms.

- Is Leopoldo guilty if he thinks about stealing one of Cecelia's cows? Probably not. Leopoldo did not actually steal Cecelia's cow, he only thought about it. Thinking about committing a crime does not harm fundamental societal interests. Acting on these thoughts and committing a criminal act does. Thus, a crime should require a criminal *act*.
- Is Leopoldo guilty if he accidentally hits and injures Cecelia's cow with his car while driving back to his house? Leopoldo did not want to commit a crime. Leopoldo does not seem as harmful to fundamental societal interests as someone who actually wanted to hurt Cecelia's property. A crime should require a criminal mindset or *mental state*.
- Similarly, what if Leopoldo and Cecelia share grazing land for their cows and Leopoldo takes one of Cecelia's cows because he mistakes it for his own? Again, Leopoldo did not want to commit a crime when he acted. It does not seem fair to label him a thief and find him guilty of stealing. There, some crimes should require *certain circumstances*, and a person should be *aware of those circumstances* when acting in order to be guilty.
- Finally, what if Leopoldo actually stole Cecelia's cow and she had a heart attack after discovering her cow was missing? Leopoldo is certainly guilty of stealing, but is he guilty of killing Cecelia? His actions do not seem closely related enough to say that he *caused* Cecelia's death. A crime should require *causal connection to a person's actions*.

These examples help illustrate the different basic parts, or **elements**, of every specific crime defined in the Penal Code. Each crime defined in the Penal Code is made up of at least two elements: 1) a criminal act or omission, called an *actus reus*; and 2) a criminal mental state, called *mens rea*. A perpetrator must commit a criminal act or omission with a criminal mindset in order to be found guilty of a crime. Additionally, certain crimes require one or both of the following elements: 3) particular **attendant circumstances** or 4) a particular result, that the criminal act or omission caused.

## I. *ACTUS REUS*: A CRIMINAL ACT OR OMISSION

### SECTION OBJECTIVES

- To understand how the Penal Code defines the *actus reus* element of a crime.
- To explore how crimes can be committed through an *omission*.

According to Article 11, every crime defined in the Penal Code requires a criminal act. This act is called an *actus reus*. The ***actus reus*** element is a voluntary act or omission that is a crime. To begin understanding what the *actus reus* of a crime is, think of an example of a crime and describe it in a sentence. Crimes commonly heard by courts in Timor-Leste include Rape (Article 172) and Homicide (Article 138). A plain description of Rape is when someone has forcible sexual intercourse with another person. Homicide is when someone *takes the life of another person*. Homicide is also called **murder**. When describing each of these crimes, notice that there is a particular *act* done by the perpetrator. It is this act that is a crime's *actus reus*. The *actus reus* of the crime of Rape is forcing another person to have sexual intercourse. The *actus reus* of the crime of Homicide is killing another person.

The description of a crime is a good starting point when thinking about the *actus reus* of a defined crime. *How* the *actus reus* element of a crime can be satisfied is a more complex question. Before exploring distinctions in the Penal Code, it is important for us to understand the difference between conduct-based and result-based offences. **Conduct-based offences** punish a specific type of conduct, regardless of the consequences. Rape is an example of a conduct-based offence. Another example of a conduct-based offence is Driving Without a License, which is described in Article 207. If Alfredo drives his car without a license, he has satisfied the *actus reus* element of the crime of Driving Without a License, even if he does not get into an accident with his car.

**Result-based offences** punish a particular result, and *any act* that causes this result. Homicide is an example of a result-based offence. The particular result required is the death of another person, but any act that causes this result is punishable. It would be impossible for the Penal Code to list and criminalize every possible way a person could cause the death of another person. Therefore, it makes sense to criminalize any act that causes another person's death. The *actus reus* for result-based offences can be satisfied in a number of ways.

In this section, we will explore the Penal Code's specific definition of *actus reus* in Article 11 and what types of conduct the definition includes. Recall from the Introduction to this chapter that the *actus reus* requirement means that criminal thoughts alone cannot be punished. As we will explore in more detail below, the *actus reus* requirement generally requires an **action**: bringing about a change in circumstances through force or a positive act of choice. An **omission** is a failure to act to prevent a certain result. An omission can only satisfy the *actus reus* element in certain situations. The *actus reus* requirement also means that only voluntary acts can be punished. Involuntary acts made reflexively by the person, or while a person is unconscious do not satisfy the *actus reus* element of a crime.

### 1. Commission by Action

Look at Article 11 below. There are *two* ways a person can satisfy the *actus reus* element of a crime. First, a person may commit a crime with an action that causes a change in circumstances. Second, a person may commit a crime through an omission. Omissions will be discussed in more detail later in this section.

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 11. Commission by action and omission

- (1) Whenever a legal definition of a crime includes a certain result, the act comprises not only the specific action required to produce it, but the omission of any specific action that would avoid it as well, unless when [the] intention of the law is otherwise.
- (2) A result caused by omission is only punishable when the perpetrator thereof is under a legal duty that personally obliges the perpetrator to avoid said result.
- (3) In the case described above, punishment may be extraordinarily mitigated.

Committing a crime by an action is straightforward. Any positive act of choice that is criminalized fulfils the *actus reus* requirement of a crime. For example, suppose Alfredo hits Fernando with a machete and Fernando dies from his wounds. As stated in the introduction to this section, any act that results in the death of another person fulfils the *actus reus* element of Homicide. In this example, Alfredo brought about a change in circumstance by hitting Fernando

with a machete. Alfredo committed this action by choice. Therefore, Alfredo hitting and killing Fernando with a machete is an action that fulfils the *actus reus* element for Homicide. Similarly, for conduct-based offences like Driving Without a License, the action of driving a car without a license satisfies the *actus reus* requirement.

### **The Voluntary Act Requirement**

An action must be voluntary in order to satisfy the *actus reus* requirement. Actions taken while unconscious or reflexively do not satisfy the *actus reus* requirement of a crime. Suppose Alfredo has a sleepwalking problem. If Alfredo starts driving his car while still asleep, he cannot be punished for driving without a license (even if he does not have a license) because his action was not voluntary. Sleepwalking, or any action taken while *unconscious*, is an involuntary bodily action that Alfredo cannot control.

Similarly, *reflexes* are involuntary bodily actions that cannot fulfil the *actus reus* requirement of a crime. If an animal jumps in front of Alfredo's car while he is driving, Alfredo will reflexively swerve to avoid hitting it. Alfredo should not be punished for any damage caused by swerving because swerving is reflexive. His actions were not voluntary.

The voluntary action requirement does *not* refer to the following two situations:

- (1) A person whose voluntary actions lead to a criminal result beyond the person's control. What if Alfredo hit Fernando with a machete but only wanted to hurt him? If Fernando dies, Alfredo's actions are still considered voluntary even though did not mean to cause Fernando's death. This situation will be discussed later in this chapter in the sections about *mens rea* and causation.
- (2) A person who is forced to act by another person. What if Helena threatens to hurt Alfredo's family if he does not kill Fernando for her? If Alfredo cuts Fernando with a machete and kills him, his action would still be considered voluntary. Although Alfredo had no desire to engage in criminal conduct, he still voluntarily chose to follow Helena's orders. This is a different situation from a person's body involuntarily acting on its own either unconsciously or reflexively.

## **2. Commission by Omission**

The *actus reus* element of a crime can also be satisfied with an omission. An omission is a failure to act to prevent a certain result. Unlike an action, however, an omission satisfies the *actus reus* element of a crime only in the limited circumstances described in Article 11. In order to understand when an omission satisfies the *actus reus* of a crime, look again at Article 11, subarticles 1 and 2 below:



## Penal Code of the Democratic Republic of Timor-Leste

### Article 11. Commission by action and omission

- (1) Whenever a legal definition of a crime includes a certain result, the act comprises not only the specific action required to produce it, but the omission of any specific action that would avoid it as well, unless when [the] intention of the law is otherwise.
- (2) A result caused by omission is only punishable when the perpetrator thereof is under a legal duty that personally obliges the perpetrator to avoid said result.

...

An omission can satisfy the *actus reus* element of a crime if: (1) the defendant could have avoided the criminal result through positive action; AND (2) the defendant had a legal duty to act based on:

- a) The Penal Code criminalizing inaction in the situation the defendant was in; OR
- b) Law outside of the Penal Code created an obligation to protect a person from unreasonable risk of harm between the defendant and the victim. This is called a **duty of care**.

Let us use an example to illustrate how someone could prevent a criminal result through positive action. Suppose Alfredo saw Fernando drowning in a river. Alfredo could try to save Alfredo by jumping in the river, swimming to Fernando, and pulling Fernando to shore. These are positive actions Alfredo could take to prevent Fernando's death. What if Alfredo decided *not* to perform any of these actions to save Fernando and let Fernando drown? This is different from Alfredo committing a positive act of choice by hitting and killing Fernando with a machete. Alfredo did not bring about a change in Fernando's circumstances. However, Alfredo has failed to prevent a result criminalized by Article 138—the death of another person. Alfredo's failure to act fits within the definition of an omission described in Article 11, subarticle 1.

Nonetheless, Article 11 contains *two* requirements for an omission to satisfy the *actus reus* element of a crime. Alfredo's failure to act and prevent a criminal result only satisfies the first requirement described in Article 11, subarticle 1. Article 11, subarticle 2 states “[a] result caused by omission is only punishable when the perpetrator thereof is under a legal duty that personally obliges the perpetrator to avoid said result.” This second requirement restricts the punishment of omissions to situations where the perpetrator is required by law to prevent a

criminal result. If Alfredo and Fernando are strangers, Alfredo has not committed the *actus reus* for Homicide because he is not required by law to prevent Fernando's death.

When is a person legally required to act to prevent a criminal result? There are two situations where a legal duty to act may exist. The first is when the Penal Code makes it a crime not to act in a certain situation. The second is when someone owes another person a **duty of care** based on laws outside of the Penal Code.

Let us first examine the situation where the Penal Code explicitly makes it a crime not to act. Therefore, a failure to act in the circumstances described satisfies the *actus reus* element of that crime. For example, Article 227, Failure to Provide Assistance, makes it a crime to not help someone in serious need when it is safe to do so.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 227. Failure to provide assistance**

- (1) Any person who, in the event of serious need, namely caused by disaster, accident, public calamity or situation of collective danger threatening the life, physical integrity or freedom of another person, fails to provide the same with necessary assistance to remove said danger, be it by personal action, or calling for rescue, is punishable with up to 1 year imprisonment or a fine.

...

Recall the previous example where Alfredo failed to save Fernando from drowning. Remember, Alfredo could not be charged with Homicide. Alfredo did not take a positive act of choice to kill Fernando and therefore did not commit *actus reus* element of Homicide through an action. However, Alfredo could be charged with Failure to Provide Assistance if he could have easily saved Fernando's life. This is because the *actus reus* of Failure to Provide Assistance is the omission of not helping someone in serious need.

Now let us examine the second situation, where a legal duty to act exists because the perpetrator owes the victim a duty of care. A **duty of care** is a legal obligation one person has to protect another person from an unreasonable risk of harm. This obligation is created by laws outside of the Penal Code, such as the Civil Code. When deciding whether an omission satisfies the *actus reus* element of a crime, we look at whether the perpetrator owed the victim a duty of care and therefore should have acted to prevent a criminal harm to the victim.

One of the most common sources of a duty of care is a special pre-existing relationship between the perpetrator and the victim. For example, what if Fernando was Alfredo's young son? The Timorese Constitution recognizes that there is a special pre-existing relationship between a parent and a child. Based on these laws, Alfredo now owes Fernando a duty of care as Fernando's father. This duty of care would require Alfredo to try to save his son Fernando from drowning. Alfredo may be charged with satisfying the *actus reus* for Homicide through omission if he fails to do so.

### **Comparative Law German Penal Code**

German courts and treatises have found that there are six types of duties of care that can create a legal obligation to act to prevent a criminal harm:

- 1) Duties based on specific legislation outside of the Penal Code;
- 2) Duties based on relationships;
- 3) Duties based on a joint dangerous enterprise;
- 4) Duties based on assumption of risk;
- 5) Duties based on qualities of the perpetrator; and
- 6) Duties based on creation of dangerous situations.

As Timorese law develops, similar duties may also be recognized by the Timorese Penal Code.

Why does the Penal Code limit the circumstances when an omission can satisfy the *actus reus* element of a crime? Recall from the Penal Code Annex that criminal law is meant to protect fundamental societal interests. Someone like Alfredo, who is unwilling to risk his life to save someone else, does not seem as harmful to society as someone who actively tries to kill someone. What if Alfredo did not know how to swim? Or what if Alfredo was afraid he might drown trying to save Fernando? These complications involved with Alfredo trying to save Fernando help explain why the Penal Code (and most countries' penal codes) only criminalizes omissions in a limited set of circumstances.

### **3. Summary**

In this section, we learned about the *actus reus* element of a crime. The *actus reus* is the voluntary action or omission that is a crime. Every specific crime defined in the Penal Code has

an *actus reus* element. We first looked at the distinction between conduct-based and result-based offences. Conduct-based offences criminalize specific actions. Result-based offences criminalize a specific result. Any act that causes the criminalized result satisfies the *actus reus* element of that crime.

These distinctions helped us understand the two ways in which a person could satisfy the *actus reus* element of a crime, as defined in Article 11. First, the *actus reus* element can be satisfied through an action, which brings about a change in circumstances through a positive act of choice. Such actions must be voluntary. Actions taken unconsciously or reflexively are not actions because they do not reflect a person's will.

Second, the *actus reus* element can be satisfied through an *omission*, a failure to act to prevent a certain result. In situations where inactivity is criminalized, there is no need to look at law outside of the Penal Code. The crime itself is the failure to act given the circumstances. Result-based crimes in the Penal Code can also be committed through omission. In such situations, it needs to be determined whether the defendant *could have avoided* the criminal result by acting and whether the defendant owed the victim a duty of care. Duties of care are created by law outside of the Penal Code, such as the relationship between a parent and child.

The *actus reus* element is important because it prevents the government from punishing criminal thoughts alone. Only people who act upon their criminal thoughts are harmful to fundamental societal interests. Remember Leopoldo and Cecelia from the introduction to this Chapter. Leopoldo thought about stealing Cecelia's cow, but never acted upon his thoughts. Leopoldo cannot be punished for only thinking about committing a crime because he has not satisfied the *actus reus* requirement for theft. This makes sense based on the different theories of criminal law. Criminal thoughts without action are not harmful to others and may be hard to prevent. They would also be difficult to prove in court.

### Questions

1. **Identifying the *actus reus*:** Read the following Penal Code Articles and 1) identify the *actus reus* element of each crime; 2) determine whether the crime is a conduct- or result-based offence; and 3) determine whether the *actus reus* element can be satisfied with an action, omission, or both.

- a) **Article 219, Subarticle 1—Illegal Fishing:** Any person who fishes in national maritime waters without a duly authorized fishing permit obtained from the competent administrative organ is punishable with up to 3 years imprisonment or a fine.
  - b) **Article 145, Subarticle 1—Simple Offences Against Physical integrity:** Any person who causes harm to the body or health of another person is punishable with up to 3 years imprisonment or a fine.
  - c) **Article 228—Refusal to Provide Medical Assistance:** Any medical doctor or health professional who refuses to provide assistance in his or her professional capacity in a case involving risk of life or serious danger to the physical integrity of another person that cannot otherwise be addressed, is punishable with up to 3 years of imprisonment or a fine.
2. **Voluntary Acts:** Atina is driving her car and passes Manuela’s farm. Manuela’s cow suddenly jumps in front of Atina’s car. Atina quickly turns her steering wheel to avoid hitting Manuela’s cow. Atina then crashes into a fence on Manuela’s farm. Has Atina committed the *actus reus* for Property Damage under Article 258?

#### Answers

- 1a) The *actus reus* of Article 219, Subarticle 1 is fishing without a permit. This is a conduct-based offence. It can only be satisfied through an action.
  - 1b) The *actus reus* of Article 145, Subarticle 1 is any action or omission that causes harm to the body of another person. This is a result-based offence. It can be satisfied through an action or omission. For example, a person could cause harm to another person by hitting him with a machete (an action). A person could also cause harm to another person by failing to pull someone out of the way of a moving car (an omission). Recall, however, this omission will not satisfy the *actus reus* for Simple Offences Against Physical Integrity if the defendant did not owe the victim a duty of care.
  - 1c) The *actus reus* of Article 228 is refusing to provide medical assistance. This is a conduct-based offence. It can only be satisfied through an omission. It is an example of criminalized inactivity.
2. No, Atina has not committed the *actus reus* for Property Damage because her action was not voluntary. Atina acted reflexively when she swerved to avoid hitting Manuela’s car.

## II. *MENS REA*: A CRIMINAL MINDSET

### SECTION OBJECTIVES

- To learn about the three criminal mental states defined in the Penal Code: intent, negligence, and gross negligence.
- To explore the difference between objective and subjective standards.
- To introduce the attendant circumstances element and the concept of mistakes.

Timor-Leste's Penal Code defines crimes not only by the perpetrator's acts but also by the perpetrator's mental state. This mental state is called *mens rea*. The mens rea element of a crime refers to what the perpetrator is thinking when committing a criminal act or omission. In order to be guilty of a crime, the perpetrator's *actus reus* and *mens rea* must match the *actus reus* and *mens rea* specified for that crime in the Penal Code.

Article 15 defines three criminal mental states: **intent**, **negligence**, and **gross negligence**. A person acts with **intent** if she consciously chooses to risk criminal harm to others, either because her *goal* is the criminal harm or she is *aware* of the risk of the criminal harm occurring and *ignores* this risk. A person acts with **negligence** if she unreasonably risks criminal harm to others, but is unaware of this risk. Another way to think about negligence is *carelessness*. A person can also act with **gross negligence** if she acts with extreme carelessness, but is unaware of the risk of criminal harm to others.

It makes sense to define crimes based on mental states as well as acts. Our ideas about justice tell us that people who harm others by accident are less of a threat to fundamental societal interests than people who actively want to harm others. Let us compare the following two scenarios to understand how a different mental state can occur with the same conduct. In the first scenario, Carla hates Hugo. Carla knows that Hugo bicycles to work every day and passes an intersection near her house. With the desire to kill Hugo, Carla parks her car at that intersection. When Carla sees Hugo coming towards the intersection, Carla drives her car directly at Hugo, hitting and killing him.

In the second scenario, Jose drives every day to and from work in Dili. After staying up late taking care of his sick children Jose is tired, but starts driving to work. Rosario is also tired when she starts riding her bicycle to work. Both Jose and Rosario are going at a reasonable speed

when they enter the same intersection. Because they are tired, however, they forget to look for oncoming traffic. Jose's car collides with Rosario's bike, killing Rosario.

Carla's and Jose's actions appear similar. Both Carla and Jose drove their cars into an intersection and killed a bicyclist. Yet, you probably think that Carla's actions were more harmful than Jose's. If asked why, you may point to the fact that Carla wanted to kill Hugo, but Jose killed Rosario by accident and bad luck. Your intuition about Carla and Jose is correct. The crime of Homicide requires not only a criminal act (any act that causes the death of another person), but also a criminal mental state. This mental state is that the perpetrator intended to kill another person when acting. Carla is guilty of Homicide but Jose is not because their mental states were different when they drove through the intersection. Carla acted with the intent to kill another person, but Jose did not.

Carla's and Jose's situations represent two extremes. Carla clearly acted with a criminal mental state because she wished to kill Hugo. Jose clearly did not act with a criminal mental state because he killed Rosario by bad luck. In this section, we will explore less clear situations and how they are dealt with by the Penal Code. First, we look at how the Penal Code defines the *mens rea* of intent, negligence, and gross negligence in Articles 15 and 16. These definitions consider situations where a perpetrator risked engaging in criminal conduct, but committing a crime was not her goal. Second, we will learn how to read Penal Code statutes to determine which *mens rea* the *actus reus* of the crime must be committed with. In this section, the attendant circumstance element will also be introduced. Finally, we will learn about how mistakes affect a person's mental state under Articles 17 and 18.

### 1. Penal Code Definitions

Before we read about the Penal Code's definitions, let us think about different standards we could use to determine whether someone acted with a criminal mental state. There are two ways we could judge guilty of acting with a criminal mental state. First, we could use a subjective standard. A subjective standard is based on what a person actually thought about when acting. Using a subjective standard in the criminal context, we would look at whether a defendant's goal was to engage in criminal conduct when acting.

Second, we could use an objective standard. An **objective standard** compares a person's actions against what a reasonable person would have done in a similar situation. The

hypothetical reasonable person is based on society's independent judgment, looking at how most Timorese people would behave. Using an objective standard in the criminal context, we would look at whether a reasonable person would have acted differently than the defendant in order to avoid engaging in criminal conduct.

The Penal Code uses both subjective and objective standards to define different punishable *mens rea*. Article 15 defines the subjective *mens rea* of **intent**. Article 16 defines the objective *mens rea* of **negligence**. The following subsections will explain the different mental states in more detail.

You probably guessed that Carla acted with *intent* when she killed Hugo. Carla's goal was to kill Hugo when she accelerated through the intersection with her car. A criminal result (Hugo's death) was her goal when acting. Intent is a *subjective* standard that depends what the perpetrator is thinking when acting.

The term negligence may be less familiar to you. As stated above, one way to think about negligence is *carelessness*. Suppose Vincente is speeding when he enters an intersection and accidentally kills a bicyclist, Antonio. Unlike Carla, Vincente did not want to kill Antonio. But by speeding, Vincente created a greater risk of harm than Jose did. Vincente's actions seem more harmful to society than Jose's, but less harmful than Carla's. Vincente was careless when he hit and killed bicyclist Antonio in the intersection. This is because society expects drivers to slow down and look for oncoming traffic whenever they enter intersections. By disregarding this obligation, Vincente increased the risk that he would harm people or property in the intersection. Therefore, he acted negligently. Negligence is an *objective* standard based on independent societal judgment.

### ***Actus reus and Mens rea***

Article 14 states that, in order to be convicted of a crime defined in a Penal Code, the criminal conduct must be accompanied by a criminal mental state. This means that a lawyer or a judge should look only at the perpetrator's mental state *at the time the crime is committed* to determine guilt. This is a **concurrency** requirement. To illustrate why this requirement matters, consider the following example with Carla and Hugo.

Suppose Carla parks at the intersection with the desire to kill Hugo, but changes her mind at the last minute. Carla drives away from the intersection and Hugo passes through unharmed. Carla passes through another intersection ten minutes later, but forgets to look for oncoming traffic



(like Jose). By accident, Carla hits a bicyclist going through that intersection. Carla gets out of her car and discovers that by coincidence, she hit and killed Hugo.

Does the fact that Carla wanted to kill Hugo earlier matter? The answer is no because the *actus reus* and *mens rea* must occur *at the same time*. The *actus reus* is still Carla hitting Hugo with her car. Nonetheless, when this occurs, Carla no longer wants to kill Hugo. His death is an accident. Carla will be treated as having the same *mens rea* as Jose in this situation. Remember the concurrence requirement as we discuss the different *mens rea* below.

### Intent

Intent is a *subjective mens rea*—it is only concerned with what a person is actually thinking when the criminal act or omission occurs. Article 15 contains three different definitions of intent.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 15. Definitions of intent**

- (1) Any person who commits an act with intention to do so, and said act is defined as a crime, acts with intent.
- (2) Furthermore, any person who commits an act that constitutes a defined crime as the necessary consequence of his or her conduct, acts with intent.
- (3) Whenever an act that constitutes a defined crime is committed as a possible consequence of the conduct of a perpetrator, and the perpetrator acts while accepting said possibility, he or she acts with intent.

Article 15, subarticle 1 is the most obvious definition of intent. This refers to the situation where a perpetrator's goal is to commit a particular crime. Carla wanting to kill Hugo by running him over with her car fits within this definition of intent. She commits the act of killing Hugo "with intention to do so" (it is her goal). Also, killing another person is the defined crime of Homicide.

Article 15, subarticle 2 provides a second definition of intent. This refers to the situation where a perpetrator *knowingly* commits a crime, even if a crime is not her exact goal. Suppose Carla wants to injure Hugo by running him over with her car, but does not care if he lives or dies? If Carla drives towards Hugo at 100 kilometres an hour, she knows Hugo will almost

certainly die from being hit by a car at this speed. Hugo’s death is the “necessary consequence” of Carla’s actions, and it would be considered Homicide. By choosing to drive towards Hugo at a lethal speed, Carla has acted with intent based on Article 15, subarticle 2.

Finally, Article 15, subarticle 3 states a third definition of intent. It refers to the situation where a perpetrator recognizes that her actions may harm others, but chooses to ignore this risk. This is the most complicated definition of intent in the Penal Code. Suppose Carla strikes Hugo several times in the chest with a machete instead of running him over with her car. Carla drives away, leaving Hugo unconscious in the road. Hugo dies from his machete wounds soon after. The police arrest Carla for killing Hugo. When questioned by the police, Carla states she only wanted to badly injure Hugo and did not care if he lived or died.

Although Carla states killing Hugo was not her goal when acting, Carla has acted with intent based on Article 15, subarticle 3. To understand why, let us break subarticle 3 into two parts. First, was a “defined crime” a “possible consequence” of Carla’s actions? Hugo could die from being cut multiple times with a machete in the chest. Therefore a “defined crime” (Homicide) was a “possible consequence” of Carla’s conduct. Second, did Carla “act while accepting” the possibility of committing Homicide? Even if Carla was not certain that Hugo’s wounds were fatal, Carla knew there was a risk Hugo *could* die from being struck multiple times with a machete. By choosing to attack Hugo despite knowing this possible consequence, Carla acted “while accepting said possibility.” Therefore Carla acted with the *mens rea* of intent based on Article 15, subarticle 3.

### Negligence and Gross Negligence

Negligence is an *objective mens rea*—it compares a person’s actions against what most people in society would do in the same situation to determine whether that person unreasonably risked harm towards others. Article 16 defines negligence.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 16. Definitions of negligence**

- (1) Any person who fails to proceed with caution to which, according to the circumstances, the same is obliged and capable of proceeding, acts with negligence, if the perpetrator:
  - a) Acts in such a manner that commission of a defined crime is a possibility, yet acts

without accepting said result.

b) Does not even realize the possibility of committing said act.

(2) The type of negligence referred to in the preceding subarticle shall take on the form of gross negligence whenever circumstance reveal that the perpetrator acted with levity or temerity and failed to observe elementary duties of prudence required in such a case.

According to Article 16, subarticle 1(a), a perpetrator acts with negligence if she “fails to proceed with caution to which, according to the circumstances, [she] is obliged and capable of proceeding” and “[a]cts in such a manner that commission of a defined crime is a possibility, yet acts without accepting said result.”

How does the Penal Code determine whether a person has failed to proceed with the caution she is obliged and capable of proceeding with? The perpetrator’s conduct is compared to how a reasonable person would have acted in the same circumstances. This hypothetical reasonable person is based on how most ordinary people in Timorese society would behave. Thus, a perpetrator acts with the mental state of negligence when most ordinary Timorese people would have recognized the likelihood of a criminal harm and taken additional precautions. The more likely a reasonable person would *not* have engaged in the perpetrator’s conduct, the more likely the perpetrator would be considered negligent. The fact that a reasonable person would have acted differently shows that the perpetrator was obligated and capable to take additional precautions.

Unlike intent, negligence does not try to determine the perpetrator’s thoughts when acting. In fact, subarticle 1(a) states that the perpetrators “acts without accepting [the criminal] result.” This means that the perpetrator does not realize that committing a crime is a possible consequence of her actions. For negligence, it does not matter that the perpetrator had no desire to harm others when acting. What matters is that a reasonable person would have been aware of the risk of harming others and acted differently to avoid this harm.

To better understand negligence, remember the example of Vincente driving fast through a busy intersection. Even if Vincente did not intend to kill Antonio, he may still be found guilty of the crime of Manslaughter (Article 140)—killing another person with the mental state of negligence.

How would we determine that Vincente acted with the *mens rea* of negligence? First, we must determine that Vincente did not act with intent. Vincente did not see Antonio when he entered the intersection. Therefore, Vincente did not accept that killing another person was a possible consequence of his actions. This fits within the definition of negligence as described in Article 16, subarticle 1(a), but does not fit within any of the definitions of intent described in Article 15. At most, Vincente acted with negligence.

Second, we must look at whether Vincente failed to proceed with the caution he was obligated and capable of. Negligence depends on societal norms. Many people speed. Most do so without wanting to hurt others. Perhaps in certain communities people know that cars may drive fast through intersections so Vincente's conduct is not unusual. Nonetheless, a reasonable person in Timor-Leste might say that Vincente was capable and obligated to proceed with more caution than he did through the intersection. Vincente is capable of applying his brakes and driving slower. A reasonable person could believe that Vincente is obligated to not speed through an intersection because of the likelihood he could hit and kill someone with his car. If most ordinary Timorese people would have slowed down when entering the intersection, he could be found negligent under Article 16, subarticle 1(a).

Some forms of carelessness are worse than others. In Article 16, subarticle 2, the Penal Code defines a more serious form of negligence called gross negligence. A person acts with **gross negligence** if she "act[s] with levity or temerity and fail[s] to observe elementary duties of prudence." This means a person must act with more than mere carelessness, which is completely socially unacceptable.

To illustrate gross negligence, suppose that when Vincente enters the intersection, he sees that it is filled with farmers' booths and shoppers looking to purchase produce, meat, and coffee. Vincente chooses to speed through the intersection anyway, thinking he is a skilled driver and will be able to avoid hitting other people. Vincente is able to swerve out of the way of many people, but still hits Antonio. Like before, Vincente hits and kills Antonio. Has Vincente acted with gross negligence?

Like negligence, gross negligence depends on societal norms. Vincente did not act with intent because he did not think hitting anyone was a possible consequence of his actions. He believed he could skilfully avoid hitting anyone. Vincente's actions seem to go beyond mere carelessness, however. If most ordinary Timorese people believe that is completely unacceptable

to speed through a busy intersection closed for a marketplace, Vincente could be found grossly negligent under Article 16, subarticle 2.

## 2. Interpreting Statutes

Every crime defined in the Penal Code requires an *actus reus* and a *mens rea*. How do we know which *mens rea* a person must act with in order to be charged with committing a crime? Article 14 answers this question.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 14. Intent and negligence

Only acts committed with intent, or in cases specifically prescribed in law, with negligence, are punishable.

According to Article 14, if the Penal Code does not specify a *mens rea* for a particular crime, the *actus reus* must be committed with intent to be punishable. A person can only be punished for acting negligently if the Penal Code explicitly makes it a crime to commit an act or omission with negligence. To illustrate how Article 14 works in practice, let us compare Homicide (Article 138) and Manslaughter (Article 140, subarticle 1). The *actus reus* of both crimes is any act or omission that causes the death of another person. Article 138 simply states that “[a]ny person who kills another person is punishable.” What is the mental state required by Article 138? Because the statute does not say, Article 14 requires it to be intent. This means that the perpetrator must *intend* to kill another person when acting in order to be convicted of Homicide.

In comparison, Article 140, subarticle 1 states that “[a]ny person who, by negligence, kills another person is punishable.” Article 140, subarticle 1 is not silent on what mental state is required. Instead, it explicitly states that the act of killing another person “by negligence” is punishable. Therefore, Manslaughter only requires the mental state of negligence.

Although they are treated as separate crimes, the act of killing another person is punishable when committed with intent *or* negligence. Many crimes defined in the Penal Code, however, only punish acts committed with intent. When looking in the Penal Code, be sure to

read carefully and check whether or not a separate Article exists which states that negligence is the punishable mental state.

### **3. Attendant Circumstances**

Some crimes defined in the Penal Code contain a third element, in addition to *actus reus* and *mens rea*. Certain acts may only be criminal because of the particular characteristics the victim had, or the particular situation the perpetrator acted in. These additional requirements for a crime are not a form of conduct. They are called **attendant circumstances**. If a crime contains an attendant circumstance element, the prosecution must show (1) the attendant circumstance was present; and (2) if the crime requires a *mens rea* of intent, the perpetrator was aware of the attendant circumstance.

To better understand attendant circumstances, let us consider two examples. An example of a crime based on the characteristics of the victim is Article 177, Sexual Abuse of a Minor. Article 177 makes it a crime to have sexual intercourse “with a minor aged less than 14 years.” The victim must be younger than 14 years old. An example of a crime with a situation-based attendant circumstance is Article 181, Sexual Exhibitionism. Article 181 makes it a crime to “publicly disturb another person by committing acts of a sexual nature.” Having sexual intercourse is not considered a crime on its own. It is both the *actus reus* (having sexual intercourse) *and* the attendant circumstances (having sexual intercourse in a public place) that make this conduct a crime according to Article 181.

It is not enough for the prosecution to prove that these attendant circumstances were present. Because both Article 177 and 181 require the mental state of intent, the prosecution must also show that the perpetrator was also aware of the attendant circumstances when acting. A perpetrator’s mental state applies to both the *actus reus* and attendant circumstance elements of a crime.

### **4. Mistakes**

Article 16, subarticle 1(b)’s definition of negligence states that a person acts with negligence if she “fails to proceed with caution to which, according to the circumstances, [she] is obliged and capable of proceeding” and “[d]oes not even realize the possibility of committing” a

crime. Like subarticle 1(a), subarticle 1(b) requires a perpetrator to act carelessly. How does a perpetrator not even “realize the possibility of committing” a crime? The answer is by making a mistake about the circumstances of the act. Mistakes of circumstance are described in more detail in Article 17.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 17. Error regarding circumstances of the act**

- (1) Error regarding elements of the law or acts related to a legally defined crime or prohibition that would reasonably be considered essential for the perpetrator to have knowledge of in order to comprehend the unlawfulness of the act excludes intent.
- (2) The system described in the previous subarticle includes error regarding existence of assumptions of a cause for exclusion of unlawfulness or guilt.
- (3) Negligent conduct shall be punishable whenever provided for by law and the respective assumptions are present.

Article 17, subarticle 1 defines mistakes regarding the circumstances of an act. Subarticle 2 relates to defenses, which will be discussed in Chapter 4. Subarticle 3 describes how mistakes affect the *mens rea* of negligence.

Let us reread subarticle 1 to understand *what* a mistake of circumstance is. According to subarticle 1, the mistake must be related to “elements of the law” or “acts related to a legally defined crime.” These mistakes must also make the perpetrator unable to “comprehend the unlawfulness of the act.” According to subarticle 1, if a person makes a mistake of circumstance, she cannot act with the mental state of intent.

Let us return to Carla and Hugo to understand how a person could make a mistake about her actions that prevents her from understanding its unlawfulness. Suppose Carla no longer wants to kill Hugo. Instead, she only wants to scare him. Carla decides to do this by shooting an unloaded gun at Hugo. Carla does not think Hugo will actually be hurt because the gun is not loaded. Like before, Carla waits at the intersection for Hugo. When she sees Hugo on his bike, she gets out of her car and shoots her gun at him. Carla does not check to make sure the gun is not loaded before she shoots. Unfortunately, the gun is actually loaded and Hugo is hit and killed by the bullet.

Carla has made a mistake regarding the circumstances of her act as defined in Article 17, subarticle 1. Carla mistakenly believed her gun was not loaded when, in reality, it was. Based on this mistake, Carla does not have the knowledge necessary to “comprehend the unlawfulness” of her actions. Carla needed to know the gun was loaded in order to realize that her actions would have an unlawful consequence (Hugo’s death). Shooting an unloaded gun would have no such unlawful consequence.

People can also make mistakes about “elements of the law.” This means the definition of mistakes of circumstances also includes mistakes related to an attendant circumstance element. Recall that if a crime has an attendant circumstance element, it is not enough for these additional circumstances to be present. The perpetrator must have “knowledge” of these circumstances “in order to comprehend the unlawfulness of the act.” If the actor is not aware of these circumstances, she cannot act with intent.

Understanding what is and is not a mistake of circumstance is important because it affects a person’s *mens rea*. Article 17, subarticle 1 states that a person cannot act with intent if she has made a mistake of circumstance. A person cannot be convicted of any crime that requires the *mens rea* of intent. This is understandable when we re-examine the definition of a mistake of circumstance. A perpetrator must fully understand her actions in order to intend to do them. A person who has made a mistake of circumstance does not fully understand her actions. Carla believed she was shooting an unloaded gun at Hugo. Shooting and killing Hugo could not have been her goal nor could she have accepted the possibility Hugo could die from her actions. Therefore, she could not have acted with intent in killing Hugo.

### **Mistakes of Law**

The definition of mistakes of circumstance does *not* include mistakes about what is or is not a crime. What if Carla said she did not realize killing another person was a crime? Would this mistake change her *mens rea*? The answer is no. Article 18 states that “[l]ack of knowledge of the law does not exclude the unlawfulness of any conduct that violates it.” This is different from a mistake of circumstances because the perpetrator still fully understands her actions. She has only made a mistake about the legality of her actions.

This may seem harsh. Hopefully, because the Penal Code reflects fundamental societal interests, most people will already know that most criminalized conduct is wrong. Carla should not need the Penal Code to tell her that killing another person is illegal. For more complex crimes, Article 18, subarticle 2 creates an exception. A mistake of law *completely excludes guilt if it is unavoidable*. This means that if someone had no way of knowing her conduct was unlawful, she



cannot be convicted of a crime. This could occur if the legislature recently criminalized something that was previously acceptable to do by society.

It is important to note that a mistake of circumstance only means a person cannot act with the *mens rea* of intent. A mistake does not affect whether a person acted with the *mens rea* of negligence. Article 17, subarticle 3 states “[n]egligent conduct shall be punishable whenever provided for by law and the respective assumptions are present.” A person can still act with the *mens rea* of negligence when she makes a mistake of circumstance if a reasonable person would have taken additional precautions *even with the same mistaken beliefs*.

This is the situation Carla is in. A reasonable person would have checked to make sure the gun was not loaded before pulling the trigger and pointing it at Hugo. Thus, Carla can still be prosecuted for negligently causing the death of another person.

## 5. Summary

*Mens rea* is one of the most complicated and important concepts in criminal law. The Penal Code defines three different mental states: intent, negligence, and gross negligence. Intent is the *default* mental state for every specific crime. This means that if a crime does not specify a mental state, the *actus reus* must be committed with intent. Intent is a purely subjective standard based on what a perpetrator is thinking at the time of a commission. There are three definitions of intent in the Penal Code. First, a perpetrator whose goal is to commit a crime acts with intent. Second, if a criminal result is the necessary consequence of a perpetrator’s actions, she has acted with intent. Third, if a perpetrator is aware of the high probability of a criminal result and chooses to ignore this risk, she has acted with intent. This is because a person who chooses to risk harm to others is still a threat to societal interests.

Negligence is the other mental state defined in the Penal Code. Negligence is an *objective* standard that judges a perpetrator’s conduct against societal norms. Even if a person did not intend to commit a crime, she could still be punished for failing to exercise a societally acceptable level of care. Negligence is only punishable if explicitly stated.

There are two definitions of negligence in the Penal Code. First, a person may act in a careless manner without intending to cause a criminal result. A reasonable person, however, would have realized that the commission of a crime was a possibility and taken additional

precautions to prevent it. Second, a person may make a mistake regarding the circumstances under which she is acting and, therefore, not realize that the commission of a crime is a possibility. Again, this mistake must be made in a careless manner. A reasonable person would have either been more aware of the circumstances or double-checked them before acting. If a person acted in a completely socially unacceptable manner, she can be found to have acted with gross negligence.

*Mens rea* is an important way of implementing the principle of culpability. *Mens rea* ensures that only those who threaten fundamental societal interest are punished.

### Questions

1. **Identifying the mens rea:** Read the following Penal Code Articles and identify the *mens rea* required. Also identify the *actus reus* and, if present, any attendant circumstances.
  - a) **Article 148, Subarticle 1:** Negligent offences against physical integrity: Any person who, by negligence, causes harm to the body or health of another person is punishable . . . .
  - b) **Article 154, Mistreatment of a Spouse:** Any person who inflicts physical or mental mistreatment or cruel treatment upon a spouse or person cohabiting with the perpetrator in a situation n analogous to that of spouse is punishable . . . .
2. **Applying Negligence:** Domingos and Boni are co-workers in Dili and live near each other in Dare. Domingos drives himself and Boni to and from work every day. One day, Domingos is driving himself and Boni from Dili back to Dare. It is the rainy season and it starts raining heavily. Domingos continues driving until he reaches a very steep hill. Boni asks Domingos to pull over until the rain stops. Domingos does not listen to Boni. He continues driving but the rain has made the road too slippery. Domingos's car cannot make it up the hill and starts sliding backward. It eventually crashes into a tree. The crash injures both Boni and Domingos. Did Domingos act with a criminal mindset in injuring Boni? Hint: Reread Article 148, subarticle 1 above.
3. **More Practice:** Anita and Santana are fighting. Santana runs away from Anita into her house and locks the door. Atina hides in the bushes outside of Santana's house and starts throwing rocks. Several of the rocks hit Santana's house. Two of the rocks go through the window and hit Santana in the head. Santana dies a few hours later.
  - a) Suppose you are a prosecutor in Dili. How would you argue that Santana acted with intent in killing Anita?
  - b) Suppose you are a public defender in Dili representing Santana. How would you argue that Santana only acted with negligence in killing Anita?
  - c) Suppose you were a judge in Dili district court hearing this case. How would you rule?

## Answers

- 1a) The *mens rea* of Article 148 is negligence. This is because Article 148 criminalizes any conduct that causes “harm to the body or health of another person” “by *negligence*.” The *actus reus* is any act that causes “harm to the body or health of another person.”
- 1b) The *mens rea* of Article 154 is intent. This is because Article 154 does not mention negligence. Therefore, based on Article 14, the *mens rea* is intent. The *actus reus* is “inflict[ing] physical or mental mistreatment or cruel treatment.” The attendant circumstances are that the victim is “a spouse or person cohabiting with the perpetrator in a situation analogous to that of spouse.”
2. The answer is probably yes. Domingos did not intend to hurt Boni. Nonetheless, he may have acted with the criminal mental state of *negligence* by driving up a very steep hill during a storm. Domingos’s conduct seems particularly negligent (or careless) because Boni asked him to stop driving until the rain stopped. Nonetheless, negligence is very fact-specific. How much care Domingos should have exercised depends on the situation. If it was not raining as heavily, Domingos may not have been careless by continuing to drive up the hill.
- 3a) A prosecutor could argue that Santina acted with *intent* when she killed Anita based on Article 15, Section 3. The prosecutor could argue that a defined crime, the death of Anita, was a possible consequence of Santina’s conduct. The most difficult argument for the prosecutor is that Santina acted “while accepting the possibility” of Anita’s death. There are a couple of facts that could help the prosecution. The prosecutor could point to (1) the rocks were large and (2) the fact that some of the rocks hit Anita in the head. It seems very possible that Santina would have known that Anita could have died if she was hit in the head with a large rock, but chose to act anyway.
- 3b) A public defender could argue that Santina acted with *negligence* when she killed Anita based on Article 16, subarticle 1(a). A public defender cannot argue that a defined crime, Anita’s death, was not a possible consequence of Santina’s actions. However, the public defender can argue that Santina acted “without accepting said result.” A public defender could argue that Santina only wanted to injure Anita or her property by throwing rocks. If Santina wanted to kill Anita, she could have broken into Anita’s house to harm her more directly. Another fact a public defender could use is that many of the rocks only hit Anita’s house. A public defender could argue that Santina was throwing the rocks at Anita’s house without wanting to hit Anita. The two rocks that went through the window and hit Anita were by accident. The rocks only struck Anita by bad luck.
- 3c) There is no absolute right answer to this question. Without knowing what was going on inside of Santina’s mind, we do not know if she wanted to kill Anita or if she realized she

could hit and kill Anita by throwing rocks at her house. A judge would have to look at all of the facts available to try to determine Santina's mental state when she was throwing rocks.

### III. CAUSATION

#### SECTION OBJECTIVES

- To explore when a perpetrator can be criminally liable for the results caused by his conduct.
- To understand how the Penal Code determines causation when there are multiple causes of a criminal result.

For crimes that require a certain result, there is another element that must exist, along with *actus reus* and *mens rea*. This element is called **causation**. In order for the perpetrator to be guilty, the perpetrator's conduct must cause criminal harm to the victim. There are different legal tests the Penal Code uses to decide whether a perpetrator caused criminal harm to the victim.

Imagine Joana wants to injure Monrique. Joana throws a rock at Monrique and hits him in the arm. Who *caused* Monrique's arm injury? This is an easy question. Joana has caused Monrique's arm injury by throwing a rock at him. But what about the following situation? Joana again hits Monrique with a rock in the arm. Monrique then goes to the hospital to have his injury treated. After exiting the hospital, another person, Julio, tries to rob Monrique. When Monrique starts to fight back, Julio strikes Monrique in the head with a machete. Monrique dies shortly afterwards. Who caused Monrique's death?

The answer depends on the test used to determine causation. Here, there are *multiple* causes of Monrique's death. Julio, obviously, is one of them. By striking Monrique with a machete, Julio caused Monrique's death. Monrique would not have been at the hospital, however, if Joana had not injured him. Joana also contributed to Monrique's death. Nonetheless, your intuition probably tells you that Joana should not be blamed for Monrique's death. Similarly, Monrique would not have died if Julio did not own a machete. Did the shopkeeper who sold Julio his weapon cause Monrique's death? What about the person who made the machete?

It would seem odd to find these people guilty of killing Monrique. In this section, we will explore when a perpetrator's actions are related enough to a criminal result that the perpetrator can be found guilty of *causing* the criminal result.

## 1. Direct Cause

Many crimes defined in the Penal Code have both a criminal act and criminal result. For crimes that require a certain result, the prosecution must prove that the defendant's action or omission *caused* the criminalized result. In most cases, the action and the result occur at the same time. The perpetrator's conduct is the only factor that contributes to the criminalized result. When the perpetrator's conduct is the *only* factor in bringing about a criminalized harm, it is called a **direct cause**.

Let us return to the example of Joana and Monrique. Article 145 criminalizes Simple Offences Against Physical Integrity. It is a crime for "[a]ny person [to] cause[] harm to the body or health of another person." In order to determine whether Joana is guilty of Simple Offences Against Physical Integrity, we must look at whether her actions actually caused "harm to the body or health of another person." Joana caused Monrique's injury by throwing a rock at his arm. Nothing else contributed to Monrique's injury. Therefore, Joana is the direct cause of Monrique's arm injury.

### ***Mens rea* and Causation**

What if Joana misses and the rock hits Monrique in the head instead of the arm? If Monrique dies a few hours later from his head injury, has Joana *caused* Monrique's death? The answer is yes. Even though Joana did not intend to cause Monrique's death, this fact is only helpful for analysing Monrique's *mens rea*, not causation. Even though Joana only intended to hit Monrique in the arm, she can be blamed for causing any predictable consequences of her actions

Nonetheless, causation is more problematic when a perpetrator does not intend her actions. This means that the perpetrator's *mens rea* is negligence. Causation and negligence are related. The more likely a criminal result is to occur, the more likely it is the perpetrator acted negligently *and* caused the criminal result. If a certain result is reasonable likely to occur, it is **foreseeable**. When determining negligence, the more foreseeable a result is, the more likely a reasonable person would have taken additional precautions to prevent the criminal result. When determining causation, the more foreseeable the result, the more likely the result is related to the perpetrator's actions.

## 2. Multiple Causes

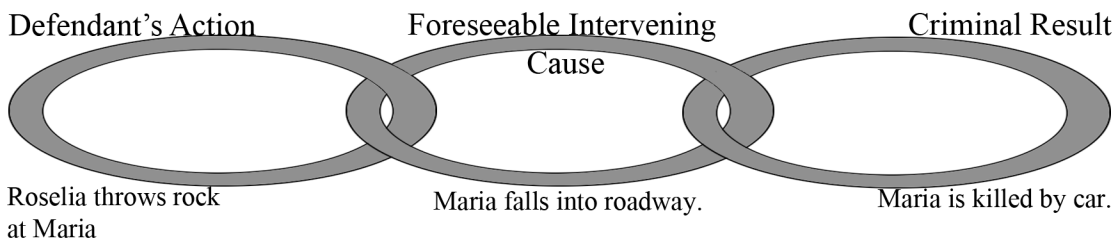
Determining whether a person legally caused a particular result becomes difficult when there are multiple contributing factors. The most basic way to think about causation when there are multiple causes is to think about "but-for causation." **But-for causation** is the simplest

causation test that asks whether the harm would not have occurred *but for* the perpetrator’s actions. For example, *but for* Joana throwing a rock at Monrique, Monrique would not have been at the hospital. *But for* Monrique being at the hospital, he would not have been killed by Julio. Joana is a *but-for cause* of Monrique’s death. Nonetheless, it does not seem fair to hold Joana responsible for Monrique’s death in this situation. But-for causation can be too broad a test in some circumstances. In other circumstances the test may be too narrow to include conduct that is actually criminally. We will explore this tension in more in depth below.

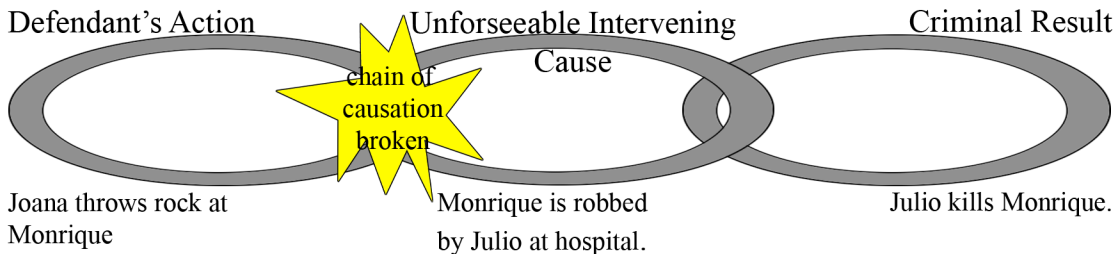
### Intervening Causes

**Intervening cause** are events that occur after the perpetrator’s conduct that contribute to the criminal result. In the example above, Julio’s conduct is an intervening cause—it occurs after Joana’s conduct but before the criminal result (Monrique’s death).

#### **Causation**



#### **No Causation**



When there are multiple causes, it may be useful to think about causation as a chain of events. Starting with the perpetrator’s conduct, each event is a potential link in the chain. If an event is *sufficiently related* to the previous one, they are linked together. Even if there is an event between the perpetrator’s conduct and the victim’s harm, the chain is not broken and the first

link (the perpetrator's conduct) and the last link (the victim's harm) are connected by the intervening cause. Because the chain of causation is not broken, the perpetrator can still be found guilty of causing the victim's harm.

If, however, an event is *not related* to the previous one, the chain of causation breaks. The perpetrator's conduct and the victim's harm are not connected. In this situation, only the intervening cause contributes to the victim's harm. In general, the *foreseeability* of the intervening cause is a good factor to look at to determine whether it breaks the chain of causation.

Let us map out the chain of events leading up to Monrique's death to determine whether Joana legally caused Monrique's death. First, Joanna threw a rock at Monrique. Second, Monrique goes to the hospital. Third, Julio robs and stabs Monrique. Fourth, Monrique dies. It was foreseeable to Joana that Monrique would be injured by the rock. It was also foreseeable that Monrique would have to go to the hospital to treat her injury. A rock can cause a serious injury and many people go to hospitals to have serious injuries treated. Nonetheless, Julio stabbing Monrique after she leaves the hospital is not foreseeable. It is not closely related to Joana throwing a rock at Monrique. Therefore, Joana has not caused Monrique's death.

#### Concurrent Causation

When two (or more) actions occur close in time and could have independently caused the same harmful result, either perpetrator can be liable for causing the harm. This is because of the theory of **concurrent causation**. In this situation, concurrent causation is needed to hold these perpetrators liable because neither perpetrator is the but-for cause of the harmful result.

For example, imagine two people belonging to a gang attack one person. Both perpetrators are armed with machetes. If both perpetrators fatally wound the victim, neither is the "but-for" cause of the victim's death—even if one of the perpetrators did not act, the victim would have died. It does not seem like the fact that another person acted in a criminal manner should excuse the other person's equally harmful conduct. Therefore, the theory of concurrent causation is used to prove that both perpetrators caused the criminal harm.



### 3. Summary

If a person is the direct cause of a criminal result, he clearly should be considered guilty of causing that criminal result. By definition, no other person contributed to that harm. Proving causation becomes more difficult, however, when there are multiple causes. This can occur in two ways. First, another person's actions could contribute to the victim's harm after the perpetrator has acted. This third party's action is called an intervening cause. The perpetrator can only be found guilty of causing the victim's harm if the intervening cause is reasonably foreseeable and related to the perpetrator's actions.

Second, another person's actions can contribute to the victim's harm at the same time the perpetrator acts. This is called concurrent causation. If multiple people commit a crime it is enough that either one of the actors could have independently caused the criminal result. The test for criminal causation reflects the principle of culpability. We do not want to punish people for unpredictable outcomes they could not have contemplated when acting.

#### Questions

1. **Intervening Causes #1:** Recall from the introduction the example of Leopoldo and Cecelia. Leopoldo stole Cecelia's cow. Cecelia was so shocked that her cow was stolen that she had a heart attack and died. Did Leopoldo cause Cecelia's death?
2. **Concurrent Causes:** Domingos and Helena are angry with Anita. They both have matches and light opposite sides of Anita's house on fire. Anita's house burns down. Who caused Anita's house to burn down?
3. **Intervening Causes #2:** Suppose Manuela sees Anita's house is on fire and runs over with a hose to try to put it out. Unfortunately, she becomes trapped in the house and is severely burned. Have Domingos and Helena caused Manuela's injuries?

#### Answers

1. No, Leopoldo did not cause Cecelia's death. This is because Cecelia having a heart attack is not sufficiently related to Leopoldo stealing her cow. This is an intervening event that Leopoldo could not have reasonably foreseen. Therefore, Leopoldo cannot be found guilty of causing Cecelia's death.
2. Both Domingos and Helena caused Anita's house to burn down based on the theory of concurrent causation.

3. This is another example of intervening causes. This time, however, Manuela's actions are sufficiently related to Domingos and Helena's to say that they caused her injuries. It is reasonably foreseeable that someone would try to put a fire out.

## IV. CHAPTER REVIEW

### SECTION OBJECTIVES

- To review the four elements of a crime and how to look for them in the specific crimes defined in the Penal Code.
- To understand how to apply the law in the Penal Code to real life cases using the four elements.

Understanding the four elements of a crime is important for legal practitioners. Every time you read a specific crime defined in the Penal Code, you should automatically identify the different elements it contains. Remember, every crime defined in an article of the Penal Code has an *actus reus* (criminal act) and *mens rea* (criminal mental state) element.

The Article will always define the *actus reus* required for the perpetrator to commit the crime. The *actus reus* element can be satisfied through an action or, in certain cases, an omission. Remember, however, that an omission can satisfy the *actus reus* element only if the omission itself is criminalized, or the perpetrator has a legal duty to act.

For the *mens rea* element, remember that Article 14 states the *actus reus* must be committed with intent unless otherwise stated. When reading Articles defining specific crimes, look for whether the Article states that the crime can be committed with negligence. If not, the crime requires the *mens rea* of intent. A perpetrator can act with intent if she desires a criminal outcome, acts knowing that a criminal outcome is certain to occur, or knows that a criminal outcome is likely and chooses to ignore this risk. All of these definitions depend on what the perpetrator is actually thinking at the time of committing the act. In contrast, negligence compares the perpetrator's actions to what a reasonable person would have done in similar circumstances. If a reasonable person would have acted differently to avoid the criminal outcome, the perpetrator has acted with the *mens rea* of negligence.

Many crimes defined in the Penal Code also require certain attendant circumstances and may also require the *actus reus* to cause a certain result. When reading the specific Articles, it is important to look for whether a crime has either (or both) of these additional elements. Attendant circumstances usually relate to characteristic of the victim or the situation the perpetrator acted in. If a crime has an attendant circumstances element, these circumstances must be present when

the perpetrator acts. The perpetrator must also be aware of these circumstances in order to act with the mental state of intent. Otherwise, the perpetrator can only act with negligence at most.

Causation is an element whenever a crime criminalizes a certain result rather than a certain type of conduct. The causation element is easily satisfied whenever the perpetrator is the only cause of the criminal harm. Events that happen after the perpetrator's conduct are called intervening causes. Intervening causes do not break the chain of causation if they are reasonably foreseeable. When two perpetrators act closely in time and could have each independently caused the criminal harm, both perpetrators satisfy the causation element because of the theory of concurrent causation.

### Applying the Law to Facts: A Checklist

A lawyer's job is to apply the law to real life situations. When you read the Penal Code, you will compare the defendant's actions to the conduct defined in a specific Article. When analysing a case, you should ask questions like:

- Does the perpetrator's actions match the *actus reus* described in this article?
- What was the perpetrator's mental state when acting? If it was negligence, does this particular crime punish actions committed with negligence, or must the perpetrator act with intent?
- Was the perpetrator fully aware of the attendant circumstances required by the crime? If not, he or she could not have acted with intent.
- Did the perpetrator's actions cause the result required by the crime?

### Questions

1. Identify the *actus reus* and *mens rea* of the following Penal Code provisions. If a crime requires attendant circumstances or a criminal result, identify them as well.
  - a) **Article 140, subarticle 1—Manslaughter:** Any person who, by negligence, kills another person is punishable with up to 4 years imprisonment or a penalty of fine.
  - b) **Article 157, subarticle 1—Threats:** Any person who, by any means, threatens another person with commission of a crime in order to cause fear or unrest or to undermine that person's freedom of decision-making is punishable with up to 1 year imprisonment or a fine.

- c) **Article 228, Refusal to Provide Medical Assistance:** Any medical doctor or health professional who refuses to provide assistance in his or her professional capacity in a case involving risk of life or serious danger to the physical integrity of another person that cannot be otherwise addressed, is punishable with up to 3 years imprisonment or a fine.
- d) Suppose you were a judge in Dili district court hearing this case. How would you rule?
2. Atina and Maria are fighting on a sidewalk near a busy street. Atina starts throwing small rocks at Maria's head. The rocks are not large enough to kill Maria, but one of them hits her in the eye, making it difficult for her to see. Maria is now disoriented as she tries to run away from Atina. She trips and falls into the busy street in front of Santana's car. Santana hits and kills Maria.
- a) What was Atina's mental state towards Maria's death?
- b) Did Atina cause Maria's death?

### Answers

- 1a) The *actus reus* is any act or omission that kills another person. The *mens rea* is negligence. The criminal result is the death of another person.
- 1b) The *actus reus* is the act of making threats. The *mens rea* is intent. The criminal result is causing another person to feel unrest or undermine that person's freedom.
- 1c) The *actus reus* is the omission of failing to provide medical assistance. The *mens rea* is intent. The attendant circumstances are that the perpetrator is a medical doctor or a health professional and that another person is physically in danger.
- 2a) Atina acted with *negligence* towards Maria's death. Atina probably did not intend to kill Maria. The rocks Atina threw at Maria were not large enough to kill Maria. Because of this, Atina can argue that she was not aware of the risk that Maria could die. However, Maria should have known that throwing rocks at Maria's head could seriously injure her and been more aware that they were near a busy street. Maria stumbling into traffic was a risk that a reasonable person would have recognized.
- 2b) Atina caused Maria's death. Maria stumbling into traffic after being hit in the eye with a rock was a foreseeable consequence of Atina's actions. Although this is not something Atina intended, it is still closely related to Atina throwing rocks at Maria's head. Therefore the chain of causation is not broken.

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## CHAPTER 3: GENERAL PRINCIPLES

### CHAPTER OBJECTIVES

- To explore how criminal liability is established based on the time, place, type, form, and perpetrators of a crime.
- To understand the difference between public and non-public crimes.
- To examine when an incomplete crime is punishable as an attempted crime.
- To learn who can be prosecuted for a crime based on their level of participation.

In Chapter 2, we learned how to identify the different elements of a crime. In this Chapter, we will learn more about the mechanics of prosecuting a crime. *How* does the government determine which crimes to prosecute? *Which* crimes are punishable? *When and where* does a crime take place? The previous Chapter discussed relatively simple situations in which one person successfully committed a crime on his own. In this Chapter, we will learn about how the Penal Code deals with more complex situations. Specifically, *when* can someone be punished at different stages of planning and committing a crime? *Who* can be punished for participating in a crime?

First, we will learn about how the government prosecutes crimes and which crimes are punishable. There are two types of crimes defined in the Penal Code: public and semi-public. Only perpetrators who commit public crimes can be charged automatically. The prosecution of semi-public crimes depends on whether the victim filed a complaint. The government may only punish a person if his actions were a defined crime at the time of commission. If the Timorese legislature makes a certain act or omission a crime *after* the perpetrator acted, the perpetrator cannot be punished because there was no way for that person to know his actions were criminal. The *actus reus* determines the time and place of commission.

We will also learn when a person may be prosecuted for a crime *even though he has not committed its actus reus*. Consider the situation in which a person tries to commit a crime but is unsuccessful because of circumstances beyond her control. Perhaps the police notice her suspicious activity and arrest her. In this case, the person has not committed the *actus reus* of the

crime. However, this person seems to threaten fundamental societal interests because she desires to harm other people and began acting upon those thoughts. We will learn about how an incomplete crime may be punished as an **attempt**. Punishing attempt must be balanced against the principle of culpability and the desire not to punish people for criminal thoughts. As you will see, mere planning activities are not punishable.

Finally, consider the situation in which multiple people work together to commit a crime. Many times, only one person in the group actually commits the *actus reus* of the crime. Can the other group members be punished for helping? Again, it seems like these people threaten fundamental societal interests by helping to harm others. In the last section, we will learn about the different ways people can participate in a crime and be punished: as a principal, a coprincipal, an instigator, or an accomplice. The Penal Code makes these distinctions based on a person's level of involvement with a crime. Again, punishing group crimes must be balanced against the principle of culpability. People who are less involved with the commission of a crime should be punished less severely than people who are more involved.



## I. GENERAL PRINCIPLES

### SECTION OBJECTIVES

- To understand when a crime must be handled by the state-sponsored justice system in Timor-Leste.
- To learn about how the principle of legality limits what crimes the government can prosecute.
- To understand how the Penal Code defines the time and place of a crime.

In Chapter 2, we learned about the elements of a crime. Even if all of the elements of a crime are present, there are two important factors we should consider before a person can be found guilty of committing a crime: (1) whether the victim has the option to resolve the dispute in an alternative system; and (2) whether the perpetrator's actions were a crime at the time of commission.

The government does not have to prosecute every crime in Timor-Leste. Timor-Leste's government has limited resources and it may be difficult to prosecute every crime that occurs. Additionally, non-state-sponsored justice systems still play a big role in Timorese society. Sometimes, the victim would prefer that local actors in the non-state-sponsored justice system handle her case rather than the state. For these reasons, the Penal Code distinguishes between more serious and less serious crimes. Serious crimes are called **public crimes**. Public crimes are always prosecuted by the state. However, less serious crimes, called **semi-public crimes**, are only prosecuted by the state if the victim files a complaint.

The principle of legality also limits the application of criminal penalties to offences that are explicitly criminalized at the time of commission. The Penal Code also prohibits analogy. An **analogy** is the inference that if two or more things are similar in one way, they must be similar in other ways. This means the Penal Code must explicitly criminalize specific conduct. It is not enough that the Penal Code may criminalize similar conduct. The Penal Code also prohibits retroactivity. **Retroactivity** is extending an effect into the past. This means that a person cannot be prosecuted for any conduct that was not criminalized at the time he committed the act, even if the Timorese legislature later makes that exact action or omission a crime. The prohibition on retroactivity makes the time and place of a crime occurred very important.

## 1. Public and Semi-Public Crimes

As stated in the Introduction to this textbook, there are two types of justice systems in Timor-Leste. There are the state institutions and actors that prosecute crimes using this Penal Code. There are also non-state institutions and actors that resolve disputes based on local customs and procedures. Can a victim of crime choose the system in which the perpetrator is punished? The answer depends on how serious the crime is. The Penal Code distinguishes between serious **public crimes** and less serious **semi-public crimes**.

### **Annex to the Penal Code of the Democratic Republic of Timor-Leste**

The Penal Code, in its defence of values and legal interests essential to life in society, has distinguished crimes of a public nature, which must be warded by the State, from those less serious crimes, which depends upon the exercise of the right to file a complaint by the bearer of the right, pursuant to provisions already adopted in criminal procedural legislation. Whenever the exercise of the right to file complaint is provided in the description of the legal definition of the crime in the Special Part of the Penal Code, the same are considered as semi-public crimes.

The government does not have to wait for a victim to file a complaint to prosecute a public crime. This means the government can prosecute the perpetrator even if the victim does not want this to happen. Examples of public crimes include Homicide, Manslaughter, and Serious Offences Against Physical Integrity. In contrast, the government cannot prosecute semi-public crimes if someone does not file a complaint. This is true even if all of the elements of the crime are present. Examples of semi-public crimes include Simple Offences Against Physical Integrity and Larceny (stealing).

How do we determine whether or not a crime is public or semi-public? The Annex states that “[w]henver the exercise of the right to file complaint is provided in the description of the legal definition [of a crime] . . . the same are considered as semi-public crimes.” This means that a crime is semi-public if the specific Article states that prosecution depends on the filing of a complaint. If the specific crime does not have this language, it is a public crime. Let us look at some examples. Compare Article 138 (Homicide) with Article 215 (Larceny).

## Penal Code of the Democratic Republic of Timor-Leste

### Article 138. Homicide

Any person who kills another person is punishable with 8 to 20 years imprisonment.

### Article 251. Larceny

- (1) Any person who, with unlawful intent to appropriate for him or herself or another party, takes a moveable object belonging to another, is punishable with up to 3 years imprisonment or a fine.
- (3) Prosecution depends on the filing of a complaint.

Article 251, subarticle 3 specifically states “prosecution [of Larceny] depends on the filing of complaint.” This means that Larceny is a semi-public crime. This language does not appear in Article 138. This means that Homicide is a public crime.

Why does the Penal Code distinguish between public and semi-public crimes? Re-read the Penal Code Annex textbox defining public and semi-public crimes. The Penal Code annex states that the distinction has been made “in . . . defence of values and legal interests essential to life in society.” The government may be concerned that the perpetrator may repeat her crimes. The more serious a crime is, the more harm the perpetrator inflicts on fundamental societal interests. Therefore, the State has a greater interest in intervening to protect society from future harm and rehabilitating the perpetrator.

You might think to yourself: all crimes harm society. If this is so, why are some crimes semi-public? Semi-public crimes help save judicial resources for the most serious crimes. Additionally, some victims may prefer non-state-sponsored institutions and actors to resolve disputes. The distinction between public and semi-public crimes helps balance these interests.

## 2. The Principle of Legality

The **Principle of Legality** limits when criminal penalties can be applied. In order to punish someone, the principle of legality’s three requirements must be satisfied. The offence must be: (1) an act or omission, (2) outlawed by a provision of the Penal Code or other legal rule, (3) prior to the commission of the act. The principle of legality ensures that the Penal Code is

predictable and straightforward. This makes it easier for people to know which acts are criminal and prevents the government from applying the law unfairly.

### **Constitution of the Democratic Republic of Timor-Leste**

#### **Section 31: Application of criminal law**

- (1) No one shall be subjected to trial, except in accordance with the law.
- (2) No one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed, nor endure security measures the provisions of which are not clearly established in previous law.
- (3) Penalties or security measures not clearly provided for by law at the moment the criminal offence was committed shall not be enforced.
- (4) No one shall be tried and convicted for the same criminal offence more than once.
- (5) Criminal law shall not be enforced retroactively, except if the new law is in favour of the accused.
- (6) Anyone who has been unjustly convicted has the right to a fair compensation in accordance with the law.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 1. Principle of legality**

- (1) No act or omission may be qualified as a crime unless it was defined as such by law before it was committed, with the respective punishment described.
- (2) Security measures may only be applied to cases of danger to self and others, with the conditions thereof previously determined by law.

There are two other principles of criminal law that limit when a perpetrator can be prosecuted: the prohibition of analogy and the prohibition of retroactivity. These principles are stated in Article 2 and Article 3.

#### *Prohibition on Analogy*

We will first discuss the prohibition on analogy. This requirement is listed Article 2.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 2. Prohibition of analogy

No act or omission may be qualified as a crime, in defining danger to self and others or in determining the corresponding legal consequences, through the use of analogy.

According to the prohibition of analogy, only the law can define a crime and provide a punishment. Courts cannot expand the scope of a crime by using the similarity of the circumstances as a justification. To help understand this principle, let us look at an example. Imagine that the law prohibits drinking wine because it intoxicates people. However, suppose this law does not mention any other alcoholic beverages. Under the prohibition of analogy, a court could not convict someone for drinking other intoxicating beverages, such as whiskey. Even though whiskey is an intoxicating beverage, and wine is illegal because it is an intoxicating beverage, the crime of drinking wine cannot be expanded to include whiskey unless the law specifically says so. Once again, this example is extreme, and is not likely to apply in Timor-Leste.

Now that we understand the general idea behind the prohibition of analogy, we can look at a less extreme example involving Timor-Leste's illegal fishing law. Article 219 prohibits fishing in certain bodies of water without a permit, unless it is done for household subsistence. Imagine that Jose goes fishing and catches a dolphin. Even though dolphins swim in water, they are actually mammals, not fish. Even though catching a dolphin without a permit may seem similar to catching a fish, Jose cannot be criminally charged under Article 219 because of the prohibition of analogy. But, taking a closer look at the Penal Code, Article 218 prohibits hunting or fishing endangered species or species at risk of extinction. If a dolphin is an endangered species or a species at risk of extinction, Jose could be charged under Article 218 instead.

As demonstrated in the examples above, courts cannot use the similarity of circumstances as a reason for expanding the scope of Penal Code crimes. Rather, the courts must look at the definitions of crimes that have been stated in either the Penal Code or other applicable laws. In this way, the prohibition of analogy makes the Penal Code straightforward and predictable.

Principle of Non-Retroactivity

In order for an offence to be punishable, the offence must have been criminalized prior to when the crime was committed. This is the principle of non-retroactivity (Article 3).

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 3. Applicability of criminal law over time**

- (1) No act or omission may be qualified as a crime unless it was defined as such by law before it was committed, with the respective punishment described.
- (2) In such a case, if a decision convicting the person has already been rendered, execution of said decision and its penal effects shall cease, even when the decision rendered is final.
- (3) The law subsequent to the commission of the crime shall apply to previous conduct whenever the same proves to be more lenient to the perpetrator and, in the case of a final decision, if any benefit may still be obtained.

According to the principle of non-retroactivity, criminal law cannot be applied to an individual's actions prior to when the law was passed. For example, suppose Jose drove a car without a license prior to March 2009 (when the Penal Code was adopted). Jose cannot be charged with disobeying Article 207 (Driving Without a License) because the Penal Code was not in effect when Jose committed this act.<sup>14</sup> This result makes sense. If the law did not exist at the time Jose acted, Jose would have no way to know he was committing a crime or that his actions were not allowed. Individuals can only be expected to follow currently existing laws.

There is one exception to the principle of non-retroactivity. If the new law is more lenient toward the accused, then the new law may apply. We will use Driving Without a License as an example again. Assume that, when Jose drove without his license, there was a law that criminalized this act with a 5-year prison sentence. One month later, the Penal Code was changed and Driving Without a License became punishable by 2 years in prison. The new prison sentence could apply retroactively to Jose because it is more lenient than the old law. Once again, this result makes sense. If a more lenient law has been put into place, it would seem

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<sup>14</sup> Jose could still have been charged with a similar crime in the Indonesian Penal Code, if such a crime existed. This is because the Indonesian Penal Code was the basis for criminal law in Timor-Leste before 18 March 2009.

unjustly harsh to force past perpetrators to abide by the stricter law that no longer applies to other perpetrators.

### 3. Time and Place of a Crime

The principle of legality makes it important to know when and where a crime took place. If the Timorese legislature creates a new crime or changes an existing crime's penalty, how do we know which law should be applied? The *actus reus* is used to determine both the time and place of a crime. Article 5 states that the *actus reus* is used to determine when a crime has taken place.

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 5. Time of commission of the act

An act is considered as committed at the time of the act or omission, regardless of the time when the typical result occurs.

For example, for Homicide, the *actus reus* and the result often do not occur at the same time. If Osme strikes his victim with a machete on Monday and the victim dies two days later on Wednesday, Osme committed the crime on Monday when he struck the victim with a machete.

This distinction is important if the law changes. Suppose the Timorese legislature increased the penalty for Homicide on Tuesday. Even though Osme's victim died on Wednesday, Osme committed the crime of Homicide on Monday based on Article 5. This means that the harsher penalty created on Wednesday cannot be applied to Osme. This is because of Article 5 and the principle of non-retroactivity.

The *actus reus* is also used to determine where a crime has taken place as described in Article 6. According to Article 6, there are two places where a perpetrator can commit a crime:

## Penal Code of the Democratic Republic of Timor-Leste

### Article 6. Place of commission of the act

An act is considered to have been committed in the place where, by any means, the action or omission occurred, wholly or in part, as well in wherever the typical result has or should have been caused.

First, a crime can take place where the perpetrator committed the *actus reus*. In the example above, if Osme struck his victim with a machete on Hera beach, he committed the crime at Hera beach. Second, a crime can take place wherever “the typical result has or should have been caused.” In the above example, the place where the crime took place is the same. Osme caused his victim’s death when he struck him with a machete. Again, this was on Hera beach. Therefore Hera beach is where Osme committed Homicide.

### 4. Summary

In this section, we learned about two important restrictions on when the Penal Code can be applied. First, we learned about **public** and **semi-public** crimes. Public crimes are automatically prosecuted. Prosecution of semi-public crimes depends on whether the victim files a complaint. This is likely because of limited judicial resources, and respect for non-state-sponsored justice systems that still play an important role in Timor-Leste.

Second, we learned about the **principle of legality**. A person can only be prosecuted for an act or omission that was explicitly criminalized at the time of commission. This means that courts cannot analogize to similar provisions in the Penal Code and cannot apply laws retroactively. The principle of legality ensures that the law is applied in a predictable and straightforward manner.

### Questions

1. Read the following articles and determine whether they are public or semi-public crimes.
  - a) **Article 258, Property Damage:** Any person who wholly or partially destroys, causes damage to, defaces or renders unusable the property of another is punishable with up to 3 years imprisonment or a fine. . . . Prosecution depends on the filing of a complaint.



- b) **Article 154, Mistreatment of a Spouse:** 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 is punishable with 2 to 6 years imprisonment if no heavier penalty is applicable by force of another legal provision.
2. Read Article 145, Simple Offences Against Physical Integrity. Currently, subarticle 1 states: “Any person who causes harm to the body or health of another person is punishable with up to 3 years imprisonment or a fine.” Suppose Joao attacks Vincente in January 2013. Joao’s trial starts in Dili District Court in August 2014.
- a) Suppose the Timorese Legislature changed Article 145, subarticle 1 to read “Any person who causes harm to the body or health of another person is punishable with up to 5 years imprisonment or a fine” in July 2014. If Joao is convicted of Simple Offences Against Physical Integrity, what will his maximum sentence be?
- b) Imagine that, in July 2014, the Timorese Legislature changed Article 145, subarticle 1 to read: “Any person who causes harm to the body or health of another person is punishable with up to 2 years imprisonment or a fine” in July 2014. If Joao is convicted of Simple Offences Against Physical Integrity, what will his maximum sentence be?

### Answers

- 1a. Property Damage is a semi-public crime. Its prosecution depends on the filing of a complaint.
- 1b. Mistreatment of a Spouse is a public crime. Its prosecution does not depend on the filing of a complaint.
- 2a. The maximum sentence Joao can receive is three years. Based on Article 3, subarticle 1, Joao can only receive the maximum sentence available at the time he committed the crime. Based on Article 5, the time of commission is January 2013. This is when the *actus reus* took place. Thus, even though Joao’s trial takes place after the penalty for Simple Offences Against Physical Integrity is increased to 5 years, he can only receive a maximum sentence of 3 years. This is the penalty that was in the Penal Code at the time he violated the law.
- 2b. Now the maximum sentence Joao can receive is 2 years. Based on Article 3, subarticle 3, Joao can receive the newer penalty because it is more lenient than the old penalty.

## II. FORMS OF CRIME

### SECTION OBJECTIVES

- To understand the difference between preparatory acts and attempt, and to learn which actions are punishable.
- To identify situations when an attempt will not be punished because of impossibility.
- To learn when punishment will be mitigated if a person voluntarily stops attempting a crime or feels remorse for a completed crime.
- To examine which crimes' attempts are punishable.

Not every crime is successfully completed. Law enforcement and bystanders often stop a person before she harms others. Some criminals may simply be incompetent and are unable to cause the harm they desire. In these situations, the *actus reus* of the crime is never committed. Yet, people who wish to harm others and are only unable to do so because of circumstances beyond their control seem to threaten fundamental societal interests. As a result, the Penal Code punishes attempted crimes. A crime that is initiated but not successful is called an **attempt**. But the punishment of an attempt must be balanced against the principle of culpability and the desire to not punish criminal thoughts alone. For this reason, it is important to determine *when* exactly a person initiates a crime.

Remember Carla from Chapter 2. Imagine that she has a new plan to kill Hugo. Carla is going to wait at Hugo's office and then hit him with a machete when he arrives. We already know that criminal thoughts alone cannot be punished. The fact that Carla wants to kill Hugo is not a crime. It is also not a crime for Carla to think about how she wants to kill Hugo. This is because these are still just thoughts.

But suppose Carla starts to act on these thoughts. Carla may commit a number of acts to implement her plan. (1) She buys a machete; (2) she learns where Hugo's office is; (3) she goes to Hugo's office and waits with her machete; (4) she takes her machete out when Hugo approaches the building; and (5) she cuts Hugo with her machete. The result, Hugo's death, is act number 6. Only when Carla commits *all* of the steps of her plan has she committed the crime of Homicide. Carla has not committed the *actus reus* of Homicide until all these steps are complete. Yet, with each step Carla takes, she seems like an increasing threat to Hugo. In order to protect

societal interests, we want to be able to punish people who have either tried to commit a crime, or are in the process of committing a crime.

In the example above, a number of events could happen between steps 1-6 to prevent Carla from completing her plan. Before step 4, Carla could change her mind and no longer want to kill Hugo. Alternatively, outside forces could prevent Carla from completing her plan. For these reasons, the Penal Code only punishes attempts that are near completion and fail to take place for reasons beyond the perpetrator's control. We will explore how attempt is defined and which crimes' attempts are punishable below.

### 1. The Penal Code Definitions of Attempt

The Penal Code states several ways to determine whether or not a person has attempted a crime. First, the Penal Code looks at how far along in the process a perpetrator has gone in carrying out a crime. There is a difference between planning activities and attempt. Planning activities are also called **preparatory acts**. Preparatory acts are not punishable. An attempt occurs when a person begins to execute the crime. An attempt *is* punishable by the law. This is the difference between Carla purchasing a machete and Carla actually trying to cut Hugo with her machete.

Second, the Penal Code will not punish a person if that person could not actually commit a crime given the circumstances at the time she acts. This means that a person will not be charged with an offence if committing the crime was an impossibility. For example, if Hugo never went to the office on the day that Carla was waiting to kill him, it would have been impossible for Carla to cut him with a machete.

Finally, the Penal Code will not punish an attempt if a person *recognizes that his actions are harmful and changes his mind*. A person who stops carrying out his criminal plan and tries to stop the crime from happening will not be punished for attempt. This is called **voluntary desistance**. Voluntary desistance would have occurred if Carla saw Hugo enter his office but decided not to cut him with her machete. Additionally, in some situations a perpetrator will not be punished for a completed crime if he completely undoes the criminal harm. This is called **remorse**. This may be possible for less serious crimes. For example, a thief who returns stolen property may qualify for remorse.

We will learn more about each of these definitions below.

### Preparatory Acts and Attempt

The Penal Code does not punish preparatory acts. However, once the perpetrator moves from the planning stages to executing the crime, she can be punished. This is true regardless of whether or not the perpetrator is ultimately successful in committing the crime. If the perpetrator is not ultimately successful, the Penal Code punishes the action as an attempt.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 22. Preparatory acts**

Preparatory acts are not punishable, except as otherwise provided in the law.

##### **Article 23. Attempt**

A crime is attempted whenever the person who has decided to commit it initiates its execution by undertaking, wholly or in part, the acts objectively required to cause the result, which fails to take place only for reasons beyond the control of the perpetrator.

There are two main components of an attempt. First, the perpetrator must subjectively intend to commit the crime. This means the prosecution must prove that the perpetrator had the *mens rea* of intent about committing a particular crime, even though he was ultimately unsuccessful in carrying it out. Second, the perpetrator must actually start to act out the crime. The perpetrator must do more than just think about the offence or plan it. As stated above, the Penal Code does not punish preparatory acts. The prosecution must prove that the perpetrator moved far enough along in his criminal plan to achieve the criminal conduct or result. Additionally, the prosecution must prove that the perpetrator only failed to complete the offence because of forces beyond his control.

This means that, in an attempt case, the court must first determine whether the perpetrator acted with the *mens rea* of intent towards committing a particular crime. This is because Article 23 requires the perpetrator to “decide[] to commit” a crime. Only a person acting with the *mens rea* of intent can “decide[] to commit” a crime. How can a court determine whether or not a defendant intended to commit a crime if the crime is incomplete?

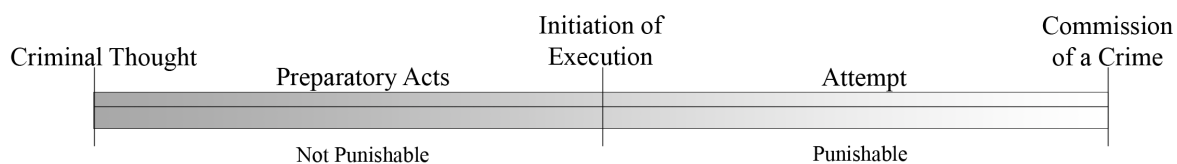
A court can look at the defendant’s actions to determine his intent, just like with a completed crime. For example, if Carla strikes Hugo with a machete at his office, a court could look at Hugo’s injuries for evidence of Carla’s mental state. If Carla only struck Hugo in the

arm, it is likely that she only wanted to injure him. Therefore, she likely did not intend to kill Hugo and so she could not be guilty of Homicide. If Carla strikes Hugo on his chest it is more likely that Carla wanted to kill Hugo. Carla likely acted with intent to kill Hugo by striking him so close to his heart. If Hugo survives, it is by mere luck. Carla should not escape punishment simply because Hugo was lucky. Therefore Carla can be punished for attempted Homicide.

If one of Hugo’s co-workers stops Carla before she can strike Hugo, it will be more difficult for a court to determine Carla’s *mens rea*. A court may have to use additional evidence to determine whether she intended to kill or only injure Hugo. One example of this additional evidence would be whether Carla told other people she wanted to kill Hugo

Second, the court must determine whether the defendant’s actions were just preparatory acts or punishable attempt. One way to think about preparatory acts and attempt is to picture criminal thoughts and the commission of a crime on opposite sides of a spectrum. Refer to the image below. On the left side of the spectrum are criminal thoughts, which are never punishable. On the right side of the spectrum are criminalized actions or omissions, which are almost always punishable.

A perpetrator will take a number of steps from the moment she starts thinking about committing the crime to the actual commission of the crime. Some of these steps are just preparatory acts, but others are objectively required to cause the crime. Preparatory acts are more similar to criminal thoughts so they are not punishable. Attempts are more similar to a completed crime in their harmfulness to society, so they are punishable. As a lawyer or a judge, you must be able to figure out where a perpetrator’s actions fall on this spectrum.



To figure out whether or not a perpetrator has engaged in preparatory acts or attempted a crime, closely read Article 23. Attempt requires the perpetrator to “initiate[] [a crime’s] execution by undertaking, wholly or in part, the acts objectively required to cause the result, which fails to take place only for reasons beyond the control of the perpetrator.” This means the

dividing line between preparatory acts and attempt is when the perpetrator has begun to execute the crime. Article 23 states that this occurs when the perpetrator has taken all of the actions objectively required to cause the crime. The perpetrator must be extremely close to completing the crime—so close that a reasonable person would not likely doubt that the perpetrator would have committed the crime if circumstances beyond her control had not stopped this.

To illustrate this, remember Carla from earlier in this section. There are six steps in Carla's plan to kill Hugo: (1) Carla buys a machete; (2) she maps out where Hugo's office is; (3) she goes to Hugo's office and waits with her machete; (4) she takes her machete out when Hugo enters the building; (5) she cuts Hugo with her machete; and (6) Hugo dies. A number of events could happen between steps 1-6 to prevent Carla from completing her plan. The dividing line seems to be between steps 3 and 4.

All of the actions before step 3 are mere planning activities, like Carla buying supplies and waiting at Hugo's office. If a reasonable person caught Carla in the preparatory acts stage, she would not necessarily conclude Carla's goal was to kill Hugo. A reasonable person could think that Carla had many legal reasons for buying a machete. Similarly, marking on a map where Hugo worked could have a number of innocent explanations. What about at step 3 when Carla is just waiting for Hugo to enter his office? This is more difficult, but because Hugo has not entered his office yet, it does not seem like Carla is close to completing her plan.

On the other side of the line are activities that wholly or partially help Carla execute the crime. Once Carla raises her machete to strike Hugo in step 4, she seems very close to completing her criminal plan. Only by pure luck could Hugo live, perhaps if a co-worker stopped Carla or Hugo was treated by a doctor and managed to survive his injuries. Additionally, a reasonable person would likely think Carla had the criminal goal of at least injuring Hugo. The crime is close to completion, and would "fail[] to take place only for reasons beyond" Carla's control. Therefore, when Carla has raised her machete to strike Hugo, she has crossed the line into attempt. This satisfies the second component of an attempt.

### *Impossibility*

There are two situations when the Penal Code will not punish an attempt. The first situation is **impossibility**. The second is voluntary desistance, which will be discussed in the next subsection. Impossibility occurs when a person cannot actually commit a crime given the circumstances, even though that person intends to commit a crime and initiates its execution.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 25. Unpunishability of attempt

An attempt is not punishable whenever the inappropriateness of the means employed or absence of an essential element to consummate the crime is manifest.

First, if the “means employed” by the perpetrator to commit a crime are inappropriate, then the attempt is not punishable. An absurd but legally correct example would be someone who tells his victim “I am going to kill you!” This shows an intent to commit a crime. Then the person tries to stab the victim with a ripe banana. If the perpetrator was holding a machete, this would certainly be punishable as attempt if the victim did not die. This is because a machete is an appropriate tool for killing someone. A ripe banana, however, is an inappropriate weapon. It is likely very difficult to kill someone with a banana. This person would not be guilty of attempt according to Article 25 because of the “inappropriateness of the means” used.

Impossibility can also occur if an “essential element” of the crime is absent. Look at Article 294, which criminalizes Active Corruption. Active Corruption is the crime of bribing a public official. Imagine that Fernando gives money to another person because he thinks the person is a public official. He hopes that the person will give him a political favour because he thinks the person is a public official. If this person is just an ordinary person who is not a public official, Fernando would not be guilty of attempted Active Corruption. This is because an “essential element” of the crime is missing—there is no public official for Fernando to bribe.

### *Voluntary Desistance*

The Penal Code will also not punish an attempt if the perpetrator later **voluntarily desists**. This means that a person stops carrying out his criminal plan and tries to stop the crime from happening. This can occur even if the perpetrator has moved beyond preparatory acts to attempt.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 26. Voluntary desistance

An attempt ceases to be punishable if the perpetrator voluntarily desists from proceeding to perform the crime, prevents its consummation, or prevents obtaining its result, or who puts forth serious efforts to hinder either.

The most important part of Article 26 is that the person acts *voluntarily*. A person who is caught in the middle of a criminal act did not stop acting voluntarily. For example, if one of Hugo's co-workers sees what is happening and grabs Carla's arm before she can strike, Carla has not *voluntarily* desisted. She only stopped because someone forced her to stop. A person also may not change his mind because the risk of arrest makes committing the crime more difficult. Again, suppose Carla is about to strike Hugo, but sees that several of his co-workers are approaching. Carla drops her machete and starts to run away because she realizes she will not be able to complete her crime. Carla's desistance is not voluntary in this situation either. The desistance needs to occur because the person genuinely changed her mind.

Voluntary desistance can take three forms: (1) "desist[ing] from proceeding to perform the crime;" (2) preventing its commission or result; or (3) "putting[ing] forth serious effort to hinder" the crime's commission or result.

Remember Article 23's definition of attempt. If Carla raises her arm to strike Hugo with her machete, she has crossed the line and initiated the execution of the crime. Nonetheless, if Carla suddenly regrets her actions and drops her machete before stabbing Hugo, she has voluntarily desisted. She has "desist[ed] from proceeding to perform the crime" by preventing its commission.

What if Carla leaves a bomb in Hugo's office? It will explode if he opens his office door. In this case, Carla has moved beyond preparatory acts to attempted Homicide. By placing a bomb in Hugo's office, she has done everything objectively required to kill Hugo. Can Carla still voluntarily desist from this crime? She may, but she must do more than "desist from proceeding to perform the crime." This is because Carla has already done everything necessary for the crime to occur. If Carla does nothing, the bomb will still go off and kill Hugo. Instead, Carla must either "prevent [the crime's] consummation" or "put forth serious efforts to hinder" its consummation. Carla can prevent the consummation of the crime by removing the bomb or



warning Hugo to not go into his office until she removes the bomb. If she is successful in doing so, she has voluntarily desisted. What if Carla is not successful? It is extremely bad if the bomb kills Hugo. Therefore Carla will have to “put forth *serious* efforts” to prevent the bomb from exploding and hurting other people.

### Remorse

Similarly to voluntary desistance, a person may not be punished if a crime has been completed but the person undoes any harm he has caused. This is called **remorse**.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 28. Remorse**

In crimes without violence or serious threat against persons, if the damage has been remedied, the object returned or the situation legalized before the crime is reported or the information or a complaint received, the penalty shall be extraordinarily mitigated or, depending on the circumstances, the agent shall be exempt from any penalty.

Remorse differs from voluntary desistance in two ways. First, remorse deals with the situation where the perpetrator has already completed the crime. Second, remorse only applies to non-violent crimes in which the perpetrator can undo all of the damage done. Obviously it is difficult for the perpetrator to undo the harm he has caused in a violent crime. Even if the perpetrator regrets his actions, the victim has still been injured. If Carla injures Hugo with her machete, she cannot heal his wounds. With property crimes, however, the perpetrator may be able to undo the harm caused. For example, a thief can undo the victim’s harm by returning the stolen property. According to Article 28, the perpetrator must do this *before* the crime is reported. If all of these requirements are met, the penalty will be extraordinarily mitigated. This means the penalty can be significantly reduced. The penalty may also be eliminated entirely.

The Penal Code may have exceptions for voluntary desistance and remorse for several reasons. First, someone who regrets his harmful actions is less of a threat to fundamental societal interests than someone who shows no regret. Second, voluntary desistance and remorse encourage people to try to stop crimes from happening. This helps prevent harm to others in society.

## 2. When Attempted Crimes Are Punishable

A person cannot be charged with both an attempt and the completed crime. In order for a crime to qualify as attempt, the crime *must* “fail to take place.” However, someone can be charged with the completion of one crime and the attempt of a second crime. For example, if a person tries to kill someone but only wounds the victim, the perpetrator can be charged with any crime that involves wounding another person *in addition to* attempted Homicide.

The punishability of attempt also depends on more than just the perpetrator’s conduct. Article 24 explicitly restricts the crimes for which an attempt is punishable.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 24. Punishability of attempt

- (1) An attempt is punishable only in connection with crimes of intent carrying a maximum prison sentence of more than 3 years and in all other cases expressly determined by law.
- (2) Except where otherwise provided, an attempt is punishable with an extraordinarily mitigated penalty in comparison to the consummated crime.

Only crimes requiring the *mens rea* of intent are punishable. This means that there can never be “attempted Manslaughter” because Manslaughter requires a *mens rea* of negligence. This makes sense. A perpetrator could never act with the *mens rea* of negligence when attempting a crime because the definition of attempt requires the perpetrator to “decide[] to commit” a crime.

Second, a crime must carry a maximum prison sentence of more than 3 years in order for its attempt to be punishable. This must be true unless something less than 3 years is “expressly determined by the law.” To determine whether a person can be charged with the attempt of a particular crime, you must look at: (1) the maximum penalty for the offence; and (2) if the statute specifically states that the attempt is punishable. Compare the following two statutes:

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 138. Homicide

Any person who kills another person is punishable with 8 to 20 years imprisonment.

### **Article 236. Obstructing the monitoring of an election**

- (1) Any person who, by any means, hinders the representative of any political party or force, legally established and running in the election, from exercising monitoring duties, is punishable with up to 3 years imprisonment or a fine.
- (2) The attempt is punishable.

Attempted Homicide is punishable because its maximum prison sentence is 20 years. This is greater than 3 years. The attempt to Obstruct the Monitoring of an Election is also punishable. Although Article 236, subarticle 1 states that the maximum prison sentence is 3 years, subarticle 2 specifically states that the attempt of the crime is also punishable. Finally, note that the penalties for attempted crimes are less severe than those for completed crimes. Article 24, subarticle 2 states the penalties for an attempt will be “extraordinarily mitigated.”

### **3. Summary**

For particularly serious crimes, the Penal Code allows the attempt to be punished whether or not the perpetrator completes the crime. These crimes are so harmful that their attempt shows that the perpetrator is a threat to fundamental societal interests. These are crimes with maximum prison sentences of 3 years or more, unless otherwise specified by law.

But, the principle of culpability limits when attempt can be punished. Preparatory acts are not punishable because they seem more similar to criminal thoughts than criminal actions. Only when the perpetrator has initiated the execution of the crime and demonstrated his intent to commit a crime, can he be punished. The crime must not have been completed because of circumstances outside of the perpetrator’s control. Those who show a willingness to harm to others should not escape punishment merely because of bad luck.

The Penal Code will not punish perpetrators who voluntarily desist from committing a crime. A person can voluntarily desist by choosing not to complete the crime. For non-violent crimes, if a perpetrator feels remorse and fully remedies the harm he caused the criminal penalties for the offence will decrease or be eliminated. This is because people who abandon their criminal plans likely do not need the rehabilitative effects of criminal punishment. These

people have already realized their mistakes and have tried to prevent harm from happening to others.

Finally, there are two reasons why the Penal Code allows a crime to be punished without the *actus reus* being committed. First, not every criminal is successful. A person who is close to committing a crime and stops only because of bad luck still threatens fundamental societal interests. She may try to commit the crime again and may be successful the next time. Second, it is better to stop a crime before it happens. Law enforcement officials should be able to stop and arrest someone one who clearly is about to commit a crime without having to wait until the perpetrator commits the criminal act and hurts another person. Therefore, attempts are punishable in limited circumstances because of the principle of culpability.

<b>Form of Crime</b>	<b>Description</b>	<b>Punishable?</b>
<b>Preparatory Acts</b>	Planning activities, which include anything up to initiating the execution of a crime.	<b>No</b>
<b>Attempt</b>	The perpetrator : (1) intends to commit a crime; and (2) is extremely close to committing the crime but does not complete it only for reasons outside of his control.	<b>Yes</b> , but only if punishing attempt is allowed by law, or the crime's maximum prison sentence is more than 3 years. Even then, the penalty is mitigated.
<b>Voluntary desistance</b>	A person voluntarily chooses not to commit a crime, even if he has already crossed the line into attempt.	<b>No</b>
<b>Completed crime</b>	All elements of the crime are present, including the <i>actus reus</i> , <i>mens rea</i> , and the criminal result.	<b>Yes</b>
<b>Remorse</b>	A crime is completed (all elements of the crime are present), but the perpetrator undoes all of the harm caused.	<b>Penalty mitigated, or no penalty given.</b>

## Questions

1. **Punishability of attempt:** Read the following Penal Code Articles and decide whether their attempt is punishable.
  - a) **Article 140, subarticle 1—Manslaughter:** Any person who, by negligence, kills another person is punishable with up to 4 years imprisonment or a penalty of fine.
  - b) **Article 145, subarticle 1—Simple Offences Against Physical Integrity:** Any person who causes harm to the body or health of another person is punishable with up to 3 years imprisonment or a fine.
  - c) **Article 171, Sexual Coercion:** Any person, who by the means of violence, serious threat, or after having made, for the purpose of compelling another person to endure or to practice with the same or a third person any act of sexual relief, such a person unconscious or placed the same in a condition where resistance is impossible, is punishable with 2 to 8 years imprisonment.
  - d) **Article 258, Property Damage:** Any person who wholly or partially destroys, cause damage to, defaces or renders unusable the property of another is punishable with up to 3 years imprisonment or a fine. The attempt is punishable.
2. Imagine you are a judge in Dili District Court. You hear the following case in your chambers. The police arrest Fernando for robbing a store. They find a gun in his bag and a piece of paper that says “Rob Helena tomorrow; away from store at noon for lunch,” along with an address. The police check the address and it matches with a store owned by Helena. Helena has not yet been robbed. The police talk to Helena and she says she normally leaves her store unattended at noon every day to go eat lunch. Can Fernando be convicted of attempting to rob Helena in addition to the robbery he has already completed?
3. Imagine you are a judge in Bacau District Court. You hear the following case in your chambers. The police arrested the defendant, Francisca, outside of a local store. The store’s owner, Angela, told the police that Francisca was outside of her store. Angela saw Francisca holding several rocks in her hand. Francisca raised her arm to throw the rock at Angela’s store when Angela yelled at her to stop. Angela pulled out a gun and threatened to shoot Francisca if she threw the rock. Francisca dropped the rock and ran away. Can Francisca be convicted of attempted Property Damage?

## Answers

- 1a. Attempted Manslaughter is not punishable. This is because attempt requires the *mens rea* of intent. Manslaughter is committed with the mental state of negligence.

- 1b. Attempted Simple Offences Against Physical Integrity are not punishable. This is because Simple Offences Against Physical Integrity has a maximum prison sentence of 3 years and the Article does not explicitly state that the attempt is punishable.
- 1c. Attempted Sexual Coercion is punishable. This is because Sexual Coercion has a maximum prison sentence greater than 3 years (8 years).
- 1d. Attempted Property Damage is punishable. This is because Article 251, subarticle 2 explicitly states that the attempted Larceny is punishable.
2. No, Fernando cannot be convicted of attempting to rob Helena's store. Writing down Helena's address and that her store is normally unattended at noon are preparatory acts. These acts are not enough for a reasonable person to say Fernando is extremely close to committing the crime.
3. Yes, Francisca can be convicted of attempted Property Damage. Even though Francisca runs away before she throws the rock at Angela's store, she did not do so voluntarily. She only stopped because Angela forced her to when she pulled out a gun. Therefore Francisca has still attempted Property Damage and does not qualify for voluntary desistance under Article 26.

### III. PERPETRATORS OF CRIMES

#### SECTION OBJECTIVES

- To explore the different ways a person can participate in the commission of a crime.
- To understand how the Penal Code assigns guilt based on the level of participation in a crime.

When a group of people work together to commit a crime, often only one person will actually commit the *actus reus* of the crime. Yet, all group members have the *mens rea* of intent towards committing the crime. Who can be convicted of a crime when only one person commits the *actus reus*, but multiple people contribute to its commission? It seems like everyone who participates in the crime should be considered guilty. By desiring and contributing to harming other people, each member may pose a threat to fundamental societal interests.

This is generally correct, but sometimes the situation can be complicated. Recall Leopoldo, the cow thief from Chapter 2. Suppose Leopoldo wants to steal Cecelia's cow. Leopoldo will not steal the cow on his own because he is afraid of being caught. He decides he will try to convince his friend Miguel to steal Cecelia's cow for him. Miguel, not Leopoldo, will be the person who commits the *actus reus* of the crime.

Stealing Cecelia's cow is Leopoldo's idea, not Miguel's. It does not seem fair to punish Miguel and not Leopoldo. Leopoldo still has the *mens rea* for Theft, even if he does not commit the offence himself. He still ensures that the Theft is committed, so he should be considered guilty of Theft. Punishing Miguel can be more complicated. What if Leopoldo tricks Miguel by telling Miguel that Cecelia's cow actually belongs to him? Even though Miguel commits the *actus reus* of Theft, he does not act with a criminal mental state. In this case, Miguel seems more innocent so perhaps he should not be punished. What if Miguel and Leopoldo plan together to steal Cecelia's cow? In this case, Miguel seems just a guilty and harmful to societal interests as Leopoldo because he now has a criminal mental state *and* participates in the criminal act.

The Penal Code differentiates between perpetrators by looking at how involved the person was in the crime. A perpetrator who plans out a crime but does not commit its *actus reus* may still be fully punished. In contrast, a perpetrator's punishment may be lessened if his involvement is minimal. These distinctions will be discussed below.

## 1. Types of Perpetrators

The Penal Code defines three ways a person can participate in a crime: **principal authorship**, **instigation**, and **complicity**. Each of these types of perpetrators will be discussed in more detail below.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 29. Perpetrators

Participation in the commission of a crime may take on the form of principal authorship, instigation or complicity and there can be various joint participants in the same act.

#### Principals

**Principal authorship** refers to when a person commits the *actus reus* of a crime, or uses a third party to commit the *actus reus*. A perpetrator who has principal authorship of a crime is called the **principal**.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 30. Authorship

(1) A principal is the person who commits the act either directly or through a third party who serves as an instrument for the former.

...

A perpetrator can be a principal in two ways. First, a principal can commit the *actus reus* of a crime. This is very common and is used in examples throughout this textbook. Second, a principal can use a third party as an instrument to commit the crime. An **instrument** is a third party who is forced or tricked by the principal to commit the *actus reus* of a crime, even though the third party does not wish to participate in the crime. This is very different from the group crimes described below because the third party instrument is *not* criminally liable.

How can someone participate in a crime without being criminally liable? Think back to previous chapter on *mens rea*. Remember that committing the *actus reus* of a crime is not enough to receive a criminal penalty. The person must also have a criminal mental state. A



perpetrator may lack the required criminal mental state because the principal has tricked or forced her into committing the crime.

Recall the example of Leopoldo and Miguel. Suppose Leopoldo tells Miguel that his farm is very large and includes Cecelia's property. Leopoldo asks Miguel to help him by bringing him his cow. Miguel believes that Cecelia's cow is actually Leopoldo's, so he agrees to help Leopoldo. He takes Cecelia's cow and brings it to Leopoldo. Miguel has committed the *actus reus* for Theft, which is called Larceny in the Penal Code (Article 251). But Miguel lacks a criminal *mens rea*. Because Leopoldo lied to him, Miguel thinks he is bringing Leopoldo his own property. This is not a crime. Leopoldo could also have forced Miguel to steal Cecelia's cow. He could have threatened to hurt Miguel's family if Miguel did not take Cecelia's cow for him. Miguel would still not be acting with a criminal mental state in this case because he is being forced to commit the crime of Larceny.

In both of these scenarios, Leopoldo is the principal in stealing Cecelia's cow. Miguel is the one who actually takes Cecelia's cow, but he only does so because of Leopoldo's criminal plans. Leopoldo is the participant with the criminal mental state. Therefore, the Penal Code treats Leopoldo as if he committed the *actus reus* of the crime instead of Miguel. Miguel is not punished because he is only an instrument.

### Coprincipals

The most complicated crimes generally involve multiple perpetrators. We will first focus on crimes where the perpetrators have an equal role in committing a crime and, therefore, are equally *guilty*. These perpetrators are called **coprincipals**. Read Article 30, subarticle 2 to better understand what makes a participant a coprincipal.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 30. Authorship**

...

- (2) Coprincipals of an act are any persons who, by expressed or tacit agreement, take direct part in commission of a crime or join forces in commission of the same crime.

Coprincipals are equally guilty because they share a common criminal plan. According to Article 30, subarticle 2, this criminal plan is made through an "expressed or tacit agreement." In

order for participants to be considered coprincipals, a prosecutor must show more than mere involvement in the commission of a crime. There must be evidence that the participants created a common criminal plan through an express or unspoken agreement. This means coprincipals generally plan a crime *together* and agree to everyone's role in committing the crime. A coprincipal plays more than a supporting role in the planning and execution of a group crime. A coprincipal also has influence over which crimes are committed and how they are executed.

It is important to know the difference between coprincipals and other types of perpetrators. This is because of the concept of **joint liability**. Under joint liability, the *actus reus* of one coprincipal can be attributed to all other coprincipals. This means that a coprincipal will be treated as though he committed the *actus reus* of the crime, even if another coprincipal actually committed it. This is because of how involved the coprincipal is in helping to plan the crime. Joint liability is a complicated concept so let us consider the following example.

Suppose Leopoldo tells Miguel that he wants to steal Cecelia's cow. Miguel also dislikes Cecelia. Miguel tells Leopoldo he would like to burn the barn where Cecelia keeps her cow when they steal it. Leopoldo agrees to this and says they will meet that night to execute their plan. According to their plan, Leopoldo and Miguel go to Cecelia's property. Once Leopoldo takes Cecelia's cow out of her barn, Miguel sets the barn on fire. Together, Leopoldo and Miguel take Cecelia's cow back to Leopoldo's farm.

In this case, Leopoldo has committed Larceny and Miguel has committed Arson. Arson is the crime of setting property on fire (Article 263). Because of their common criminal plan, Leopoldo and Miguel are coprincipals. This means joint liability can be applied. Leopoldo can be held responsible for Miguel's Arson, and Miguel can be held responsible for Leopoldo's Larceny. This means that Leopoldo is guilty of both Larceny and Arson, even though he only committed the *actus reus* for Larceny. Similarly, Miguel is guilty of both Larceny and Arson, even though he only committed the *actus reus* for Arson.

Joint liability exists because coprincipals are considered equally threatening to fundamental societal interests. Coprincipals desire the same criminal harm and execute a common criminal plan. Even if their actions are different, coprincipals have the same *mens rea*. This common *mens rea* allows a court to charge one coprincipal with the actions done by the other coprincipals.

### **Limits on Joint Liability**

There are limits to joint liability. In the example above, Miguel and Leopoldo are coprincipals of each other's crimes because they were part of a criminal plan. Leopoldo intended for Miguel to set fire to Cecelia's barn, while Miguel intended for Leopoldo to steal Cecelia's cow. However, coprincipals cannot be charged with actions unrelated to the criminal plan.

Suppose Miguel tells Leopoldo he will help with the plan only if there is no risk of violence. Leopoldo tells Miguel that he knows Cecelia will not be home that night and he will not bring any weapons with him. However, Leopoldo does not actually know whether Cecelia will be at home and brings a machete with him. Cecelia is actually at home and hears Leopoldo and Miguel breaking into her barn. When she approaches them, Leopoldo takes out his machete, and kills Cecelia with it.

In this situation, Leopoldo's act of Homicide *will not be attributed* to Hugo. Hugo and Leopoldo's mental states differed with respect to committing acts of violence. Acts that were not part of the agreement will not be considered part of the common criminal plan. Because they are not part of the common criminal plan, joint liability cannot be applied.

### *Secondary Participants: Instigators and Accomplices*

People can also participate in crimes as **secondary participants**. Secondary participants are less involved in the crime than coprincipals. One way of distinguishing between coprincipals and secondary participants is by looking at the level of *control* a perpetrator has over the commission of a crime. A coprincipal will have a substantial amount of control over the way a crime is committed. This is true even if the coprincipal does not commit the *actus reus* of the crime herself. In contrast, a secondary participant primarily plays a supporting role in the crime. There are two types of secondary participants defined in the Penal Code: instigators and accomplices.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 31. Instigation**

A person is punishable who, directly and maliciously, instigates another person to commit the crime, if said crime is actually committed or initiated.

#### **Article 32. Complicity**

- (1) A person is punishable as an accomplice who, with intent, materially or morally aids another person to commit a crime.

- (2) In the case of an accomplice, the penalty prescribed for the unlawful act is extraordinarily mitigated.

An **instigator** is someone who “directly and maliciously” causes another person to commit a crime. An instigator does not help plan and execute a crime like a coprincipal. But an instigator may know the principal wants to commit a crime and provides encouragement or information to make sure the principal commits the offence, or causes additional harm. Because the instigator knows the principal is likely to commit the crime, she acts “directly and maliciously” by providing encouragement. However, a person cannot be an instigator just because the principal used information provided by that person to commit a crime. Unlike a coprincipal an instigator has no other role in the commission of the crime besides causing another person to commit a crime.

For example, Leopoldo and Miguel are talking about how much they dislike Cecelia. Again, Miguel says he plans on lighting Cecelia’s barn on fire. Leopoldo tells Miguel that this is a good plan but that Cecelia’s cow is worth more to her than her barn. He suggests that Miguel steal her cow if he wants to hurt her. Later that night, Miguel sets Cecelia’s barn on fire and steals her cow. Because Leopoldo knew that Miguel wanted to hurt Cecelia, he “directly and maliciously” encouraged Miguel to commit a crime when he told him to steal Cecelia’s cow. Miguel would not have had the idea to take Cecelia’s cow if Leopoldo had not suggested it to him. Even though Leopoldo did not steal Cecelia’s cow, he can still be charged with Larceny as an instigator. Miguel would be charged as a principal.

However, Leopoldo and Miguel are not coprincipals. They do not have a common plan to steal Cecelia’s cow. Penalties are not reduced for instigators. Why does the distinction between instigators and coprincipals matter then? The answer is joint liability. Because they are not coprincipals, Leopoldo cannot be charged with Miguel’s Arson. Leopoldo can only be charged with Larceny as an instigator.

The phrase “directly and maliciously” is also an important limitation when defining who is an instigator. Imagine Leopoldo and Miguel are discussing farming and Leopoldo told Miguel that Cecelia’s cow is very valuable. If Miguel decides to steal Cecelia’s cow based on this information, Leopoldo would not be considered an instigator. Even though Leopoldo gave

Miguel this information, he did not want Miguel to harm Cecelia or steal from her. Thus, Leopoldo would not be punished.

**Comparative Law:  
Masterminds in German Criminal Law**

The German Penal Code discusses additional differences between a coprincipal and an instigator. In Germany, the instigator is called a “**mastermind**” of a crime. The mastermind does not commit the *actus reus* of a crime. Additionally, the person who actually commits the *actus reus* of the crime has control over when and how the offence is committed. For example, imagine that Leopoldo and Miguel are just friends. Suppose Leopoldo tells Miguel that Miguel should steal Cecelia’s cow for him. Leopoldo would be treated as an instigator in Germany. This is because Miguel still has control over how and when he will steal Cecelia’s cow. Assuming Leopoldo has not threatened him, Miguel could always choose not to steal Cecelia’s cow. It does not seem like Leopoldo and Miguel are acting together based on a common criminal plan.

German criminal law also looks at whether this is an organization to determine whether someone is an instigator or coprincipal. The more control a person has over an organization the more likely he will be considered a coprincipal rather than an instigator. For example, imagine that Leopoldo and Miguel are members of a gang. Leopoldo is the leader of this gang and plans out most of the crimes that other gang members commit. If Leopoldo orders Miguel to steal Cecelia’s cow, Leopoldo would be treated as a coprincipal according to German Law. The important distinction under German criminal law is Leopoldo is the leader of the gang. Because Leopoldo is the leader, Miguel has less control over when and how the crime takes place and it is difficult for him to resist. Leopoldo is the person primarily in charge of deciding whether the crime is committed, not Miguel.

An **accomplice** has the lowest level of involvement in a crime. Therefore, accomplices are punished least severely. An accomplice does not commit the *actus reus* of a crime. Instead the accomplice intends to materially or morally aid another person in committing a crime. This means that an accomplice must *intend* to help someone else commit a crime. But, someone who accidentally helps another person commit a crime is not an accomplice. For example, a taxi driver who picks up a thief will not be considered an accomplice. The taxi driver thinks that the thief is a regular customer and is not intending to aid the thief in fleeing from the place where he has just stolen property.

An accomplice must also help another person commit a crime. How is an accomplice different from a coprincipal? An accomplice plays more of a supporting role and has less influence in the planning and execution of a crime. An accomplice primarily does what the principal (or coprincipals) of a crime tells her to do. To illustrate how a person can have a

primarily supporting role in a crime, imagine that Miguel asks his sister, Marquita, to help him steal Cecelia's cow. He asks Marquita to go with him to Cecelia's farm and tell him if she notices lights go on at Cecelia's house, or if she sees any cars approaching. Marquita agrees to help her brother.

In this situation, Marquita is only an accomplice. She had no role in planning the crime and she may be motivated by a desire to help her brother, rather than wanting to cause Cecelia harm. However, Maria knows that Miguel is stealing Cecelia's cow. By watching for people who might interrupt Miguel's crime, Marquita is intentionally aiding her brother's criminal act. Therefore, she is an accomplice.

Because of her lower level of participation, however, Marquita's punishment will be mitigated. Marquita seems like less of a threat to fundamental societal interests than Leopoldo or Miguel. She is not actively trying to cause harm towards other people. She is only doing what her brother told her to do. Although her punishment will be mitigated, it will not be entirely eliminated. Marquita should have told her brother she would not help him because he is about to commit a crime. Marquita is still somewhat culpable for the commission of the crime, so she will be punished for her role as an accomplice.

## **2. Assigning Guilt**

A person's role in a crime does not only determine his punishment. There may be other characteristics that be attributed to other participants in a group crime. For example, some participants may be able to use certain defenses, while other participants may be able to show certain attendant circumstances. These situations are discussed in Article 33 and Article 34.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 33. Guilt in joint participation**

Each individual participant is punishable according to his or her guilt, regardless of the penalty or degree of guilt of the others.

#### **Article 34. Unlawfulness in joint participation**

- (1) If the unlawfulness or degree of unlawfulness of an act is dependent on certain qualities or special relationships of the perpetrator, it is sufficient that such qualities or special

relationships are reflected in any one of the joint participants, for the respective penalty to be applicable to them all, unless specific law provides otherwise.

- (2) Whenever, pursuant to the rule provided in the previous subarticle, a more serious penalty is applicable to any of the joint participants, said penalty may be replaced by the penalty that would apply if the rule had not intervened, depending on circumstances of the case.

When you first read Articles 33 and 34, you may think they seem to contradict each other. Article 33 states that individuals will only be punished according to their level of guilt. But Article 34 states that each participant of a crime will be assigned the special qualities or relationships of other participants. How do these two provisions fit together?

Article 33 refers to individual legal characteristics like defenses. If one person has a defense that she can use, she may assert it in court to reduce or eliminate her culpability for the crime. This defense cannot be used by other participants. In contrast, Article 34 refers to elements of a crime. If one participant has a characteristic that is an attendant circumstance of a crime, every other participant will be treated as having that characteristic. This means that the other participants could also be punished for the crime that includes those characteristics. For example, imagine that three participants will commit a crime. The group agrees that they will hurt one of the participant's children. If the group is convicted, the court will treat the child as if he belonged to all of the participants. As a result, each participant could be charged with crimes that involve the attendant circumstance of harming a child, or injuring one's own child.

Additionally, one member of a group crime may change his mind about committing the crime, but the other participants may not. Recall the previous section's discussion of voluntary desistance. Can one member of a group crime voluntarily desist even if other participants still decide to commit the crime? The answer is yes, according to Article 27.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 27. Cases of joint commission**

In the event of joint commission, the attempt of a person shall not be punishable, if the same voluntarily desists from proceeding with commission of the crime, or hinders or voluntarily desists in realizing its result, or earnestly endeavours to hinder either, even if other coparticipants proceed with execution or commission of the act.

Article 27 includes situations where the perpetrator is a member of a group who is trying to carry out the same criminal plan. For example, imagine that Leopoldo and Miguel are planning to steal Cecelia's cow. According to Article 27, if Leopoldo decides he no longer wants to steal Cecelia's cow, he must try to prevent Miguel from stealing Cecelia's cow in order to qualify for voluntary desistance. If Miguel still wants to commit the crime, Leopoldo must "earnestly endeavour" to prevent the crime's consummation. This means it is not enough that he leaves Cecelia's farm once he and Miguel break into it. Leopoldo must actually try to stop Miguel. Perhaps he could take any tools Miguel had with him, or he could try to find Cecelia to warn her, or he could call the police. Putting forth these efforts should be enough to qualify Leopoldo for voluntary desistance, even if Miguel succeeds in stealing Cecelia's cow. If Leopoldo actually stops Miguel from stealing Cecelia's cow, he will not be punished.

### **3. Summary**

In this section we learned that there are other ways that a person can be convicted of a crime without committing the *actus reus*. Acting as an accomplice is one way. Like with attempt, we must be careful when using identifying accomplices to ensure that the principle of culpability is met. We do not want to punish criminal thoughts alone. Someone who helps with the preparatory stages of a crime may not threaten fundamental societal interests as much as someone who commits the *actus reus* of the crime, or thinks of an elaborate plan to commit the offence. For this reason, the Penal Code tries to differentiate between the different ways a person can participate in a crime.

We also learned about group crimes and the different ways a person can participate in a group crime. There is a difference between authors of a crime and secondary participants. There are two types of authors: principals and coprincipals. Principals either commit the *actus reus* themselves or have an instrument commit the *actus reus*. When a principal uses an instrument to commit a crime, the person does not have the required *mens rea* to commit the crime because she is deceived or forced to act by the principal.

When a group crime is committed by coprincipals, each coprincipal contributes to the planning and execution of the crime. Most importantly, coprincipals can be charged with each other's crimes because of joint liability, as long as they are a part of a common criminal plan.



Authors are different from secondary participants because of the level of control they exercise when executing a crime. Compared to coprincipals, secondary participants have a more minor role in how a crime is executed. An instigator is someone who directly and maliciously causes another person to commit a crime. This person differs from a coprincipal because she generally only gives the principal suggestions. The principal is usually still the person who actually executes the crime. The principal will also make the final decision about whether to act on the instigator's suggestion. If the principal commits a crime because of the instigator's suggestion, however, the instigator will receive the same punishment as the principal.

An accomplice also plays a minor role in committing the crime by intentionally helping another person commit a crime. The accomplice only has a supporting role. The accomplice primarily does what a principal tells her to do. This person is punished less severely than authors or instigators because an accomplice has a smaller role in the commission of the crime.

Type of Perpetrator	Penalty Given
Principal	Full penalty
Coprincipal	Full penalty
Instigator	Full penalty, but only if the crime is actually attempted or committed
Accomplice	Extraordinarily mitigated penalty
Instrument	No penalty

### Questions

1. Odete asks Helena to help her break into Odete's neighbour's house. Odete's neighbour is named Julio. Odete wants to steal Julio's rice. Odete tells Helena that all she needs to do is talk to Julio so he does not enter his house while Odete is breaking into it. Helena agrees to do this. The next day, Helena asks Julio to come to her house to talk. Odete then goes to Julio's house to steal his rice. Although Julio has gone out, his wife Carla is still at home. Carla sees Odete break in and starts screaming. To stop her from screaming, Odete hits Carla on the head and knocks her unconscious. Odete is able to steal the rice and then shares some of it with Helena.

Later, Odete is caught by the police and charged with Larceny and Simple Offences Against Physical Integrity because she has committed the *actus reus* for both. What can Helena be charged with? What type of perpetrator is Helena?

2. Ruel and Fernando decide to rob a store together. Ruel will drive Fernando to the store and then wait in the car to make sure no one sees them. Fernando will go into the store and take money from the owner's cashbox. Neither Fernando nor Ruel owns a weapon. Instead of buying one, Ruel asks his brother Vicente if he can borrow his machete. Ruel does not tell Vicente what he is using the machete for. Vicente allows Ruel to borrow his machete. The next day, Ruel drives Fernando to the store and Fernando robs it. Ruel drives Fernando away and they split the money. What are Ruel, Fernando, and Vicente roles in the robbery?

### Answers

1. Helena can be charged as an accomplice to Odete's Larceny. A prosecutor might try to argue that Helena should be considered a coprincipal. The prosecutor would argue that Helena and Odete planned to steal Julio's rice and executed this plan together. However, Helena's role in stealing the rice is relatively minor. Odete thought of the plan and Helena only followed Odete's specific instructions to make sure Julio was not in his house. Because of she is not as involved in the crime, Helena would most likely be considered only an accomplice and not a coprincipal.

Additionally, Helena would only be an accomplice to Larceny and not to Simple Offences Against Physical Integrity. This is because Helena did not intend to aid Odete in hurting Carla. In fact, Helena's role was to make sure the Larceny was not violent by keeping Julio out of his home. Helena only intended to aid in Odete's plan to steal Julio's rice. Therefore she is only an accomplice in Larceny.

2. Ruel and Fernando are coprincipals. Vicente has no role in the crime. Ruel and Fernando share a common criminal plan to rob the store. Even though Fernando is the only person who commits the *actus reus* for robbery, Ruel can also be charged with robbery because he is a coprincipal. Ruel does more than just follow Fernando's instructions. Ruel helps to plan the crime and also asks his brother Vicente for a machete. Vicente cannot be charged as an accomplice to Robbery. Again, an accomplice must intend to aid in the commission of a crime. Vicente did not intend to aid in the robbery because he did not know what Ruel would use his machete for.

## IV. CHAPTER REVIEW

### SECTION OBJECTIVES

- To review how criminal liability is established.
- To review the difference between public and semi-public crimes.
- To review when a crime that is not completed can be punished as an attempt.
- To review who can be prosecuted for committing crimes based on how much the person participates in the crime.

In this Chapter we learned about the mechanics of prosecuting a crime. In some cases, it is not enough that all the elements of a crime are present. If a crime is semi-public, a complaint must be filed before it can be prosecuted. If a crime is public, it will be prosecuted automatically. It is also important to determine the time and place when a crime took place, so that you know which law to apply. The time and place a crime occurs is determined by looking at its *actus reus*.

Based on the principle of legality, a crime can only be prosecuted if it was explicitly criminalized at the time it was committed. The prohibition on analogy means that a person cannot be prosecuted for an act or omission similar to one criminalized in the Penal Code. The act or omission must be specifically criminalized. The principle of non-retroactivity prohibit a person from being prosecuted for an act or omission that later becomes a crime. This is because the perpetrator did not know at the time that his actions violated any law.

A person can be prosecuted for attempted crimes and group crimes, even if the perpetrator did not commit the *actus reus*. However, the principle of culpability places certain limits on when criminal penalties can be applied. In an attempted crime, a person can be prosecuted for a crime *before* he has actually committed the *actus reus*. This is so that people who threaten fundamental societal interests can be stopped and prosecuted before they actually harm other people. However, a person must intend to commit a crime *and* initiate its execution. Mere preparatory acts are *not* punishable.

A person who voluntarily desists from attempting a crime is not punishable even *after* he has initiated its execution. Similarly, a person who feels remorse for a *non-violent* crime *after* its

completion may not be punished, or have her penalty lessened, if she undoes all of the harm caused by her criminal act or omission.

In group crimes, a principal commits the *actus reus* of a crime, but coprincipals, instigators, and accomplices may be punished for their contributions to the criminal activity. When assigning guilt, the Penal Code will differentiate between these types of perpetrators. Coprincipals are the most culpable because they expressly or tacitly agree to a common criminal plan. Joint liability can also be used to find coprincipals guilty of each other's crimes. Instigators directly and maliciously cause others to commit crimes. Although they are less involved in the commission of the crime, their penalties are not lessened. Accomplices, however, have only supporting roles in the commission of a crime. Because of their lesser involvement, their penalties are mitigated.

<b>Question</b>	<b>Answer</b>	<b>Penal Code Article</b>
<b>How can a crime be prosecuted?</b>	Automatically if it is a public crime; when a complaint is filed if it is a semi-public crime.	Penal Code Annex
<b>What crimes can be punished?</b>	Crimes defined in the Penal Code at the time the act was done.	Articles 1-3, Articles 5-6
<b>When can a crime be punished?</b>	<i>Before</i> the act or omission occurs if the perpetrator intends to commit a crime and has initiated its execution; but <u>not after</u> the act or omission occurs if the perpetrator voluntarily desisted or demonstrates remorse.	Articles 22-26, 28
<b>Who can be convicted of a crime?</b>	Principals, coprincipals, instigators, and accomplices	Articles 29-32

### Questions

1. The police arrested the defendant, Domingos, after he had a fight with Joao. Joao is badly injured and has machete wounds on his arms and shoulders. Joao tells the police that he was leaving his office at 5 o'clock in the afternoon when Domingos jumped out of the bushes and stabbed him repeatedly with a machete. The police look in Domingos's pocket and find a piece of paper with Joao's office address written down, and the words "5 o'clock" written next to the address.

- a) If you were a Public Defender, how would you argue that Domingos did not attempt to kill Joao?
  - b) If you were a prosecutor, how would you argue that Domingos did attempt to kill Joao?
2. Antonio is talking to Manuela about his plans to steal money from a local store. Manuela tells Antonio that she believes the owner of the store, Monrique, keeps a machete in the store to protect himself. She tells Antonio that he should bring a weapon with him when he robs the store. She offers to give him her gun and tells him that Monrique is likely to fight back so Antonio should not be afraid to shoot him. Antonio takes Manuela's gun with him when he robs Monrique's store. When Monrique draws out his machete stop Antonio, Antonio shoots Monrique in the arm with Manuela's gun. Assume that Antonio can be charged with both Larceny and Robbery, which is committing Larceny by violent means. Can Manuela be charged with any crimes? What type of perpetrator is she?

### Answers

- 1a) A Public Defender would argue that Domingos did not attempt to kill Joao because he never intended to kill Joao. The public defender would point to Joao's injuries as evidence. Joao's injuries are on his arms and shoulders, not in places that could kill him. This suggests that Domingos only intended to injure Joao, not kill him.
- 1b) A prosecutor would argue that Domingos did intend to kill Joao and is guilty of attempted Homicide. A prosecutor would argue that Domingos planned out his attack on Joao. Additionally, Domingos caught Joao by surprise which suggests that he did not want Domingos to be able to defend himself against any attacks.
2. Manuela can be charged as an instigator of Robbery. Manuela is not an instigator because Antonio had already decided to commit Larceny when he talked to her. Therefore Manuela could not instigate his Larceny. However, Manuela directly and maliciously caused Antonio to commit Robbery by telling him to bring a gun to Monrique's store. Because of this suggestion, Manuela is an instigator of Antonio's Robbery.

Notice that Manuela is not a coprincipal because she and Antonio do not share a common criminal plan. Antonio came up with the idea to steal money from Monrique by himself. He also retained control over the time and general means of robbing Monrique. Manuela's minimal amount of control over how the crime is committed means she is not a coprincipal. This also means joint liability cannot be used to charge her with Larceny.

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## CHAPTER 4: DEFENSES

### CHAPTER OBJECTIVES

- To learn what a defense is and when a defense can be asserted by a defendant.
- To understand the different types of defenses in Timorese criminal law.
- To understand the difference between an excuse and a justification.

In this chapter we will learn about defenses. Article 43 tells us that some acts which are usually unlawful may not be unlawful if they are done for certain, specific reasons. These reasons are called defenses. A **defense** is a situation or set of circumstances which show that a criminal defendant is not guilty of wrongdoing, or which mitigate the defendant's guilt. A **partial defense** is a type of defense that mitigates, but does not erase, the amount of culpability assigned to a defendant. A **complete defense** is a factual circumstance or argument that eliminates all of the defendant's culpability. If a complete defense is proven, it will end the prosecution against the defendant. Defenses are listed in Articles 44 through 50 of the Penal Code.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 43. Exclusion of unlawfulness

- (1) When the unlawfulness of an act, considered in its entirety, is excluded by the legal system, the same shall not be liable to criminal punishment.
- (2) Specifically, any act committed in exercise of a right or performance of a duty, in legitimate defense, a state of justifying need or with consent, is not unlawful.

Defenses can typically be divided into two categories: **excuses** and **justifications**. An excuse or a justification can provide a complete or a partial defense to a crime. In this chapter we will first learn about excuses. Excuses are listed in Articles 20 and 21 and are separate from the other type of defenses in the Penal Code. Two types of excuses are the Excuse of Age and the Excuse of Insanity. When an **excuse** is asserted, the defendant argues that he did not have the

*mens rea* necessary to commit the alleged crime. When a defendant makes an excuse, he concedes that the act was wrongful, but seeks to avoid punishment because he did not realize his actions were wrongful *at the time he acted*. For example, imagine that Jose parks his car under a sign that clearly reads “No Parking.” When asked why he did so, he first replies “I had to. The voices in my head told me to do it.” This is an excuse. We recognize that Jose should not have broken the law; but, Jose likely has a mental disability because he hears voices in his head. As a result, he should not be punished for committing the unlawful act.

In the next part of this chapter, we will discuss justifications. A defendant who asserts a **justification** for her conduct states that her actions were justified under the circumstances. Justification claims emphasize the rightness or appropriateness of an act that is unlawful and would otherwise subject the perpetrator to criminal punishment in normal circumstances.<sup>15</sup> When a defendant asserts a justification, she states that the elements of the offence have been carried out, but she challenges whether these actions were wrongful. By invoking a justification defense, the defendant wants society to acknowledge that her conduct was appropriate because of the circumstances.

An example can also help explain this concept. Imagine that Jose parks his car under a “No Parking” sign. This time, when he is asked why he did so, he says “I had to. I was taking my injured child to the hospital to save his life.” This is an example of Jose asserting a justification. He is claiming that, although the act appears to be illegal, he only violated the law in order to achieve a greater good—saving his child’s life.

#### **What is Not a Defense?**

The difference between excuses and justifications is mostly conceptual rather than practical. However, the terms “justification” and “excuse” are frequently used in Timorese criminal law, so it is important that you understand the difference. It is also important to understand what statements are not defenses. In criminal cases, not every claim that a defendant makes is a defense. For example, a defendant who denies committing a bad act is not asserting a defense. Instead, a defendant who asserts a defense is admitting that he committed the act he has been charged with but tries to excuse or justify the actions. Some claims that we initially think of as defenses are actually just facts or assertions that contradict the prosecutor’s case against the defendant.

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<sup>15</sup> Bakircioglu, Onder. *Self Defence in International and Criminal Law*. London, United Kingdom: Routledge, 2011. 17.



For example, a defendant who claims that he was in Dili on the night that a killing occurred in Baucau is *not* raising a defense. He is challenging a critical aspect of the prosecutor’s case—that he was present at the scene of the crime. This type of claim is called an **alibi**. “Alibi” means “elsewhere” in Latin. When a defendant gives an alibi he is claiming that he was at a place other than where the crime allegedly occurred. A criminal defendant who relies on an alibi does not deny that a crime was committed. Rather, he denies the ability to have committed the crime because he was elsewhere at the time.<sup>16</sup> An alibi is not a defense because a defendant who claims to have an alibi does not admit to committing the crime.

### Questions

1. João is charged with murdering Hugo. He admits that he killed Hugo, but says that he should not be found guilty because he killed Hugo in order to keep Hugo from killing João’s son. Is this an excuse or a justification?
2. Santana is charged with robbery. She argues that the police arrested the wrong woman and that it was actually Veronica who committed the robbery. Is this a defense?

### Answers

1. João is asserting a justification for the murder. Recall that the primary difference between excuses and justifications is that if the defendant asserts a justification, he argues that his actions were appropriate or right. João is arguing that, under the circumstances, he did the right thing by protecting his son’s life, even though that meant taking Hugo’s life.
2. This is not a defense. Recall that a defense is when a defendant admits she committed the act, but argues that it was not unlawful because of some justification or excuse. Santana is arguing that she did not commit the act because someone else did.

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<sup>16</sup> Scheb, John M., and John M. Scheb II. *Criminal Law and Procedure* 6th Edition. Belmont, California: Thomson/Wadsworth, 2008. 358.

## I. EXCUSES: THE DEFENSE BY REASON OF AGE

### SECTION OBJECTIVES

- To understand why there is an exemption from criminal liability because of age.
- To compare the Defense by Reason of Age in Timor-Leste with other countries' practices.

In Timor-Leste, a defense that can be asserted is the **Defense by Reason of Age**. This defense is a type of excuse. This defense claims that the perpetrator is incapable of understanding the moral significance of his behaviour and should not be blamed for his actions as a result.

#### 1. The Rationale for the Defense by Reason of Age

The Defense by Reason of Age is listed in Article 20. This defense excuses children's criminal actions, even though those actions are wrong. This is because children are not as capable as adults at making intelligent, rational decisions.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 20. Exemption from criminal liability by reason of age

- (1) Minors under 16 are exempt from criminal liability.
- (2) For persons over 16 years of age and less than 21, the law shall determine specific provisions concerning application and execution of criminal penalties in any and all cases not provided for in specific legislation.

The rationale for the Defense by Reason of Age is that children younger than a certain age lack the capacity to form the *mens rea* to commit an offence. Another rationale is that young children require protection from the harshness of the criminal justice system. Most young children do not have the intelligence, judgment, emotional maturity, and moral capacity to make the rational choices that criminal law requires. For this reason, people who have not reached the age of majority are excluded from criminal liability for their actions. In Timorese criminal law, the age of majority is 16 years old. The relevant age is the defendant's age at the time he allegedly committed the offence, *not* his age at trial.

The Penal Code also protects young people aged 16 to 21 years old by allowing reduced penalties if they commit criminal acts. This may be because children's judgment and maturity develops slowly over time. As a result, their criminal liability during this period of development is mitigated by law.

## **2. The Defense By Reason of Age in Other Countries**

Timor-Leste's Defense by Reason of Age is unique because it completely excludes minors from all criminal liability until they reach age 16. The Latin term for this policy is *doli incapax*, which means "incapable of wrong." This means that no matter what the minor has done, she cannot be criminally prosecuted. In many other countries, children can be prosecuted for crimes, but they are prosecuted in a separate system known as the "juvenile justice system." Timor-Leste does not have a separate justice system for children because children under age 16 cannot be prosecuted for crimes. Anyone over age 16 is tried in criminal court.

Most legal systems in other countries have rules about what age when a person can be held criminally liable for her actions. These rules are different depending on which country's law you are looking at. For example, in some South American countries and in the International Criminal Court, the age when a child can be charged with a crime ranges from 7 years old to 18 years old. In Timor-Leste, however, children younger than 16 are exempt from criminal liability. This is a higher age than in most countries in the region. In other countries, such as Singapore and many common law countries, the minimum age at which a child can be charged with a crime is 7 years old. In East Asia and the Pacific Region, the average age where a child can be charged with a crime is 9 years old.<sup>17</sup> This wide variation in what age a child can be criminally liable is likely due to different views about criminal responsibility. These different views may come from differences in each country's history and culture.

## **3. Summary**

Minors younger than 16 years old are exempt from criminal liability in Timor-Leste. According to Article 20, minors can assert the Defense by Reason of Age if they are accused of

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<sup>17</sup> UNICEF Regional Office for South Asia. "South Asia and the Minimum Age of Criminal Responsibility: Raising the Standard of Protection for Children's Rights." UNICEF (2005). 6. <[http://www.unicef.org/rosa/Criminal\\_Responsibility\\_08July\\_05\(final\\_copy\).pdf](http://www.unicef.org/rosa/Criminal_Responsibility_08July_05(final_copy).pdf)>

committing a crime. This defense is based on the assumption that children younger than 16 years old do not have the intelligence, judgment, emotional maturity, and moral capacity to make the rational choices that criminal law requires. The minimum age that a child can be liable for criminal actions in Timor-Leste is high compared to other nations in the region and around the world. Because the minimum age is high, Timor-Leste does not have a separate juvenile justice system.

### **Discussion Questions**

1. Why do you think the drafters of the Penal Code chose to set the minimum age of criminal responsibility at sixteen? Does this number accurately reflect any historical or cultural ideas about childhood or adulthood in Timor-Leste?
2. As you read above, Timor-Leste allows lower penalties for people aged 16 to 21 who commit crimes, but there is no separate juvenile justice system for these people. Do you think there should be a separate system? What would be the costs and benefits of having a separate juvenile justice system?

### **Suggested Answers**

1. The drafters of the Penal Code may have chosen 16 as the minimum age because it is close to the age when society considers a person capable of making important decisions. For example, the Constitution of the Democratic Republic of Timor-Leste permits people to become citizens and to vote at age 17. Seventeen-year-olds are also granted many other privileges, such as the ability to obtain a driver's license.
2. One cost of having a separate juvenile justice system would be the expense of creating and maintaining an independent court system for minors. One benefit would be that the system would allow certain judges and lawyers to become experts in working with young people. This system might be more efficient and more responsive to young people's needs as a result.

## II. EXCUSES: THE INSANITY DEFENSE

### SECTION OBJECTIVES

- To understand why people with mental disabilities are excluded from criminal liability.
- To learn the elements required to assert an Insanity Defense.
- To learn elements required to assert the Diminished Capacity Defense.
- To learn how the mental health system and the criminal justice system overlap in Timor-Leste.

### 1. Insanity as a Defense

When we decide whether a person is criminally culpable, we ask whether that person has the mental ability to know and understand the law. If a person does not have the ability to know and understand the law, she may be excused from criminal culpability. This is why a person can assert insanity as a defense. Legal **Insanity** is an excuse that allows the judge to look at the defendant's capacity to know and understand the law. It is defined in Article 21. This defense focuses on the individual's personal characteristics rather than her actions. A person is legally Insane if she is not capable of understanding the unlawfulness of her actions because of mental illness. Similar to the Defense by Reason of Age, Legal Insanity a defense that excuses the person's conduct because of her inability to form the required *mens rea* for the crime.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 21. Exemption from criminal liability by reason of insanity

- (1) A person is exempt from criminal liability if, due to a mental disorder, he or she is incapable, at the time of committing the act, to comprehend its unlawfulness or to decide accordingly.
- (2) A person may be declared exempt from criminal liability when, by force of a mental disorder, has, at the time the crime is committed, significantly diminished capacity to appreciate the unlawfulness of such an act or to act accordingly.
- (3) The proven inability of the perpetrator to be influenced by penalties may be an indication of the situation provided for in the subarticle above.

- (4) Criminal liability is not excluded when the mental disorder was caused by the perpetrator with the intent to commit the act.

The rationale of the Insanity Defense is that it is wrong to punish a person who suffers from an illness that makes her unable to understand the immorality of her conduct. Instead of punishment, these individuals should receive treatment for their illnesses. Courts start out assuming that the defendant is sane, and they will continue to assume this unless facts arise that gives the court reason to doubt the defendant's sanity. The defendant also has no burden to prove she is legally Insane. The prosecution and the court have the responsibility to answer the question of whether the defendant was legally Insane at the time of the offence.<sup>18</sup> Establishing insanity usually requires the help of an expert. If an expert is not available to testify about the defendant's sanity, courts in Timor-Leste will sometimes accept the testimony of people living in the community who know the defendant well and can confirm his insanity.

Most mental health professionals consider legal insanity present defendant does not understand reality and cannot accurately perceive the world around him. For example, the defendant may be hearing voices that command him to commit harmful acts. Or he may have a delusional belief system, such as a belief that secret agents are trying to kill him. These mental disabilities make it very difficult for the defendant to understand reality accurately and to evaluate the appropriateness of his conduct. This is why individuals with these impairments may engage in inappropriate and even criminal behaviour.<sup>19</sup>

## 2. Elements of the Insanity Defense

Three elements must be satisfied to prove an Insanity Defense. First, the defendant must have been suffering from a mental disorder. Second, this disorder must have made her incapable of comprehending the unlawfulness of the act. Third, this disorder must have existed at the time the offence was committed. We will look at each of these elements more closely in turn.

The first element requires the defendant to have been *suffering a mental disorder* at the time of commission. "Mental disorders" include a broad range of mental illnesses. Some of the

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<sup>18</sup> Bohlander, Michael. Principles of German Criminal Law. Portland, Oregon: Hart Publishing, 2009. 83.

<sup>19</sup> La Fond, John Q. and Richard G. Singer. Criminal Law: Examples and Explanations. 2nd ed. New York City, New York: Aspen Law and Business, 2001. 436.

types of mental disorders that can be the basis of an Insanity Defense are: pathological mental disorder, a profound unconsciousness disorder, debility, or any other serious mental abnormality. It is generally irrelevant whether the disturbance is permanent, temporary or whether the mental disturbance comes and goes (is intermittent). What matters is that the mental illness affected the perpetrator at the time the offence was committed, as discussed in the third element.<sup>20</sup>

The second important issue for a court to consider is whether the defendant's mental disorder *made her incapable of comprehending the unlawfulness of her actions*. This could happen if a person was suffering from hallucinations or became delirious. For example, Schizophrenia sometimes causes people to suffer from delirium. **Delirium** is a serious disturbance in a person's mental abilities that results in a decreased awareness of one's environment and confused thinking.<sup>21</sup> People in a state of delirium may commit criminal acts without understanding that they are doing something wrong.

Third, the mental illness must also have *existed at the time the offence was committed*. Prior mental illness will only be taken into account when determining the appropriate sentence for the crime. If the mental illness existed at the time the act was committed, then the defendant may be excluded from criminal culpability. If the mental illness is only established during the actual trial then the defendant will be acquitted.<sup>22</sup> If acquitted, the defendant may be required to go to a mental hospital.

A defendant may also develop a mental illness after committing the offence but before her trial. If this happens, Legal Insanity cannot be used as a defense, but it will lead to the prosecution being suspended. The judicial investigation does continue, however. This means that certain actions cannot take place, such as questioning the suspect, but other aspects of the investigation will proceed. If the suspect recovers from the mental illness, the prosecution can continue its investigation.<sup>23</sup>

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<sup>20</sup> Bohlander 132.

<sup>21</sup> "Delirium." Mayo Clinic. <<http://www.mayoclinic.org/diseases-conditions/delirium/basics/definition/con-20033982>>

<sup>22</sup> Elliott 120.

<sup>23</sup> Elliott 120.

### **3. The Diminished Capacity Defense**

The **Diminished Capacity Defense** is very similar to the Insanity Defense. The only difference is that the perpetrator is not totally incapable of comprehending his actions. Instead, his ability to comprehend his actions is severely impaired. This means that the perpetrator understands his actions in part, but does not understand completely. Insanity is a complete defense to a crime, but Diminished Capacity is only a partial defense. Diminished Capacity is a defense that can be used by people who have a mental illness but who are at least partially capable of comprehending their wrongdoing. If the defendant is found to have had diminished capacity at the time of the crime, he will still be convicted, but he may be convicted of a lesser offence, or received a reduced penalty.

### **4. Mental Illness in Timor-Leste**

As we have learned, people who qualify for the Insanity Defense are exempt from criminal liability. However, people who commit criminal acts because they are unable to comprehend the unlawfulness of those acts may still be a danger to society. For this reason, Article 93 describes “internment measures” for people who are exempt from criminal liability due to insanity, but whom the court believes are dangerous and may commit similar crimes.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 93. Assumptions**

Whenever an act described as a defined crime is committed by a person exempt from criminal liability under article 21, that person shall be interned in an appropriate establishment, whenever, due to a mental disorder and the nature and gravity of the act committed, the court has reason to believe that the perpetrator may commit other acts corresponding to crimes against individuals or crimes posing collective danger.

It is important to note that, as of 2013, Timor-Leste does not have the mental health facilities that are necessary to intern people who pose a danger to society. In order to meet the needs of people suffering from mental disorders, Timor-Leste will likely need to expand its mental health services. However, this can be difficult for various reasons including: financial restrictions and competing priorities. Further, people requiring mental health services may be unable to access them because of transportation and communication difficulties. In the Ministry



of Health's National Mental Health Strategy 2011-2015, the department called for a large expansion in mental health services; however, we do not yet know whether the government will meet its ambitious goals.<sup>24</sup>

## 5. Summary

If a person is legally insane because of mental illness, she is not criminally culpable for the crime. This is because she is incapable of understanding the unlawfulness of her actions. If an investigation gives a court a reason to question the defendant's sanity, the judge and prosecutor must resolve the issue. To assert the Insanity Defense, the perpetrator must have a mental disorder that made her incapable of comprehending the nature of her actions at the time she committed the crime. The Diminished Capacity Defense is similar, except that the perpetrator is at least partially capable of understanding that she is doing something wrong. Mental health seriously affects the criminal justice system. However, as of 2013, Timor-Leste does not have the facilities to treat perpetrators who are acquitted of their crimes using the Insanity Defense, but still present a risk to the public.

### Questions

1. Joaquina is charged with murder. While investigating the circumstances of the murder, the court discovers that Joaquina feels so guilty about her actions that she has become insane. Joaquina's defense attorney argues that the court should dismiss the charges because Joaquina is insane. How should the court respond?
2. Leopoldo is charged with violating Article 139(f), Aggravated Homicide. As defined in Article 139(f), Aggravated Homicide means that the perpetrator thought about the crime in advance and planned the crime before killing the person. Leopoldo's doctor tells the judge that Leopoldo has a mental illness and he is incapable of making any plans at all. Is this a complete defense?

### Answers

1. The court should not dismiss the charges against Joaquina. Remember that for the Insanity Defense, timing is important. The mental illness must have existed at the time the offence was committed. The defense is not available if the person was capable of comprehending her

<sup>24</sup> Ministry of Health, Timor-Leste, Department of Mental Health, *National Mental Health Strategy 2011-2015*. 28 Dec. 2010. 10. <<http://www.moh.gov.tl/sites/default/files/National%20Mental%20Health.pdf>>

actions at the time of the crime, but later became insane. The court should suspend prosecution of the case until Joaquina recovers from her mental illness.

2. This is not a complete defense. Although Leopoldo is incapable of *planning* murder, this does not mean that he is incapable of understanding that murder is illegal. This means that he has diminished capacity, not that he is insane. Since Leopoldo understood at the time of the crime that murder is illegal, Leopoldo can still be prosecuted and convicted of a less serious offence.

### III. JUSTIFICATIONS: THE LEGITIMATE DEFENSE

#### SECTION OBJECTIVES

- To understand the elements of Self-Defense.
- To understand how the defense applies to someone who has made a mistake of fact.
- To understand how the defense applies to someone who is defending his property.
- To understand how the defense applies to someone who provoked an attack.

#### 1. Elements of the Legitimate Defense

**Self-Defense** is an act that involves defending one's self, one's property, or the well-being of another from harm. It is also called a **Legitimate Defense**. It is a legal justification for the use of force in times of danger, as long as the means a person uses to defend himself are proportionate to the seriousness of the attack. The right to Self-Defense is guaranteed to all people of Timor-Leste in Section 29 of the Constitution.

#### Constitution of the Democratic Republic of Timor-Leste

##### Section 39 (Family, marriage and maternity)

- (1) Every citizen has the right to disobey and to resist illegal orders that affect their fundamental rights, freedoms and guarantees.
- ...
- (3) The right to self-defense is guaranteed to all, in accordance with the law.

Self-Defense is a concept that also appears in Article 44 of the Penal Code. It is a complete defense. Although Article 44 is short, there are many complex ideas contained in this defense. Once you have read Article 44's language, we will look closely at each element of the defense: action taken to defend against (1) an unlawful attack, (2) that is imminent or present, and (3) the action taken was "necessary" to repel the attack.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 44. Legitimate defense

An act constitutes legitimate defense when committed as the necessary means to repel an imminent or present unlawful attack on legally protected interests of the perpetrator or of a third party.

First, the attack that provokes the perpetrator's response must be an *unlawful action*. The action does not have to be threatening to another person's life. The action also does not have to be intentional. It is enough if a person is acting negligently as long as the conduct is dangerous.<sup>25</sup> For example, Ruel believes that a gun is not loaded, so he points the gun at Jose and pulls the trigger. Jose knows the gun is loaded, however, so he believes that Ruel is trying to kill him. Jose throws himself on the ground and the bullet misses him, but he pulls out his own gun and shoots Ruel. Although Ruel was not actually trying to kill Jose, his behaviour was extremely negligent and dangerous. Ruel did not actually know whether the gun was loaded, so he was taking a big risk by pointing it at another person and pulling the trigger. Therefore, Jose can assert the Legitimate Defense because he was defending himself from what he believed was an attack by Ruel.

The Legitimate Defense also applies when someone attacks the defendant and a third party. Therefore, if Ruel sees Fernando beating his sister, Santana, Ruel may protect Santana. Ruel can use force to defend another person to the same extent that he would protect himself.

Second, in order for the Legitimate Defense to apply, the attack must also be "*imminent or present*." This means that the aggressor must actually be attacking the victim or must be about to attack the victim. For example, imagine that Monrique verbally threatens to attack Fernando, but Monrique's friends physically restrain him from starting a fight. Fernando cannot punch Monrique and then assert a Legitimate Defense because Monrique's attack was no longer about to happen.

This requirement is part of the law because, when a threat is not imminent or present, a person has time to seek the police's protection. Seeking the assistance of a police officer is preferable when someone has committed a crime or wants to commit a crime. When there is a

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<sup>25</sup> Bohlander 100.

long period of time between the attack and the response, the Legitimate Defense cannot be used. The defense also cannot be used when the threat has completely ended. For example, imagine that Monrique threatens Fernando and Fernando responds by taking out a knife. Monrique immediately puts his hands up in the air when he sees the knife, so Fernando does not have a reason to feel threatened by Monrique.

Third, the response to the attack must be *only what is necessary to repel the attack*. This will depend on the intensity of the attack. This element is often called the “proportionality” of the attack. The court decides whether the defendant acted with the amount of force that was appropriate given the circumstances. If the defendant used an appropriate amount of force to protect himself, then he can assert a Legitimate Defense. If he used more force than was necessary, he does not have a complete defense. For example, the Legitimate Defense is not available when a person is slapped in the face and responds by stabbing the other person with a knife.

Another situation when the defense cannot be used is when the perpetrator acted first in order to prevent a potential, future attack. A person can take precautions to prevent an attack, but these precautions must not produce a disproportionate response to whatever actual attack happens. This problem has arisen in other countries where property owners attempt to protect their property by leaving traps for intruders. For example, in one case in France, a farmer installed a trap gun in his chicken shed that injured a thief.<sup>26</sup> The Farmer tried to assert a Legitimate Defense, but the court convicted him of an intentional offence instead.

Why do you think the court decided to convict the farmer? Courts must decide these types of case based on the particular facts. Specifically, the court has to decide whether the precaution would produce a disproportionate response. In the case we just discussed, the potential harm to the farmer is that he could lose some of his chickens. But the potential harm of the trap gun is that it could kill someone unexpectedly. The court likely found that the risk of killing another person did not justify installing a trap gun to protect the farmer’s chickens.

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<sup>26</sup> Elliott 111.

## 2. Excess of Legitimate Defense

When the response to an attack is not proportional, the Legitimate Defense is no longer a complete defense to the crime. This means that the perpetrator responded excessively. Instead, it becomes a partial defense, and only mitigates the amount of liability the defendant receives. For example, suppose Antonio slaps Vincente and Vincente responds by stabbing the Antonio with a machete. A court may still find Vincente guilty of a crime, but he may receive a less severe penalty for acting defensively.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 48. Excess of legitimate defense**

- (1) Means which, given their nature or extent of use, are excessive to those required for the defensive action taken by the perpetrator may result in special mitigation of the penalty that the crime would otherwise carry.
- (2) The perpetrator is not punishable if the excess of means used in legitimate defense are due to a justifiable disturbance, fear or surprise.

Using excessive means to defend one's self can be justified if it is because of fear or surprise. Let us return to the example of Antonio and Vincente. Imagine that Vincente knew that Antonio usually carries a gun. Once Antonio slapped Vincente, he quickly became afraid that Antonio would shoot him too. That is why Vincente stabbed Antonio with his knife, so that Antonio would not be able to reach for his gun and shoot him. In this situation, a court might find that Vincente's conduct was done out of fear, and therefore Vincente can assert a Legitimate Defense.

## 3. Mistake

What if a defendant believed that he was about to be attacked, but was wrong? If the defendant mistakenly believed that he is about to be attacked, he will still be able to assert the Legitimate Defense as long as the mistake was reasonable.<sup>27</sup> If there are no good reasons for the defendant to make the mistake, the defense will not be available.

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<sup>27</sup> Elliot 111.

For example: Fernando, a police officer, catches Hugo while Hugo is robbing a store with a gun. Hugo runs away and Fernando chases after him. While running from Fernando, Hugo drops his gun, but Fernando does not see the gun fall. Fernando corners Hugo behind a building and, fearing that Hugo will shoot him, Fernando shoots Hugo first. Because Hugo no longer had his gun, Fernando actually used more force than was necessary to repel any attack Hugo could have committed. However, a court would most likely find that Fernando reasonably believed that he was in danger of a deadly attack. This is because Fernando did not see Hugo drop the gun. Fernando could reasonably have believed that Hugo still had the gun that he used earlier in the robbery. Therefore, Fernando could likely assert a Legitimate Defense.

#### **4. Defense of Property**

Look again at Article 44. You will notice that it does not specifically mention actions taken to defend property. It does, however, say that the defense is available against an “unlawful attack on legally protected interests of the perpetrator.” This language suggests a person could act to defend property, because property is a legally protected interest. This means that a person may use force against someone who threatens their property, such as a thief or a robber. However, courts typically enforce stricter criteria for the defense of property than for defense of a person. This reflects a value judgment that human life is more important than physical property.

#### **Comparative Law**

In France, French courts have decided that the response to theft must be “strictly” necessary. Additionally, the perpetrator must give the victim a verbal warning before using violence. If a person commits murder in order to protect her property, she cannot use the Legitimate Defense. The defense can also only be used when there is a serious attack on one’s property. This would not include offences that cause only minor property damage.

#### **5. Provocation**

If the defendant is the person who provoked the attack, the court will have serious concerns about whether he was actually acting to defend himself. The court may have reason to believe that the defendant actually wanted the aggressor to attack him simply so that he could respond with violence. When this happens, it is called **Intentional Provocation**. Depending on

the circumstances, the court may not allow the defendant to assert the Legitimate Defense. For example, Vincente provokes Antonio by insulting him. Antonio responds by slapping Vincente. Vincente then punches Antonio in the face, causing him serious injury. The court might find that Vincente intentionally angered Antonio in the hope that Antonio would attack him. Therefore Vincente did not feel genuinely threatened by the attack and did not act with intent to defend himself.

## 6. Summary

The right to self-defense is protected by the Timorese constitution and is also called “Legitimate Defense” in the Penal Code. The Legitimate Defense requires: (1) that there was an unlawful attack; (2) that the danger was present or imminent; and (3) that the defendant acted only with the necessary means to repel the attack. When the defendant responds to an attack with excessive force, his culpability will only be mitigated, not erased. If the defendant made a mistake about the imminence or severity of an attack, he may still assert the Legitimate Defense as long as his actions were reasonable. A person can respond with force to an attack on his property, but courts typically enforce stricter criteria for defense of property than for defense of a person. A person who intentionally provokes another person to attack him will most likely not be able to argue Legitimate Defense.

### Questions

Can the following defendants assert the Legitimate Defense?

1. Manuel is walking down the street when he is confronted by Jose. Jose pulls out a knife and demands money. Manuel takes out a gun and kills Jose.
2. Fernando sees a thief fleeing from his house. The thief has stolen one bottle of beer. Fernando shoots the thief in the back and kills him.
3. Julião and Ruel hate each other because they are both in love with the same woman. One day Julião’s friend Miguel overhears Ruel telling his friends that in one hour he is going to Julião’s house to attack him with a knife. Ruel takes a big knife out of his pocket and shows it to his friends. Miguel runs to Julião’s house and tells him that Ruel is coming in one hour and is planning to attack him with a knife that he keeps in his right pocket. One hour later, Ruel arrives at Julião’s house and knocks on the door. Julião opens the door and sees Ruel reaching into his right pocket. Julião throws a large rock at Ruel and hits him in the head, causing



serious brain injury. When the police arrive, they look in Ruel's pockets and they only find a pack of cigarettes.

### Answers

1. Manuel is the innocent victim of an unprovoked and unlawful attack. Since Jose has a knife and is threatening to harm Manuel unless he gives him money, the attack is imminent. Finally, Jose is threatening Manuel with a deadly weapon, so Manuel can also use a deadly weapon as the necessary means to repel the attack. Therefore, Manuel has a complete Legitimate Defense.
2. Fernando cannot use Legitimate Defense as a complete defense because his actions were not proportionate to the harm that he suffered. Remember that courts are less likely to allow Legitimate Defense when it is being used to protect property. Furthermore, killing another person generally cannot be done to protect property. A court would most likely not approve of Fernando killing a man simply to protect his legal interest in one bottle of beer. However, the court might still find that Fernando has a partial defense, so his culpability would be mitigated.
3. By throwing a large rock at an unarmed person, Julião used greater force than was necessary to repel an attack. But Julião threw the rock because of a mistake—he believed that Ruel would be armed with a deadly weapon, even though he actually did not have a knife. Therefore, Julião can still assert a Legitimate Defense, as long as his mistake was reasonable. Was it reasonable?

A judge would look at the facts from Julião's point of view: Julião and Ruel hate each other. One of Julião's trusted friends told him that Ruel was coming at a certain time and would have a knife. Miguel even saw Ruel with the knife shortly beforehand. Ruel arrived at the expected time. Finally, Ruel reached into the pocket where Julião believed the knife would be. Based on these facts, a judge would likely conclude that Julião's mistake was reasonable.

## IV. JUSTIFICATIONS: STATE OF JUSTIFYING NEED

### SECTION OBJECTIVES

- To understand what the Necessity Defense, also known as State of Justifying Need, is and the rationales behind the defense.
- To understand the elements of the State of Justifying Need Defense.

#### 1. The State of Justifying Need Defense

The Necessity Defense is also called the **State of Justifying Need** in the Penal Code. The **Necessity Defense** can be thought of as a “choice of two evils” claim. The defense is usually made where the defendant has two alternatives: to either commit a crime, or cause another person extreme hardship. This situation arises when someone (usually the defendant) is threatened with serious harm and chooses instead to cause someone else harm in a way that would otherwise be deemed criminal. If the harm the defendant actually inflicts is less than the harm that would have occurred had he not acted, then society has benefitted. He has chosen the “lesser evil.” For example, Odete does not have enough money to feed her children and she is afraid that they will starve. She steals some rice from her neighbour in order to feed her children, but her neighbour catches her and Odete is charged for stealing. If the court finds that Odete’s actions were required to prevent her children’s starvation, then Odete will not be found guilty.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 45. State of justifying need

An act is not unlawful when committed as an appropriate means to avert a present danger that threatens legally protected interests of the perpetrator or of a third party, if the following requisites are met:

- a) There is a significant superiority of the interest to be safeguarded in relation to the interest sacrificed; and
- b) It is reasonable to impose the sacrifice of the interest of the victim, considering the nature or value of the interest endangered.

The rationale of behind this defense involves two factors: one is avoiding a greater harm; the other is the difficulty of complying with the law during emergencies.<sup>28</sup> Because of these factors, there are two principles that underlie the State of Justifying Need Defense. The first is that, within certain limits, it is justifiable in an emergency to break the law, if breaking the law will avoid a greater harm than obeying it. The second is that, within limits, it is excusable in an emergency to break the law if compliance would impose a great burden on the perpetrator.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 49. Exculpatory state of need**

- (1) Any person who commits an unlawful act required to avert a real danger, which cannot be otherwise removed, which threatens the life, physical integrity, honour or freedom of the perpetrator or a third party, where, depending on the circumstances of the case, it is not reasonable to require any different behaviour of the same, acts without guilt.
- (2) Whenever the danger threatens legal interests other than those referred to in the preceding subarticle, and the assumptions mentioned therein are met, the penalty may be extraordinarily mitigated or the perpetrator may be held exempt from punishment.

## **2. Elements of the Defense**

A person will not be criminally liable if she encounters a present danger that threatens herself or another person or property, and carries out a necessary act to protect herself in response. A person can still be criminally liable, however, if the means used to prevent the danger were unreasonable. To assert the State of Justifying Need Defense, three conditions must be met. First, there must be a present danger to the perpetrator's or a third party's life, physical integrity, honour, or freedom. Second, the danger must have truly made committing the offense necessary. Third, it must be reasonable for the victim to sacrifice his or her interest. Now let us look more closely at these elements.

First, the State of Justifying Need Defense is only available when there is a *present danger*. The danger can be to the defendant, a third party, or to property. The nature of the danger does not matter. The danger may even arise from natural causes. But, the danger must not

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<sup>28</sup> D. O'Connor and P. A. Fairall, *Criminal Defences*, Third Edition (Australia: Butterworths), 103.

be one imposed by the law. For example, a soldier cannot use the State of Justifying Need Defense to flee from battle because he has an obligation to fight when ordered to do so.

Furthermore, courts may decline to allow a perpetrator to use the State of Justifying Need Defense in situations where she created the conditions of her own state of need. For example, imagine Odete spent all of her grocery money to buy herself a new necklace. She has no money left to feed her children, so she steals rice. A court might say that she cannot use the State of Justifying Need Defense because she created the state of need by making poor choices about how to spend her money.

Second, the danger must have *truly made committing the offense necessary*. This means that there is no other way of avoiding the threat than by breaking the law. If the perpetrator had other ways to protect his threatened interests, then he cannot use the State of Justifying Need Defense. The only exception is if he can show that he chose the best course of action. If there were several courses of action that a person could have chosen to protect against the danger, he must choose the least dangerous or unlawful one. Therefore, a judge might find that the State of Justifying Need Defense did not apply to Odete when she stole her neighbour's food, if there were other legal ways for her to obtain food for her children.

Third, the State of Justifying Need Defense only applies when it would be *unreasonable to ask the perpetrator to behave differently than she did*. The important factor is that the perpetrator's unlawful action must have been reasonable under the circumstances. For example, a court may find it reasonable that Odete stole rice from her neighbour in order to feed her starving children. However, it would not be reasonable for Odete to kill her neighbour so that she could take his food more easily. The court must weigh the sacrifices on both sides. In practice, comparing the values of these different interests can be difficult. The burden of proof is on the prosecution to show that the offence done was not proportionate to the original danger.<sup>29</sup>

### Comparative Law

Can necessity ever be used as a defense to excuse killing another person? Most countries say no. In a famous British case, four men were adrift on a lifeboat in the Atlantic Ocean after their ship sank. After nineteen days, the two defendants killed the youngest man on the boat. They selected the man to be killed because he was the youngest, the sickest, and the only one without a family. The defendants survived by eating the corpse. The court refused to allow the two defendants to

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<sup>29</sup> Elliot 115.

claim necessity. The court concluded that taking an innocent life could never be justified under the law.<sup>30</sup>

### 3. Summary

The State of Justifying Need Defense is often asserted when the defendant has two alternatives: she must either commit a crime, or cause another person extreme hardship. The rationale for this defense is that it is justifiable in an emergency to break the law if breaking the law will avoid a greater harm than obeying it. For the State of Justifying Need Defense to apply, the defendant must have been faced with a present danger that could not be removed except by committing a crime. Further, it must have been reasonable for the defendant to sacrifice someone else's interests given the circumstances.

### Questions

Could the State of Justifying Need Defense be used by the following defendants?

1. Antonio is in prison for a previous crime. He wakes up in the middle of the night and smells smoke. He realizes that the prison is on fire. He escapes from prison just in time to save his life, but he is then charged with Escape (Article 246).
2. One night Vincente is drinking beer with his friends. One of his friends gets mad and stabs another friend in the chest. The injured man is bleeding profusely. Vincente fears that the man might die, so he takes him in his car and drives to the nearest doctor. A police officer stops Vincente because he is driving very fast. Vincente is charged with Driving Under the Influence of Alcohol (Article 208).
3. Cecilia sees a snake go into her neighbour's home. She knows that the neighbour is not home, but she fears that the snake will bite her neighbour when she returns home. Cecilia sets the house on fire in order to kill the snake. She is charged with Arson (intentionally setting fire to a house, Article 263).

### Answers

1. Yes, the State of Justifying Need Defense would apply. Antonio was faced with a present danger: he was inside a building that was on fire. The only way for him to remove himself from the danger was to leave the building. Finally, it was reasonable for Antonio to break the law by leaving the prison in order to save his own life. It would be unjust to punish Antonio

<sup>30</sup> *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

because he did not stay and die in the fire. Therefore, the State of Justifying Need Defense applies.

2. To decide whether the State of Justifying Need Defense applies to Vincente, the judge would need to know more facts. A judge would likely agree that the injured man's potential death was a present danger. But remember that the State of Justifying Need Defense only applies when the defendant had no other means of removing the danger. A judge would need to find out the exact circumstances of this incident: Who else saw the stabbing? Was everyone present intoxicated? Was Vincente the least intoxicated person there? Did Vincente have time to call for help? Is there anyone else who could have come to the bar to help? If it truly seems that there was no choice but for Vincente to drive his friend to the doctor, then the State of Justifying Need Defense probably applies. However, if there were other, lawful means for Vincente to obtain medical help for his friend, then the defense does not apply.
3. The State of Justifying Need Defense would probably not apply to Cecilia for several reasons. Although there was a danger that the snake could bite her neighbour, it is not clear that it was a present danger. Furthermore, there were probably other, less destructive means of preventing her neighbour from being bitten. A judge would find that Cecilia did not act reasonably by burning the house down in response to the small possibility of a snakebite.

## V. JUSTIFICATIONS: CONFLICT OF DUTIES

### SECTION OBJECTIVES

- To understand the Conflict of Duties Defense and see examples of when this defense is used.
- To understand how Conflict of Duties is different from the State of Justifying Need Defense.

If a defendant has two or more conflicting duties to act, but can only carry out one action, then the defendant will necessarily be unable to carry out the other action. In this situation, the defendant can assert the **Defense of Conflict of Duties**. This defense is based on the principle that the law cannot ask the impossible: If a defendant has no choice but to violate one duty in order to carry out the other, it seems unfair to punish her for this situation.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 46. Conflict of duties

- (1) It is not unlawful for a person to commit, in the case of conflict in performance or legal duties or legitimate orders from an authority, a duty or order of equal or superior value to that sacrificed.
- (2) Duty to obey hierarchical superiors ceases when the same leads to commission of a crime.

The Conflict of Duties Defense is very similar to the State of Justifying Need Defense. To assert either defense, the perpetrator must have been in a position where he had to choose between two bad options. However, the Conflict of Duties Defense has some differences. As you learned in the previous section, a State of Justifying Need Defense requires the perpetrator to be faced with a present danger. To assert the Conflict of Duties Defense, the perpetrator must be faced with violating a duty. A **duty** is something a person must do because it is morally right or because the law requires it. For example, parents have a duty to protect their children because it is morally right. As another example, the law imposes a duty on people not to steal. To assert a Conflict of Duties Defense, the perpetrator has two or more duties which conflict with one

another, and he must choose the least harmful of these duties. He has no choice but to violate one of the duties. It is inevitable that one of the duties will not be fulfilled.

In order to use this defense, the duties must be of equal value, or the perpetrator must have chosen the superior duty. For example: Maria borrows her friend's motor scooter to take her son to school. As they drive, Maria is knocked off the road by a truck into a river. Maria has time to save either her son or the scooter and she chooses to save her son. A court would find that Maria's duty to protect her son's life is superior to her duty to protect her friend's property. Therefore Maria can assert the Defense of Conflict of Duties and her actions would likely be considered lawful.

If the duties are of equal value, it does not matter which duty the perpetrator chose to fulfil. Imagine that Maria's daughter and son both fall into a river with a strong current. Both children are still within reaching distance from the shore, but Maria cannot swim. She holds onto a tree to try and grab for her children, but she can only grab one child at a time. In the time it takes to rescue one child, the other child becomes caught in the current and drowns. Maria will likely not be punished for failing to rescue the child who drowned, because she has an equal duty to save both children no matter which one she ultimately saves.

Finally, a person's duty to obey their hierarchical superiors ceases when obeying the order would lead to committing a crime. The concept of obedience is discussed in greater detail in Section VII of this chapter. For now, you should understand that the duty to obey a person's hierarchical superiors only applies to people who work for the government. Article 46, however, applies to *all people* who must follow the orders of their superior. No person has a duty to follow an order if she is being ordered to commit a crime, no matter who the order comes from. This means that a person who commits a crime after being ordered to do so cannot rely on the Defense of Conflict of Duties. Why is this so? This is because the perpetrator did not actually have to choose between two duties. The duty to obey superior orders disappeared when the person was ordered to commit a crime. Therefore, a person who is has been given an illegal order has no duty to obey it. Since there are no competing duties, the perpetrator is not faced with a difficult decision and should be able to obey the law.



## VI. JUSTIFICATIONS: CONSENT

### SECTION OBJECTIVES

- To understand the Defense of Consent and when this defense can be asserted.
- To learn who is legally capable of giving consent and how a person consents to behaviour that would otherwise be unlawful.
- To learn what presumed consent is and when it applies.

### 1. The Defense of Consent

A person who gives **Consent** gives permission for something to happen or for something to be done. In some cases, a person can consent to something that would be considered a crime if there was no consent given. For example, if Carla gives Joana permission to take an action that would be considered a crime, Joana has Carla's consent to perform the action. If Joana is later charged as the perpetrator of a crime because of the action that she took, Joana will be able to use the Defense of Consent. Joana would argue that Carla gave her permission to take the action. As we will learn in this section, there are many specific rules regarding who can give consent, how consent must be given, and when the Defense of Consent can and cannot be used.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 47. Consent

- (1) In addition to special cases provided for in law, consent excludes unlawfulness when it refers to freely available legal interests and the act does not offend social mores.
- (2) Consent may be expressed by any means revealing a free, honest and informed will of the holder of the protected legal interest, and it may be freely withdrawn at any time before the execution of the act.
- (3) Consent is effective only if it has been given by someone who is over 16 years of age and has the necessary discernment to judge its meaning and scope, at the moment it is given.
- (4) If consent is not known to the perpetrator, he or she shall be punishable with the penalty applicable to attempt.

- (5) Effective consent will be considered equivalent to presumed consent, when the situation, in which the perpetrator is acting, reasonably permits one to suppose that the holder of the legally protected interest would have effectively given consent to act, if the same had known the circumstances in which it was committed.

The **Defense of Consent** can be asserted if the defendant argues that the alleged victim gave him permission to take an otherwise criminal action. Because the defendant had the alleged victim's consent, there was actually no crime committed. For example, imagine that Joana borrows Carla's car with Carla's permission, but then Carla files a complaint saying that Joana stole her car. Joana would be able to argue that she had consent to take the car and therefore no theft occurred.

Consent of the victim is not always a defense, however, because the victim cannot always legally give permission for a crime to occur. For example, Article 144 prohibits assisting a person in committing suicide. This means that, even if a person asks for help to end his own life, the person who gives assistance is held criminally liable. The idea is that a person can never give legal consent for someone else to kill him.

There are, however, countless activities which are usually unlawful which can become lawful if consent is given. For example, a surgeon who operates without consent may be guilty of a crime. But, if she has the patient's consent, she is simply performing surgery. Without someone giving another person permission to have sexual intercourse, the sexual conduct is an unlawful Rape. Similarly, taking a book from the library without permission becomes stealing. As a result, it is important to understand whether an action is always unlawful or whether consent can make the action lawful.

Criminal offences may be classified into three categories according to the relevance of consent: (1) Crimes which are defined so that not having consent is a part of the actus reus (for example, in case of Rape); (2) Crimes where not having consent is not an element of the crime, but consent could be a basis for a justification or excuse; and (3) crimes where consent can never be used as a defense, such as murder or sexual abuse of a minor.<sup>31</sup>

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<sup>31</sup> O'Connor and Fairall 83-84.

## 2. Who Can Give Consent?

The ability to consent first requires that the alleged victim of the act holds a legal interest.<sup>32</sup> A **legal interest** is any right, claim, or privilege that an individual has toward real or personal property. A person can only give consent if she has a legal interest that she is able to give up. Consent cannot be a defense to attacks on a common or publicly held interest. For example, the Defense of Consent cannot be used to justify corruption.

Carla can consent to letting Joana borrow her car because Carla has a legal interest in her car—it is her property. However, Carla cannot consent to letting Joana borrow her neighbour Cecilia's car. This is because Cecilia's car is not Carla's property and, therefore, she has no legal interest in it. Article 47(1) also specifies that consent is lawful when it “does not offend social mores.” This means that a person cannot lawfully consent to acts that violate the accepted traditional customs and morals of society. A person who commits an act that offends social mores cannot rely on the Defense of Consent. For example, torture is an act that is generally considered to offend social mores. A person who tortures another person cannot rely on the defense that the victim consented to be tortured.

Capacity to consent also requires the alleged victim to have the necessary intellectual maturity to understand what she is consenting to. The victim must be able to make an informed decision and understand the consequences of her actions.<sup>33</sup> Consent must also be declared before the act consented to is performed. Once consent has been given it must continue to exist from the beginning to the end of the act. Once consent has been revoked, the act becomes unlawful from that point onward.<sup>34</sup>

Public policy requires the law to place limits on the extent to which citizens are allowed to consent or are bound by the consent they apparently gave. For example, children younger than 14 cannot consent to having sexual intercourse (Article 177). Article 47(3) is even stricter: it says that a defendant can argue consent only if the person who allegedly gave consent is over the age of 16 *and* has the necessary discernment. Is there a conflict between these two articles? Could a defendant charged with raping a 15-year-old claim that he believed the lawful age of consent to be 14 years?

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<sup>32</sup> Bohlander 86.

<sup>33</sup> Bohlander 84.

<sup>34</sup> Bohlander 86.

Furthermore, according to Article 47(3), it is not enough that the consenting person is over age 16. The person must also have the necessary ability to judge the meaning and scope of his consent at the moment it is given. This further restricts who can give consent and in what situations. A person over age 16 may still not be able to consent if he has a mental disability that makes it difficult for him to understand the full meaning of his actions. It also restricts the ability of people to consent in a moment when their thinking may be impaired, such as if they are intoxicated or using drugs.

### 3. How is Consent Given?

According to Article 47(2), consent can be expressed in any means that reveals that the free, honest, and informed will of the holder of the protected legal interest. For consent to be “free” and “honest” it cannot have been given through threats or duress. For example, if the perpetrator told the victim that he would hurt her if she did not consent, then her consent has not been freely given. The holder of the interest must have freely chosen to allow another person to commit an act that would otherwise be unlawful. Consent must also be “informed.” This means that the holder of the legal interest must have all of the truthful information that would be relevant to making her decision to consent.

For example, Joana asks to borrow Carla’s car. Carla asks Joana if she has a valid driver’s license. Joana does not have a driver’s license, but she tells Carla that she does. Carla allows Joana to take the car. Carla later learns that Joana lied about having a driver’s license and files a complaint against her. Joana cannot rely on the Defense of Consent because Carla did not give *informed* consent. Joana knew that the issue of whether she had a driver’s license was relevant to Carla’s decision, but Joana purposefully misled Carla. Carla would not have lent her car to Joana if she had known that Joana did not have a driver’s license. Another example is in the case of fraud. **Fraud** is when a person intentionally deceives another person in order to unlawfully gain that person’s property (Article 266). The victim may have given apparent consent to giving up ownership of money or goods, but this consent is negated because of the dishonesty of the perpetrator who acted deceitfully. If the victim had known of the perpetrator’s true intentions, she would not have given consent.

Article 47(4) also states that if the perpetrator does not know of the consent, she will be punished with the penalty applicable to attempt. Imagine that Joana takes Carla’s car without

asking her, but it is later discovered that Carla had left a note for Joana saying that she could borrow the car. However, Joana never saw the note and therefore she is charged with attempted vehicle theft. Does this law make sense? What harm is caused when someone commits a crime that the alleged victim actually consented to? One could argue that if the perpetrator should not be punished if the holder of the legal interest gave consent. It should not matter that the perpetrator did not know that she had consent. The best response to this argument relates to public policy: the law should encourage people to act only when they are certain that they have the consent of the holder of the legal interest. By punishing the lack of knowledge of consent as attempt, the law encourages people to seek out consent before acting.

#### **4. Presumed Consent**

Sometimes the perpetrator does not have time to determine whether the alleged victim has given consent. If a doctor finds an unconscious patient, can she take emergency steps to revive the person even though the person has not consented? The common view is that the perpetrator's actions would be justified by **Presumed Consent**. Consent is presumed if an evaluation of all the circumstances leads to the conclusion that the alleged victim would have consented.<sup>35</sup> Article 47(5) states that effective consent is the same as presumed consent if the circumstances are such that the perpetrator would reasonably think that the holder of the legal interest would have given consent under normal circumstances. This means that, even if the holder of the legal interest never actually gave consent, the court can find presumed consent if the person would have consented if she had had the opportunity to do so.

For example, suppose Joana is babysitting Carla's son, Jose, while Carla is at work. Jose cuts himself very badly and needs immediate medical attention. Even though Carla has not said that Joana can use her car, Joana takes the car and rushes Jose to the hospital. A judge would likely find that, if Carla had known the circumstances in which Joana took the car, she almost certainly would have given consent to help her son get to a doctor.

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<sup>35</sup> Bohlander 88.

## 5. Summary

The Defense of Consent can be used when a defendant can argue that no crime occurred because he was given consent. However, receiving consent from the victim is not always a defense. Consent is only lawful if the consenting person has a legal interest that she can lawfully give up. The activity consented to also cannot offend social mores. The consenting person must be mature enough to understand the consequences of her actions and she must give informed consent. Consent must be free and honest. The Defense of Consent cannot be used if the consent was obtained through fraud, threats, or other unlawful means. Consent will be presumed when the alleged victim cannot give consent, but the circumstances show that she would have consented if she had the opportunity to do so.

### Questions

1. Maria works in a bank. One day Maria's boss tells her that she can take some of the money out of the bank cash register so that Maria can buy a new car. Maria takes the money and is charged with a crime. Does the Defense of Consent apply?
2. Miguel asks João if he would like to compete against him in a boxing match. João does not have much experience boxing and is afraid of getting injured if he competes against a more experienced boxer. João asks Miguel how long he has been boxing for. Miguel replies, "I just started two months ago, I am not very good." Actually, Miguel is being modest: he has been boxing for 8 years and is very good. João agrees to fight in the match. As soon as the match begins, Miguel hits João so hard that he causes him severe injury. Miguel is charged with a crime. Does the Defense of Consent apply?

### Answers

1. The Defense of Consent would not apply to Maria. The person giving consent must hold a legal interest and have the right to give up that legal interest. The money in the bank cash register belongs to the people who deposit money into the bank, not to employees of the bank. Maria's boss has no legal interest in the money in the cash register, so he cannot give consent for Maria to take the money.
2. The Defense of Consent would not apply to Miguel because he did not receive informed consent from João. When João asked Miguel about his boxing skills, Miguel purposefully deceived João and made him believe that he was not very good at boxing. If João had known how skilled Miguel really was, he never would have agreed to participate in the match.

## VII. JUSTIFICATIONS: OBEDIENCE

### SECTION OBJECTIVES

- To understand the Defense of Exculpatory Undue Obedience.
- To understand what it means to obey an order and when an order must be followed.
- To understand when it may not be clear that an act is unlawful.

### 1. The Defense of Exculpatory Undue Obedience

A person's job often requires him to obey his boss or superior's orders. A person who carries out an act ordered by a legitimate authority is not criminally liable unless the act is obviously illegal. A **legitimate authority** is someone in a government position who has the power to give orders that other people are required to obey. For example, an investigating judge has the authority to order a police officer to arrest a suspected criminal. The officer who receives this order must obey it. But what if the police officer carries out the arrest and is later charged with abuse of power according to Article 297 (violating the duties of his office with intent to cause loss to another person?) Since the police officer was simply following orders that he received from the judge, he can rely on the **Defense of Exculpatory Undue Obedience**. The defense only applies, however, if the unlawfulness of the act was not obvious.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 50. Exculpatory undue obedience

A public servant who obeys an order not knowing that it leads to commission of a crime, acts without guilt, if the unlawfulness of the act is not evident from the circumstances surrounding it.

### 2. Elements of the Exculpatory Undue Obedience Defense

When deciding whether the defense applies, the court needs to consider whether (1) the order came from a legitimate authority, and (2) whether the unlawfulness of the act was obvious.

First, the Exculpatory Undue Obedience Defense can only be used by *public servants*. A **public servant** is a government official or employee. Public servants include both people who

are appointed to their offices and people who are elected. The public servant must have been obeying the order as part of his employment duties. For example, a soldier may be ordered to shoot someone during wartime by a superior officer, but he cannot shoot someone when he is not working. The person obeying the order must also have been the subordinate of the authority issuing the order. A **subordinate** is a person under the authority or control of another person. Finally, the order cannot come from a private authority. Thus the defense cannot be used by the head of household who gives orders to his children, a husband who gives orders to his wife, or a store owner who gives orders to his employee.

Second, if an order was clearly unlawful, the person who carries it out cannot assert the Exculpatory Undue Obedience Defense. This requires the judge to decide *whether the unlawfulness of the act should have been obvious to the perpetrator given the circumstances*. Recall the earlier example of the police officer. The officer obeyed an order from a judge to arrest an individual, but that arrest was later declared unlawful. The police officer would be able to use the defense as long as it was not obvious that following the judge's order was unlawful, or that arresting the person was unlawful.

In determining whether the unlawfulness was evident the courts will evaluate the nature of the conduct carried out. The more serious the conduct is, the more likely the court will conclude that it was evidently illegal.<sup>36</sup> For example, orders for soldiers to kill a prisoner or for police officers to torture a suspect are very likely to be treated as evidently illegal. Finally, if it can be shown that the subordinate public servant knew the order she received was unlawful, the courts are not likely to allow the defense, even if the unlawfulness of the action was not obvious.

### **Comparative Law**

In some countries, such as France, the penal code specifically states that a person who commits a Crime Against Humanity (a very, very serious crime in international law) cannot rely on the Defense of Exculpatory Undue Obedience. This argument can only be used by the court to mitigate what sentence the court is deciding to impose.

### **3. Summary**

A person who carries out an act ordered by a legitimate authority is not criminally liable unless the act is obviously illegal. The Exculpatory Undue Obedience Defense can be only be

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<sup>36</sup> Elliot 109.



used by public servants who obey a superior's orders at the workplace. When deciding whether the unlawfulness was evident the court will take into account the nature of the conduct carried out. The more serious the conduct the more likely the court will conclude that it was obviously illegal.

### Questions

1. Rosario is an accountant for a large company. Her boss tells her to change some of the numbers in the accounting books. Rosario does not realize that her boss is actually using her to steal money from customers. Rosario is charged with helping her boss steal money. Does the Defense of Exculpatory Undue Obedience apply to Rosario?
2. Carla works for Mr. Alves, who is a Member of Parliament. Mr. Alves is running for re-election against Mr. Soares. Mr. Alves tells Carla to go to Mr. Soares' home and steal some documents that he believes he will make Mr. Soares look bad. Mr. Alves wants to give these documents to a newspaper to publish. Carla does as she is told, but she gets caught and is charged with stealing the papers. Does the Defense of Exculpatory Undue Obedience apply to Carla?

### Answers

1. No. The Defense of Exculpatory Undue Obedience only applies only to public servants—people who work for the government. Since Rosario works for a private company, the defense does not apply to her. Instead, the court would have to find that Rosario did not have the *mens rea* required to commit the crime due to a mistake of circumstance.
2. No. The second element of the Defense of Exculpatory Undue Obedience is that the unlawfulness of the act must not be evident. Everyone knows that breaking into someone else's home and stealing his personal belongings is against the law. The judge will probably find that the unlawfulness of the order should have been obvious to Carla.

## VIII. CHAPTER REVIEW

### SECTION OBJECTIVES

- To review what a defense is and the different types of defenses a criminal defendant can use.
- To review the Defense by Reason of Age and the Insanity Defense, and the rationales for excusing certain people from criminal culpability.
- To review the justification defenses: Legitimate Defense, Necessity, Conflict of Duties, Consent, and Exculpatory Undue Obedience.

In this chapter, we discussed the concept of a defense. A defense is a situation or set of circumstances that show that a criminal defendant is not guilty of wrongdoing, or which mitigate the defendant's guilt. A complete defense nullifies the defendant's culpability for his actions. A partial defense mitigates his culpability. Conceptually, defenses can be divided into two categories—justifications and excuses. A defendant who claims a defense based on justification argues that, although he committed an unlawful act, he did not actually do anything that was morally wrong. A defendant who claims a defense based on excuse argues that he committed an unlawful act, and that that act was wrong, but that his actions should be excused because he was somehow forced to act the way he did.

Age is an excuse for criminal conduct. Minors under age 16 are exempt from criminal liability in Timor-Leste. This defense is based on the presumption that children younger than this age do not have the intelligence, judgment, emotional maturity, and moral capacity to make the rational choices that criminal law requires. The minimum age of criminal liability in Timor-Leste is comparatively high amongst the nations in its region, as well as in the world. Because the minimum age is high, Timor-Leste does not have a separate juvenile justice system.

Insanity is another excuse for criminal conduct. A person who is legally Insane is not responsible for a crime. A person is considered legally Insane if she is incapable of understanding the unlawfulness of her actions because of a mental disorder. Diminished Capacity is another, similar defense. The important difference is that the perpetrator asserting Diminished Capacity is at least partially capable of understanding that she is doing something wrong.

A common justification for criminal conduct is Legitimate Defense. The Legitimate Defense requires (1) that there was an unlawful attack, (2) that the danger was present or imminent, and (3) that the defendant acted only with the necessary means to repel the attack. When the defendant responds to the attack with excessive force, the fact that he was responding to an attack will mitigate, but not erase his culpability for the act. A person can respond with force to an attack on his property, but courts typically enforce stricter criteria for defending property than for defending another person. A person who provokes the attack against himself will most likely not be able to assert the Legitimate Defense.

The State of Justifying Need Defense is often used when the defendant has two alternatives: she must either commit a crime, or cause another person extreme hardship. The rationale for this defense is that it is justifiable in an emergency to break the law, if breaking the law will avoid a greater harm than obeying it. For the State of Justifying Need Defense to apply, the defendant must have been faced with a present danger that could not be removed except by committing a crime. Furthermore, it must have been reasonable for her to sacrifice someone else's interests given the circumstances.

If a defendant has two or more conflicting duties to act but can only obey one, the necessary and unavoidable consequence is that she will violate the other. In such situations, the defendant can rely on the Defense of Conflict Duties. This defense is based on the principle that the law cannot ask the impossible: if a defendant has no choice but to violate one duty to carry out another duty, it seems unfair to expose her to criminal sanctions.

The Defense of Consent is asserted when a defendant argues that no crime was committed because she had permission to take the action. Consent is only lawful if the consenting person has a legal interest that she can lawfully give up. The activity consented to also cannot offend social mores. The consenting person must be mature enough to understand the consequences of her actions, and she must give informed consent. Consent must be free and honest. Consent obtained through fraud, threats, or other unlawful means is no valid. Consent will be presumed when the alleged victim cannot give consent but an evaluation of the circumstances leads to the conclusion that she would have consented if she had the opportunity to do so.

Finally, we discussed the Defense of Exculpatory Undue Obedience. A person who carries out an act that is ordered by a legitimate authority is not criminally liable unless the act

was obviously illegal. The defense can only be used by public servants who obey their superior's orders at their workplace. When deciding whether the unlawfulness was evident, the court will evaluate the nature of the conduct carried out. The more serious the conduct the more likely the court will conclude that it was obviously illegal.

### Questions

Which defense would be available in each of the following cases?

- a. A doctor is charged with Serious Offences Against Physical Integrity (Article 146) after she performs emergency surgery on an unconscious accident victim without consent.
- b. Manuel takes João's car keys to prevent him from driving while drunk. João later files a complaint and Manuel is charged with Article 251, Larceny (unlawfully taking an object belonging to another person).
- c. Rosario, a government employee, is instructed by her boss to deliver a package to an important businessman's house. Later, it is discovered that the package contained money that Rosario's boss was giving to the businessman as a bribe. Rosario is charged with being an accomplice to Bribery, attempting to persuade another person by means of a gift (Article 281).
- d. Miguel is walking down the street when he sees a man pull out a knife. The man holds it up to a woman in what Miguel believes is a threatening way. Miguel tackles the man, knocking him to the ground and causing injuries. Later, Miguel finds out that the man and woman were brother and sister, and the man was simply showing his sister his newly purchased knife. Miguel is charged with a Simple Offence Against Physical Integrity for causing harm to another person's body (Article 145).
- e. A group of 15 year-old boys burn down a building, but they run away before the police arrive. After three years of investigation, the police discover who committed the crime. The boys are charged with Arson, intentionally setting fire to a building (Article 263).
- f. Vincente and Marquita meet at a bar. Vincente asks Marquita if she would like to come home with him and she says yes. At Vincente's home, the two engage in sexual relations. Marquita later files a complaint alleging that Vincente raped her. Vincente is charged with Rape (Article 172).
- g. Joana kills her son. She admits to the police that she committed the crime, but says that she had to do so because the voices in her head told her that the child was evil. Joana is charged with Homicide (Article 138).

## Answers

- a. The doctor in this scenario could rely on presumed consent as defense. The victim of the accident was unconscious at the time the doctor performed the operation, so he was obviously incapable of giving consent. But a court would find that, had the victim been conscious and aware of the fact that he needed the operation in order to save his life, he would have consented.
- b. Manuel could use the State of Justifying Need Defense. By driving while intoxicated, João would be a present danger to other people on the road, as well as a danger to himself. Manuel acted reasonably by taking João's keys to prevent this danger.
- c. Rosario could rely on the Exculpatory Undue Obedience Defense. Rosario is a public servant, so she can assert the defense. She was also following her superior's orders. Therefore, the defense will apply to her, as long as the act was not obviously illegal. There is nothing that is obviously illegal about delivering a package; therefore, the Exculpatory Undue Obedience Defense will apply.
- d. Miguel would likely assert the Legitimate Defense. First, recall that a person can act in legitimate defense of himself or of a third party. Therefore, Miguel had a right to defend the woman because he believed to be in danger. There is still a problem, however, because Miguel made a mistake—the woman was not actually in any danger. But remember that although Miguel made a mistake, he can still argue Legitimate Defense so long as his actions were reasonable. The court would need to look at the circumstances surrounding the incident to determine whether Miguel's mistake about the knife was reasonable.
- e. The boys could not be prosecuted because of the Defense by Reason of Age. This is true even though the boys are charged three years after the crime. What is relevant is the perpetrators' ages at the time the criminal act occurred. The age of criminal liability in Timor-Leste is 16. No one who committed a crime at a younger age may be prosecuted. Therefore, the boys cannot be prosecuted because they were 15 when the incident occurred.
- f. Vincente would argue the Defense of Consent. He would argue that by her actions, Marquita indicated to him that she consented to the sexual activities. The court would need to carefully examine the facts and circumstances surrounding the incident in order to determine whether it was reasonable for Vincente to believe that Marquita had consented.
- g. The prosecutor and judge would likely find that the Insanity Defense applies to Joana. Joana is obviously suffering from delusions. The court would need to determine whether she was being affected by these delusions at the time when she killed her son. The court would also need to find out whether the delusions prevented her from understanding the criminal nature of her actions. If they find that she was suffering from delusions that made her unable to understand her actions, then Joana can use the Insanity Defense and she will not be prosecuted. However, she may still be subject to security measures, such as internment in a mental hospital.

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## CHAPTER 5: PENALTIES

### CHAPTER OBJECTIVES

- To compare the different theories justifying criminal punishment.
- To understand the principles that criminal sentencing is based upon in Timor-Leste.
- To understand how judges decide what penalties to give a criminal defendant, and the different sentencing options in Timorese law.
- To understand aggravating and mitigating circumstances.
- To learn how security measures differ from penalties.

In this chapter, we will learn about the penalties that are given to people who are convicted of crimes. We will also learn how a judge decides which penalties to give these perpetrators. We begin by learning about different theories of punishment that legal scholars have developed. These theories answer the question: “why should we punish people who commit crimes?” Next, we will next study the principles of criminal sentencing in Timor-Leste. We will then discuss how judges in Timor-Leste decide which penalty to give to a person who has committed a crime. In order to understand how these penalties are determined, we will also learn about aggravating and mitigating circumstances. These are circumstances that make a crime either more or less serious.

Once we have learned how penalties are decided, we will study the different types of penalties that exist in Timor-Leste. These types of penalties include imprisonment, probation, parole, payment of a fine, community service, admonishment, and accessory penalties. Finally, we will learn about security measures. Security measures are different from penalties because they apply to people who are not culpable for their bad acts.

## I. PURPOSES OF PUNISHMENT

### SECTION OBJECTIVES

- To understand the four primary theories of punishment.
- To understand how theories of punishment influence a legal system.

**Punishment** is the legal process in which perpetrators of crime are condemned and sanctioned in accordance with specified laws and procedures. Punishment inflicts some kind of loss on a person in response to that person violating the law. There are four fundamental theories that scholars have developed to justify punishing people who commit crimes: rehabilitation, incapacitation, deterrence, and retribution. Each of these theories tries to answer the question “why should we punish criminals?” After reading through these theories, you may find yourself wondering which theory is “correct.” Instead of worrying about finding a right answer, a better approach is to recognize that all these theories have merit, and multiple theories can form the basis of a single legal system. Finally, keep in mind that the theories of punishment discussed below are not merely philosophical. They affect a legal system’s approach to sentencing.

#### 1. Rehabilitation

**Rehabilitation** is the theory that punishment should be inflicted on a perpetrator to reform him, or to correct his criminal ways. Successful rehabilitation allows a perpetrator to re-enter society as a law-abiding citizen. For example, Carla has no job and no money. To provide food for her family, Carla steals a bag of rice from a store. She is caught and convicted. In prison, Carla is taught to how to sew and mend clothes. Thus, once Carla leaves prison, she will be able to obtain a job making and repairing clothes, and will no longer have to steal for food.

Now, Imagine that Julio is an alcoholic. After drinking one night, Julio drives home. He is pulled over and charged with Driving Under the Influence of Alcohol. Instead of going to prison, the court orders Julio to attend a drug rehabilitation program to help him end his addiction to alcohol. Thus, after the program, Julio will no longer be addicted to alcohol and will therefore not drive after drinking.



Many people agree that it is desirable for punishment to rehabilitate the perpetrator. This is because society benefits if an individual who breaks the law is rehabilitated. But one problem with this theory is that it may be more expensive to offer rehabilitation programs to criminals than to simply put them in jail. Some believe that criminals represent the worst in society, so it is unjust to take money from what they would consider worthier people to pay for the rehabilitation less worthy people.

In general, however, rehabilitation is considered a worthy goal of punishment. The main objection to rehabilitation is that it does not always work. This argument is often supported by looking at the large amount of recidivism by people who have been imprisoned. **Recidivism** is the tendency to relapse into a previous mode of behaviour—in this case, criminal behaviour. However, it would be unfair to state that the idea of reforming former perpetrators is a completely bad. It is possible for a penalty to be used to provide a person with skills that will transform her into a highly useful citizen.

## **2. Incapacitation**

**Incapacitation** is the theory that punishment will prevent the criminal defendant from offending again by making him incapable of committing a crime. This theory relates primarily to prison sentences. A prison sentence makes it impossible for a perpetrator to commit another crime, at least for the duration of his sentence, because he is removed from society. This is because some individuals present a danger to society and need to be incapacitated. Even someone who believes strongly in rehabilitation must admit that a convicted and dangerous criminal must be restrained while he is being reformed. Whether, and for how long, imprisonment is necessary will depend on the dangerousness shown by the defendant in perpetrating his crime.

For example, Jose is a mentally ill man. He believes Manuel is going to kill him. This belief is because of his mental illness. Because of this belief, Jose attempts to murder Manuel. Jose is then put in prison to prevent him from trying to kill Manuel again. Jose is later cured of his mental illness and no longer believes Manuel is going to kill him. Jose is no longer a threat to Manuel. Thus the justification for keeping Jose in prison would no longer exist to under the incapacitation theory.

The argument against incapacitation as a purpose of punishment is not directed towards incapacitation itself. The argument is generally that it is bad to restrain someone without trying to reform her as well. This argument suggests that unless incapacitation is either permanent (life imprisonment) or done together with a meaningful program to rehabilitate the perpetrator, imprisonment does not do enough to stop criminal conduct. The imprisonment will just postpone when the criminal conduct will happen. This is a strong argument, but it is clear that immediate incapacitation of a potentially dangerous criminal is often necessary to protect society.

### **3. Deterrence**

**Deterrence** is the theory that penalties are used as a threat to discourage people from committing crimes. When the punishment for the crime outweighs the value of the any benefit of committing the crime, people will choose not to violate the law. There are two types of deterrence: individual deterrence and general deterrence.

#### *Individual Deterrence*

**Individual deterrence** is similar to rehabilitation, in that it aims to discourage perpetrators from violating the law again. It is punishment that says to a convicted perpetrator: “This is what happens to you when you commit a crime. Remember that when you get out of prison.” For example, imagine that Jose drove to a bar and drank multiple beers. When Jose decides to go home he has two options: he can drive back home or he can take a taxi back home. Jose knows that is against the law to drive a vehicle if he has been drinking a lot of alcohol. He also knows that he could be sent to prison for up to two years if he is caught driving while under the influence of alcohol. Therefore, Jose decides to pay for a taxi to drive him home. The threat of a prison sentence deterred Jose from driving home under the influence of alcohol.

One argument against individual deterrence is that it is not consistent with rehabilitation. This argument is that very bad prison conditions are likely to be the most effective at deterring individuals who have already been to prison and do not wish to return. This does not necessarily deter people who have never gone to prison before. Also if a prison sentence does not include programs for rehabilitation and very bad conditions to discourage perpetrators from committing crimes, then rehabilitation will not happen. It is important to find the balance between these two positions so that prison conditions are not so bad that they are inhumane, but where they also deter prisoners from returning by providing rehabilitation programs.

### General Deterrence

General deterrence is the idea that punishments imposed on one convicted criminal will deter other people from engaging in that conduct. People who have not yet committed crimes will see what might happen to them if they do commit a crime, and will choose to obey the law. Look back to the example given above about Jose drinking and driving. Now assume that Jose decided to drive under the influence of alcohol and was caught. Jose is punished with 1 year in prison. Jose's punishment is broadcast to the rest of his community. As a result, other individuals become educated about the severe consequences for drinking and driving, and choose to never drink and drive. The knowledge of Jose's punishment deters the rest of the community from committing the same crime.

Critics of this theory argue that many criminal defendants do not know what sentences a court would impose. Also, even if criminal defendants know the possible sentences for violating the law, they are not the kind of people who would calculate possible losses and gains based on their own conduct. Additionally, many factors can influence person behaviour, including religious beliefs or the expectations from a person's peers. Finally, people who oppose general deterrence theory argue that, if punishment really deters crime, the crime rate should be zero because it would not make sense for anyone to commit a crime.

People who favour deterrence theory argue that people do have some idea that their crimes will be punished and this knowledge does influence their thinking, at least to some degree. They also argue that just because there are other, non-legal factors that influence a person's behaviour does not change the fact that the law is still one important factor.

In conclusion, it seems fair to say that the prospect of punishment does deter crime, at least to some degree. The more a person calculates the costs and benefits of committing a crime, the greater the likelihood that the person will be deterred from criminal behaviour. But it is difficult to measure how well deterrence works because it is hard to know how many people have considered committing a crime and then chosen not to commit it.

#### **4. Retribution**

**Retribution** is a theory of justice that considers punishment to be the best response to crime if the punishment is proportionate. This theory states that punishment through the criminal justice system is society's method of correcting a wrong. The basic idea is that when a person

harms society by committing a crime, that person deserves to have a proportionate harm inflicted back on him. This means that the severity of punishment should be comparable to the seriousness of the crime. Punishment is justified by the moral requirement that the guilty make amends for the harm they have caused to society.

For example: Jose kills Hugo's pig. The pig was worth 100 dollars. Because it was wrong for Jose to kill Hugo's pig, he deserves to be punished. Since the pig was worth US\$ 100, making Jose pay US\$10 would not be sufficient. However, making Jose pay US\$ 1000 dollars would also be unjust. An appropriate penalty would likely be about US\$ 100, the value of the pig. This way the punishment is proportionate to the crime. Not everyone agrees that retribution is a legitimate purpose of punishment. Opponents argue that it is barbaric because it is as though the state is taking revenge upon its citizens. Another issue with retribution is determining what punishment is proportionate to the crime. For example, how long should a person be imprisoned for killing another person? Is this punishment truly equal or comparable to the crime committing? People who support retribution argue that it is necessary to create rules that establish what is morally acceptable in society. It is also important to punish people who break society's rules. Another argument in favour of retribution is that if the government punishes a criminal, this will prevent ordinary people from trying to punish a criminal herself.

## **5. Summary**

It is important to understand *why* criminals should be punished by the legal system because this affects practice decisions of *when* and *how* criminals are punished. There are four primary justifications for punishing criminals: rehabilitation, incapacitation, deterrence, and retribution. Rehabilitation is the theory that punishment should be inflicted on a perpetrator to reform him, or to correct his criminal behaviour. Incapacitation is the theory that punishment will prevent the criminal defendant from violating the law again by making him incapable of committing a crime. Deterrence is the use of penalties as a threat to deter people from committing crimes, either individually or generally. Retribution is the theory that, when a person harms society by committing a crime, that person deserves to have a proportionate harm inflicted upon him. All four of these theories have positives and negatives. Typically, the theory that dominates a legal system will influence the laws that are made and the penalties that are given.

### **Questions**

1. What are some of the costs and benefits of punishing criminal conduct?

### **Answers**

1. Some costs of punishing criminal conduct include paying police officers to enforce the law, the cost of prosecuting a defendant, and the cost of building a prison to hold convicted criminals. Some of the benefits gained from punishing criminal conduct are the preventing future crime, rehabilitating former criminals, and providing a safer community for victims and society in general.

## II. PRINCIPLES OF PUNISHMENT IN TIMOR-LESTE

### SECTION OBJECTIVES

- To learn the main theory of punishment for the Timorese criminal justice system.
- To learn which principles and rights determine penalties in Timor-Leste.

In the previous section we learned about the four primary justifications for punishing criminals. In this section, we will learn about the justification for punishment in Timor-Leste, specifically. These principles influence every law relating to punishment in Timor-Leste. Therefore, it is important that you thoroughly understand them.

### 1. Rehabilitation Is the Justification for Punishment in Timor-Leste

Now that we have learned the four most common theories of punishment, let us consider which theory underlies the system of punishment in Timor-Leste. The Penal Code's Annex states: "With regards to legal consequences of punishable acts, observe that penalties are always executed as a teaching or re-socializing tool . . . ." Additionally, Article 61 states that it is important that penalties are used to help the perpetrator re-enter society.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 61. Purpose of penalties and security measures**

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.

These statements make it clear that the theory of rehabilitation is the basis for punishment in Timor-Leste. This means that the goal of punishment in Timor-Leste is to rehabilitate perpetrators. This goal has an important effect on courts' sentencing decisions. It tells us that the most important consideration in determining a sentence is whether the sentence will help rehabilitate the perpetrator. Because rehabilitation focuses on the perpetrator's unique characteristics, her program for reform will likely be unique. Thus each sentence is individualized. Two convicts committing the same crime may receive different sentences

because a rehabilitative punishment is tailored to fit the perpetrator, not the type of crime committed.

According to rehabilitative theories, prison may not be the best place to achieve rehabilitation because it isolates the perpetrators from society, which they will eventually have to return to. Incarceration may also cause perpetrators to become dependent on the prison system. Choosing not to put the perpetrator in prison can help keep her functioning within her ordinary life to some degree, and help her learn to manage responsibilities she will face after her sentence has expired. This explains why, in Timor-Leste, there is a preference for non-liberty denying penalties. **Non-liberty denying penalties** do not require the convicted person to go to prison or be interned through a security measure. As you can see, Article 62 states that courts must give preference to non-liberty denying penalties whenever such penalties are adequate.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 62. Determination of penalties and security measures**

- (1) Whenever a sentence of deprivation of liberty and another penalty that does not involve deprivation of liberty are alternatively applicable, the court shall give preference to the latter, whenever the latter adequately and sufficiently fulfils the purpose of the penalty.
- (2) In determining the type of security measure to be applied to a perpetrator whose danger is procedurally established, the personality of the perpetrator and appropriate treatment of the case shall be considered.

As in all countries, however, punishment in Timor-Leste relies on more than one justification for punishment. Although rehabilitation is the dominant justification for punishment, the Penal Code also relies on the theory of incapacitation to justify certain punishments. As you may recall, incapacitation is a penalty that is meant to prevent a convicted person from committing another crime, usually by holding the person in jail or prison. In some Penal Code provisions, a prisoner can only be released before the end of his sentence if he does not present a danger to society. This is an example of incapacitation. Other provisions state that people who have committed certain crimes can no longer practice a certain profession, drive a vehicle, or carry a weapon. These are also examples of ways to incapacitate a person.

## 2. Penalties as Re-Socializing Tools

In the Timorese criminal justice system, penalties are to be used as re-socializing tools. Because the goal of punishment is to rehabilitate the perpetrator, alternative penalties are preferred, particularly when the crime is less serious. Penalties like fines or community service are meant to help the perpetrator reintegrate into society. This means that the penalty of imprisonment should only be used when other penalties are inadequate to fulfil the objectives of preventing crime and rehabilitating the perpetrator. Minimum and maximum duration of the penalties of imprisonment have been established from between 30 days and 25 years, and in only limited cases can the maximum prison sentence be 30 years.

The Penal Code also promotes social reintegration by providing for suspended sentences. A **suspended sentence** occurs when the judge delays when the defendant will serve his prison sentence for a certain period of time. If the defendant does not break the law during that period, then the judge will not impose the prison sentence at all. Suspended sentences can be used in any case where the penalty for the crime is less than 3 years and where the judge believes that the defendant will not commit other crimes in the future. A judge can also attach conditions to the suspended sentence, such as requiring the perpetrator to be monitored by **reintegration services**, officers of the court who help former prisoners with their transition back into society.

## 3. Culpability

When someone is **culpable** for a wrong or harmful act, the person has done something deserving disapproval or blame. A person may only be punished by the criminal justice system if he or she is culpable. The principle of culpability is a form of limitation on the power of the State, because the amount of punishment can never exceed the amount of guilt.

### **Annex to the Penal Code of the Democratic Republic of Timor-Leste**

Culpability is an assumption for all penalties, ensuring that there can be no penalty without guilt.

To be considered culpable of a crime, a person must be able to understand that they have committed an act that is wrong or harmful. That is why there are exemptions from criminal culpability due to age or if something has a mental disturbance. The exemption for age is based



on the idea that someone who is young may be unable to understand the consequences of their actions the way that adults can. For this reason, children below the age of sixteen are exempt from all criminal liability in Timor-Leste. Similarly, a person who has a mental illness cannot understand the consequences of her actions and, therefore, she cannot be culpable of a crime. A mental illness is typically confirmed by either a doctor or members of the community where the perpetrator lives.

#### **4. Right to Life**

Because the right to life is protected in Timor-Leste, the **death penalty** is not a permissible form of punishment. The death penalty is a legal process in which a person is put to death by the state as punishment for a crime. According to Section 29 of the Constitution, “There shall be no death penalty in the Democratic Republic of East Timor.” In the past, many societies used the death penalty as a form of punishment. As of 2013, there were fifty-eight countries that still actively practice the death penalty, while ninety-seven countries have abolished it.<sup>37</sup>

The right to life also means that life sentences are not permitted in Timor-Leste. These are prison sentences that last until a person dies. Section 32.1 of the Constitution states, “There shall be no life imprisonment nor sentences or security measures lasting for unlimited or indefinite period of time in the Democratic Republic of East Timor.”

#### **5. Other Fundamental Rights**

According to Section 32.4 of the Constitution, even if a perpetrator is subjected to a penalty, she will not lose her other basic fundamental rights. This means that no penalty or security measure will result in the loss of civil, professional, or political rights. Examples of civil rights in the Constitution include:

- The right to honour and privacy (Section 36)
- Freedom of the press and mass media (Section 41)
- Freedom of speech and information (Section 40)

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<sup>37</sup> “Abolitionist and Retentionist Countries” *Amnesty International*. 12 Mar. 2014 < <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>>

No penalty or security measure can require these rights, or any other civil right, to be taken away from someone who is convicted of a crime.

Examples of professional rights in the Constitution include:

- The right to work (Section 50)
- The right to form or joint trade unions (Section 52)

No penalty or security measure can require these rights, or any other professional right, to be taken away from someone who is convicted of a crime. Finally, Political rights in the Constitution include:

- The right to assemble and demonstrate (Section 42)
- The right to political participation Section 46)
- The right to vote (47)

No penalty or security measure can require these rights, or any other political right, to be taken away from someone who convicted of a crime.

## **6. Summary**

The primary theory of punishment in the Penal Code is rehabilitation. For this reason, penalties are supposed to be used mainly as re-socializing tools. It is also important to remember that there can never be punishment without culpability. The right to life is guaranteed to the people of Timor-Leste, so the death penalty is not a permissible punishment for any crime. There are many other rights stated in the Constitution that cannot be taken away as a consequence of committing a crime. These principles are the basis of the system of penalties in Timor-Leste.

### III. DETERMINING THE PENALTY

#### SECTION OBJECTIVES

- To learn the process for determining what penalty will be given to a perpetrator of a crime.
- To understand aggravating and mitigating circumstances.

Once the police have arrested the perpetrator and the judge has found him guilty, the next step in the process is deciding the penalty. A defendant must be sentenced to a certain punishment for the crime. **Sentencing** is the process when a judge imposes punishment on a person convicted of a crime or crimes. The Penal Code has specific procedures for a court to follow in order to determine the penalty that a convicted defendant should receive. In this section, we will go step by step through the court's process of determining the penalty for a convicted defendant.

#### 1. Determining the Concrete Extent of a Penalty

Article 90 establishes the procedure that the court must follow in order to determine the penalty that a defendant could potentially receive. This penalty is usually listed as a range of years in the statute. It tells the court what the minimum and maximum possible penalty is for the crime. This possible penalty is called the **abstract penalty**. For example, the abstract penalty for homicide is, at a minimum, 8 years and, at a maximum, 20 years imprisonment. How do we know this? Because Article 138 states that homicide "is punishable with 8 to 20 years imprisonment."

It is essential for the court to begin by determining the abstract penalty. However, the abstract penalty does not tell the court all that it needs to know. The actual penalty that the court can give to a particular defendant for a particular crime is affected by other factors, such as the circumstances of the crime and whether the defendant has committed other crimes in the past. The "**concrete extent of the penalty**" is the actual penalty that can be given to a defendant convicted of a particular crime. To determine the concrete extent of the penalty, the court must go through several steps. The first step for the court is to look at whether the defendant qualifies as a recurrent or habitual criminal (Article 90(2)(a)).

## Penal Code of the Democratic Republic of Timor-Leste

### Article 90. General Principles

- (1) Whenever the law establishes a penalty, it refers to the crime in its consummated form.
- (2) The concrete extent of the penalty within the scope of the abstract penalty shall be determined in the following manner:
  - a) Any modifying aggravating circumstances of recurrence and habitual criminality, as described in articles 53 and 54, shall be applied to the abstract penalty corresponding to the consummated crime;
  - b) Any extraordinary mitigating circumstances shall be taken into consideration, in the absence of any modifying circumstances, if provisions in the previous paragraph have been met or based on the abstract penalty for the consummated crime.

Whether a person is a recurrent or habitual criminal is defined in Articles 53 and 54. But what is the difference between a **recurrent criminal** and a **habitual criminal**? The difference comes from the number of crimes the perpetrator has committed, the amount of time that has passed between crimes, and the judge's determination of the perpetrator's characteristics. A **recurrent criminal** will have committed two crimes of intent punishable by six months or more of imprisonment. If more than four years have passed between the two crimes, the person is not a recurrent criminal. The judge must also find that the previous sentence failed to serve as a sufficient warning against the perpetrator committing crime again. A **habitual criminal** will have committed three or more crimes of intent that were punished by effective imprisonment. This means that the defendant's sentence was not suspended. Additionally, no more than three years can have elapsed between any of the three or more crimes. The judge must also find that the defendant has a "strong or dangerous tendency" to commit crime.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 53. Recurrence

- (1) Any person who commits a crime of intent individually or under any form of joint participation that is punishable with effective imprisonment superior to 6 months, after having received final sentence of an effective penalty of imprisonment superior to 6 months due to a previous crime of intent, and it be found that, according to the

circumstances of the case, the previous sentence or sentences have failed to serve as sufficient warning against crime to the perpetrator, the same shall be considered a repeat perpetrator.

- (2) There is no recurrence if, between the commissions of one and the other crime, more than four years have elapsed, not considering the time that the perpetrator has been subject to a procedural measure, penalty or security measure involving deprivation of liberty.
- (3) In the event of recurrence, the minimum limit of the penalty applicable to the crime is increased by one third and the maximum limit remains unchanged, however the aggravation cannot exceed the measure of the heaviest penalty applied in previous convictions.

#### **Article 54. Habitual criminality**

- (1) Whenever any person commits a crime of intent, and an actual prison sentence exceeding one year should be applied, and cumulatively, the following requirements are met:
  - a) The perpetrator previously committed three or more crimes of intent and has been punished by effective imprisonment;
  - b) Less than three years having elapsed between each of the crimes;
  - c) Assessment of both the acts and personality of the perpetrator reveals a strong or dangerous tendency toward crime;

The applicable penalty will be that for the crime committed with its minimum and maximum limits increased by one third.

- (2) Provisions of the law shall prevail over any specific rules for punishing recurrence.

To make this decision, the judge must examine the defendant's criminal record to see if she is a recurrent or habitual criminal. If the court finds that the defendant fits in either category, then the minimum sentence and maximum sentence will change. Let us do an example to make this clearer: Imagine Odete is convicted of homicide. The court looks at Article 138 and finds that the crime is punishable with 8 to 20 years imprisonment. Now the court looks at Odete's criminal history. The judge discovers that, within the last four years, she has committed another crime of intent and served more than 6 months in prison. This means that Odete can be considered a recurrent criminal. Therefore, the minimum penalty for her homicide increases by one third. So, instead of 8 years, Odete can be sentenced to 10 years and 8 months in prison.

After deciding whether the defendant is a recurrent or habitual criminal, the court will consider any extraordinarily mitigating circumstances. A **mitigating circumstance** is a circumstance that does not justify or excuse committing the crime, but may reduce the severity of a charge. Extraordinarily mitigating circumstances are a special type of mitigating circumstance. An extraordinarily mitigating circumstance will reduce to *a large extent* the unlawfulness of the perpetrator's conduct, guilt, or need to receive a penalty.

Article 56 defines the different extraordinarily mitigating circumstances and lists several circumstances that may be considered extraordinarily mitigating. For example, one extraordinarily mitigating factor is if the perpetrator has maintained good conduct for a period of time after the crime was committed (Article 56.2(d)). If the court finds that there are extraordinarily mitigating circumstances, it will look at Article 57. Article 57 tells the court what consequences the extraordinarily mitigating circumstance will have on the potential penalty for the defendant. Again, let us do an example:

Ruel is convicted of Rape. The court refers to looks at Article 172 for the abstract penalty. The Article states that this crime is punishable by 5 to 15 years of imprisonment. The judge looks at Ruel's criminal record, but he has never committed a crime before. This means that he is not a recurrent or habitual criminal. The court finds, however, that Ruel has been obeying the laws and showing good conduct for some time after the crime was committed. This is an extraordinarily mitigating circumstance. The court must then look at Article 57 to see how this mitigation limits the penalty. Article 57 states that the maximum limit of the penalty of imprisonment must be reduced *by* one third, and the minimum limit must be reduced *to* one-fifth. If we reduce the maximum of 15 by one third, we get 10 years. If we reduce the minimum of 5 years by one-fifth we get 1 year. Therefore, when the court applies this law to Ruel's case, the final result is that the potential sentence is now a minimum of 1 year and a maximum of 10 years.

### Questions

1. Hugo is convicted of Arson. This crime is punishable with 2 to 8 years imprisonment. Hugo is sentenced to 3 years imprisonment. Once released, Hugo commits Arson again, so the court declares that he is a recurrent criminal. Can the court give the following sentence to Hugo? Why or why not?

- a) 2 years imprisonment
  - b) 9 years imprisonment
2. Manuel committed his first crime in 2000, his second in 2002, and his third in 2007. Can he be considered a habitual criminal?

#### **Answers**

- 1a) No, the court cannot sentence Hugo to 2 years imprisonment because the minimum limit is increased by one third for recurrent and habitual perpetrators. This means that the minimum penalty is now 32 months, or 2 years and 8 months. Hugo cannot receive a sentence that is less than this.
  - 1b) No, the court cannot sentence Hugo to 9 years imprisonment because the maximum limit of the penalty will not change for recurrent perpetrators. Therefore, the maximum that Hugo could receive is still 8 years.
2. No, Manuel would not be a habitual criminal because the second requirement in Article 54 has not been met. More than three years passed between Manuel's second and third Manuel's crimes.

## **2. Determining the Specific Penalty and Aggravating Circumstances**

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 91. Determination of a specific penalty:**

- (1) Once the abstract scope of the penalty has been determined under the terms of the previous article, the court shall assess all circumstances that, not forming part of the legal definition itself nor having been weighed in light of the previous article, either aggravate or mitigate the liability of the convict.
- (2) Upon weighing these latter circumstances, the court shall determine the exact extent of the penalty deemed necessary to protect legal interests essential to life in society and to reintegrate the perpetrator into society within the limits established in the definition of the crime or resulting from application from the previous article.
- (3) Under no circumstance may the extent of the penalty applied to the convict exceed the limit befitting the guilt.

Once the court has taken the steps above, it will know the extent of the penalties available for a particular defendant. Next, the court must decide the specific penalty for the defendant.

Article 91.1 requires the court consider any other aggravating and mitigating circumstances.

**Aggravating circumstances** are any circumstances involved in the commission of the crime that increases its guilt or seriousness, or adds to its consequences. An aggravating circumstance must be something more than the essential elements of the crime itself. These circumstances will increase the perpetrator's penalty or punishment. Examples of aggravating circumstances include committing a crime for money, committing a crime against a particularly vulnerable person, or committing a crime in a way that intentionally increases the victim's suffering.

Article 52 lists many other factors that may be considered aggravating circumstances. The prosecutor must present any aggravating circumstances. Aggravating circumstances are presented at trial by the prosecutor. The prosecutor must support these aggravating circumstances with evidence. The prosecutor will argue that because of the aggravating circumstances, the judge should give the defendant a harsher penalty.

A **mitigating circumstance** is a circumstance that does not justify or excuse an offence but may reduce the severity of a charge. Often, mitigating circumstances partially explain or excuse the behaviour of a person who has committed a crime. Mitigating circumstances are typically presented as evidence by the defendant. The defendant presents this evidence to show why he should be given a less severe penalty. A prosecutor may also consider mitigating circumstances before trial and may ask for a lower sentence. The judge uses this evidence when making her decision about what sentence the defendant should be given. The court must consider these circumstances to be fair to the defendant.

Article 51 lists examples of mitigating circumstances, including when: the perpetrator acts in an emotional state or reacts to provocation; if the perpetrator appears before the authorities voluntarily, before knowing of the existence of criminal proceeding against him; if the perpetrator demonstrates sincere repentance for the crime; or if the perpetrator spontaneously confesses. Once the court has weighed the aggravating and mitigating factors, it can make the final determination of the defendant's penalty. As always, the court must remember that penalties are re-socializing tools in Timor-Leste. The court must select a penalty that will protect the legal interests of society while helping to reintegrate the perpetrator back into society. And, of course, the extent of the penalty cannot exceed the level of guilt.



### 3. Summary

Sentencing is not a science. It is important to remember that there is no exact formula for determining a penalty. Instead, the court starts with a basic framework. Its first step is to consult the Penal Code or other relevant laws to determine the abstract penalty. The next step is to determine the specific range of sentences that could be given to a particular defendant. This step requires the court consider the defendant's criminal history and any extraordinarily mitigating circumstances involved in the commission of the crime. Finally the court must consider all relevant aggravating and mitigating circumstances. Based on these circumstances, the court can make the final decision about the defendant's sentence. As always, the court's decision must be informed by the principles justifying punishment in the Timorese legal system.

#### Questions

**Exercise: Determining the Concrete Extent of the Penalty**  
*Adapted from Dili District Court Case No. 34/C.Ord/2011/TDD<sup>38</sup>*

You are the judge. Determine the concrete extent of the penalty for the following crime.

On 3 May 2011, the Dili District Court conducted a hearing to make a final decision in Case No. 34/C.Ord/2011/TDD. The alleged incident occurred in Estadu Village, Ermera District on 16 August 2009. The motive for this incident was because the victim, who was the wife of the defendant, had accumulated a lot of debts without the defendant's knowledge. The defendant and his wife had an argument and the defendant killed the wife.

The defendant is convicted of Aggravated Homicide (Article 139). When the court examined the defendant's criminal record, it learned that he was convicted of Mistreatment of a Spouse (Article 154) 2 years ago. He was also convicted for stealing a vehicle 4 years ago. The defendant served sentences of imprisonment for both of these crimes.

#### Answers

##### **Determining the Concrete Extent of a Sentence**

Let us go through all of the steps:

First, we must find the abstract penalty for the crime. Article 139 tells us that Aggravated Homicide is punishable with 12 to 25 years imprisonment. Next we look at the defendant's criminal history. Since this defendant has committed three crimes of intent, less than three years

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<sup>38</sup> Judicial System Monitoring Programme. *Summary of Cases Heard by the Dili District Court in May 2011*. 31 May 2011. <<http://jsmp.tl/wp-content/uploads/2012/06/CS-Dili-May-2011.pdf>>

have passed between each crime, and he also went to prison for two of the offenses, the defendant qualifies as a habitual criminal.

Now we calculate the specific sentence: The minimum and maximum penalty increases by one third for habitual criminals. This means that the minimum is now 16 years and the maximum would be 33 years and 4 months. However, careful readers will remember that the maximum possible penalty for any crime in Timor-Leste is 30 years of imprisonment. The penalty can never be more than that. Therefore, the concrete extent of the penalty for this defendant is 16 to 30 years imprisonment.

## IV. TYPES OF PENALTIES

### SECTION OBJECTIVES

- To learn the different types of penalties a defendant could receive if convicted of a crime, including imprisonment, suspended sentences, fines, community service, and admonishment.
- To understand the legal consequences that result from committing crimes.

#### 1. Sentence of Imprisonment

Prisons are a place where convicted perpetrators are physically confined and usually prevented from having certain freedoms. Prisons are usually used for perpetrators who have committed the most serious crimes. Remember that, in Timor-Leste, there is a preference for giving non-liberty depriving penalties whenever that is possible. This means that prisons are seen as the last resort for punishment in Timor-Leste. Prison sentences for certain minor crimes will not be served. For example, Article 67 states that a fine can be paid instead of serving a prison sentence of twelve months in certain circumstances. Imagine Domingos is caught by the police after he steals a car. He is charged and convicted of Vehicle Theft (Article 255). The judge sentences him to 6 months in jail. The judge does not believe that Domingos needs to stay in jail to prevent him from committing another crime. However, the judge also thinks that the crime was serious enough that the sentence should not be suspended. In this case, Article 67 allows a fine to be substituted for the 6-month prison sentence.

Now imagine that Domingos does not pay the fine, and does not tell the court why he has not paid the fine. He will have to serve the original prison sentence – 6 months. If Domingos later pays the fine, then the sentence will be suspended. If the judge decides not to substitute a fine for the prison sentence when the law allows her to do so, she must provide reasons why she made that decision.

Remember, according to Article 66, the absolute maximum length of a prison sentence is 30 years. The minimum is 30 days.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 68. Suspension of execution of a prison sentence

- (1) Whenever the prison sentence applied does not exceed three years, the court may suspend the execution thereof for a period to be set between one and five years, to be counted from the time the final decision was rendered.
- (2) The decision must contain the grounds for the suspension, such as the personality of the perpetrator, the circumstances under which the crime was committed, previous behaviour and living conditions, and most importantly the perpetrator's likely conduct in the future.
- (3) The court shall provide the grounds for any decision when substitution is not performed when the law allows it to do so.

A suspended sentence occurs when the judge delays when the penalty will be applied to the defendant. Typically the defendant will serve a period of **probation** instead. If the defendant does not break the law during the probation period, and fulfils all of the conditions of probation, the judge will usually dismiss the sentence. This means the sentence does not have to be served at all.

### Comparative Law

In Australia, suspended sentences are commonly imposed in order to help reduce overcrowding in prisons. For example, a person may be sentenced to 6 months in jail, but receives a wholly suspended 6 month sentence instead. If the person commits any other offence during the year, the original jail term is immediately applied in addition to any other sentence for the new crime. The period for which the sentence is suspended cannot exceed the term of the original sentence.

How does a judge make the decision to suspend the sentence? Article 68.2 says that the judge should consider factors like the perpetrator's personality or the circumstances under which the crime was committed. The most important factor is whether the perpetrator is likely to commit crime in the future. As of 2013, there is a strong preference among judges in Timor-Leste for suspending a perpetrator's sentence whenever possible. There are two primary reasons for this: first, it prevents overburdening the country's prison resources, and second, it reflects the preference for non-liberty-denying penalties.

Article 69 says that the court may condition suspended execution of a prison sentence on the performance of certain duties. The court can require the defendant to do any of the following: pay for any damage caused by the crime; publicly apologize to the victim; perform certain tasks in connection with the crime committed; or provide a sum of money to the State or to a charity institution of importance to the reintegration of the convict. Although some of these duties may seem broad in scope, they are limited by Article 69(3), which says that duties imposed may not be those whose performance cannot reasonably be expected from the convict.

This requires the judge to look at the particular circumstances of an individual defendant and make a determination about what conditions the defendant will be able to perform. This may require the judge to take into account factors such as how much money the person earns or whether he is physically able to complete certain tasks. If the judge later discovers circumstances that will make the convict unable to complete the duties that were originally imposed, then the court can modify the duties.

The court can also impose on the defendant certain rules of conduct. The defendant must comply with these rules for the duration of the suspension. The purpose of these rules is to promote the person's reintegration into society. These rules often require a person to stay away from any accomplice of the crime, or to stay away from the area where the crime was committed, or to not be in possession of weapons, or to appear periodically before a court.

Sometimes the court may have reason to believe that a simple or conditional suspension of a prison sentence is insufficient to ensure rehabilitation of the perpetrator. According to Penal Code Article 71, in such cases the court may order suspension and subject the convict to monitoring by reintegration services for the duration of the suspension period. When the court imposes suspension with monitoring or reintegration services, the prosecutor and the trial judge are expected to work together to prepare a social reintegration plan that will be performed with the assistance of the reintegration service. The social reintegration plan must contain all duties to which the convict is subject and the court may also impose duties and rules of conduct cited in Articles 69 and 70, or other obligations of interest to the reintegration plan.

## **2. Probation and Parole**

Two common alternatives to incarceration are probation and parole. **Probation** is when a convicted perpetrator is allowed to be released back into society as long as he does not commit

any other crimes during the period of his probation. Probation is usually imposed in addition to a period of incarceration, but that imprisonment can be suspended on the condition that the perpetrator follows certain terms and conditions of probation. Imprisonment can either be fully suspended, meaning that the perpetrator does not serve any time in prison, or it can be partially suspended, meaning that the perpetrator serves some, but not all of the prison sentence. Probation is normally granted to perpetrators who are not violent or seen as a threat to society.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 64. Execution of penalties or imprisonment measures**

- (1) A perpetrator convicted and sentenced to effective imprisonment or subject to an internment measure may be granted parole or probation.
- (2) Except where otherwise provided, once the convict has served five-sixths of the imposed sentence, the same must be released on parole.
- (3) Except as described in the previous article, parole cannot be granted without consent of the convicted.

The theory behind probation is the idea that a majority of perpetrators do not need to have time in prison. These perpetrators are not bad people, or a major problem for society. Further, one argument in support of probation is that sending a young perpetrator to prison is similar to sending the person to a university on crime. Rather than spending her time around law-abiding citizens, the young perpetrator will be surrounded by other criminals, who may teach her about committing crimes. This would just make the young perpetrator a more sophisticated criminal. The goal of probation is to impose some amount of control over the perpetrator so that community-based programs can help with rehabilitation.

Probation may be supervised or unsupervised. Supervised probation includes reviewing the probationer's activities and periodically having an agent of the court visit. In countries with well-developed probation systems, these agents of the court are called **probation officers**. Probation officers are responsible for supervising perpetrators who have been placed on probation by court order. In Australia, for example, perpetrators on probation regularly meet with a probation officer so that the officer can make sure that the person is staying away from criminal behaviour and is completing all other requirements of their sentence.

For now, the only type of probation imposed by courts in Timor-Leste is unsupervised probation. This is because Timor-Leste does not have probation officers. There is no one who meets with perpetrators who are on probation to make sure that they are staying out of trouble. The only way to know that a perpetrator has violated the terms of his probation is if he is brought back to court on charges of committing another crime. For a small country such as Timor-Leste, it may not be necessary to closely monitor perpetrators. In the future, lawmakers always have the option to create probation officers to supervise probation if they believe it is necessary.

Once a person has been sentenced to prison, there is another alternative available for early release. **Parole** is when a convicted perpetrator is released back into society before the entire prison sentence has been served.<sup>39</sup> The goal of parole is to release the prisoner from incarceration and allow him to become a productive member of society.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 65: Accumulation of penalties and liberty-deprivation measures**

- (1) When a perpetrator is convicted and sentenced to effective imprisonment sentence and subject to an internment measure, the latter is first served and deducted from the prison sentence.
- (2) The court shall release the perpetrator on parole as soon as the internment measure is to cease, if the same has served a period corresponding to half of the sentence and release is demonstrated to be compatible with protecting legal order and maintaining social peace.

Sometimes parole must be granted under the supervision of a government agent. Once the perpetrator is released from prison, the parole agent supervises the person's progress to see how well rehabilitation and readjustment happens. Depending on the sentence, some prisoners can be eligible for parole after serving only a short period of time in prison. However, some perpetrators have committed such dangerous crimes that they will not be granted an opportunity to return to society early.<sup>40</sup>

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<sup>39</sup> Wallace, Harvey, and Cliff Roberson. Principles of Criminal Law, 2nd Edition. Boston: Allyn and Bacon, 2001. 330.

<sup>40</sup> Wallace and Roberson 330.

As of 2013, legislation has not yet been passed stated what the requirements are before parole can be granted. It can be helpful to look at comparative law to see how Timor-Leste's future parole laws might be drafted.

### **Comparative Law**

In Australia, the court decides whether or not a person will be eligible for parole when they first send the person to prison. The court also decides when the person will be eligible for parole. This means that the court decides how long the person must stay in prison before the person has the opportunity to be released on parole. Once this amount of time has passed, the perpetrator appears before a government agency called the Prisoners Review Board. The Board's main role is to decide whether a prisoner should be released on parole. The Board considers many factors in making this decision, including the degree of risk that the perpetrator poses to the community, the circumstances of the crime the perpetrator committed, whether the perpetrator participated in programs while in prison; and the perpetrator's behaviour since the crime. If the board decides to grant parole, the perpetrator is released from prison with the understanding that he must follow certain conditions to stay in the community and must meet regularly with parole officers.

### **3. Penalty of Fine**

**Fines** are monetary payments to the court as a form of punishment. Traditionally, fines are commonly used as a penalty for less serious offences. In Timor-Leste, fines are the primary penalty listed in the Penal Code for less serious offences. Courts may also impose fines instead of imprisonment for more serious crimes. Many times, courts will order the perpetrator to serve time in jail but suspend the sentence on the condition that she pays a fine. One benefit of fines to society is that they do not require the taxpayer to pay for feeding and housing a perpetrator in prison.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 75. Duration of the penalty of fine**

- (1) The penalty of fine ranges from a minimum of 10 to a maximum of 360 days, except where otherwise provided in law.
- (2) Each day of fine corresponds to an amount ranging from 50 cents to 200 US dollars, which the court shall determine depending on the economic and financial status of the convict and his or her personal expenses.



- (3) Whenever circumstances surrounding the case so justify, the court may authorize the payment of the fine within the period of 1 year, or allow payment in instalments, with the final instalment due no later than two years after the date of rendering of the final decision.

In Timor-Leste, fines are counted by the day. This enables the amount of the fine to be adapted to the perpetrator's guilt and his or her financial conditions. The amount for each day of the fine can be set according to these conditions. There are also ways to convert fines into days of imprisonment in case the perpetrator fails to pay the fine.

#### **4. Penalty of Community Service**

Another type of penalty is community service. **Community service** requires the perpetrator to work, without pay, in a social service agency for a specific number of hours. Globally, the modern concept of community service as punishment began in the 1960s. It became increasingly popular as a more flexible and humane option for punishing perpetrators who are unlikely to commit another crime. Whether the work itself is useful or not, the penalty of community service can be helpful to the criminal justice system because it reduces the cost of imprisoning criminals and prevents overcrowding in prisons.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 78. Community Service**

- (1) Community service consists in providing services free of charge to a public agency or other entity that the court deems to be of community interest, as long as consent of the convict has been obtained.
- (2) Duration of the work to be provided by the convict is determined by the court, substituting one day of incarceration set in the sentence for one hour of work that may never exceed 240 hours.
- (3) The work may be provided within or after regular business hours, whether on a continuous basis or otherwise, and may not exceed the allowed amount per day according to rules regarding overtime and always in such a manner that the livelihood of the convict and family members is not affected.

(4) Unjustified refusal to perform the community service entails serving the originally imposed sentence, deducting the days already worked, pursuant to subarticle 78.2 above.

It is not easy, however, to answer the question: does community service help rehabilitate perpetrators? One clear benefit is that it keeps people out of prison. Time spent in jail sometimes has the effect of making people more dangerous because it means they are surrounded by other people who have committed crimes (and sometimes more serious crimes). Additionally, as of 2013, judges in Timor-Leste were not imposing sentences of community service because a system for community service had not yet been organized. In order for perpetrators to perform community service, there need to be places where perpetrators can go work to serve the community. These places must also be able to inform the court that the perpetrator is actually performing the work. Until such a system is in place in Timor-Leste, penalties of community service cannot be imposed.

### **5. Penalty of Admonishment**

To **admonish** a person means to express warning or disapproval to that person. When a judge admonishes a convicted person, she reprimands him in court. She explains to him that he has done something wrong and tells him that he must not commit this crime again. The formal procedure for the penalty of admonishment is to wait for the period of appeal—15 days—to expire. After this period, if an appeal has not been filed, the court will summon the convicted person and admonish her in court. However, it is typical for judges to execute this penalty more informally by simply reprimanding a defendant as soon as she has been convicted of the crime.

## **Penal Code of the Democratic Republic of Timor-Leste**

### **Article 82. Admonishment**

If the perpetrator is found guilty of committing a crime that carries an abstract prison sentence not exceeding three years or a fine, the court may limit itself to admonishing the individual, provided that, cumulatively:

- a) Reparation has been made for the damage caused by the criminal conduct;
- b) The perpetrator is a first time perpetrator; and

- c) Admonishment is by itself sufficient to prevent crime and to rehabilitate the perpetrator.

### **Article 83. Execution of the penalty of admonishment**

Admonishment consists in solemn and adequate oral reprimand made by the court to the convict, performed at a public hearing, once the final decision applying it has been rendered.

## **6. Accessory Penalties**

Penal Code Articles 84 through 89 define several **accessory penalties** which a perpetrator can also receive. An **accessory penalty** is a penalty that is in addition to the primary penalty for a particular crime. Certain penalties for crimes also include the restrictions on exercising certain rights practicing certain professions. Accessory penalties are cumulative with one another. This means that a perpetrator can receive two or more accessory penalties at the same time. For example, a perpetrator could be prohibited from working for the government and have their permit to carry a weapon cancelled. Accessory penalties may only be applied together with a primary penalty. The accessory penalties listed in the Penal Code are:

- temporary suspension from holding public office
- prohibition from holding office
- deportation
- prohibition from driving
- cancellation of permit to carry a weapon

## **7. Summary**

There are many different ways to punish a convicted defendant. In Timor-Leste, imprisonment is the least favoured penalty. Sentences of imprisonment for minor crimes generally be suspended and will not be served. When appropriate, the court will suspend a sentence of imprisonment so that the defendant completes a period of probation or parole. A short prison sentence can also be converted to a fine. The amount of the fine varies based on the defendant's income. Other penalties available include community service, admonishment, and accessory penalties that prohibit a defendant from exercising certain rights or practicing certain professions.

### Questions

1. Roselia is convicted of homicide and sentenced to 12 years in jail. When must she be released on parole?

2. Match the crimes below to the most applicable accessory penalty:

Crimes:

- Hazardous Driving (Article 209)
- Homicide (Article 138)
- Active Corruption (Article 294)

Accessory Penalties:

- Prohibition from holding public office
- Prohibition from driving
- Cancellation of a permit to carry a weapon

### Answers

1. According to Penal Code Article 64, once a convict has served five-sixths of the imposed sentence, she must be released on parole. Therefore, Roselia must be released on parole after 10 years in prison.

2. Crime: Hazardous driving—Accessory penalty: Prohibition from driving  
Crime: Homicide—Accessory penalty: Cancellation of permit to carry a weapon  
Crime: Active Corruption—Accessory penalty: Prohibition from holding public office

## V. SECURITY MEASURES

### SECTION OBJECTIVES

- To understand the purpose of security measures.
- To compare how security measures differ from penalties.

#### 1. Internment Measures

Earlier in this chapter we learned that a person cannot be criminally liable, or culpable, if she has a mental disorder that makes her incapable of comprehending the unlawfulness of her actions. In these cases, the court may decide that the person presents no further danger to any individual or to society. If that is the case, then the person may be released. In other cases, however, the court may believe that the perpetrator may commit other criminal acts against the victim or pose a danger to society in general. When the court has these concerns, it becomes important to incapacitate the perpetrator so that she cannot endanger herself or others. How does the court decide whether the person might be dangerous? The court will look at the person's particular mental disability and the seriousness of the perpetrator's crime. When the court believes that the person may be dangerous, that person must be **interned**. This means that the person must be confined in an appropriate facility.

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 93. Assumptions

Whenever an act described as a defined crime is committed by a person exempt from criminal liability under article 21, that person shall be interned in an appropriate establishment, whenever, due to a mental disorder and the nature and gravity of the act committed, the court has reason to believe that the perpetrator may commit other like acts corresponding to crimes against individuals or crimes posing collective danger.

Just as someone who has received a prison sentence can be released on probation, an interned person can also be released on probation. An interned person who has been granted probation must follow certain rules of conduct, according to the terms in Article 70. The purpose

of these rules of conduct is to prevent further danger, and also to make sure that the perpetrator receives the appropriate treatment and medical examinations.

The court can review its internment decision at any time if someone submits a justifiable reason why the internment should end. If the court concludes from its review that that the purpose of internment can be achieved without further internment, the court must release the interned person to probation. A period of probation can last for a minimum of 2 years to a maximum of 5 years.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 94. Duration**

- (1) If the act committed by a person exempt from criminal liability is punishable with imprisonment not exceeding three years, internment shall have a maximum duration of one year.
- (2) If the act committed by a person exempt from criminal liability corresponds to a crime against persons or a crime of collective danger punishable with imprisonment equal to or exceeding 5 years, internment shall have a minimum duration of 3 years except if release of said person is deemed compatible with safeguarding of law and order and maintaining social peace.

A court can also revoke probation for a formerly interned person under certain circumstances. This revocation results in re-incarceration. A sentence of internment can also be suspended (Article 99). A court may suspend internment under certain circumstances if it reasonably expects that the purpose of the security measure will still be carried out, and suspending the internment is compatible with maintaining social peace and upholding the law.

As of 2013, judges were not imposing internment measures as penalties because appropriate mental hospitals have not yet been constructed and staffed. However, in the future, legislators may consider it necessary to provide funding for building mental hospitals and training employees to work in these facilities.

## **2. Other Security Measures**

There are also other security measures that can be used besides internment. The Penal Code lists two other options. Article 100 provides for measure barring the practice of a

profession. A person who is exempt from criminal liability because of Insanity who commits a crime related to their profession can be prevented from practicing in that profession. This can happen if there are reasons to believe that the perpetrator may continue to commit these offences if he is allowed to continue working in his current occupation. The court may prevent the person from practicing his profession for a period from 1 to 5 years.

For example, Article 295 states that Embezzlement is a crime. This is when a public official takes for her own use without permission money or property placed in her possession. The punishment is 3 to 10 years imprisonment. Roselia works at a bank and is caught embezzling money. The court finds that she is not liable by reason of Insanity. However, the court believes that if she continues working at a bank, she will continue to embezzle. The court can prevent Roselia from working in a bank for a period between 1 and 5 years.

Article 101 also allows prohibitions from driving and cancellation of licenses to carry weapons. A prohibition from driving a motor vehicle can last from 2 to 6 years. In the event that a person exempt from criminal liability commits a crime using a weapon, the court may order the cancellation of the license to carry and use weapons for a period from 5 to 10 years.

Careful readers may remember that these same penalties appeared earlier in the section on accessory penalties. What is the difference between an accessory penalty and other security measures? Recall that accessory penalties may only be applied together with a primary penalty. When someone is exempt from criminal liability by reason of Insanity, he will not receive a primary penalty. This means that a perpetrator who is exempt from criminal liability is not eligible to receive accessory penalties either. Sometimes it is still necessary to take additional steps to secure the safety of society from a perpetrator who is exempt from criminal liability. Security measures listed in Articles 100 and 101 can be applied even when no primary penalty has given. This allows courts to protect society from people who may still be dangerous even though they are exempt from criminal liability.

### **3. Other Consequences of Committing Crimes**

Other possible consequences of committing crimes include having to give up any property used during the crime (Forfeiture) or paying money to the victims of the crime (Compensation).

### Forfeiture

**Forfeiture** occurs when property related to or used in the commission of a crime is seized by the government. Forfeiture laws are listed in Articles 102 and 103 and are designed to punish defendants financially by causing a loss of property owned or controlled by the perpetrator. There are two types of Forfeiture: Forfeiture of Objects of the Crime (Article 102) and Forfeiture of Benefits (Article 103).

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 102. Forfeiture of objects of the crime**

- (1) Objects that were used or destined to be used in the commission of a crime, or were results from the same, shall be forfeited to the State, whenever, due to their nature or the circumstances surrounding the case, the same may endanger the security of persons or public order, or pose serious risk of being used in the commission of further crimes.
- (2) Rights shall be safeguarded regarding objects belonging to any victim or third party, who has not participated in their use or production nor taken advantage thereof.
- (3) The court shall determine the disposal of objects declared forfeited whenever not specified in law, and may order the partial or complete destruction thereof or to remove them from circulation.
- (4) Provisions in subarticle 102.1 shall apply even when no specific person can be punished for the crime.

##### **Article 103. Forfeiture of benefits**

- (1) All items, rights or benefits directly or indirectly acquired as a result of the commission of a crime shall be declared forfeited to the State, without prejudice to the rights of any victim or third parties acting in good faith.
- (2) If said items, rights or benefits cannot be appropriated in kind, their forfeiture shall be compensated through payment of their respective value to the State.

Objects that are seized are usually used or destined to be used to commit a crime, or resulted from committing a crime. If these objects might put another person in danger, disturb public order, or be used to commit a future crime, the court can decide to seize these objects. The court must determine whether these objects pose any sort of risk based on the nature of the object



and the circumstances surrounding the case. For example, if Joana used a knife to commit a Serious Offence Against Physical Integrity (Article 146), she will have to forfeit the knife to the state because it was used to commit a crime. Once an object has been forfeited, the court must decide what to do with the object. The court can order the objects to be disposed of, or the court may order the partial or complete destruction of the object.

Forfeiture of Benefits refers to the benefits of a crime that the perpetrator may have received. Any item that the perpetrator gets directly or indirectly from committing a crime must be forfeited to the state. If the object itself cannot be forfeited, then the value of the object can be paid in money to the state. For example, if Osme stole Antonio's machete and sold it to someone else, this money could be forfeited to the state if the machete itself cannot be found.

The reason for requiring forfeiture is simple: it would be unfair to allow the perpetrator of a crime to benefit from his harmful actions.

### Compensation

Some crimes result in civil liability, in addition to criminal liability. This means that a perpetrator may be found guilty in criminal court *and* be found liable in civil court. If a person is convicted in civil court, the penalty is usually paying **damages** (money). For example, if a person commits the Fraud, he will be criminally liable under Article 266, but he can also be charged with a civil crime. This means that the victim of the Fraud (the person who was deceived and lost her property) has the right to file a lawsuit against the perpetrator in civil court. If the victim's lawsuit is successful, the perpetrator will be required to pay damages to the victim to compensate her for the harm he caused.

Article 104 states that compensation for losses and damage resulting from a crime is mandatory. This means that the court does not have discretion to release the defendant from civil liability. The defendant must pay compensation to the victim of the crime. There are certain exceptions to this under criminal procedural law. Additionally, how the compensation is calculated is regulated by the civil law rules. Article 105 also gives preference to the victim over anyone else whom the defendant may owe money. This makes compensation for the victim the court's first priority. The defendant must first pay the victim before he pays other fines imposed by the court, or any other debts he has incurred since committing the crime.

#### **4. Summary**

Security measures are different from legal consequences because they apply to people who are not culpable for their bad acts. Security measures are typically used for people who the court has ruled to be Insane. Security measures seek to rehabilitate these people, but they also serve the purpose of incapacitating people who may still present a danger to society. Forfeiture and compensation are additional penalties that can be used to make sure that perpetrators of crimes do not benefit from their bad actions.

## VI. CHAPTER REVIEW

### SECTION OBJECTIVES

- To review the four primary theories justifying punishment.
- To review the principles justifying punishment in Timor-Leste.
- To review how sentences are decided and the types of penalties that can be given for committing crimes.
- To review security measures.

In this chapter we discussed the concept of penalties and how penalties are given in Timor-Leste. First, we learned the four primary justifications for punishing criminals: rehabilitation, incapacitation, deterrence, and retribution. We discussed arguments in favour and against each theory of punishment. Next, we learned about the principles underlying punishment in Timor-Leste. These principles are: rehabilitation as the primary justification for punishment, penalties as re-socializing tools, culpability, right to life, and retaining basic fundamental rights. In Timor-Leste, these principles create a system in which perpetrators are punished in proportion to their guilt, and there is a strong preference for rehabilitative penalties that do not deny people their most important rights.

Third, we learned how courts decide the penalty that a particular defendant will receive. We learned that there is no exact formula for determining a penalty. Instead, the court works through several steps. A judge must first determine the abstract penalty, and then determine the concrete range of the penalty that a particular defendant could receive. The court will take into consideration the defendant's criminal history and any extraordinarily mitigating circumstances. Finally, the judge considers all relevant aggravating and mitigating circumstances of the crime and makes the final decision of what the defendant's sentence will be.

Then we learned how penalties are actually executed. In Timor-Leste, imprisonment is the least favoured penalty. Sentences of imprisonment for minor crimes are not served. When appropriate, the court will suspend the sentence of imprisonment while the defendant completes a period of probation. Parole is available to criminal defendants after they have served a certain amount of time in prison. A short prison sentence can also be converted to a fine. Amounts of the

fine will vary based on the defendant's income. Other available penalties include community service, admonishment, and accessory penalties that prohibit a defendant from exercising certain rights or practicing certain professions.

Finally, we learned about security measures. Security measures differ from legal consequences in that they apply to people who are not culpable for their bad acts. Security measures typically involve persons who the court has ruled to be Insane. Security measures seek to rehabilitate these people, but they also serve the purpose of incapacitating people who may still present a danger to society.

Imposing Penalties is a broad and complex field of study and may take some time to understand. You are strongly encouraged to carefully re-read sections of the Penal Code that relate to penalties. Although it may take time, mastering of the concept of penalties is crucial to understanding criminal law in Timor-Leste.

### Questions

1. Fines in Timor-Leste are paid by the day and the amount that a perpetrator must pay depends on her income. How might the practice of tailoring the fine to the perpetrator's income help deter crime?
2. Juliao commits the crime of Driving Without a License (Article 207). It is the first time he has ever been convicted of committing a crime. List all of the possible sentences that a judge could give Juliao. Look up the relevant Penal Code Articles.

### Answers

1. An example can help us understand how fines can be used to deter someone from committing a crime. Imagine that João is a wealthy businessman who earns \$50,000 per year. Hugo is a poor fisherman who earns \$500 per year. They are both convicted of Driving Under the Influence of Alcohol (Article 208). The judge sentences both men to pay 50 cents per day for one year.

What does this mean for Hugo? This means that over the course of one year, Hugo will pay \$182.50. This is 36.5% of Hugo's income that he must pay as a punishment for his crime. This is a very serious penalty that will likely create a significant hardship for Hugo. It will likely act as a strong deterrent against committing the crime in the future. But what about João? For him, paying \$182.50 for one year is only 0.4% of his income. This is an insignificant amount of money for João. The penalty will create very little hardship for him and is unlikely to act as a significant deterrent against committing the crime in the future. This is why the Penal Code allows the judge to punish João and Hugo by imposing different fines

for each person. The penalty is equal because both men receive a fine as a sentence. But the amount of the fine can be adjusted so that they both will be punished effectively.

2. The judge has several options in this scenario. The first step is to look at the Penal Code to find the crime. Article 207 states that the punishment for Driving Without a License is up to two years imprisonment or a fine.

One option is to give Juliao a suspended sentence. Article 68 allows courts to suspend a sentence if the prison sentence is less than three years long. Since Juliao's sentence must be less than three years, he can be given a suspended sentence. Another option is for the judge to admonish Juliao. Article 82 allows the court to simply admonish the perpetrator if the penalty is less than three years or a fine. This means Juliao can also be summoned to court for the court to publicly admonish him for breaking the law.

Another option is to sentence Juliao to pay a fine. The judge could theoretically impose a sentence of community service instead but as of 2013, a system for community service supervised by the court has not been organized in Timor-Leste. The judge could also impose the accessory penalty of a prohibition from driving. This is unlikely, however, because it is only Juliao's first offence and his crime is relatively less serious.

Finally, remember that if the court determines that Juliao is not culpable for his crime because of a mental illness, the judge can impose a security measure instead of other penalties.

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## CHAPTER 6: CRIMES AGAINST LIFE

### CHAPTER OBJECTIVES

- To learn the Penal Code provisions criminalizing serious crimes that result in death.
- To understand the difference between Homicide and Manslaughter, and when Aggravated Homicide can be charged.
- To review the provisions of international law in the Penal Code criminalizing serious Crimes Against Life.

The rest of this textbook will focus on individual crimes in the Penal Code. This chapter discusses serious crimes that can result in death. Chapter I of Title I, Book II lists the different crimes that a perpetrator can be charged with when he or she causes another person's death. Each crime typically comes with a sentence of imprisonment. All of these crimes are public crimes. The first section of this chapter will discuss Homicide and Manslaughter and the difference between these two crimes. Homicide is the *intentional* killing of another person. Manslaughter is the *negligent* or *grossly negligent* killing of another person. Homicide and Manslaughter are distinguished by the perpetrator's *mens rea*. The next section discusses Aggravated Homicide. Aggravated Homicide occurs when the perpetrator uses: 1) particularly bad killing techniques, 2) has particular bad motivations for killing, and 3) kills a specially protected type of victim. The third section explores other crimes that may result in death, including Abandonment. The final section discusses Crimes against Peace and Humanity. These crimes come from international law and include Genocide, Terrorism, and War Crimes.

## I. HOMICIDE AND MANSLAUGHTER

### SECTION OBJECTIVES

- To understand the difference between Homicide and Manslaughter.
- To understand the elements of crimes of Homicide and Manslaughter.

Imagine that Jose comes home one night and finds his wife having sexual intercourse with another man, Antonio. Enraged, Jose stabs Antonio to death with a knife. Upset, Jose flees the scene of the crime in his car. While driving, Jose does not see a stop sign and hits and kills Ruel, a pedestrian crossing the street. What crimes can Jose be charged with in connection with Antonio and Ruel's deaths? As we will learn in this section, Jose may be charged with **Homicide** for Antonio's death and **Manslaughter** for Ruel's death. The Penal Code lists two different offences for when a person kills another person. These offences are listed in Articles 138 and 140.

### 1. Homicide

Homicide occurs when any person kills another person. It is punishable by 8 to 20 years in prison (Article 138). To determine whether a Homicide has occurred, it is critical to look at the required *mens rea* and causation.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 138. Homicide

Any person who kills another person is punishable with 8 to 20 years imprisonment.

The *actus reus* for Homicide is killing another person. But what is the *mens rea*? Recall from Chapter 2 that *mens rea* is the perpetrator's mental state. It is what the perpetrator was thinking when she acted. Each crime requires a certain *mens rea* for the defendant to be found guilty. But Article 138 does not specify what the *mens rea* is for this crime. According to Article 14, only acts committed *with intent* are punishable in Timor-Leste, unless the Article specifically says something different.

Also remember that Article 15 defines three types of intent: 1) when a person commits a crime with *the intention to commit the crime*, 2) when the crime is the *necessary consequence* of a person's conduct, and 3) when a person *accepts* that the crime could be a *possible consequence* of his or her actions and acts anyways. A person killing another person with any of these types of intent can be found guilty of Homicide. Some examples will help illustrate these cases:

- 1) Jose repeatedly shoots Antonio with a gun because he wants to kill Antonio. Jose has acted with the intention of killing Antonio so he has the required *mens rea* for Homicide.
- 2) Jose repeatedly shoots Antonio in the chest but he does not care if Antonio dies, he just wants to hurt him. Antonio's death is a necessary consequence of Jose's actions because shooting someone repeatedly in the chest usually results in death. Therefore, Antonio has the required *mens rea* for Homicide.
- 3) Jose starts shooting wildly in Antonio's direction. He wants to hurt Antonio but he is not aiming specifically at him. Jose knows that Antonio's death is a possible consequence of his actions because he knows one of the bullets could hit Antonio in the head or heart and kill him. Therefore, Jose has the required *mens rea* for Homicide.

#### **Case Study: Homicide by Throwing Stones**

Case No. 217/C.Ord/2011/TDD<sup>41</sup> from the Dili District Court is an example of a successful Homicide conviction. The perpetrator was also charged with Attempted Homicide but he did not have the required *mens rea* for the second crime. This case involved three defendants who were charged with the Homicide of Evaristo Soares and the Attempted Homicide of Hermenegilda Maia—a couple living in Fatu Cado Sub-Village, Railaco Kraik Village, Ermera District. Based on the facts revealed during the trial, on 13 January 2011 at approximately 9 P.M. the defendants threw stones at Soares and Maia's home. One of the defendants also struck Soares with a piece of wood that the defendant had taken with him to the victim's house. As a result of the beating, Soares experienced serious injuries to his head and shoulder and eventually died at the scene. The victim Maia was also struck by the defendant but she did not suffer any serious injuries.

The court found that the defendants either wanted to kill Soares or knew that throwing stones and wood at him could kill him. They therefore had the required *mens rea* for the Homicide of Soares. The court did not find sufficient evidence that the defendants intended to kill Maia. The

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<sup>41</sup> Judicial System Monitoring Programme. *Case Summary for Trials Conducted at the Dili District Court in August 2011*. 12 Sep. 2011 <<http://jsmp.tl/wp-content/uploads/2012/06/CS-Dili-August-2011.pdf>>

court was convinced that the defendants had only pushed this victim and caused her to fall over. Therefore, the defendants did not have the required *mens rea* for Attempted Homicide of Maia. The court found the defendants guilty of Homicide and also Simple Offences against Physical Integrity (Article 145) for striking Maia. The court sentenced the defendants to 12 years and 6 months imprisonment and ordered them to pay compensation.

The second factor to consider is causation. It is important to remember that to be convicted of Homicide the perpetrator must actually cause the person's death. Recall the first example where Jose struck Ruel with his car. Suppose Carla is standing right next to Ruel when she sees Jose's car about to hit Ruel. Carla secretly hates Ruel and wants him dead. Carla could easily pull Ruel out of the way and save his life, but she chooses not to. Carla could not be convicted of Homicide even if she intended for Ruel to die because of her omission (failing to act by not pulling him to safety). This is because Carla did not cause Ruel's death nor did she have a legal duty to prevent his death. In contrast, Jose actually caused Ruel's death by hitting him with his car. Therefore, Jose could be charged with a crime for Ruel's death, as long as he also had the required *mens rea*.

Although this chapter will not discuss more about Homicide due to an omission, you can learn more about when failing to act can result in a Homicide conviction in Chapter 2. Additionally, the Penal Code also has a separate crime of Abandonment (Article 143), which is an offence for an omission that leads to another person's death. This crime will be discussed later in this chapter.

## **2. Manslaughter**

Manslaughter occurs when any person negligently kills another person. It is punishable by up to four years imprisonment or payment of a fine (Article 140.1). If the killing occurs because of gross negligence, a sentence of up to five years imprisonment may be given (Article 140.2).

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 140. Manslaughter**

- (1) Any person who, by negligence, kills another person is punishable with up to 4 years imprisonment or a penalty of fine.

- (2) In cases where the perpetrator has acted with gross negligence, the same is punishable with up to 5 years imprisonment.

It is important to see the difference in severity of the punishment for Homicide and Manslaughter. Homicide is punished with 8-20 years imprisonment, while Manslaughter is punished with 5 years or less (or even just a fine). This shows that Manslaughter is a less serious crime than Homicide in the Penal Code. This may be because a perpetrator commits Manslaughter without intentionally trying to kill another person.

Article 16.1 defines negligent action. It is when a person fails to proceed with the caution that a person should and is capable of proceeding. In addition, the perpetrator must not honestly accept or realize that she may commit a crime through her actions. She must be unaware of the possible consequences of her actions. For example, imagine that Cecelia does not see a stop sign while driving because she is distracted by her thoughts. She does not see Ruel crossing the road and hits him before she is able to stop the car. Is Cecelia guilty of Manslaughter? First, by failing to focus on her driving, Cecelia has most likely failed to proceed with the caution she should while driving, and which she is capable of under the circumstances. If Cecelia had not been distracted, she would have observed the stop sign and stopped in time. Second, Cecelia did not realize that she could kill Ruel because she was distracted and did not see him. She did not intend to hit him with her car. Because Cecelia acted negligently she can be charged with Manslaughter for Ruel's death.

### **Case Study: Manslaughter Charge Due to Negligent Driving**

Case No. 44/C.Ord/2011/TDD<sup>42</sup> from the Dili District Court involved a Manslaughter charge due to negligent driving. The defendant was charged for killing of a victim in Fatuhada on 24 July 2010. At approximately 10 P.M., the defendant was driving a minibus and struck the victim who was riding a motorcycle along the main road. The victim suffered a broken leg, serious injuries to his arms and face, and died at the scene. In his testimony to the court, the defendant stated that, at the time of the incident, he heard a loud noise coming from the minibus's tire but he did not know that the victim was under the vehicle. Then the defendant stopped the vehicle in front

<sup>42</sup> Judicial System Monitoring Programme. *Summary of Cases Heard by the Dili District Court in May 2011*. 31 May 2011. < <http://jsmp.tl/wp-content/uploads/2012/06/CS-Dili-May-2011.pdf>>

of a store and got out to check the condition of his vehicle. At that time many people appeared carrying stones and pieces of wood and told the defendant that he had struck someone.

The defendant did not know he could have killed the victim, but his lack of care under the circumstances resulted in another person's death. Therefore, the prosecutor charged him with violating Article 140.

A higher penalty will be given if Manslaughter is committed because of gross negligence (Article 140.2). **Gross negligence** occurs when a person acts extremely carelessly, but fails to acknowledge the risk of harm to other people. For example, suppose Jose almost never pays attention to stop signs while driving. He believes that he can easily avoid hitting pedestrians because he has excellent driving skills. Jose also loves to play loud music in his car even though it distracts him. If Jose hits and kills another person who is crossing the street, he could likely be considered grossly negligent. This is because he was acting with extreme carelessness when he chose to drive without stopping at stop signs and also listened to loud, distracting music instead of focusing on the road. If Jose is charged with Manslaughter, he could be punished with a longer sentence under Article 140.2.

### **Case Study: Unsuccessful Manslaughter Charge**

Case No. 144/Crm.S/2011/TDB<sup>43</sup> from the Baucau District Court resulted in the defendant being acquitted of Manslaughter because he was not found to be negligent in his actions. The defendant was charged with killing Octavio Siko on 07 April 2011, in Kaiwati Village, Ossu Sub-District, Viqueque District. A witness stated that the defendant's car was climbing a steep hill in Kaiwati Village, Ossu Sub-District. The defendant told all of the passengers to get out of the car because it was raining heavily and there were thick clouds covering the road that they were travelling on. However the passengers, including the victim, did not want to get out of the vehicle. When the car started to climb the hill the car fell into a hole because the defendant could not see properly. The car was also not properly balanced and did not have enough power. The car eventually started sliding backwards and then flipped over and crushed the victim to death. The defendant was acquitted because he was deemed to have acted with the required caution under the circumstances. This is likely because he asked the passengers to leave the vehicle because climbing the steep hill could be dangerous. As a result, the *mens rea* for Manslaughter was not proven.

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<sup>43</sup> Judicial System Monitoring Programme. *Summary of Trials Conducted at the Baucau District Court During the Second and Third Weeks of March 2012*. 30 Mar. 2012. <<http://jsmp.tl/wp-content/uploads/2012/06/CS-Baucau-March-2012-Vol-1.pdf>>

### 3. Differentiating Between Homicide and Manslaughter

As you can see, the main difference between Homicide and Manslaughter is the perpetrator's *mens rea*. Table 6.1 illustrates the possible mental states a perpetrator could have and the offence he would likely be charged with. Remember, a perpetrator must at least have been negligent in causing the victim's death in order to be charged with a crime. Finally, once the defendant has been found guilty, the court can impose a range of sentences based on its judgment about how dangerous the defendant is to society and how likely he will be rehabilitated.

**Table 6.1: Required *Mens Rea* for Crimes Resulting in Death**

Perpetrator's <i>Mens rea</i>		Crime
Intent	Wanted to kill victim	Homicide
Intent	Knew victim would die and acted anyways	Homicide
Intent	Knew victim might die and acted anyways	Homicide
Gross negligence	Did not know victim might die and acted carelessly and without acknowledging the risk to others	Manslaughter (Article 140.2)
Negligence	Did not know victim might die and failed to proceed with the caution required under the circumstances	Manslaughter (Article 140.1)
No Negligence	Did not know victim might die and proceeded with the caution required under the circumstances	No crime

Sometimes it is not easy to determine the perpetrator's *mens rea*. This is because it is difficult to know for certain what the defendant was thinking at the time of the crime. Even the defendant may not remember or may lie about what she was thinking. As a result, the court has to make a judgment based on all of the evidence. For example, witnesses may say the defendant seemed surprised by the victim's death and did not think it was possible that the victim would die. Witnesses may also testify that the defendant had never talked about killing anyone, or that he talked frequently about hurting or killing the victim.

### 4. Summary

There are two different crimes that a perpetrator can be charged with if she kills another person: Homicide or Manslaughter. For both crimes, the perpetrator must either cause another person's death, or fail to act to prevent the other person's death when she had a legal duty to do so. The main difference between these two offences is the required *mens rea*. For Homicide, the

perpetrator must have intentionally caused the victim's death, or known the victim's death was a possibility. For Manslaughter, the perpetrator must have acted negligently, which means that the perpetrator acted without appropriate caution under the circumstances, but did not realize her actions could cause the victim's death. The punishment allowed for Homicide (8-20 years imprisonment) is much greater than the punishment allowed for Manslaughter (0-5 years imprisonment or a fine).

### Questions

1. Rodrigo is furious at Manuel because he owes him money. Rodrigo grabs his machete and runs after Manuel. He does not want to kill Manuel but only hurt him so he will be fearful and repay his debt. Rodrigo starts swinging his machete and strikes Manuel on both arms. Manuel starts bleeding badly, but they are far from the closest hospital. Manuel ends up dying before help arrives. What crime can Rodrigo be charged with?
2. Leopoldo wants to chop down a large tree near the road. Without looking around to see if anyone is nearby or calling out a warning, he proceeds to chop down the tree. When the tree falls, it strikes Odete on the head as she is walking by. Odete is knocked unconscious and eventually dies from her injuries. What crime can Leopoldo be charged with?

### Answers

1. Rodrigo can be charged with Homicide because he caused Manuel's death by striking him with his machete and he had the required *mens rea* of intent. Although Rodrigo did not want to kill Manuel, he most likely knew it was a possibility that Manuel could die a serious cut from a machete.
2. Leopoldo can be charged with Manslaughter. He caused Odete's death by chopping down the tree that struck her head. Leopoldo did not intend to kill Odete or know that her death was a possibility, so he did not have the required *mens rea* for Homicide. However, Leopoldo did not proceed with the caution required under the circumstances. He did not make sure that no one was in the falling tree's path before cutting it down and did not call out a warning to anyone who might be nearby. Because he acted negligently, he can be charged with Manslaughter.



## II. AGGRAVATED HOMICIDE

### SECTION OBJECTIVES

- To learn the elements of Aggravated Homicide.
- To understand the circumstances when a person can be charged Aggravated Homicide.

Article 139 lists ten different circumstances when a perpetrator can be charged with Aggravated Homicide. These circumstances are “particularly reprehensible or reflect a particular degree of perversity.” **Reprehensible circumstances** are circumstances that are particularly bad or inexcusable and are deserving of a more severe punishment. **Perverse circumstances** are extreme and extraordinary methods used to commit the crime, such as using poison, torturing the victim, or tricking the victim. Aggravated Homicide is punishable by 12-25 years in prison. This is more severe than for regular Homicide (8-20 years). The ten circumstances can be divided into three categories that involve either 1) the method of the killing, 2) the motivation or premeditation by the killer, or 3) the victim’s characteristics.

For example, Roselia decides to kill her husband so she can control all of their money. She carefully plans the killing for weeks. She decides to poison his food one evening and to dispose of his body in a nearby forest. When the planned evening arrives, Roselia successfully poisons her husband but is caught trying to bury his body. Roselia is clearly guilty of Homicide: she has intentionally killed her husband. However, the circumstances of Roselia’s killing will allow the prosecutor to charge her with Aggravated Homicide, exposing her to harsher sentencing. This is because Roselia planned the homicide for many weeks, and also used poison to kill her husband.

As you read and consider Article 139 below, think about why these specific circumstances are (or are not) worthy of giving a harsher punishment.

### 1. Aggravation Due to the Method of the Killing

Articles 139(a) and (b) describe the manner in which the killing occurred: Article 139(a) applies if the perpetrator uses “insidious means” to kill the victim. This means that the perpetrator was deceptive and dishonest in order to kill the victim. This subarticle also applies if

the victim poses a “collective danger,” which means she threatens multiple people and inflicts greater harm on the victim.

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 139. Aggravated Homicide**

If the perpetrator is found guilty of committing a crime that carries an abstract prison sentence not exceeding three years or a fine, the court may limit itself to admonishing the individual, provided that, cumulatively:

- a) Through employment of poison, torture, asphyxia, fire, explosive or by another insidious means . . . of collective danger or, with another act of cruelty to inflict greater suffering to the victim;
- b) Through treachery or disguise or another means . . . that renders the defense of the victim difficult or impossible;

. . .

Article 139(b) applies when the perpetrator acts treacherously to render the victim defenseless. These clauses reflect the idea that some killing techniques are “worse” than others, even though the end result is the same (the victim dies). Techniques that do not allow for a person to defend herself, or that cause greater suffering than necessary are therefore given harsher punishment. This may be because perpetrators who kill in these cruel ways may be seen as less likely to be rehabilitated. Do you agree that using these techniques should be punished more harshly?

**2. Aggravation Due to the Criminal’s Motivation or Premeditation**

Articles 139(c)-(f) concern the perpetrator’s motivation, and also whether there was premeditation. A killing is premeditated if the perpetrator thought about and planned the crime before committing the offence.

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 139. Aggravated Homicide**

If Homicide is committed under circumstances that are particularly reprehensible or reflect a particular degree of perversity:

. . .

- c) Out of greed, pleasure in killing, seeking of excitement or satisfaction of a sexual nature, through payment or reward or promise of payment or reward . . . ;
- d) For the purpose of preparing, executing or covering up another crime, facilitating escape or ensuring impunity of the perpetrator of a crime;
- e) Out of racial, religious or political hatred;
- f) With premeditation, construed as cold-bloodedness, giving forethought to the means of performing the crime or delaying intent to kill for more than 24 hours

These subarticles ask *why* the killer committed Homicide and how long she *thought* about committing the offence. The Penal Code discusses particularly bad reasons for killing someone:

- 1) For money (Article 139(c));
- 2) To hide the commission of another crime (Article 139(d)); and
- 3) Out of religious or political hatred (Article 139(e)).

Do you agree that these reasons are worse than other reasons for killing, such as jealousy or out of other types of hatred? Whether you agree or not, do you think that people should be punished differently based on their reasons for killing?

Some people believe that the killer's motivation should not matter. One argument is that all reasons for killing someone are equally bad. There are no better or worse reasons for killing another person. Another argument is that punishing someone for having a "bad" reason for committing a crime is like punishing someone for thinking bad thoughts. As you learned in Chapter 2, thinking bad thoughts alone is not a crime in Timor-Leste. One counterargument to these points of view is that someone who kills for particularly bad reasons may be harder to rehabilitate, and this is why these perpetrators must serve longer sentences. This is a question that remains open to research and debate.

In addition to the killer's motivation, a perpetrator can be charged with Aggravated Homicide if the killer **premeditated**, or thought about or planned the crime for more than 24 hours before the killing. Why does the Penal Code provide higher punishment for killers that thought about the killing for more than 24 hours? The Timor-Leste Court of Appeal has written

that the main reason is because premeditation shows a strong willingness to commit the crime, despite there being time for the perpetrator to change his mind:

“[T]he aggravation of the penalty where a crime is committed with premeditation finds its justification in the perpetrator’s strong willingness to commit the crime, a willingness which persists despite the time passing by that would be sufficient for another person in the same circumstance to change his or her mind . . . .<sup>44</sup>

When a crime is premeditated, it is considered a “cold-blooded” crime. This is different from a killing that is done without thinking or done out of passion, which is considered a “hot-blooded” crime. For example, if a wife comes home and finds her husband having sexual intercourse with another woman, she may become enraged. If the wife picks up a nearby knife and stabs the other woman to death, the killing was most likely not premeditated. The killing was done in a moment where the wife was “hot-blooded” and felt a lot of intense emotions. However, if the wife already knew her husband had a mistress and carefully planned to kill the other woman one day (by going to a store and buying a sharp knife, for example), this would be a “cold-blooded” killing. This type of killing may also be called **murder**. In this case, the wife has premeditated the killing. Although she had time to change her mind, she decides to kill the other woman anyway.

### 3. Aggravation Due to the Victim’s Characteristics

Articles 139(g)-(j) concern the victim’s characteristics:

<p style="text-align: center;"><b>Penal Code of the Democratic Republic of Timor-Leste</b></p> <p><b>Article 139. Aggravated Homicide</b></p> <p>If Homicide is committed under circumstances that are particularly reprehensible or reflect a particular degree of perversity:</p> <p style="text-align: center;">. . .</p> <p>g) If the victim is a spouse, descendant, parent, collateral or similar relation to the second degree . . . or a person living with the perpetrator under analogous conditions where a hierarchical, economic or labour dependency exists;</p>
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<sup>44</sup> Timor-Leste Court of Appeal. Case File No. 50/03 Dili: 2003. 15. <<http://www.jornal.gov.tl/lawsTL/court-decisions/CD-2003-50-03.pdf>>

- h) If the victim is particularly vulnerable by reason of age, illness or physical or mental disability;
- i) If the victim is a member of an organ of national sovereignty and constitutional political body, member of a local government body, [etc.] or any other person responsible for a public service, provided that the crime is committed while performing or because of performance of his or her duties;
- j) If the victim is a witness . . . and the crime is committed with the purpose of impeding the deposition . . . or because of the person's involvement in the proceedings . . . .

To summarize these provisions, killing a

- 1) Family member (Article 139(g));
- 2) A vulnerable or disabled person (Article 139(h));
- 3) A governmental official acting as such (Article 139(i)); or
- 4) A witness in a relevant criminal proceeding (Article 139 (j))

can trigger an Aggravated Homicide charge. If increasing the punishment for a crime helps to deter people from committing the offence, then these provisions may help provide protection for these special categories of victims. Alternatively, explicitly listing these categories of victims may be a public statement by the legislature that killing these types of victims is a particularly bad act that deserves severe punishment.

Do you agree that these categories of victims require more protection? Some would say that there is no difference between killing a stranger and killing a family member or governmental official. In each case, a person has died. Others would say that killing each of these types of victims is particularly reprehensible because they are vulnerable, or worthy of even more protection by society.

### **Case study: Aggravated Homicide for Killing A Husband**

Case No. 17/PEN/2011/TDS<sup>45</sup> from the Suai District Court involved an Aggravated Homicide charge because of the identity of the victim. The defendant was accused of murdering her husband on 27 December 2010 in Urhu, Maubisi Village, Maubisi Sub-District, Ainaru District. On the day of the incident, the defendant, the victim, and their three children were at home. The defendant went to wash some dirty clothes and asked the victim to watch the children. The

<sup>45</sup> Judicial System Monitoring Programme. *Summary of Hearings Conducted By the Suai District Court in the Latter Part of June 2011*. 31 June 2011 <<http://jsmp.tl/wp-content/uploads/2012/06/CS-Suai-June-2011.pdf>>.

victim refused to watch the children and went to sleep. The victim's attitude enraged the defendant, who got a pipe and struck the victim on the head numerous times while he was asleep. The victim suffered serious injury to his head and heavy bleeding, and eventually died. The Public Prosecutor charged the defendant with an Article 139(g) violation for Aggravated Homicide for killing her spouse. The court sentenced the defendant to 12 years imprisonment, which was the shortest sentence available.

#### **4. Summary**

Recall the example from the start of Section II—when Roselia killed her husband. What subarticles of Article 139 could be applicable to Roselia's Homicide? First, Roselia poisoned her husband, which violates subarticle (a). Second, Roselia killed her husband out of greed because she wanted his money, which violates subarticle (c). Third, Roselia premeditated her crime because she planned it for several weeks in advance. This violates subarticle (f). Fourth, Roselia killed her spouse, which violates subarticle (g). Only one violation is required to charge a defendant with Aggravated Homicide, but the judge will consider all of the crime's circumstances when sentencing Roselia.

The sentence for Aggravated Homicide is 12-25 years imprisonment. Regular Homicide receives 8-20 years imprisonment. This means that someone convicted of Aggravated Homicide could still receive a shorter sentence than someone convicted of non-Aggravated Homicide. This depends on how the judge decides the case. Still, the minimum and maximum sentences for Aggravated Homicide are four and five years longer, respectively. Therefore, the difference between Aggravated and non-Aggravated Homicide is important for defendants.

In summary, Article 139 lists ten particularly serious circumstances for which a defendant can be charged with Aggravated Homicide. These circumstances involve the manner of the killing, the killer's motivation and premeditation, and the victim's characteristics. If any of the ten circumstances are satisfied, a Homicide charge can be raised to Aggravated Homicide, which increases the minimum and maximum length of the penalty.

### **Comparative Law Aggravated Homicide in Other Countries**

Many countries are similar to Timor-Leste and punish certain types of Homicide more severely by law. Other countries do not have a separate Aggravated Homicide charge, so the judge only looks at the circumstances of the crime to decide what the sentence will be.

The Portuguese Penal Code is very similar to the Timorese Penal Code, for example. In **Portugal** one type of aggravating circumstance is when the perpetrator is an official and commits a killing by abusing his or her power (Article 132, Section (m) of the Portuguese Penal Code).<sup>46</sup> In **Indonesia**, the law differentiates between premeditated and non-premeditated Homicides.<sup>47</sup> Finally, in **England**, Homicide is charged no matter who the victim was or what the killer's motivation was. However these factors may be considered.<sup>48</sup>

### Questions

1. Vincente hates members of the most popular political party. He carefully plans to bomb the party's office building. He succeeds in the bombing and kills members of Parliament and many of their secretaries and staff. Can Vincente be charged with Aggravated Homicide? If so, which subarticles of Article 139 has he violated?
2. How might you prove that someone premeditated before killing another person?

### Answers

1. Vincente can be charged with Aggravated Homicide. At least five of Article 139's subarticles have been violated. First, the bombing violates subarticle (a) because Vincente used explosives. Second, the bombing may be deemed an act of "treachery" or "disguise," violating subarticle (b). This is because the bombing was a surprise and there was no way for the victims to defend themselves. Third, the bombing was done out of political hatred, which violates subarticle (e). Fourth, the bombing was premeditated because Vincente planned it for more than 24 hours. This violates subarticle (f). Fifth, the victims were public servants and Vincente targeted them because they were public officials, violating subarticle (i). Remember, only one provision of Article 139 needs to be violated for the perpetrator to be charged with Aggravated Homicide.
2. You could look for evidence that person planned her crime in advance, like buying supplies to commit the crime, or observing the victim regularly. Another way to prove premeditation is to find witness who heard the defendant make statements about wanting to hurt or kill the victim.

<sup>46</sup> Refer to Timor-Leste Court of Appeal's discussion of Portuguese homicide law in Case File No. 50/03.

<sup>47</sup> Refer to Timor-Leste Court of Appeal's discussion of Indonesia homicide law in Case File No. 50/03.

<sup>48</sup> Horder, Jeremy. Homicide Law in Comparative Perspective. Oxford: Hart Publishing, 2007. 12.

### III. OTHER CRIMES AGAINST LIFE

#### SECTION OBJECTIVES

- To learn other types of Crimes Against Life in the Penal Code, including Abandonment, Aiding or Inciting Suicide, and Termination of a Pregnancy.
- To understand when a defendant can be charged for these types of offences.

In addition to Homicide and Manslaughter, the Penal Code also criminalizes other types of crimes that result in death. These crimes include: Abandonment or Exposure, Aiding or Inciting Suicide, Termination of Pregnancy, and Infanticide. This section will provide an overview of these crimes.

#### 1. Abandonment or Exposure

Usually, the Penal Code does not punish omissions. However, the crime of **Abandonment or Exposure** (Article 143) is one circumstance when a person can be charged for intentionally choosing not to act when he had a responsibility to act. For example, imagine that Maria lives with her 2-year old son, Fernando. Their house is very small and not very sturdy, so it can flood easily. One day a big rainstorm causes severe flooding and the house will soon be under water. Maria has a car that she can use to escape with her son. However, Maria is tired of always taking care of Fernando. She decides to leave Fernando in the house and escape on her own. The house becomes completely flooded and Fernando drowns because he is unable to save himself. This is an example of an Article 143 violation. Although Maria had a duty as Fernando's parent to protect him, she chose to escape and let him drown.

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 143. Abandonment or exposure

- (1) Any person who, intentionally, endangers the life of another person by:
  - a) Exposing said person in a place where the same is placed in a situation where he or she is unable to protect him or herself single-handedly; or



- b) Abandoning the person defenseless by reason of age, physical impairment or illness, when the perpetrator is responsible for protecting, caring for or assisting said person;

The key elements of Abandonment or Exposure crime are: 1) the perpetrator must *intentionally* endanger another person's life, and 2) the abandoned person must be someone *for whom the perpetrator is responsible for protecting*. Therefore, a perpetrator cannot be charged for negligently or accidentally endangering another person. In addition, there is generally no duty to protect strangers, unless you have intentionally placed the stranger in danger or have voluntarily made yourself responsible for their protection. For example, a hospital must care for the patients once they have admitted them to be treated by their doctors. A hospital cannot admit a patient and decide not to provide any treatment at all. It is also important to see that Abandonment or Exposure do not have to result in actual harm. The victim's life only has to be put in danger, even if she is not actually harmed.

The penalty for Abandonment or Exposure is 1 to 6 years of imprisonment. If death does result, however, the perpetrator can be sentenced to 5-15 years imprisonment (Article 143(2)(b)). If serious physical harm but not death occurs, the penalty is 2-8 years (Article 143(2)(b)). If the victim of abandonment is a spouse, a descendant, a parent, or other relative (for example, a child) the penalty will be increased by one third (Article 143(3)).

## **2. Incitement or Aiding Suicide**

Article 144 makes it a crime to incite or aid another person to commit suicide. This means that it is against the law to encourage, provoke, or help another person kill himself or herself. The penalty for this crime is up to 3 years imprisonment or a fine. The suicide must actually be attempted or completed. What is the required *mens rea* for Article 144? Because it is not stated specifically, Article 14 provides the default *mens rea* of intent. Thus, the perpetrator must have intentionally incited or aided suicide, or new that it would be a necessary consequence of her actions.

What actions could count as "inciting" or "aiding"? This is not clear in Article 144. It could be giving words of encouragement or even providing significant assistance, such as

purchasing a gun for the victim to use to kill himself. What level of inciting or aiding do you think should be punished?

**Comparative Law**  
**Physician-Assisted Suicide and “Mercy Homicides” in Other Countries**

In some countries and in certain parts of the United States of America, physician-assisted suicide is legal. This means that a doctor is allowed to prescribe a lethal dose of drugs to a person who gives her informed consent. Typically doctor must verify that the patient suffers from a chronic and incurable pain to be allowed to assist the suicide.

In other countries, such as Germany, a patient can be charged with a crime if he requests to be killed.<sup>49</sup> For example, in an elderly or very sick person is in a lot of pain, he might request a friend to help with suicide by giving him an overdose of drugs. These Homicides may be called “mercy killings” and may be viewed as less blameworthy because the victim was in a lot of pain and asked to be killed. In Timor-Leste and in many other countries (including England and France) there is no exception for “mercy killings.” All intentional killings are charged as Homicide or Aggravated Homicide.

### **3. Termination of Pregnancy and Infanticide**

Article 141 states that causing an abortion is a crime. An abortion is when a pregnancy is terminated. The punishment for this crime can vary depending on whether it was cause with or without the pregnant woman’s consent. The pregnant woman who consents to an abortion is also subject to imprisonment of up to three years.

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 141. Termination of pregnancy**

- (1) Any person who, by any means and without consent of the pregnant woman, causes an abortion shall be punishable with a prison sentence between 2 and 8 years.
- (2) Any person who, by any means and with the consent of the pregnant woman, causes an abortion shall be punishable with a prison sentence not exceeding 3 years.
- (3) Any pregnant woman, who consents to an abortion committed by a third party or, by her own actions or those of a third party, causes an abortion, shall be punishable with a prison sentence not exceeding 3 years.

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<sup>49</sup> Refer to Article 216 of the German Penal Code.

One exception is when an abortion is the only way to remove the pregnant woman from danger of death or serious and irreversible harm (Article 141.4). Article 141 has also been amended to specify the procedures when this exception is allowed. These procedures include, when possible, receiving consent from the pregnant woman and her spouse, and also getting independent medical verification that the woman's life is in danger.

Article 142 criminalizes Infanticide. **Infanticide** is when a mother kills her child during childbirth or soon after childbirth. This offence is punishable with 3 to 10 years imprisonment. This crime is an exception to the normal Homicide charge. Why do you think the sentence for Infanticide is less severe than for regular Homicide? Perhaps it is because the legislature considered these mothers to be less serious criminals, or maybe they believed that a mother has "less bad" reasons for these killings. For example, some women suffer from depression after giving birth. This illness is called Post-Partum Depression. This illness may make the mother want to harm her baby. Alternatively, even a healthy mother may fear that she will be unable to feed and support the child, which leads her to kill or abandon the infant.

#### 4. Summary

The Penal Code also includes other Crimes Against Life that result in death. Abandonment or Exposure is the intentional endangerment of another person's life by exposing someone to life-threatening danger or failing to protect the person when the perpetrator has a duty to do so. Aiding or Inciting Suicide is a crime if the victim actually attempts or succeeds in committing suicide. Termination of Pregnancy is a crime that can be done with or without the pregnant mother's consent, unless terminating the pregnancy is the only way to save the mother's life. Infanticide is an exception to Homicide. It occurs when a mother kills her child during childbirth or soon after the infant's birth.

#### Question

1. The Penal Code normally does not punish a person for an omission, but Abandonment or Exposure is one exception. When can a perpetrator be charged with this crime?

### **Answer**

1. The perpetrator must have *intentionally* endangered the victim's life. They must also have either 1) exposed a victim to a situation where she was unable to protect herself; or 2) abandoned a victim that was defenseless due to her age or a physical impairment. Another requirement for Abandonment is that the perpetrator must have been responsible for protecting the defenseless victim. If the perpetrator was not responsible for the victim, or did not intentionally abandon the victim, the perpetrator cannot be charged with this crime.

## IV. INTERNATIONAL CRIMINAL LAW PROVISIONS IN THE TIMOR-LESTE PENAL CODE

### SECTION OBJECTIVES

- To review the provisions in the Penal Code addressing the most serious crimes that may result in death: Genocide, Crimes Against Humanity, War Crimes, and Terrorism.
- To understand the origins of these international law provisions and why these crimes are found in the Penal Code.

The Penal Code reserves its highest punishment, a maximum of 30 years in prison, for serious Crimes against Peace, Humanity, and Freedom. These crimes are contained Title I of Book II. These provisions come from international law. The Annex to the Penal Code states that this part of the Code “is an affirmation of the . . . history of the country and reflects the fundamental interests and values that have constructed this fledgling nation.” This section will provide an overview of many of these serious crimes.

### 1. International Criminal Law

**International law** is also called “the law of nations.” It is the law that controls how nations and their citizens interact with each other. International law includes treaties, which are legal agreements between nations, as well as customary law that has been accepted as international law over time. There are many fields of international law, including the law of the sea, international trade law, international environmental law, and laws about how armed force is used. There is also a portion of international law that governs criminal activity: international criminal law.

International criminal law includes acts that violate basic human rights and global stability as well as transnational acts. **Transnational acts** are actions that occur across national borders. Transnational acts that violate international criminal law include drug trafficking, human trafficking, counterfeiting, money laundering, and other financial crimes. Some of these crimes are covered in other chapters in this textbook. Acts that violate basic human rights and threaten global stability include Terrorism, War Crimes, Crimes Against Humanity, and Genocide. This section will provide an overview of these serious crimes. Many of these crimes

were first prosecuted by the United States, England, France, and Russia against German Nazi leaders for their actions during World War II.

The Timorese Penal Code incorporates many international criminal law provisions into Timor-Leste's domestic law. This means that someone who commits Genocide, for example, is violating both international law and domestic Timor-Leste law. Having international criminal law provisions in the Penal Code is a requirement of a treaty that Timor-Leste signed—the Rome Statute of the International Criminal Court. The Rome Statute is an international treaty that has been law since 2002. It has been ratified by 121 countries as of 2012. Countries that have ratified the Rome Statute pledge to prosecute individuals that commit grave crimes that violate international criminal law. If a country fails to prosecute certain individuals, the International Criminal Court (ICC), based in The Hague in the Netherlands, has the right to prosecute these individuals instead.<sup>50</sup>

## 2. Genocide

**Genocide** occurs when any person, with the intent to destroy a specific group of people, commits one of a number of serious crimes (Article 123). It is punishable by 15-30 years imprisonment.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 123. Genocide**

- (1) Any person who, with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, commits any of the following:
  - a) Homicide or offence against the physical or mental integrity of members of the group;
  - b) [Acts preventing procreation or giving birth];
  - c) [Acts preventing procreation or giving birth];
  - d) Rape [and other sexual violence];
  - e) [Violent resettlement];

<sup>50</sup> International Criminal Court. <<http://www2.icc-cpi.int>>. More information about international criminal law and the Rome Statute is available at this website.

- f) Subjection . . . to cruel, degrading or inhumane conditions . . .
- g) [Seizure of property];
- h) [Prohibition from carrying out business activities];
- i) Spread of an epidemic . . . ;
- j) [Blocking] humanitarian assistance required to combat epidemic[s] . . . or severe food shortages;

The two elements of Genocide are: 1) intent to destroy a national, ethnic, racial or religious group; and 2) commission of an act that may cause the destruction of that group. Note that all of the acts listed in Article 123 are crimes that can be found separately in the Penal Code. Most of these crimes are violent acts. What distinguishes Genocide from the other, separate offences is the intent to destroy a specific group of people. One well-known example of Genocide is the Holocaust, which occurred during World War II in Europe. During the Holocaust, German leaders wanted to destroy Jewish people as a group, and killed millions of Jews using cruel and merciless means.

### **3. Crimes Against Humanity**

Crimes Against Humanity is a broad crime that involves violent acts committed during “widespread or systematic” attacks against civilians (Article 124). The key elements of Crimes Against Humanity are: 1) a serious criminal act such as Homicide or Enslavement; 2) done in the context of widespread or systematic attack; and 3) against a civilian population.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 124. Crimes against humanity**

Any person who, within the context of a widespread or systematic attack against any civilian population, commits acts that result in:

- a) Homicide or serious aggression to physical or mental integrity;
- b) Extermination . . .
- c) Enslavement . . .

- d) Forcible deportation . . .
- e) Imprisonment . . .
  
- f) Torture . . .
  
- g) Rape . . .
  
- h) Persecution . . .
  
- i) Enforced disappearance of persons . . .
  
- j) Apartheid . . .
  
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health;

is punishable with 15 to 30 years imprisonment.

What are the differences between Crimes Against Humanity and Genocide? Both crimes involve actions that are criminalized in other parts of the Penal Code, such as Homicide or Rape. One important difference is that Crimes Against Humanity does not require the perpetrator to have an intent to destroy a specific group of people. Instead, Crimes Against Humanity must be committed during widespread or systematic attacks against civilians. Therefore, committing Genocide may often also involve committing Crimes Against Humanity, but committing Crimes Against Humanity may not always result in Genocide.

One infamous example of Crimes Against Humanity occurred during the Khmer Rouge period in Cambodia, from 1975-1979. Millions of people are estimated to have died due to widespread torture and executions, as well as unnecessary famine. Many of the Khmer Rouge's actions also constituted Genocide because they targeted specific ethnic groups for destruction. These crimes are currently being prosecuted in the Extraordinary Chambers in the Courts of Cambodia.<sup>51</sup>

#### 4. Terrorism

Articles 131 and 132 address Terrorism. Article 131 states that a **terrorist group** is:

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<sup>51</sup> Extraordinary Chambers in the Courts of Cambodia. <<http://www.eccc.gov.kh/en>>



- 1) Two or more persons,
- 2) Pursuing political, ideological, philosophical, or denominational goals,
- 3) Acting in a coordinated manner,
- 4) Who commit serious crimes,
- 5) With a view to undermine or influence national or international institutions, organizations, or persons.

As with Genocide and Crimes Against Humanity, the underlying crimes committed by terrorist groups are also independent crimes in the Penal Code. To qualify as Terrorism, these crimes must be committed by coordinated groups who pursuing certain goals in order to influence others. Terrorist groups may try to send a message or make a statement through violent actions.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 131. Terrorist organizations**

- (1) A terrorist group . . . is the grouping of two or more persons who, in order to pursue political, ideological, philosophical or denominational goals, act in a coordinated manner with a view to undermining national integrity or independence; . . . subverting the operation of national or international institutions, intimidating . . . public authorities, international organizations or certain persons . . . to act [or] abstain from acting . . . by means of the commission of serious crimes:
  - a) Against life, physical integrity or freedom . . .
  - b) Against the safety of transport and communications . . .
  - c) Of maliciously causing collective danger, through arson, explosion, . . . contamination of foodstuffs and drinking water or dissemination of disease, [etc.].

#### **Article 132. Terrorism**

- (1) Any person who commits any of the crimes provided for in subarticles 131.1(a) to (c) and (e) . . . shall be punishable with 12 to 25 years imprisonment . . .

. . .

## **5. War Crimes**

Although war often involves violent actions, you may be surprised to learn that there are international law provisions controlling what is legal during war. Another name for war is

“**armed conflict.**” International humanitarian law is the area of law that governs armed conflict. This area of law comes from treaties signed in Geneva and The Hague over the last 150 years. The goals of international humanitarian law are: to protect **civilians**, which are people who are not actively participating in the conflict; and to limit the pain and suffering of **combatants**, people who are actively participating in the conflict. Articles 125-127 address war crimes. Article 125 makes it a crime to harm civilians during armed conflict. Articles 126 and 127 make it a crime to use prohibited means of war that increase the pain and suffering of combatants and civilians.

It is important to remember that, to charge a perpetrator with a war crime, an armed conflict must have occurred. Armed conflict is a complicated term, but it is traditionally defined as two states’ armies fighting against each other. Conflict between a state and non-state actors can also be an armed conflict in some cases. If no armed conflict occurred, the perpetrator cannot be charged with a war crime, but he may be charged with Crimes Against Humanity, Terrorism, or Genocide. Individuals can also be charged with individual Penal Code offences, such as Homicide or Rape.

## **6. Summary**

The Timorese Penal Code includes international criminal law provisions. These crimes have the highest possible punishment in the Penal Code—up to 30 years imprisonment. Each crime consists of a serious crime plus an additional circumstance that must be present. For Genocide, the perpetrator must commit serious crimes with the specific intent of destroying a certain group of people. Crimes Against Humanity occur when a perpetrator commits serious crimes as part of widespread or systematic attacks on civilians. War Crimes can only occur during armed conflict. Terrorism occurs when a group of perpetrators have a common goal and commit serious crimes in order to disrupt or influence institutions or organizations. If these extra circumstances are not, the perpetrators can only be charged with individual Penal Code crimes, such as Homicide or Rape.

## V. CHAPTER REVIEW

### SECTION OBJECTIVES

- To review the Penal Code provisions addressing serious crimes resulting in death.
- To review the difference between Homicide and Manslaughter, and the circumstances when Aggravated Homicide can be charged.
- To review the international criminal law provisions in the Penal Code criminalizing serious crimes against life.

In this chapter we learned about Crimes Against Life. These offences involve causing the death of another person. We also learned about the international criminal law provisions in the Penal Code. The Penal Code reserves the most severe punishment, 30 years of imprisonment, for these serious crimes. All of the crimes in this chapter are public crimes.

When one person kills another person, the killer may be charged with Homicide or Manslaughter. This depends on the perpetrator's *mens rea*. If he was aware of the risk that his actions could cause the victim's death, or if he intended to kill the victim, the proper charge is Homicide. If the perpetrator was not aware of the risk that someone could die but acted without appropriate caution under the circumstances, the proper charge is Manslaughter. If the perpetrator acted with appropriate caution but the victim still died, no crime will be charged.

Homicides may be committed under circumstances that justify an Aggravated Homicide charge instead. Aggravated Homicide occurs when the perpetrator uses particularly cruel methods of killing, has certain motivations for killing, or kills particularly vulnerable victims. Other serious Crimes Against Life include Abandonment or Exposure, Termination of Pregnancy, and Aiding or Inciting Suicide. Abandonment occurs when the perpetrator is responsible for protecting a vulnerable person from deadly conditions but intentionally fails to help that person.

The Penal Code also incorporates serious crimes from international criminal law, including Genocide, Crimes Against Humanity, Terrorism, and War Crimes. These crimes occur when the perpetrator commits serious crimes under specific conditions. Genocide requires the perpetrator to intend to destroy a specific group of people. Crimes Against Humanity requires instances of widespread or systematic attacks on civilians. Terrorism must be conducted by a

group of individuals with a common goal of disrupting normal life. War Crimes can only be committed during an armed conflict. Each crime carries different punishments. Table 6.2 shows these different crimes and the possible penalties allowed.

**Table 6.2: Punishments for Selected Crimes Against Life**

<b>Crime</b>	<b>Penal Code Article(s)</b>	<b>Prison Sentence Allowed</b>
Genocide, War Crimes, Crimes Against Humanity, Terrorism	123-128, 131-133	Varies; Up to 30 years for some crimes
Aggravated Homicide	139	12-25 years
Homicide	138	8-20 years
Abandonment or Exposure (resulting in death)	143	5-15 years; Up to 20 years if victim is a relative
Infanticide	142	3-10 years
Manslaughter (grossly negligent)	140.2	Up to 5 years
Manslaughter (negligent)	140.1	Up to 4 years (or a fine)
Aiding or Inciting Suicide	144	Up to 3 years

### Questions

1. Pedro's father Juan is very sick and in the hospital. Juan is in a lot of pain and tells Pedro he would rather die than continue to live in pain. Pedro wants to grant his father's last wish. He considers three different options. For each option, what crime, if any, could Pedro be charged with and what possible punishment would he face?
  - a) Pedro would hope and pray for his father to die immediately. He believes this may kill his father.
  - b) Pedro would give his father a lethal dose of a drug to kill him.
  - c) Pedro would give his father a button to push that would administer a lethal dose of a drug, and kill him.
3. The more Pedro thinks about his father's situation, the more he becomes angry and enraged about the way the hospital has taken care of his father. He wants to send a message to the hospital and government that treating people this way is wicked and must be punished. Pedro asks his friend, Pablo to help him, because Pablo also had a bad experience at the hospital. Pedro and Pablo decide to put a bomb in Juan's hospital room.

The bomb goes off, killing Juan but fortunately causing no other damage to the rest of the building. Pedro sends a letter to the newspaper claiming responsibility for the bombing and demanding the hospital change its policies. What crimes can Pedro and Pablo be charged with?

## Answers

- 1a. Pedro is not committing a crime by hoping and praying that his father dies. Pedro has the required *mens rea* because he believes his hopes and prayers may kill his father. However, Pedro has not satisfied the *actus reus* for the crime. He has not acted or caused his father's death, so he cannot be charged with Homicide.
- 1b. Pedro could be charged with Aggravated Homicide by administering a deadly poison to his father. There are three aggravating circumstances: 1) the victim is his father (Article 139(g)); 2) the victim is vulnerable due to illness (Article 139(h)); and 3) the method of killing was poison (Article 139(a). If Pedro planned the poisoning for over 24 hours, another aggravating circumstance would be present (Article 139(f)). The punishment for Aggravated Homicide is 12-25 years imprisonment.
- 1c. Pedro could be charged with Aiding or Inciting Suicide by giving his father a button to push to administer a deadly poison. Pedro would not be causing his father's death, because his father must decide whether to push the button. However, Pedro could be charged for aiding his father and intended to help him kill himself. The punishment for Aiding or Inciting Suicide is up to 3 years imprisonment (Article 144).
2. Pedro and Pablo could be charged with Aggravated Homicide and Terrorism. Killing Juan is an Aggravated Homicide because it was done with explosives (Article 139(a)) and Juan was vulnerable due to illness (Article 139(h)). Additionally, for Pedro, the victim was his relative (Article 139(g)).

The bombing could charge as an act by a terrorist group (Articles 131-132). Pedro and Pablo could be seen as a group with a common political or ideological goal: to raise awareness about something they believe in. In this case, that the hospital system is bad. Pedro and Pablo also intended to use the bombing to influence public and government opinion. Under Article 132, Terrorism is punishable with 12-25 years imprisonment.

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## CHAPTER 7: CRIMES AGAINST PHYSICAL INTEGRITY & PERSONAL LIBERTY

### CHAPTER OBJECTIVES

- To understand Physical Integrity as a concept and a right protected by the law
- To discuss the types of physical and non-physical actions that infringe on a person's physical integrity rights
- To summarize the laws and decrees criminalizing Domestic Violence
- To understand Personal Liberty as a concept and a right protected by the law
- To discuss the types of sexual violence that violate a person's personal liberty rights

In the previous chapter, we learned that Timor-Leste's Penal Code criminalizes actions that cause another person's death. Timorese law also protects against unwanted harm or injury to citizens' bodies and mind, even when the injuries do not result in death. This category of crimes is very broad because there are many ways that a person can harm another individual's body or mind. Can you think of some examples?

Maybe you thought of two people getting into a fight and punching each other with their fists. Or perhaps you thought of someone slapping another person, or striking that individual with an object like a stone or a knife. If you thought of these or similar examples, then you have already anticipated some of the offences the Penal Code describes. In Title II of Book II of the Penal Code, Chapters II and III prohibit actions that cause non-fatal harm to another person's body or mind. In the following sections, we will see that these actions can range from causing relatively minor physical harm (Article 145) to more serious and life-threatening injuries. For example, the Penal Code criminalizes causing another person to lose a limb (Article 146(a)), permanently disfiguring the body (Article 146(b)), or damaging the brain (Article 146(d)).

Chapter II describes conduct that violates a person's Physical Integrity. This is the first concept we will learn about. If you have studied international law, the term "Physical Integrity"

may be familiar to you as an important human right. In Timor-Leste, the right to Physical Integrity is also very important. The Timorese Penal Code defines crimes that violate this right in a very particular way. One way to understand **Physical Integrity** is a right all people have to be free from unwanted contact, including actions that inflict physical or mental damage. This means that Timorese citizens should be able to do their lawful, daily activities without fear that another person will hurt or mistreat them.

Compare this definition with the concept of Physical Integrity in international human rights law. In that context, Physical Integrity (also called “bodily integrity”) usually refers to the right to be free from more extreme unlawful acts committed by government officials. These actions include torture and political imprisonment. Political imprisonment is when people are put in jail because of their politically unpopular ideas.<sup>52</sup> As you know, crimes like torture are listed in Book II, Title I as Crimes Against Peace and Humanity. These crimes will not be discussed in this chapter.

To better understand the Timorese Penal Code’s concept of Physical Integrity, we will learn about the types of actions that violate this right. We will divide Chapter II offences into two categories of crimes:

- 1) Inflicting harm through *physical actions*, such as using one’s hands, objects, or administering harmful substances; and,
- 2) Inflicting harm through *non-physical actions*, such as verbally mistreating another individual or threatening to commit a crime prohibited by the Penal Code.

We will also learn about crimes committed within the family unit. Some examples are physically or mentally harming one’s spouse or children. Injuring a particularly vulnerable category of citizens—usually children, the elderly, or the disabled—will often result in more severe penalties for the crime.

In the second part of this chapter, we will learn about offences described in Chapter III of the Penal Code: Crimes against Personal Liberty. Personal Liberty is closely related to Physical Integrity, because they are both rights involving Timorese citizens’ health, bodies, and minds. When you think of someone’s “Personal Liberty,” what examples come to mind?

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<sup>52</sup> David L. Cingranelli and David L. Richards, “The Cingranelli and Richards (CIRI) Human Rights Data Project,” *Human Rights Quarterly* 32 (2010): 404-405. This article can also be found in English online at <http://www.jus.uio.no/smr/english/about/programmes/serp/docs/cingranelli-richards%20proofs%20HRQ.pdf>

Perhaps you thought about people being able to meet in public or protesting against something they dislike? Or maybe you thought generally about words like “freedom” or “movement.” If so, you already have a basic understanding of the rights the Penal Code is trying to protect. You may think of **Personal Liberty** as the right people have to live without unlawful restrictions to their movement, and to be free from any violation of their bodies. Violations of this right include restricting an individual’s ability to physically move by forcing them to do labour, or invading a person’s privacy by tampering with private mail.

Personal liberty rights also include security from unwanted sexual conduct or sexual activity. Forcing people to receive or perform sexual acts against their will is a violation of their personal liberty. To better understand sexual crimes that violate Personal Liberty, we will divide Chapter III offences into three types:

- 1) *General Sexual Violence*—when a perpetrator performs unwanted sexual acts with another person;
- 2) *Sexual Violence Against Vulnerable Citizens*—when a perpetrator commits unwanted sexual acts with underage citizens, the elderly, or the disabled; and
- 3) *Sexual Violence for Profit*—sexual acts committed with third parties for the perpetrator’s economic benefit.

Invading the Personal Liberty of a particularly vulnerable citizen—a child, family member, or person with a mental or physical disability—will also result in more serious penalties.

We will discuss Personal Liberty rights and the types of conduct that violates an individual’s Personal Liberty in more detail later in the chapter. For now, try answering the questions below to see whether you understand the difference between Personal Liberty and Physical Integrity.

### Questions

1. Antonio is convicted of forcing Abelita, a 13-year-old girl in his village, to have sexual intercourse with him. Did this crime violate Abelita’s Physical Integrity or Personal Liberty? Why?
2. Cecilya and her husband, Hugo, are having a serious argument about money. During the fight Cecilya yells at Hugo and hits him on his arms and chest with her fists. The next day Hugo has bruises on his arms. Has Cecilya violated Hugo’s rights?

### **Answers**

1. Antonio has violated Abelita's Personal Liberty. As we discussed above, having sex with a person against her will is a crime. You will also learn later in this chapter that having sexual intercourse with a child is a criminal offence in Timor-Leste.
2. Yes, Cecilya has violated Hugo's Physical Integrity. Notice that Cecilya used physical means to inflict harm upon her husband when she hit him with her fists. She also hit him hard enough to leave bruises on his body.

## I. CRIMES AGAINST PHYSICAL INTEGRITY

### SECTION OBJECTIVES

- To identify the offences that violate Physical Integrity in Timor-Leste.
- To discuss the aggravating factors that will increase the penalties for Crimes Against Physical Integrity.

The Timorese Constitution discusses the importance of citizens' rights to Physical Integrity. For example, Section 30, states: “[e]very one has the right to personal freedom, security and integrity.” These rights cannot be taken away, even in situations where the government is constitutionally allowed to suspend other fundamental rights (Constitution Section 25(5)). This means that the right to Physical Integrity should not be violated by government officials, even when a state of emergency requires the government to limit other freedoms that Timorese citizens have.

### Constitution of the Democratic Republic of Timor-Leste

#### Section 30 (Right to personal freedom, security and integrity)

- (1) Every one has the right to personal freedom, security and integrity.

Physical Integrity is also an important value in the Penal Code. The Penal Code prohibits conduct that violates physical integrity rights. Many Crimes Against Physical Integrity are semi-public crimes. As you know, the victim of a semi-public crime must file a complaint in order for the perpetrator to be prosecuted in court. A victim of a semi-public crime can also decide not to prosecute the perpetrator by withdrawing his complaint at any time during the litigation until the judge enters a verdict.

### 1. Types of Offences

Crimes Against Physical Integrity can be divided into two categories of offences: physical and non-physical. A physical offence usually occurs when the perpetrator uses her body, objects, or other harmful substances to commit the crime. For example, punching another person is a kind of physical crime because the perpetrator uses her fists to injure another person.

A non-physical offence does not require that these objects or substances be used. Words can be used to injure another person in a non-physical way. Threatening another person is a type of non-physical offence, for example.

### Physical Offences

Imagine that your best friend, Roselia, was injured while walking home one night in Viqueque. Roselia was attacked by a man wearing a mask. The man pushed Roselia to the ground and then tore at her clothes looking for money in her pockets. When Roselia screamed for help, the man punched her in the face twice with his fists. A couple walking on the path several meters behind them heard Roselia screaming and ran to help her. The man then kicked her once in the stomach before running away. Two days after the attack, you visit Roselia at her home. Luckily, she is already recovering. She has many painful bruises on her face and stomach, but her injuries are not permanent. What crime has been committed against your friend?

Roselia was the victim of a violent attack. In some countries, this is called **battery**. According to the Penal Code, Roselia's Physical Integrity has been violated. Remember that Physical Integrity refers to the right to be free from actions that harm an individual's body or mind. In Roselia's case, her attacker violated this right when he kicked and beat her with his fists and foot. Luckily Roselia's injuries were not fatal. If Roselia decided to file a complaint, the prosecutor would likely charge the perpetrator with a **Simple Offence Against Physical Integrity**.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 145. Simple offences against physical integrity**

- (1) Any person who causes harm to the body or health of another person is punishable with up to 3 years imprisonment or a fine.
- (2) Prosecution depends on the filing of a complaint.

Notice that this Article's language is very broad. Subarticle 1 refers to causing "harm to the body or health of another person" without describing the specific actions that cause the victim's injuries. This is because there are many actions that could meet the criteria listed in this Article: slapping, choking, biting, hitting with fists, cutting with a knife or other sharp object,

etc. It is possible that even a minor Article 145 offence could seriously wound the victim. In the example above, Roselia still has painful bruises two days after being attacked. Article 145 is also a semi-public crime, so the victim must file a complaint to bring the incident to a prosecutor's attention.

The Penal Code also has separate offences for situations where the harm is inflicted by multiple perpetrators. This is because the harm to the victim does not have to be caused by just one perpetrator. The Penal Code criminalizes situations where two or more people inflict harm upon each other (Article 151), or cause "serious bodily harm" or death to people who participate in brawls or other violent fights (Article 152).

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 151. Reciprocal offences against physical integrity**

- (1) Whenever two person cause reciprocal harm to the body or health of the other, with neither acting in legitimate defense and none of the effects provided in Article 146 nor the death of any intervening party occurring, the same are punishable with up to 2 years imprisonment or a penalty or a fine.
- (2) Prosecution depends on the filing of a complaint.

You may have noticed that there are different penalties for Reciprocal Offences and Simply Offences Against Physical Integrity. The maximum penalty for Reciprocal Offences is 2 years, but the maximum for a Simple Offence Against Physical Integrity is 3 years. Perhaps this is because the perpetrator of a Reciprocal Offence was also injured by the victim. Because the victim may not be entirely blameless, the legislature chose to impose a less severe penalty for this crime.

#### *Non-Physical Offences*

Violence can also be inflicted through *non-physical* actions. An example of a serious form of non-physical violence is when someone threatens another person with conduct prohibited by the Penal Code:

## Penal Code of the Democratic Republic of Timor-Leste

### Article 157. Threats

- (1) Any person who, by any means, threatens another person with commission of a crime in order to cause fear or unrest or to undermine that person's freedom of decision-making is punishable with up to 1 year imprisonment or a fine.
- (2) Prosecution depends on the filing of a complaint.

A **Threat** is made when a perpetrator tells another person that she will commit an act that is prohibited in another Penal Code Article in order to make the victim afraid. Typically the act the perpetrator is talking about is a Crime Against Physical Integrity. That is why we are discussing Article 157 in this part of the chapter. Although Article 157 is listed in Chapter III as a Crime Against Personal Liberty, it is also closely connected to Physical Integrity.

Perpetrators often threaten victims with acts that they ultimately intend to do. For example, suppose a woman threatens to hit her boyfriend with a rock, and then actually hits him on the arm with one. The woman could be charged with making a Threat. She could also be charged with a Simple or Serious Offence Against Physical Integrity, depending on the severity of her boyfriend's injuries. Although these offences are listed in different chapters of the Penal Code, it is important to see that there are circumstances where a perpetrator can be charged with a Crime Against Physical Integrity *and* a Crime Against Personal Liberty.

**Coercion** is another offence that is listed in Chapter III as a Crime Against Personal Liberty. Like Threats, Coercion involves actions that could also violate Physical Integrity. A perpetrator who commits Coercion usually acts in one of two ways:

1. Forcing someone to carry out an act or omission; or
2. Forcing someone to allow *another person* to carry out an act or omission without interfering.



## Penal Code of the Democratic Republic of Timor-Leste

### Article 158. Coercion

- (1) Any person who, by means of violence or threat of serious harm, compels another person to commit an act or omission, or to accept an activity under duress is punishable with up to 2 years imprisonment or a fine.
- (2) Prosecution depends on the filing of a complaint.

There is a higher penalty for Coercion than for Threats. This is because of two elements that differ between Coercion and Threats. First, the *actus reus* for each offence is different. Coercion requires *actually using violence* or threatening the victim with serious harm. In contrast, physical violence is *not* required for a Threat to be made against another person. Second, the perpetrator's *mens rea* will differ. In order to commit Coercion, the perpetrator must act with the goal of either making the victim commit an act or omission, or allowing someone else to do so. When making a Threat, the perpetrator's goal only needs to be making the victim feel fear or unrest. Because the difference between Threats and Coercion can be difficult to understand, try thinking about the example below. See if you can identify the different offences committed:

Imagine that there is a boy named Julio who is 13 years old. Julio lives in Dili. Many of his friends recently joined a gang and asked him if he wants to be a member. At first Julio refuses. His friends became very aggressive and tell him to join the gang if he does not want anything bad to happen to his mother. Julio feels afraid when he hears these words and decides to become a member.

One night, Julio hears some boys from his gang talking about breaking into a shop the next night. They also want Julio to watch for police so that he can warn the group if they are about to get caught. Julio begins to feel afraid and tells his friends in the gang that he does not want to help steal items from the shop. One of the oldest boys in the gang is named Ruel. Ruel gets angry at Julio and tells him that if he does not help them steal from the shop he will break Julio's legs. Julio has seen Ruel fight a member of another gang before and knows that he is dangerous. He tells Ruel that he will help the gang steal from the shop.

The next day, Julio is very worried that someone will find out he is planning to help the boys steal from the shop. He worries so much that he begins to feel sick and cannot eat. He does not want to help the gang, but he is afraid that Ruel will find him and hurt him if he does not.

Julio decides to go to the local police station to tell them everything he knows about the gang and the crime they are planning.

At the police station, can Julio file a complaint against Ruel for violating his Physical Integrity? The answer is yes. Julio can actually file a complaint stating that Ruel violated his Personal Liberty *and* Physical Integrity. First, Julio can argue that Ruel committed Coercion by making him agree to help steal from the shop. This is because Ruel threatened Julio with serious harm by saying he will break Julio's legs. Ruel also threatened Julio for the purpose of making Julio help the gang commit a crime. Thus, Ruel's actions fit the definition of Coercion in Article 158. Julio's physical integrity rights have also been violated. This is because Julio experiences mental distress and also becomes sick because he is so afraid of Ruel and his friends in the gang.

Ruel could also be charged under Article 159 for **Serious Coercion**. This Article is also listed in Chapter III as a Crime Against Personal Liberty.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 159. Serious coercion**

If the coercion is exercised:

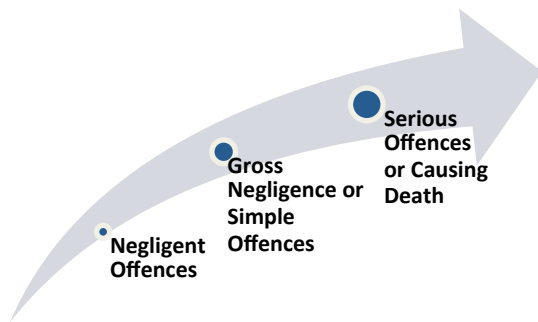
- a) Through the threat of a crime punishable with penalty of imprisonment exceeding 3 years;
- b) By an official seriously abusing his or her office;
- c) Against a person who is particularly defenseless, by virtue of age, deficiency, illness or pregnancy;
- d) Against any of the people referred to in subparagraph i) of article 139,

the perpetrator is punishable with up to 3 years imprisonment or a fine.

Ruel could be charged with this offence because he coerced a "particularly defenceless" person "by virtue of age." (Article 139(c)). Julio is only 13 years old, so he is considered a particularly defenceless person because he is still a child.

Finally, Julio can argue that the gang members should also be charged with Threats when they made him join their gang. Julio became afraid when they threatened to hurt his mother, and he only decided to join the gang because of his fear.

## 2. Negligent Offences and Serious Offences Against Physical Integrity



The Penal Code typically punishes perpetrators less severely if they negligently commit a Crime Against Physical Integrity. (Article 148). This may be because the legislature believed that negligent perpetrators are less of a threat to fundamental societal interests than people who intentionally hurt others. The legislature may

also have recognized that accidents happen and people should not be harshly punished based on bad luck. At the same time, Penal Code will more harshly punish a perpetrator the more severe the victim's injuries are. This is because the more serious the victim's injuries are, the greater the risk that the victim will die *even if the perpetrator did not actually want to kill the victim*.

### Negligent Offences Against Physical Integrity

Imagine an angry wife picks up a pen from a nearby table and throws it at her husband. She might argue that she was frustrated and threw the object to express this emotion. But, if the pen hits her husband in the eye and he needs to see a doctor, she has harmed his body even if she did not intend to do so. Because accidents happen every day, even between family members, it is unlikely that her spouse would want to sue her. This is especially true if the husband's injuries are not that serious.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 148. Negligent offences against physical integrity**

- (1) Any person who, by negligence, causes harm to the body or health of another person is punishable with up to 1 year imprisonment or a fine.
- (2) In the case of gross negligence, the penalty shall be up to 2 years imprisonment or a fine.
- (3) If the act results in serious bodily harm, the perpetrator shall be punishable with up to 3 years imprisonment or a fine.
- (4) Prosecution depends on the filing of a complaint.

Now imagine that this argument occurred while the wife was cutting some meat with a knife. If she became angry and threw her knife at her husband, this act likely shows “gross negligence.” Gross negligence is described in Article 148, subarticle 2. The wife’s act reflects gross negligence because most people know that knives are dangerous tools and throwing a knife is a very dangerous thing to do. Although the wife may not have intended to hurt her husband, she could receive a more severe penalty under Article 148, subarticle 2. This penalty would also increase if the wife seriously injured her husband: for example, if the knife hit him in the eye and damaged his sight.

The Penal Code also criminalizes another type of negligent offence: when a medical practitioner injures his patient. Article 149 makes it a crime to physically harm another person by using improper medical treatment. This article states that it is a crime “[i]f the violation of the *leges artis* results in danger to the body, health or life of the patient.” “*Leges artis*” is a Latin phrase that means “the established methods of the discipline.” Performing medical procedures or giving treatments in a way that is different from the approved methods used by licensed doctors is a crime.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 149. Medical-surgical procedures and treatments**

- (1) Medical procedures and other treatments that the state-of-the-art and medical experience show to be adequate and are performed or provided according to the *leges artis* by a medical professional or another legally certified person with a view to preventing, diagnosing, curing or reducing a disease, suffering, lesion or bodily fatigue or mental disorder are not considered bodily harm.
- (2) If the violation of the *leges artis* results in danger to the body, health or life of the patient, the perpetrator is punishable with imprisonment of up to 3 years or fine.
- (3) Prosecution depends on the filing of a complaint.

Article 149 is important to understand because it is usually lawful for a doctor or other medical person to treat patients or perform procedures. For example, during surgery, a doctor will have to cut the body with a blade or other medical tool. This is not a violation of Physical Integrity because these actions are done to help heal the patient. The patients also allow the doctor to perform these procedures because they trust him to perform the procedure correctly. A

patient likely would not have agreed to treatment if he had known the medical practitioner was not going to follow *leges artis*. Therefore, Article 149, subarticle 2 makes it a crime for a medical practitioner to negligently harm a patient's "body, health or life" by not following *leges artis*.

### *Serious Offences Against Physical Integrity and Aggravation*

The Penal Code also lists separate crimes with harsher penalties for more serious violations of Physical Integrity. These penalties are likely more severe because the perpetrator seriously injures the victim. Additionally, harsher penalties may be imposed due to certain characteristics of the victim or the way the crime was committed. We will discuss these crimes in detail below.

First, if a perpetrator intends to substantially harm the victim, and actually does so, he can be charged with a Serious Offence Against Physical Integrity (Article 146). If the perpetrator seriously injures the victim accidentally, he can be charged a **Simple Offence Against Physical Integrity with Aggravation** under Article 147, subarticle 1(a).

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 146. Serious offences against physical integrity**

Any person who causes harm to the body or health of another person with the purpose of:

- a) Depriving such person of an important organ or limb;
- b) Seriously or permanently disfiguring said person;
- c) Seriously affecting, for a long period of time or definitively, a person's working capacity, intellectual faculties, or capacity to procreate;
- d) Causing permanent illness or incurable mental disorder to such a person; or
- e) Endangering the life of said person;

is punishable with 2 to 8 years imprisonment.

##### **Article 147. Aggravation**

- (1) Any person who, with the sole intent to cause harm to the body or health of another person:

- a) causes any of the results provided in article 146 is punishable with up to 5 years imprisonment.
  - b) causes death by negligence is punishable with 1 to 6 years imprisonment.
- (2) If, with intent to cause any of the offences provided in article 146, causes death by negligence, is punishable with 4 to 12 years imprisonment.
- (3) If the victims of the crimes referred to in the two previous articles are any of the persons mentioned in article 139, paragraph (i), because of or while performing their aforementioned duties, the limits of the penalty shall be increases by one-third, where no heavier penalty is applicable by force of another legal provision.

Article 146’s language is very descriptive. Article 146 lists specific types of injuries in subarticles (a) through (e). This suggests that the Penal Code drafters wanted to be very clear about forbidding severely harmful acts. Article 146’s text also uses the word “purpose” in the first sentence. As you know, this word describes the required *mens rea* for the crime. To be charged with a Serious Offence Against Physical Integrity, the perpetrator must desire to cause harm “with the purpose” of causing one of the consequences listed in subarticles (a) through (e). For example, suppose Jose wants to cut off Rodrigo’s arm. Jose takes out his machete and strikes Rodrigo’s arm multiple times, cutting it off. Jose has satisfied Article 146’s *actus reus* and *mens rea* requirements. He acted with the purpose of cutting off Rodrigo’s arm and actually cut off a limb.

It is important to know that the victim’s injuries do not have to be *physical* for a perpetrator to be charged with a Penal Code violation. Article 146, subarticles (c) and (d) describe injuries to the victim’s mental health, ability to work, or ability to have children. This is because physical violence may not permanently damage the victim *externally* but can still cause damage to internal organs or to the brain. These types of injuries can also harm a person’s ability to carry out normal activities. Recall the example of Roselia from the beginning of this section. Imagine that, in addition to her physical injuries, Roselia is also traumatized by the attack. She is afraid to leave her house for the next month because she is so afraid of an attack happening again. This affects Roselia’s ability to keep her job because she does not go to work every day anymore. This is a consequence described in Article 146, subarticle (c). But we do not know whether Roselia’s attacker acted with the purpose of seriously affecting Roselia’s ability to work. Therefore, it is likely that he would be charged with Aggravation under Article 147, subarticle

(a). Roselia’s attacker intended to physically harm her, but ended up causing a result listed in Article 146.

Every time a perpetrator uses force against another person, she risks causing greater harm to that person than what she intends. In extreme cases, the perpetrator may accidentally kill the victim, even though he only intended to wound the victim. This perpetrator can be charged with Aggravation under according to either Article 147, subarticle 1(b) or subarticle 2. Notice that the maximum penalties for these offences are even higher than the maximum penalties for Manslaughter (Article 140). These higher penalties are imposed because the perpetrator intended to violate the victim’s Physical Integrity *even if he did not intend to cause the victim’s death*. Additionally, another aggravating factor is listed in Article 147, or subarticle 3. If the victim of the crime is a government official or member of the justice system, such as an attorney or a judge, the penalty will be increased by one third.

Finally, as you know, the Penal Code describes particularly dangerous ways of injuring another person. Article 150 lists poisoning as a separate crime. To be charged with this offence, the perpetrator must give the victim a poisonous substance *without intending to kill that person*.<sup>53</sup>

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 150. Offences caused by poisonous substances**

- (1) Any person who causes harm to the body or health of another person by giving the same substances poisonous or harmful to his or her physical or mental health is punishable with up to 5 years imprisonment.
- (2) If any of the consequences provided in article 146 or the death of the victim occurs, the perpetrator is punishable with 2 to 6 years or 4 to 12 years imprisonment, respectively.

The maximum penalty for administering a poison is higher than the penalty for a Simple Offence Against Physical Integrity. This is likely because giving someone poison is more dangerous and sneaky than just attacking another person. You can also see that the severity of the penalty for a convicted poisoner increases if any of the consequences listed in Article 146 occur, or if the victim dies.

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<sup>53</sup> Remember, poisoning someone with the intent to kill that person is Aggravated Homicide under Article 139, subarticle (a).

## Questions

1. Joana has trained to be a nurse for one month. She does not have her license yet, but many people in her village ask her for help with medical questions. One day, her uncle asks her to give him medicine for stomach pain. Joana is not sure what medicine would help her uncle, but she has a bottle of blue pills in her bag that she thinks will stop stomach pain.

Her uncle takes the medicine and becomes extremely ill a few hours later. He has trouble breathing and has a very high fever. Joana is very worried and takes her uncle to a doctor in a village nearby. She shows the doctor the pills that her uncle took. The doctor tells her that the drug should not be taken by people older than 50 because of how powerful the medicine is. Joana's uncle is 67 years old.

Has Joana committed a crime? If yes, what Article of the Penal Code can she be charged with?

2. Manuel and Fernando get into a loud argument while watching football at a restaurant in Dili. After yelling at each other and knocking over two tables, the owner asks the two men to leave. They go out to the street and Fernando gets even angrier. He blames Manuel for getting them kicked out of the restaurant before the game had finished.

Manuel responds by punching Fernando in the face. In response, Fernando shoves Manuel to the ground and bites off a piece of his ear

- a) What crimes have Manuel and Fernando committed?
- b) Imagine that Fernando only bit Manuel's ear but did not tear a piece of it off. Instead, the wound became infected and Manuel had to have surgery to have his whole ear removed. Would this change the crime Fernando is charged with?

## Answers

1. Yes. Joana has likely broken the law by giving her uncle medicine in a way that violates medical *leges artis*. She could be charged with an Article 149 violation. Even though Joana is training to be a nurse, she does not have a license. She probably should not be giving medicine to other people without a doctor's supervision. Her uncle also suffered physical harm because she gave him medicine that was inappropriate for his age.

But this type of crime requires a complaint to be filed before the perpetrator can be prosecuted. It is possible that Joana's uncle will not file a complaint against his own niece, especially if he recovers without any permanent damage. The doctor could still report the incident though.



2. This example comes from a real case that the Dili District Court heard on 7 November 2012 (Case No. 1356/C.Ord/ 2012/TDD).<sup>54</sup> Some of the facts and the names have been changed in the question above.

a) Because Manuel and Fernando got into a physical fight, they can both be charged with Crimes Against Physical Integrity. Manuel can be charged with a Simple Offence Against Physical Integrity for punching Fernando in the face under Article 145. Fernando's actions were more violent because he bit off a part of Manuel's ear. He could be charged with a Serious Offence Against Physical Integrity. This is because biting off a piece of Manuel's ear "seriously or permanently" disfigures him under Article 146, subarticle (b).

Note that, had Manuel and Fernando injured each other, they could be charged Reciprocal Offences Against Physical Integrity instead (Article 151).

b) Yes, these circumstances would likely change what Fernando could be charged with. In this situation, Fernando did not bite off a piece of Manuel's ear. Because the wound became infected, the ear had to be removed by doctors at a hospital. Manuel could file a complaint under Article 148 and argue that Fernando acted with gross negligence when he bit his ear. He would argue that Fernando should have known that biting another person's ear can lead to serious and more extensive injuries than Fernando intended.

A prosecutor could also charge Fernando with a Simple Offence Against Physical Integrity with Aggravation based on Article 147, subarticle (1)(a) and Article 146, subarticle (a). This is because Fernando wanted to harm Manuel when he pushed him down and bit him. Although Fernando may not have intended for Manuel to end up permanently disfigured, his actions deprived Manuel of a vital organ, his ear.

### 3. Violence Against Vulnerable Groups

Crimes Against Physical Integrity are particularly serious when they are committed against vulnerable groups. These vulnerable groups include elderly people, mentally or physically disabled people, pregnant women, and children under the age of 17. In the Penal Code this conduct is called **Mistreatment**. Mistreatment includes causing the victim physical or mental harm, or committing sexual violence or other acts of particularly cruel treatment. Articles 153-155 prohibit this conduct and focus on the types of individuals who are vulnerable to Mistreatment. Because Mistreatment is a **public crime**, the State can investigate and prosecute these crimes even if the victim does not want to file a complaint and prosecute the perpetrator.

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<sup>54</sup> Judicial System Monitoring Programme. *Summary of the trial process at the Dili District Court November 2012*. 20 Dec. 2012. <<http://jsmp.tl/wp-content/uploads/2012/06/Dili-District-Court-November-20122.pdf>>

### Violence Against Children and the Disabled

Children and disabled people often depend on other adults to take care of their lives and health. As you know, children are typically cared for in their family's homes. Disabled people may be taken care of by family members or by medical professionals depending on the severity of the mental or physical impairment. The legislature appears to be aware of these circumstances, because the Penal Code makes it a crime for a guardian to commit violent acts against children (Article 155) and the disabled (Article 153). As you will read below, Mistreatment of children under the age of 17 also includes:

- Subjecting children to dangerous working conditions (Article 155(b)),
- Subjecting children to any kind of slavery (Article 155(c)), and
- Recruiting children to commit crimes like distributing pornography (Article 155(d)) or drugs (Article 155(e)).

Article 155's detailed list of subarticles suggests that the legislature wanted to be very clear about prohibiting behaviour that violates Timorese children's Physical Integrity.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 155. Mistreatment of a minor**

- (1) Any person who provides guardianship or custody, or is responsible for the upbringing of a minor aged less than 17 years, or does so under employment, and:
  - a) Causes harm to the minor's body or health, or inflicts physical or mental mistreatment or cruel treatment;
  - b) Subjects the minor to economic exploitation, hazardous work or work capable of compromising his or her education or physical, mental, spiritual, moral or social development;
  - c) Subjects the minor to any form of slavery or analogous practice;
  - d) Uses, recruits or offers the minor for purposes of prostitution, production of pornographic material or pornographic shows; or
  - e) Uses, recruits or offers the minor for practicing unlawful acts or activities, namely production and trafficking in narcotics as defined by international conventions, is punishable with 2 to 6 years imprisonment, if no heavier penalty is applicable by force of another legal provision.

- (2) Any person who, under similar circumstances, uses a minor for begging is punishable with up to 3 years imprisonment, if no heavier penalty is applicable by force of another legal provision.
- (3) If the victim is a descendant, collateral kin, relative or similar to the second degree, has adopted or been adopted by the perpetrator or a person cohabiting with the perpetrator under similar conditions, the limits to the penalties referred to in the preceding subarticles shall be increased by one third.

**Article 153. Mistreatment of a disabled person**

...

- (2) If the victim is a descendent, collateral kin, family or similar to the second degree, a person who has adopted or been adopted by the perpetrator or person cohabiting with the perpetrator under similar conditions, the limits of the sentence shall be increased by one third.

The maximum punishment for violating Article 153 or 155 increases by one third if the perpetrator is related to the victim. This is true even if the victim is adopted. This penalty increase also applies to mistreating children or disabled individuals who are not legally related to the perpetrator but are cohabiting with the perpetrator. **Cohabiting** means the victim is living with the perpetrator in a way that is similar to how a family member might live.

*Violence Against Spouses and Cohabiting Individuals*

The Penal Code also criminalizes Mistreatment of one’s spouse, or of a person who acts similarly to a spouse, like a girlfriend or boyfriend. This means that the victim of this offence does not have to be legally married to the perpetrator for the crime to be prosecuted.

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 154. Mistreatment of a spouse**

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 is punishable with 2 to 6 years imprisonment if no heavier penalty is applicable by force of another legal provision.

According to Article 154, the punishment for this offence is 2-6 years in prison, unless a “heavier penalty” is required by another legal provision. This is important language to think about when

we discuss Domestic Violence below. This language is also included in Article 153 and Article 155. Other laws, regulations, and international treaties may require that a person convicted of Mistreatment be punished more severely than what the Penal Code requires. At a minimum, the Penal Code's penalties will determine the sentence

Lastly, if any Article 146 consequences or death occurs to a victim of Mistreatment, the maximum number of years that a perpetrator can be imprisoned increases substantially depending on the crime (Article 156).

#### 4. Domestic Violence

Now we will learn about violence that occurs between family members, and intimate partners. An **intimate partner** is a spouse, girlfriend, or boyfriend. We know from the previous section that the Penal Code prohibits violence against these groups of people in Articles 154 and 155. In addition to the Penal Code's provisions, the National Parliament passed a separate Law on Domestic Violence in 2010. This law was passed to *specifically* address the crime of Domestic Violence because of how frequently the crime was happening, especially against women. Violence against spouses and intimate partners is one of the most common crimes in Timor-Leste. According to the Law on Domestic Violence, **Domestic Violence** is:

- Any harmful act or series of acts committed by a family member against another family member, whether they are living together or not; or,
- Any harmful act or series of acts committed against a person with whom the perpetrator has an intimate relationship or has previously had an intimate relationship.

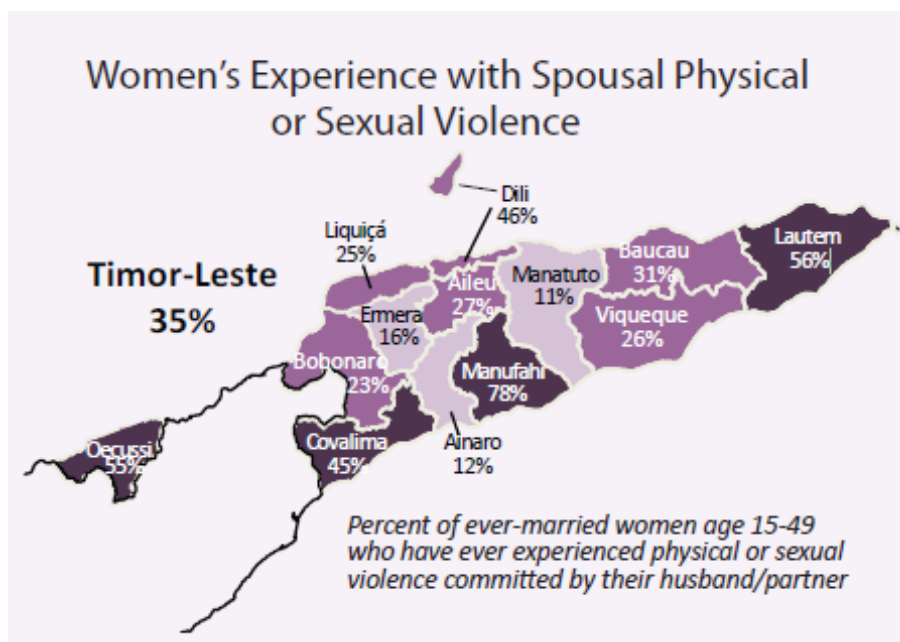
This means that Domestic Violence includes physical, mental, emotional, or sexual violence inflicted on family members, children, or intimate partners.

It is not easy to document the number of victims of Domestic Violence. Many sources suggest that it is a major problem in the country, including the 2009-2010 Timor-Leste Demographic and Health Survey (TLDHS). Timor-Leste's Ministry of Finance conducted the TLDHS with the support of the Ministry of Health and other international organizations.<sup>55</sup> This study collected information about general health and spousal and intimate partner violence in

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<sup>55</sup> National Statistics Directorate (NSD) [Timor-Leste], Ministry of Finance [Timor-Leste], and ICF Macro, *Timor-Leste Demographic and Health Survey 2009-10*, (Dili, Timor-Leste and Calverton, Maryland, U.S.: NSD [Timor-Leste] and ICF Macro.), xxiii.

Timor-Leste. The TLDHS surveyed 11,463 households from all over Timor-Leste, including 4,076 men ages 15-54 years old, and 13,137 women ages 15-59 years old.<sup>56</sup> “Ever-married women” were interviewed about their experiences with spousal violence if they were currently married or had ever had a spouse in the past.<sup>57</sup> “Never-married women” also reported their experiences of violence from *any person*, including boyfriends.<sup>58</sup> Below is an illustration of some of the data collected from “ever-married women” in the country.<sup>59</sup>



In some districts, such as Manufahi, Oecussi, and Lautem, more than half of the ever-married women surveyed had experienced physical or sexual violence from their husband or intimate partner. This data is an example of how frequently this type of violence happens in Timor-Leste. Although there are cases where women are violent against their male spouses or intimate partners, this is a less commonly reported crime.

#### Definition of Domestic Violence

The Timorese Constitution states that a marriage should be based on the two individuals agreeing to the relationship without being forced or pressured. The Constitution also expects

<sup>56</sup> *Demographic and Health Survey*, xxiii.

<sup>57</sup> *Demographic and Health Survey*, 226

<sup>58</sup> *Demographic and Health Survey*, 226

<sup>59</sup> *Timor-Leste Demographic and Health Survey Fact Sheet 2009-10*.

“full equality of rights between spouses” in the marital relationship. This includes the right to Physical Integrity.

**Constitution of the Democratic Republic of Timor-Leste**

**Section 39 (Family, marriage and maternity)**

- (1) The State shall protect the family as the society’s basic unit and a condition for the harmonious development of the individual.
- ...
- (3) Marriage shall be based upon free consent by the parties and on terms of full equality of rights between spouses, in accordance with the law.

When Domestic Violence occurs, it violates the victim’s physical integrity rights. The perpetrator can be prosecuted in court; however, it is important to know that Domestic Violence is often addressed by the non-state-sponsored justice system. As of 2013, this is especially true in rural areas because Timor-Leste’s state-sponsored legal system is still developing. This textbook is not focused on non-state-sponsored justice or the ways that crimes are handled outside the state-sponsored justice system. We will not discuss these complex, community-level justice systems in this chapter. But, because Domestic Violence is a serious and common crime in Timor-Leste, it is important to carefully study the state-sponsored laws criminalizing this offence.

You can read the language from the Law on Domestic Violence below:

**Law no. 7/2010 of the Democratic Republic of Timor-Leste  
Law on Domestic Violence**

**Article 2**

Concept of domestic violence

- (1) For the purposes of this law, domestic violence shall mean any act or sequence of acts committed within a family context, with or without cohabitation, by a family member against any other member of that family, where there is a situation of ascendancy, notably physical or economic, in the family relationship, or by a person with regard to another person with whom the former has had an intimate relationship which resulted, or may result, in physical, sexual or psychological injuries or suffering, economic abuse, including threats such as intimidating acts, bodily harm, aggression, coercion, harassment, or deprivation of freedom

...

Before we look at more statutory language, it is important to understand that Domestic Violence is different from the crime of Mistreatment. This is because the Law on Domestic Violence focuses on two important features:

- 1) The first feature is the nature of the relationship between the perpetrator and the victim. The Law on Domestic Violence calls this relationship a “**situation of ascendancy**.” This means that the perpetrator is able to exert power or influence over the victim and uses violence to control the victim.
- 2) The second feature is that the victim is dependent in some way on the perpetrator. One example is if the victim is physically dependent because the perpetrator is stronger than the victim. Another example is if the victim is economically dependent, on the perpetrator because the perpetrator is the only one who works and earns money for the household.

Article 2 of the Law on Domestic Violence lists the different types of Domestic Violence. Similarly to other Crimes Against Physical Integrity, the prohibited conduct can result in physical or non-physical injuries to the victim.

**Law no. 7/2010 of the Democratic Republic of Timor-Leste  
Law on Domestic Violence**

**Article 2**

Concept of domestic violence

- (2) The following, inter alia, shall be considered forms of domestic violence:
- a) Physical violence, understood to be any conduct that causes bodily harm or harms a person's health;
  - b) Sexual violence, understood to be any conduct that constrains any person to witness, engage, or take part in an undesired sexual relation, even if within marriage, through intimidation, threat, coercion or use of force, or that limits or annuls the exercise of one's sexual and reproductive rights;
  - c) Psychological violence, understood to be any conduct that causes emotional harm and reduces self-esteem, aimed at degrading or controlling the actions, behaviour, beliefs and decisions of another person through threats, coercion, humiliation, manipulation, isolation, constant surveillance, systematic persecution, insults, blackmail, ridiculing, exploitation, restrictions to the right to move freely or by any other means that cause harm to the psychological wellbeing and to self-determination.
  - d) Economic violence, understood to be any conduct that results in the retention, subtraction, partial or total destruction of personal effects, working instruments, impediment to work or outside the home, personal documents, assets, valuables and rights or economic resources, including those intended to meet personal needs and the needs of the household.

Based on the language of the law above, the following actions would be considered types of Domestic Violence: if a man beats his girlfriend and pulls her hair (Article 2(a)), if a woman verbally insults and humiliates her son in front of other people (Article 2(c)), or if a husband forces his wife to have sexual relations with him when she does not want to (Article 2(b)).

#### *Prosecuting Perpetrators of Domestic Violence*

It is important to understand how Domestic Violence is prosecuted in Timor-Leste. Article 2 of the Law on Domestic Violence does not create any new crimes. Instead, Article 35 of the Law on Domestic Violence includes crimes *already defined in the Penal Code*. These offences become Domestic Violence crimes if they also involve the circumstances described in Article 2: that there is a family relationship and a situation of ascendancy. This means that a perpetrator will be prosecuted for committing an offence listed in Article 35, not for actions listed in Article 2.



**Law no. 7/2010 of the Democratic Republic of Timor-Leste  
Law on Domestic Violence**

**Article 35**

Crimes of domestic violence

For the purposes of this law, the following shall be considered crimes of domestic violence:

- a) the types of crime provided for in articles 153, 154, 155 and 156 of the Criminal Code;
- b) the types of unlawful conduct provided for in articles 138, 139, 141, 145, 146, 167, 171, 172, 175, 177, 178 and 179 whenever, in addition to fulfilling the typical elements of fact contained in the incriminating norm, any of the circumstances described in article 2 of this law occur.

**Article 36**

Crimes of domestic violence as public crimes

The crimes of domestic violence referred to in article 35 above are considered public crimes.

It is important to understand this difference because if a crime from the Penal Code is listed in the Domestic Violence Law, it becomes a public crime according to Article 36. Article 36 makes any Domestic Violence crime a public crime *even if the crime is normally a semi-public crime in the Penal Code*. For example, Article 35, subarticle (b) of Law on Domestic Violence makes Simple Offences Against Physical Integrity public crimes if the offence is committed against a family member and involves a situation of ascendancy. Although Simple Offences Against Physical Integrity are semi-public crimes in the Penal Code, they can be treated as public crimes if they occur in a Domestic Violence situation.

**Questions**

In June 2012, the Suai District Court held a hearing about an alleged crime that occurred in 2011 in Leo Hitu Village, Balibo Sub-District, Bobonaro. At the hearing, the public prosecutor read the indictment stating that an incident of violence occurred between the defendant and his wife around 8AM. Neighbours heard a woman screaming. When police arrived at the house, the wife was crying and bruises were seen on her arms and face.

The wife told the police that she wanted to go to the market but her husband refused to let her leave. He threatened to beat her. When she insisted on going to the market, the husband became

angry and threw a telephone at her. The telephone struck her on the face. Afterwards, the defendant pushed his wife and struck her on the body several times with his hands.

In the defendant's testimony to the court, he admitted that all of the prosecutor's charges were true. He then said that he and his wife had reconciled after the incident. He said they had been living together normally for the last 6 months. The defendant also told the court that he regretted his actions. After the prosecutor finished reading the indictment, he recommended that the judge give the defendant a sentence of 1 year and 6 months imprisonment.

1. What crime(s) would you charge the defendant with? Would you charge him under the Penal Code, the Law on Domestic Violence, or both laws?
2. Imagine that the wife does not want her husband to be prosecuted. She tells this to the prosecutor and the judge. Can the prosecutor and the judge decide not to convict or sentence the husband?
3. Now assume that the defendant and the victim were not married. Imagine that the woman has been the man's girlfriend for 2 years. Would you charge the defendant differently?
4. Now imagine that the defendant told the court that his wife became violent against him first and that is why he threw the telephone at her. Would you charge him with the same crime?
5. Now assume that the facts are the same, but the defendant tells the court that he has two young children at home. He is the only one working in the household. What sentence would you give the defendant?

### Answers

This example was adapted from *Case No. 61/PEN/2012/TDS* from Suai District Court.<sup>60</sup> Some facts were changed.

1. The defendant can be charged with a Simple Offence Against Physical Integrity (Article 145). He can also be charged under the Law on Domestic Violence. In the actual case the Suai District Court heard, the public prosecutor charged the defendant with a Penal Code Article 145 offence *and* an Article 35 Law on Domestic Violence offence.

This shows that a defendant can be charged under both codes of law. This is because Article 35 of the Law on Domestic Violence states that crimes of Domestic Violence in Timor-Leste *include* certain Penal Code violations. These include Articles 145-146 and Articles 153-156, as long as there is a family relationship and a situation of ascendancy exists between the perpetrator and the victim. Review Article 35 of the Law on Domestic Violence to see the full list of crimes in the Penal Code that are also considered Domestic Violence crimes in Timor-Leste.

<sup>60</sup> An English summary of this Case, written by the Judicial System Monitoring Programme, can be found online at <http://jsmp.tl/wp-content/uploads/2012/06/Suai-District-Court-Juny-20121.pdf>.

2. No. According to Article 36, Domestic Violence crimes are public crimes. Even if the victim decides that she does not want to prosecute her husband, the government has a responsibility to prosecute the perpetrator.
3. No. It does not matter that the man committed Domestic Violence against his girlfriend. The defendant does not have to be legally married to the victim. From the facts of the case, the defendant and the victim are sharing the same house and have been in an intimate relationship for two years. This satisfies the terms of Article 2, subarticle (1) of the Law on Domestic Violence.
4. This question is difficult. The answer depends on whether the court thinks the defendant is telling the truth. In the original scenario, the prosecutor does not say that the wife harmed the defendant. If the husband has no injuries, it may be difficult to convince the court that he was justified in throwing a phone at her and hitting her multiple times.

At the same time, we know that women can initiate acts of Domestic Violence against men. It is possible that the wife could be charged under the Law on Domestic Violence if she injured her husband and there is a relationship of ascendancy between them. This might not be a common situation, but it is possible, particularly if the husband is old, or does not work, or is sick or disabled. The husband and wife could also be charged for Reciprocal Offences Against Physical Integrity under the Penal Code Article 151 for injuring one another.

5. You may think that it would be a bad idea to imprison the husband in this case. Article 38 of the Law on Domestic Violence allows the court to replace imprisonment with fines when this will help maintain the unity of the family. It is also important, however, for the court to consider the victim's future safety and health. In this case, the defendant and his wife have reconciled and been living together for 6 months. No other incidents of violence have occurred since then. If the husband and wife are now getting along, and he is the only one brings income into the household, it may hurt the family to imprison him for a long period of time.

In the actual case in Suai, the public prosecutor and the defendant's attorney asked for a suspended sentence because the defendant was the only person working for the family. The defendant also regretted his actions. As we learned in Chapter 5 a suspended sentence means that the defendant would not be punished with imprisonment. Instead, the court would monitor him to see if he commits additional crimes. The court can also ask the defendant to perform other duties or to pay a fine. Article 32 of the Law on Domestic Violence also allows judges to require a perpetrator to pay to support the victim if she is economically dependent on him. This payment is called **Alimony**. If the defendant is not able to pay Alimony, the Ministry of Social Solidarity pays it. As of 2013, however, courts have not used this option.

Finally, note that suspended sentences could still endanger the victim. Can we be sure the perpetrator will not become violent against his wife again if he only pays a fine or receives a suspended sentence? Letting the defendant go without a strict punishment could allow the violence against the wife to continue. This is especially true if she has no other family

members or friends who can help support herself and her children. This may make the wife feel like she cannot leave her violent spouse.

As of 2013, suspended sentences are very common in Timor-Leste. This is particularly true if it is the perpetrator's first offence. Think for a few minutes about whether it is fair for the judge to balance the family's economic situation and the potential for future harm to the victim. What if this was the defendant's tenth time beating his wife, but the last nine times he was not prosecuted because no charges were reported to the police? This fact might lead the court to opt for imprisonment because the perpetrator had repeatedly beaten his wife in the past.

Finally, the Law on Domestic Violence also requires the government to set up programs to study Domestic Violence nationwide and help victims of Domestic Violence. These programmes include:

- Educating students about human rights, gender, and sexuality, and how to resolve conflicts in a non-violent way (Article 11)
- Setting up support centres and shelters (Article 15), a telephone hotline (Article 20), and legal services for victims of Domestic Violence (Article 26).
- Educating perpetrators of Domestic Violence and encouraging them to practice non-violent behaviour (Article 27)
- Protection for witnesses of Domestic Violence who testify in court (Article 39)

Think about the place where you grew up. Have you seen the development of any of these types of programmes? What social, cultural, or legal issues do you think may contribute to the spread of Domestic Violence? Try to think about what law students and lawyers can do to help reduce this type of violence in Timor-Leste.

## **5. Summary**

The Penal Code criminalizes conduct that violates Physical Integrity rights. Crimes Against Physical Integrity involve injuring a person's body or mind and can result in serious or permanent damage, or death. These crimes can be divided into physical and non-physical offences. We learned how some Crimes Against Physical Integrity overlap with Crimes Against Physical Liberty, such as Threats and Coercion.

Aggravating factors increase the penalty for a person convicted of a Crime Against Physical Integrity. The severity of the penalty is often related to the severity of the victim's injuries. When a perpetrator's actions lead to the victim's death, this typically increases the possible penalty. If a crime is committed negligently, however, a perpetrator may receive a less severe punishment, unless gross negligence was involved.

Whether the victim is the member of a vulnerable population or the perpetrator is related to the victim are also aggravating factors. Children, the elderly, disabled people, and women are particularly vulnerable to violence. This violence is called Mistreatment in the Penal Code. Violence between spouses, siblings, relatives, or cohabiting adults is also major problem in Timor-Leste as of 2013. In 2010, the National Parliament passed a separate Law on Domestic Violence to address this issue. Crimes of Domestic Violence can be prosecuted under the Penal Code *and* the Law on Domestic Violence. It is important for law students to carefully read the entire Law on Domestic Violence. Crimes that appear to be regular Mistreatment or Crimes Against Physical Integrity may also be a Domestic Violence crime. This will often depend on the type of relationship between the perpetrator and the victim.

## II. CRIMES AGAINST PERSONAL LIBERTY

### SECTION OBJECTIVES

- To identify the sexual offences that violate Personal Liberty in Timor-Leste
- To discuss the aggravating factors that will increase penalties for perpetrators convicted of Crimes Against Personal Liberty

In this section, we will learn more about Crimes Against Personal Liberty, which are listed in Chapter III of Title II, Book II of the Penal Code. Like Physical Integrity, **Personal Liberty** is a very important right in Timor-Leste. It is the right all people have to live without unlawful restrictions to their movement, and to be free from the violation of their bodies.

The Timorese Constitution protects the right to Personal Liberty. For example, Section 30.3 states that citizens cannot be unlawfully arrested or detained, and they must be told why their freedom of movement has been restricted if this happens. Even when government officials arrest or detain a citizen, the Penal Code prohibits subjecting that person to torture, intimidation, or cruel or degrading treatment (Articles 167-169). Article 170 of the Penal Code also prohibits stopping Timorese citizens from holding meetings or demonstrations in public places because of the right to assembly described in Section 42 of the Constitution.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 170. Freedom of assembly or demonstration

- (1) Any person who interferes with a lawfully authorized gathering or demonstration being held in a public place or open to the public by hindering or attempting to hinder it from being held is punishable with up to 2 years imprisonment or a fine.
- (2) Any law enforcement official who hinders or attempts to hinder, outside of legal limits, the exercise of the right to assembly or to demonstrate described in the preceding subarticle is punishable by up to 3 years imprisonment.

Section 36 of the Constitution also guarantees that the government will respect the privacy of citizens' personal lives, families, and homes, unless the government has a lawful reason to intrude into these areas. For example, the police usually cannot enter a person's home

without an invitation. They may enter without permission, however, if they have a reasonable suspicion that someone's life or Physical Integrity is at risk inside the house (Constitution, Section 37). It is also illegal for anyone to tamper with another person's mail, telephone communications, or other correspondence (Article 187), to disclose another person's private information (Article 183), or to disclose commercial or professional secrets (Article 184).

Some Crimes Against Personal Liberty seriously restrict a person's physical freedom, such as when someone **kidnaps** another person (Article 160). Kidnapping involves illegally and forcibly stealing or carrying another person away. It is also illegal to abduct a person in order to force her to commit a crime prohibited by the Penal Code (Article 161). Often, the most serious violations of Personal Liberty also violate international law. These crimes include slavery (Article 162), **trafficking**, which is selling or trading people in exchange for goods or money (Article 166), or participating in the trade of human organs (Article 165). Although the Penal Code allows perpetrators of these types of crimes to be prosecuted in the domestic court system, it is likely that international justice systems would be used because of the human rights violations involved.

The majority of Chapter III's remaining offences involve violations of a person's Personal Liberty through unwanted sexual activity. As a result, we will study these crimes more closely.

### 1. Sexual Violence

In Timor-Leste, it is not a crime for adults to engage in sexual activity with one another's permission. As long as the people engaging in lawful sexual activity do not disturb the general public (Article 181), their private sexual conduct is not prohibited by the Penal Code. The law *does* prohibit engaging in sexual activity when a person has not given permission for the conduct to happen. This permission is called **consent**:

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 47. Consent

...

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

- (3) Consent is effective only if it has been given by someone who is over 16 years of age and has the necessary discernment to judge its meaning and scope, at the moment it is given.
- (4) If consent is not known to the perpetrator, he or she shall be punishable with the penalty applicable to attempt.

You may remember learning about Consent in Chapter 4. When a person commits a sexual act or activity without the permission of another person, the action is done without consent. This is **sexual violence**. Acts of sexual violence violate Personal Liberty because they deprive victims of their right to control the freedom and security of their own bodies. Sexual violence also has other harmful consequences. Women in particular can suffer problems during pregnancy and childbirth as a result of sexual violence.<sup>61</sup> Sexual violence also has a broader impact on society by contributing to the spread of sexually transmitted infections and diseases like HIV/AIDS.<sup>62</sup>

The Penal Code has severe penalties for perpetrators convicted of committing acts of sexual violence. You will also see that many articles in this Chapter of the Penal Code focus on whether force or a serious threat of force was used to commit the crime. Typically, the severity of the punishment depends on the age of the victim, the nature of the sexual act or activity carried out, and the kinds of injuries the victim sustains. Similarly to our discussion of Domestic Violence, women can also be sexually violent against men. A person of either gender can be prosecuted for engaging in illegal sexual activity with another person, whether male or female. This means that a man can be prosecuted for having illegal sexual activity with another man *or* another woman, and a woman can be prosecuted for having illegal sexual activity with another man *or* another woman.

Finally, do not forget what we have learned about Crimes Against Physical Integrity. If a perpetrator of sexual violence also causes other bodily injuries, the victim's Physical Integrity *and* Personal Liberty rights may be violated. This is true even if the perpetrator is ultimately charged with only one type of offence.

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<sup>61</sup> Abeysekera, Sunila. "Gendering Transitional Justice: Experiences of Women in Sri Lanka and Timor Leste in Seeking Affirmation and Rights." In *Engendering Human Security: Feminist Perspectives*, edited by, Amrita Chhachhi, Thanh-Dam Truong, and Saskia Wieringa, 3-35. London, UK: Zed Books, 2006. 29-30.

<sup>62</sup> Abeysekera 29-30.



## 2. Types of Offences

We will group the remaining Crimes Against Personal Liberty into three categories:

- 1) *General Sexual Violence* – when a perpetrator performs unwanted sexual acts;
- 2) *Sexual Violence Against Vulnerable Citizens* – when a perpetrator commits unwanted sexual acts with underage citizens, the elderly, or the disabled; and
- 3) *Sexual Violence for Profit* – sexual acts committed for the perpetrator’s economic benefit.

### General Sexual Violence

General Sexual Violence includes many forms of sexual activity committed without the victim’s consent. This conduct may include unwanted kissing, inappropriate touching, stroking another person’s body, or even using physical violence against the victim’s genitals. Actual intercourse is not always required for a crime to be committed. The use of force is also not always a requirement. For example, the crime of **Sexual Fraud** (Article 180) is committed when the perpetrator takes advantage of a mistaken identity to engage in sexual conduct with another person.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 180. Sexual fraud**

- (1) Any person who fraudulently takes advantage of mistaken identity, and practices vaginal, anal or oral coitus with another person is punishable with up to 3 years imprisonment.
- (2) Prosecution depends on the filing of a complaint.

In the case of Sexual Fraud, violence or force may be unnecessary because the victim gives his consent thinking that he knows the perpetrator. If the perpetrator then has oral, anal, or vaginal intercourse with the victim, he has violated the victim’s Personal Liberty.

When force or a serious threat of force *is* used to commit a sexual act without a person’s consent, the perpetrator can be prosecuted for **Sexual Coercion** or **Rape**. We have already discussed Coercion as a crime that violates a person’s Physical Integrity. In the context of Personal Liberty, Sexual Coercion occurs when the perpetrator threatens another person with violence or uses actual force to make the victim receive or perform sexual acts.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 171. Sexual coercion

Any person who, by means of violence, serious threat, or after having made, for the purpose of compelling another person to endure or to practice with the same or a third person any act of sexual relief, such a person unconscious or placed the same in a condition where resistance is impossible, is punishable with 2 to 8 years imprisonment.

Notice that Article 171 criminalizes coercing a person into practicing or enduring “any act of sexual relief.” “Sexual relief” is broad language that could potentially include inappropriate touching of the body, buttocks, or genitals, unwanted kissing, or any other act that gives the perpetrator sexual pleasure. Sexual Coercion also applies to situations where the perpetrator puts the victim in a state of unconsciousness or makes it impossible for the victim to resist. This could be done by physically hitting a person in the head, giving the person a drug that makes the person unconscious, or other similar actions.

Consider the example of a woman named Odete. Odete lives in Baucau with her husband and children. Her husband goes to visit relatives for a few days. Odete stays home with her children. One night, two men break into Odete’s home. When Odete hears one man’s footsteps in her room she begins to shout for help. The man holds up a sharp machete and tells her to get out of bed otherwise he will kill her two children. The man then tells her to perform oral sex on him otherwise he will kill Odete too.

At this point, what crime has the man committed? This terrible situation is an example of Sexual Coercion. The man in Odete’s bedroom is using a serious threat of violence with a machete to force her to perform an act of oral sex without consent. The perpetrator also threatened her children’s lives. In this situation, Odete is alone and the man has told her he is willing to use the machete if she disobeys him. As a result, Odete may feel that it is impossible to try and resist him. Look again at Article 171’s language. It does not require Odete to actually resist her attacker. What is important is that the perpetrator used forced to coerce Odete to perform a sexual activity without her consent.

Now assume that Odete actually performed oral sex on the intruder. If so, the man could also be prosecuted for **Rape**. This crime is committed when a person threatens to use violence or actually uses violence to practice anal, oral, or vaginal intercourse with another person without

her consent. The crime of Rape also occurs when the perpetrator creates a situation where the victim is unconscious, or it is impossible in some other way for the victim to resist. Finally, Rape does not have to be carried out with the genitals. Article 172 also includes violating another person's body with an object:

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 172. Rape**

Any person who, by the means referred to in the previous article, practices vaginal, anal, or oral coitus with another person or forces the same to endure introduction of objects into the anus or vagina is punishable with 5 to 15 years imprisonment.

Aggravating factors for Rape and Sexual Coercion are listed in Article 173. These factors will substantially increase the maximum penalty that a perpetrator can receive.

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 173. Aggravation**

If the sexual offences referred to in articles 171 and 172 are committed:

- a) Through abuse of authority arising from a family relationship, ward or guardianship, or hierarchical, economic or labor-related dependence;
- b) Through taking advantage of duties exercised or office held, in any capacity, in a prison, educational or correctional establishment, hospital, mental institution, rest home, clinic or other health establishment or establishment intended to provide assistance or treatment; or
- c) Upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency;
- d) Against a victim aged less than 17 years;

The perpetrator is punishable with 4 to 12 years imprisonment in the case of article 171 and 5 to 20 years imprisonment in the case of article 172.

Now think about the following example, which is based on a real case that was heard by the Dili District Court on 4 July 2011.<sup>63</sup> According to the indictment, the victim and her boyfriend were travelling on a motorcycle toward Hera when the six defendants approached the victim. The six defendants told the victim that it was a prohibited area and couples were not allowed to enter. After making this statement, the defendants forced the victim's boyfriend to go and buy cigarettes from a kiosk in Hera. While her boyfriend was gone, the defendants took the victim into the forest and forcefully removed her clothing. Then each defendant took turns having sexual intercourse with the victim against her will.

In court, two of the defendants chose not to testify. Two other defendants (M.G.D. and E.F.S.) stated that the charges were untrue and said they were not involved in the case. Based on the facts above, the public prosecutor charged the defendants with an Article 173 violation, which has a sentence of 4-12 years imprisonment.

Why do you think the prosecutor charged the defendants under Article 173 instead of with Rape (Article 172)? Because we are not given any more details about the victim of this alleged crime, there are a many reasons why the prosecutor may have thought that the defendants' should be charged under Article 173. Perhaps the victim was younger than 17 years old. Or perhaps she had a mental or physical disability. Another possibility is that the prosecutor was thinking of Article 173, subarticle (b). This aggravating factor applies when a perpetrator takes advantage of the duties he has or the office he holds to commit Sexual Coercion or Rape. For example, if the defendants in this case were government officials, this might explain why they told the victim and her boyfriend that they could not enter a prohibited area. This could also explain why the boyfriend agreed to go and buy the men cigarettes, because he thought he had to follow the men's orders.

These are only guesses. Without more facts, we cannot know for sure what happened in the case. If the victim's allegations are true, however, she has suffered a serious infringement of her personal liberty rights. Her body was forcefully violated by multiple individuals without her consent. It is also likely that she felt it was impossible to resist because she was forced to perform sexual acts by six men. Whatever the true reason may be, the defendants in this case

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<sup>63</sup> Judicial System Monitoring Programme. *Summary of cases tried at the Dili District Court in July 2011*. 01 Aug. 2011. <<http://jsmp.tl/wp-content/uploads/2012/06/CS-Dili-July-2011-Vol-1.pdf>>

were charged under Article 173, which increases the penalty for Rape from 5 to 15 years to 5 to 20 years.

Finally, remember that Article 171 does not describe exactly how “impossible” it must be for the victim to resist her attacker. If the victim is unconscious she is unlikely to be able to resist unwanted sexual activity. This is because the victim is not aware of her environment at the time. However, it may not be necessary for the victim to know with 100% certainty that resistance is impossible. It may be enough for her to reasonably believe that she cannot resist her attacker. For example, when the man held a machete to Odete’s throat, or when six men attacked the victim in the Dili case.

### *Sexual Violence Against Vulnerable Citizens*

We know that the Timorese Constitution protects citizens that are vulnerable to all types of violent behaviour, including children, the elderly, and disabled citizens.

#### **Constitution of the Democratic Republic Timor-Leste**

##### **Section 18 (Child protection)**

- (1) Children shall be entitled to special protection by the family, the community and the State, particularly against all forms of abandonment, discrimination, violence, oppression, sexual abuse and exploitation.
- (2) Children shall enjoy all rights that are universally recognised, as well as all those that are enshrined in international conventions commonly ratified or approved by the State.
- (3) Every child born inside or outside wedlock shall enjoy the same rights and social protection.

##### **Section 20 (Senior Citizens)**

- (1) Every senior citizen has the right to special protection by the State.

...

##### **Section 21 (Disabled citizens)**

...

- (2) The State shall promote the protection of disabled citizens as may be practicable and in accordance with the law.

The Penal Code also has provisions that prohibit sexual violence against these vulnerable groups. Children tend to be protected from sexual violence because their age and inexperience can allow them to be taken advantage of by more sexually experienced adults. Additionally, children may not fully understand the consequences of sexual activity, such as getting pregnant or contracting a sexually transmitted disease. Most importantly, children are considered too young by law to give consent to any sexual activity (Article 47.3). These may be some of the reasons why the Timor-Leste legislature has prohibited all sexual conduct with children under the age of 17.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 177. Sexual abuse of a minor**

- (1) Any person who practices vaginal, anal or oral coitus with a minor aged less than 14 years is punishable with 5 to 20 years imprisonment.
- (2) Any person who practices any act of sexual relief with a minor aged less than 14 years is punishable with 5 to 15 years imprisonment.

#### **Article 178. Sexual acts with an adolescent**

Any person who, being an adult and apart from situations provided in this section, practices any relevant sexual act with a minor aged between 14 and 16 years, taking advantage of the inexperience of the same, is punishable with up to 5 years imprisonment.

According to Article 177, any *person* who practices anal, vaginal, or oral sexual activity, “or any act of sexual relief” with a **minor** has committed a Crime Against Personal Liberty. A minor is a child under the age of 14. This language is broad enough to include touching or groping a child’s body, exposing the child’s genitals, or making a child do anything that is clearly sexual in nature. Article 178 prohibits any *adult* from having sexual intercourse with an **adolescent** by taking advantage of the child’s inexperience with sexual activity. An adolescent is a child aged 14, 15, or 16 years old. **Sexual Acts with an Adolescent** is a crime because the law does not consider the child’s consent to be a “free, honest, and informed” decision if she is underage (Article 47.3). Children can also be victims of Rape. If the elements of Rape are present and the victim is a minor, any conduct that satisfies the requirements of Article 172 can be prosecuted as Rape.

The Penal Code also prohibits acts of sexual violence against people who are physically or mentally incapable of resisting:

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 179. Sexual abuse of a person incapable of resistance**

Any person, who practices any relevant sexual act with an unconscious or incapable person particularly vulnerable by virtue of illness, physical or mental deficiency, taking advantage of said situation of incapacity, is punishable with 4 to 12 years imprisonment.

Article 179's language could apply to situations where a person is unconscious or so physically ill that he cannot resist unwanted sexual advances. Additionally, if a person has a mental or physical handicap, he may be vulnerable to being taken advantage of sexually because of the impairment. Because of this, the law is very clear about protecting people who are vulnerable to forced sexual activity, or who do not have the ability to meaningfully give consent to engage in sexual conduct.

Recall the example of Odete from earlier in this section. Now imagine that Odete was born with one leg. She uses a walking stick to move around. When the man entered her room at night with a machete, Odete could not easily run away because of her physical disability. In this situation, the man could be charged with an Article 179 violation for taking advantage of Odete's physical inability to resist. If the man then used force or threatened to use force to make Odete perform unwanted sexual activity, he could also be charged with Rape under Article 172.

*Sexual Violence for Profit*

In some cases, the perpetrator does not actually commit sexual acts with the victim. Instead the perpetrator exploits the victim's body for economic benefit. To **exploit** someone means to use a person unfairly for one's own advantage. **Sexual Exploitation of a Third Party** is a crime that involves the perpetrator benefitting from the victim's sexual conduct with other people. The perpetrator will either promote or facilitate prostitution by having the victim participate in sexual activities with other people in exchange for money or goods (Article 174(1)). For example, if Vincente tells Hugo that he will make Carla have sex with him if Hugo pays him \$50, Vincente has violated Article 174.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 174. Sexual exploitation of a third party

- (1) Any person who, with intent to derive profit or any person who makes a livelihood from, promotes, facilitates, or by any other means, contributes toward engaging another person in prostitution or other sexual acts, is punishable with 3 to 10 years imprisonment.
- (2) The perpetrator is punishable with 4 to 12 years imprisonment, if any of the following circumstances arises:
  - a) Exploitation of the situation of abandonment or economic necessity of the victim;
  - b) Use of violence, serious threat or coercion over the victim;
  - c) Displacing the victim to a country different from where the victim was born or was resident;
  - d) Withholding any identification document belonging to the victim.

Vincente broke the law because he provided Hugo with another person to have sexual acts with him in exchange for money.

Article 174 also mentions other factors that can increase the penalty for perpetrators of Sexual Exploitation of a Third Party.

- If the victim was taken from her country of residence (Article 174.2(c)),
- If the perpetrator is withholding important documents in order to force the victim to perform the sexual acts (Article 174.2(d)),
- If the perpetrator threatened the victim with violence or actually used force (Article 174.2(b)), and
- If the victim agreed to participate in the prohibited conduct because of poverty or abandonment (Article 174.2(a)).

Using children as prostitutes is prohibited by the Penal Code in Article 175. This Article defines **Child Prostitution** broadly. Child Prostitution includes seeking out child prostitutes, receiving children for the purpose of having them work as prostitutes, or paying to have any kind of sexual activity with a child. Article 176, subarticle 2 also makes it illegal to distribute, produce, or import or export any kind of Child Pornography. **Child Pornography** includes materials that exhibit children under the age of 17 having sexual intercourse (whether it is real or



simulated sex), depicting children performing sexual acts, or exposing children to sexual activities. This means that making or distributing images of non-Timorese children in sexual situations is also a crime. These images are a crime regardless of whether the sexual acts are real or simulated.

### **3. Aggravation—The Common Provisions**

The penalties for the sexual offences in Articles 171-181 can be increased if any of the aggravating factors listed in Article 182 are present:

<p><b>Penal Code of the Democratic Republic of Timor-Leste</b></p> <p><b>Article 182. Aggravation</b></p> <p>(1) The penalties prescribed from Section II to Section IV of this chapter shall have their minimum and maximum limits increased by one third if:</p> <ul style="list-style-type: none"><li>a) The victim is less than 12 years of age at the time the act was committed;</li><li>b) The perpetrator has transmitted to the victim any venereal disease, syphilis or AIDS;</li><li>c) Due to the act, the victim attempts or commits suicide or the same results in death.</li><li>d) The victim is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence;</li></ul> <p>(2) Whenever more than one of the circumstances described in the preceding subarticle are present, only one may be evoked as a modifying circumstance and those remaining shall be weighed in determining a specific penalty</p>
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Article 182 increases the minimum and maximum penalties for a convicted defendant by one third. For example, if a perpetrator has sexual intercourse with a minor, the regular punishment is 5 to 15 years of imprisonment under Article 177, subarticle 2. If the victim was 10 years old when the crime was committed, however, the recommended punishment increases by one third and becomes 6 years and 8 months to 20 years of imprisonment under Article 182, subarticle

1(a). Additional aggravating factors include: if the victim is related to the perpetrator or cohabiting with the perpetrator; whether the victim gets a sexually transmitted disease as a result of the crime; or if the victim attempted or actually committed suicide after experiencing the sexual violence.

When multiple aggravating factors are present, only one factor will be used to increase penalty. According to Article 182, subarticle 2, the rest of the circumstances will be used to help the court determine the final sentence.

### Questions

1. Police arrest a man and discover that he has photographs of children who appear to be performing sexual acts. The man tells the police that he bought the images from a woman in Lospalos, named Mrs. Pinto. After an investigation, the police learn that Mrs. Pinto sells photos of her children pretending to engage in sexual conduct in exchange for money and food.
  - a) If Mrs. Pinto's son is 11 years old and her daughter is 12 years old, what crimes can she be charged with?
  - b) Now imagine that Mrs. Pinto confesses her crimes to the police. She also tells the police the names and addresses of four people who frequently buy her photos. Can these purchasers be charged with a Crime Against Personal Liberty?
2. Luis is a 14-year-old boy who was hospitalized after attempting to commit suicide. Luis's parents are very upset and ask Luis why he tried to end his life. Luis reveals that one of his uncles has been sexually abusing him since he was 11 years old. The uncle touched Luis's genitals multiple times and forced him to perform other sexual acts. Luis's parents are shocked to hear Luis's story and are trying to decide whether they should prosecute Luis's uncle.
  - a) Can Luis's parents file a complaint against the uncle? If so, what crime(s) can he be charged with?
  - b) What is the maximum penalty the uncle can receive if he is convicted?
3. One night, Jose goes to his bedroom and wakes up his wife, Marlia. Jose tells Marlia that he wants to have sexual intercourse with her but Marlia says "No." She tells Jose that she would rather sleep. After a few minutes, Marlia is sleeping deeply. Jose has sexual intercourse with Marlia anyways. Has Jose committed a crime?

## Answers

- 1a. Because Mrs. Pinto's children are not engaging in real sexual conduct, Mrs. Pinto would likely be charged under Articles 176, subarticles (1) and (2) for creating and selling Child Pornography. Article 182's aggravating factors also apply, since one of her children is under 12 years old (Article 182(1)(a)), and her children are related to her (Article 182(1)(d)).
- 1b. Yes. If what Mrs. Pinto says is true, the people who have purchased these images of Child Pornography can also be charged under Article 176, subarticle (2) and Article 182, subarticle (1)(a) for possessing Child Pornography of a minor less than 12 years of age.

- 2a. Yes, Luis's parents can report the crime. The uncle would likely be charged with Sexual Abuse of a Minor under Article 177, subarticle (2). This is a public crime. Article 182 also applies because three aggravating factors are present:

- Luis is related to his uncle (Article 182(1)(d))
- Luis was under the age of 12 when his uncle began committing the crimes (Article 182(1)(a)), and
- Luis has attempted suicide because of experiencing the sexual violence (Article 182(1)(c)).

Notice that the Penal Code does not list **Incest** as a separate crime. **Incest** is typically defined as sexual intercourse between close relatives. As you can see, two different Penal Code Articles would have to be used to prosecute Luis's uncle. If Luis's uncle physically injured Luis in other ways or made Threats in order to carry out the crime, he might also be charged with violating Luis's physical integrity rights.

- 2b. If Luis's uncle only practiced sexual acts with his nephew, he would receive 5 to 20 years imprisonment if convicted under Article 177, subarticle (1). However, there are aggravating factors involved in the crime. These aggravating factors will increase the maximum penalty by one third. Remember that the penalty can only be increased once, even if there are multiple aggravating factors involved. This means that the uncle could receive a maximum sentence of 26 years and 8 months in prison if he is convicted.
3. Jose has violated his wife's Personal Liberty by having sexual intercourse with her without her consent. You might think that his conduct is Rape or Sexual Coercion, because Marlia said "No" and clearly stated that she did not want to have sexual intercourse with her husband. Identifying the specific crime Jose could be charged with is actually difficult. It is a difficult because it is not clear whether Jose could be charged with a crime in the Penal Code. Nothing in the question describes Jose using a threat of force or actual force against his wife. Marlia also did not resist her husband because she was sleeping, not because Jose made her unconscious or put her in a situation where she could not resist. This situation does not seem to fit the criteria for Article 171 or Article 172.

If Jose is violent against Marlia in other ways, she may still be able to benefit from other protections in the Law on Domestic Violence. These include having access to a hospital or a

shelter (Article 15), receiving police assistance (Article 24), or receiving social assistance (Article 23). It would just be difficult for Jose to be prosecuted *criminally* based on the conduct described in the question.

#### 4. Summary

All people have the right to Personal Liberty in Timor-Leste. Personal Liberty is the right to live without unlawful restrictions to one's movement, and to be free from any violation of one's body. Like Physical Integrity, Personal Liberty is about the health and security of all Timorese people. Restricting another person's movement, invading another person's privacy, or forcing another person to participate in unwanted sexual activity are all Crimes Against Personal Liberty. The majority of crimes in Chapter III are sexual offences. In Timor-Leste, it is important to have another person's permission to engage in sexual activity. Adults must consent to sexual activity in order for the conduct to be lawful. Children are not considered legally able to consent to any kind of sexual activity.

General sexual violence includes crimes like Sexual Coercion or Rape. These offences are committed with force or the threat of force. Sexual activities performed with members of vulnerable groups, like children, the elderly, or the disabled, will usually result in more severe penalties for the perpetrators. It is also a Crime Against Personal Liberty to exploit adults and children by forcing or coercing them to have sexual intercourse with other people for profit. Finally, the penalties for all of the sexual offences significantly increase if any of the aggravating factors listed in Article 182 are elements of the crime.

### III. CHAPTER REVIEW

#### SECTION OBJECTIVES

- To review the concept of Physical Integrity.
- To review the types of crimes that violate a person's Physical Integrity rights.
- To review the concept of Domestic Violence and the laws criminalizing violence between family members.
- To review the concept of Personal Liberty.
- To review the types of sexual offences that violate a person's Personal Liberty rights.

In this chapter we discussed how Physical Integrity and Personal Liberty are rights protected by the Timorese Constitution and Penal Code. In Timor-Leste, Physical Integrity refers to the right all people have to be free from conduct that harms their bodies, minds, or health. A person's Physical Integrity can be violated in many different ways.

Chapter II, Title II, Book II of the Penal Code criminalizes injuring another person using physical means. These methods include using one's fists, tools, objects, or poisonous substances to inflict harm. Crimes Against Physical Integrity can also be committed in non-physical ways, such as making Threats or Coercing another person to do something illegal. These offences can potentially violate *both* Physical Integrity and Personal Liberty. This shows how Crimes Against Physical Integrity and Crimes Against Personal Liberty often occur together, even though they are listed in separate parts of the Penal Code. We also learned that a perpetrator is typically punished more severely the more seriously the victim is injured. Even if the perpetrator acted negligently and misjudged the amount of damage he would inflict on the victim, he can still be prosecuted if the victim suffers severe injuries or dies.

Finally, violating the rights of a member of a particularly vulnerable group will increase the severity of the penalty. These vulnerable groups include children, spouses, intimate partners, the elderly, and the mentally or physically disabled. These same groups of people are also vulnerable to Mistreatment. In 2010, the National Parliament also passed the Law on Domestic Violence. This law focuses on violent crimes where there is a power imbalance in the relationship between the perpetrator and the victim. This type of relationship is called a

“situation of ascendancy.” This relationship involves the perpetrator using violence to control the victim, and the victim being dependent in some way on the perpetrator. The situation of ascendancy is an important feature of Domestic Violence. Although women are frequently victims of Domestic Violence in Timor-Leste, they can also commit Domestic Violence against men. In addition to describing criminal forms of Domestic Violence, the 2010 law also created the legal framework to develop support systems for victims of Domestic Violence throughout the nation. These systems include creating support centres and shelters, and teaching Timorese students how to resolve conflicts peacefully.

Next, we learned about the concept of Personal Liberty. Personal Liberty is a right that includes freedom of movement, privacy of one’s home and life, and the ability to be free from unwanted sexual activity. Crimes Against Personal Liberty are actions that unlawfully restrict people’s physical movement or violate their bodies. Many of the worst types of these crimes are prosecuted as violations of international law and human rights. However, many sexual offences can be prosecuted in the domestic court system.

Most sexual offences are listed in Chapter III, Title II, Book II of the Penal Code. We learned that sexual violence is committed against the will of another person. This means that the sexual activities are performed without consent. Sexual Coercion occurs when a perpetrator uses force or threatens to use force to perform sexual acts with the victim. Rape occurs when the unwanted sexual conduct involves oral, anal, or vaginal intercourse, or the perpetrator penetrates the anus or vagina with an object.

The law also strictly prohibits sexual conduct with minors and adolescents. Children cannot legally consent to any sexual activities. It is also a crime to force or coerce children to appear in sexually explicit materials (images, video, photographs, etc.), or to allow children to engage in sexual activities with other people in exchange for money or other goods. The law also prohibits unlawful sexual conduct with people who may not have the normal capacity to consent, such as people who are unconscious, ill, or who have mental or physical impairments.

It is also a Crime Against Personal Liberty to commit any act of sexual violence for profit. This is true even if the perpetrator is not the one having sexual relations with the victim. It is illegal to exploit the victim by forcing or coercing her to perform sexual acts with another person for money. The penalty for this crime increases if the perpetrator used violence or threatened to use violence, or took advantage of the victim’s vulnerable circumstances, in order

to convince the victim to participate. Finally, we learned that the penalties for all sexual offences will increase by one third if any of the circumstances listed in Article 182 are involved in the crime.

Because this Chapter discusses many different concepts and types of crimes, we encourage you to carefully review Penal Code Chapters II and III and the Law on Domestic Violence. Although the Penal Code separates the crimes into different categories, these offences often overlap when they are committed in real life.

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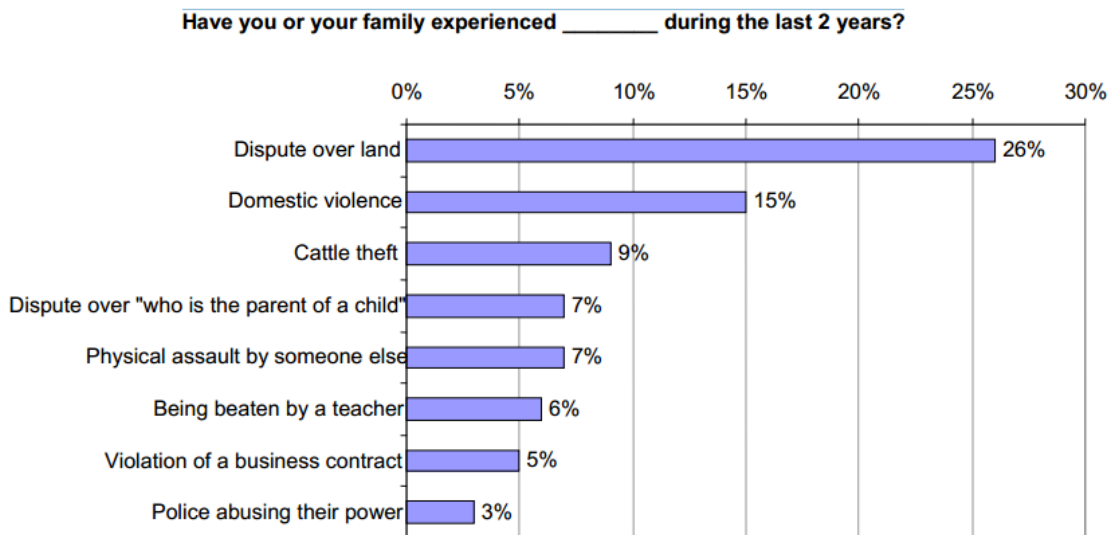


## CHAPTER 8: CRIMES AGAINST IMMOVABLE PROPERTY

### CHAPTER OBJECTIVES

- To discuss the Penal Code's treatment of crimes against an individual's land, including Usurpation of Property, Property Damage, and Arson.
- To understand the importance of aggravating factors in the context of property crimes, why they exist, and how they affect the punishments for these crimes.
- To introduce common controversies surrounding land ownership in Timor-Leste.

Crimes against immovable property and assets are a relatively common issue in Timor-Leste. In a survey conducted in 2008, the most common disputes experienced by families were disputes over land.<sup>64</sup> Over one quarter of people surveyed indicated that they had experienced a problem involving land ownership.<sup>65</sup>



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<sup>64</sup> Asia Foundation, *Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice*. 2008. <<http://asiafoundation.org/resources/pdfs/2008LawJusticeSurvey.pdf>>

<sup>65</sup> *Law and Justice in Timor-Leste*.

Timor-Leste's former status as a Portuguese colony, the Indonesian occupation, the destruction of land records in 1999, and the complex customary land tenure system complicate the law surrounding land ownership.<sup>66</sup>

Although this chapter will focus on the Penal Code, we will briefly go over some key components of land ownership in Timor-Leste. First, only Timorese citizens can own land. Second, in most of the rural areas of the country, people acquire rights to land through customary practices, and not the state-sponsored legal system. Instead, origin groups have the authority to allocate customary communal land to individuals within their origin group.<sup>67</sup> **Origin groups** are people who have lived on the land for many years. An origin group can also decide to give non-origin group individuals the right to use the origin group's land through gift or sale. However, non-origin group individuals' rights are generally limited to use and possession only. Therefore, these rights are not inheritable. Non-origin group individuals are often relocated groups or displaced people.

Many people live on and use property to which they have no formal title. **Formal title** is the recording of ownership in the state-sponsored legal system and documentation or written proof of ownership. These people often attempt to claim ownership based on long-term occupation. Yet, another person may formally own the title to the land. As of January 2014, there is no legislation explaining whether people can take ownership of land through long-term occupation. There is also no legislation on how conflicting claims of ownership would be resolved.<sup>68</sup> As a result, many land disputes are unresolved. One survey of 175 land disputes in Timor-Leste conducted in 2008 found 31% of these disputes were not resolved.<sup>69</sup>

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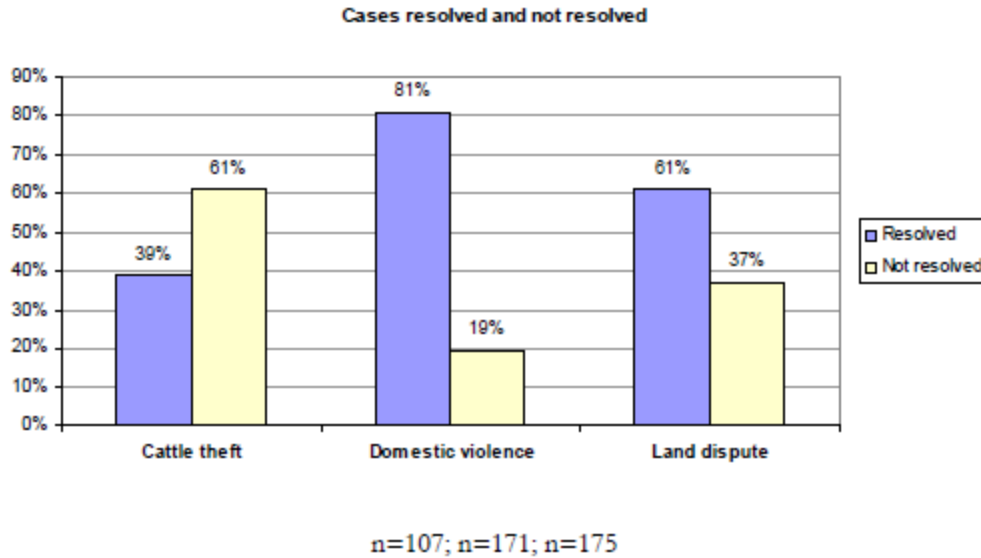
<sup>66</sup> USAID. *Timor-Leste—Property Rights And Resource Governance Profile*. 2012.

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<sup>67</sup> USAID.

<sup>68</sup> USAID.

<sup>69</sup> Asia Foundation, *Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice*. 2008. <<http://asiafoundation.org/resources/pdfs/2008LawJusticeSurvey.pdf>>



These disputes are important in a discussion of criminal law. Not only does the Penal Code criminalize the invasion and taking of another person’s land, unresolved disputes sometimes lead to violence. For example, in two separate incidents in October 2012, violence occurred over land disputes. One of the incidents occurred in Bobonaro District, where “unknown persons with their faces covered attacked . . . residents in two houses with machetes.” Five people (including two children) were murdered. It was later reported that a martial arts group was responsible for the attack and acted in response to a land dispute.<sup>70</sup>

In response to ongoing problems and violence over land disputes, the East Timor Law and Justice Bulletin made a number of suggestions recommending a new national land policy that clarifies:

- 1) What land rights from the Portuguese, Indonesian, and customary land tenure systems are legally valid;
- 2) Which parties are entitled to compensation in the event that the resolution of a land dispute results in the loss of land rights or of long-term occupations or illegal appropriations;
- 3) What communal land tenure systems are acknowledged by the government and Timorese legal system;
- 4) What the rights of the state are in relation to land;

<sup>70</sup> “Massacre Leaving 5 Dead the Result of a Land Dispute.” *East Timor Law and Justice Bulletin*. 26 Oct. 2012. <<http://easttimorlegal.blogspot.com/2012/10/massacre-leaving-5-dead-result-of-land.html>>

- 5) The difficult question of land redistribution where large landholders' land is acquired by the state and granted to the landless; and
- 6) What the administrative and judicial dispute resolution institutions are.<sup>71</sup>

These suggestions from the ETLJB are included here because they are representative of possible solutions to some of the land problems Timorese people currently face. When the government finalizes a land law, the government will hopefully address these issues in a manner that is satisfactory to all parties.

Regardless of the outcome of these policy decisions, the Penal Code clearly describes a number of crimes that address violations of property rights. The Penal Code protects individuals' rights to use and maintain their property. Owners have a basic right in Timor-Leste to peacefully enjoy the property they rightfully own. This includes the right to exclude those who trespass on their property, or remove people who make threats to harm them or damage their homes. As discussed above, there remain a number of unresolved policy issues regarding rightful ownership of land. In this chapter we will discuss crimes against those who are considered to be the full owners of the property and have valid title to the land.

The majority of this chapter will review some of the Articles contained within Title IV of the Penal Code, Crimes Against Assets. Some Articles, such as Articles 261 and 262, protect property and its owner from the threat of violence or usurpation. Others, such as Articles 258, 259, 260, and 263, punish those who damage or otherwise destroy buildings and other pieces of personal property on an owner's land. Finally, owners have the right to privacy on their land. Articles 185 and 186 protect this right to privacy by making it a crime to enter private property without permission. We will explore these crimes below.

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<sup>71</sup> "Land disputes a continuing cause of violence in Timor-Leste." *East Timor Law and Justice Bulletin*. 05. Sep. 2012. <<http://easttimorlegal.blogspot.com/2012/09/land-disputes-continuing-cause-of.html>>

## I. THEFT OF LAND

### SECTION OBJECTIVES

- To discuss the crime of Usurpation of Property and how it is committed in Timor-Leste.
- To discuss the crime of Alteration of Property Boundary Markings and how it is committed in Timor-Leste.

In this first section, we will discuss crimes that involve taking complete control of another person's land. This is described generally in the crime of Usurpation of Property. We will also discuss the specific situation in which someone tries to take part of another person's land by stealth, by altering boundary lines. This is known as the crime of Alteration of Property Boundary Markings.

#### 1. Usurpation of Property

Article 261 protects an owner's property against another person who "invades or occupies" the property with the intent to own, possess, or use it in violation of the law. Article 262 similarly prevents individuals from altering the property's boundaries in an attempt to take someone else's land.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 261. Usurpation of property

- (1) Any person who, by means of violence or serious threat against another person, invades or occupies property of another person with the intent to exercise right of ownership, possession, use or easement not granted by law, sentence, agreement or administrative act, is punishable with 1 to 4 years imprisonment.
- (2) If the means employed constitute a crime punishable by a penalty heavier than that prescribed in the previous subarticle, the heavier penalty shall apply.<sup>72</sup>

<sup>72</sup> The second subarticle of Article 261 will not be discussed in the material below. It only applies when someone has committed a more serious crime. For example, suppose the perpetrator killed the owner of the land in order to take it. Under Article 261, subarticle (2), the heavier penalty for Article 138, Homicide, 8-20 years imprisonment, would be applied instead of the 1-4 year imprisonment for a conviction under Article 261, subarticle (1), Usurpation of Property.

Recall from Chapter 2 that if a *mens rea* is not given in the text, the crime must be committed with intent. If we divide the language of Article 261 into its elements, the crime of usurpation of property is composed of four elements: (1) The intentional invasion or occupation of property by another person, who; (2) by means of violence or serious threat; (3) intends to exercise right of ownership, possession, use or easement; (4) *without* the legal right to do so.

Let us examine some important words from Article 161. In the first element, “invasion” refers to a hostile or forcible intrusion on another person’s property. This intrusion does not need to involve any malice or threat. Invasion can mean as little as walking onto someone’s land without permission. Further, an “occupation” is simply possession, use, or control of land. An occupation could be as little as setting up a tent and claiming the land as one’s own.

Nonetheless, the second element requires the invasion or occupation to be accomplished through *violence or the threat of violence*. For example, suppose Josefa sets up a tent on Manuel’s land and threatens to kill him with a machete if he tries to remove it. This would be enough to satisfy Article 261. Josefa does not even need to hit Manuel with the machete to meet the requirements of Article 261—simply threatening Manuel with violence is enough.

The third element states that the perpetrator must intend “to exercise right of ownership, possession, use or easement.” Intent is discussed earlier in Chapter 2, so we will focus on the second portion of this element, exercising “ownership, possession, use or easement.” Ownership seems like a straightforward concept, but has a precise legal definition. In the legal context, **ownership** is the “bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others.”<sup>73</sup>

Let us think about what this definition means. There are lots of different ways you could demonstrate your ownership of a piece of land. You could own a farm on the land, lease the land for someone else to use, or do nothing with it but sell it to another person. These rights to do what you want with your land represent ways people demonstrate ownership.

The third element is also satisfied if the perpetrator exercises “possession” or “use.” Demonstrating possession or use is similar to demonstrating ownership. For example, a court might find that Josefa intended to “exercise right of use” if she started harvesting crops on

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<sup>73</sup> *Black's Law Dictionary*, 9th edition. St. Paul: West, 2009.



Manuel's land after she violently took it. Or Josefa might "exercise the right of possession" by representing to another person that she owned Manuel's land and selling it to that person.

An easement is the final important definition in the third element. An **easement** is a technical term for a limited right given by the owner of the property to another individual. It is like having a very limited type of ownership over a piece of another person's property. One example of an easement is a road that passes through one owner's property to get to another person's land. For instance, suppose Manuel's farm is behind Josefa's, so that the only way he can leave his property is by driving across Josefa's land. In this situation, Manuel might ask Josefa for an easement that gives him a permanent right to drive across her property. He might pay for it, or Josefa might give it to him as a gift. Easements can also be for things like water pipes or electric wires that need to pass through someone else's land. Easements can represent an intrusion on the legal landholder's rights if they were not properly granted.

The final element of Usurpation of Property is that the perpetrator acts without the legal right to do so. A perpetrator will not be guilty of this crime if they can show that their actions were done in compliance with a "law, sentence, agreement or administrative act." If the perpetrator has a valid reason for usurping the victim's land, they will not be charged with this crime. For example, suppose a judge decides that the perpetrator of an assault must give the victim some of his land as a penalty. The victim's taking of that land will not be a violation of Article 261 because he has a legal right to do so, even against the perpetrator's wishes.

To summarize, a defendant can be charged with Usurpation of Property only if he meets all four of these elements. For example, if the Josefa walked onto the Manuel's land, built a house, threatened Manuel with a machete and told him to stay away (without a legal claim to the land), the Josefa could be charged with a Usurpation of Property under Article 261.

## **2. Alteration of Property Boundary Markings**

Not all land crimes involve violence. Article 262 addresses a situation in which a person tries to take another person's property in a more subtle way: by changing the boundary markers between properties.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 262. Alteration of property boundary markings

- (1) Any person who, with the intent to wholly or partially appropriate property of another, for him or herself or another party, removes or changes the position of boundary markers or any other sign destined to set the boundaries of any property is punishable with up to 1 year imprisonment or a fine.
- (2) Prosecution depends on the filing of a complaint.

Article 262 focuses on perpetrators who move boundary markers in an attempt to intentionally “appropriate,” property. To **Appropriate** means to take or claim ownership of. Note the boundary markers need not be an official sign or even a fence. Rather, “any other sign destined to set the boundaries of any property.” This means, if everyone knows that one edge of José’s property is marked by a big rock he placed there to indicate the border, moving that rock in order to build a shed for one’s self would be a violation of Article 262.

### Questions

*Adapted From: No. 57/Civ/2011/TDD<sup>74</sup>*

On 8 July 2011, the Dili District Court conducted a hearing in a case involving a land dispute. The hearing was presided over by Judge Gonçalves.

The plaintiff, Manuel, claimed that the defendant, Josefa, had seized his land and was preventing him from levelling the land to build a house. The court convened to hear testimony from witnesses.

On the first day of the trial, the court heard testimony from three witnesses for Josefa, including the local Village Chief. They testified that the land was purchased by Josefa from Mr. Albano during the Indonesian occupation and accompanied by full documentation; however nobody knew who the owner of the land was during the Portuguese occupation.

Later, the court also heard testimony from two witnesses for Manuel. They testified that their grandfather had a plantation and planted rice on the land during Portuguese times. Their grandfather later gave the land to his son, Manuel.

<sup>74</sup> Judicial System Monitoring Programme. *Summary of cases tried at the Dili District Court in July 2011*. 01 Aug. 2011. <<http://jsmp.tl/wp-content/uploads/2012/06/CS-Dili-July-2011-Vol-1.pdf>>

The lawyer for Josefa asked the court to order Manuel to activities relating to building a house on the land until the court issues a final decision.

1. If it is determined that the plaintiff, Manuel, is illegally occupying the land owned by the defendant, Josefa, could he be charged with the crime of Usurpation of Property?
2. If it is determined that Josefa is the rightful owner but Manuel only took possession of a small corner of the defendant's property, which had previously been clearly marked, what crime could the Manuel be charged with?

### Answers

1. Clearly, there are a number of different ways the court could decide this case, and it is representative of the tough decisions that must often be made to resolve property disputes in Timor-Leste.

In this case, we do not have any evidence that the Manuel used “violence or serious threat” in order to establish his claim to the property. Instead, he simply occupied the property and began building his home, at which point Josefa attempted to stop him. There does not appear to be any threat or use of violence. Therefore, charging Manuel with Usurpation of Property under Article 261 would not be appropriate. However, it may be possible to charge him with crimes that involve being on someone's property without her permission, which will be discussed in the next section.

2. If it is determined that Josefa is the rightful owner of the property, and Manuel changed the position of boundary markers in order to claim ownership of part of the land, then he can be charged with a violation of Article 262, subarticle (1). Note that according to Article 262, subarticle (2), Josefa would need to file a complaint in order for the government to file suit.

## II. UNLAWFUL ENTRY AND TRESPASSING

### SECTION OBJECTIVES

- To understand the crime of Unlawful Entry and how it is committed in Timor-Leste.
- To discuss aggravating circumstances that might cause a prosecutor to charge a perpetrator with Aggravated Unlawful Entry instead of Unlawful Entry.
- To discuss the crime of Trespassing and how it is different than the crime of Unlawful Entry.

Sometimes a perpetrator's action may not meet all of the required elements under Articles 261 or 262, despite violating someone's property rights. Perhaps the perpetrator simply walked onto the land and refused to leave, or, in a more serious case, broke into the owner's home. In such a situation, the perpetrator has not acted intending to exercise rights of ownership as required by Article 261. Instead, the perpetrator may be charged under a different statute; Article 185, which punishes Unlawful Entry, or Article 186, which punishes Trespassing.

### 1. Unlawful Entry

Article 185 describes the crime of Unlawful Entry.

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 185. Unlawful entry

- (1) Any person who, without consent, enters the dwelling of another person, or having been authorized to do so, remains therein once requested to leave, is punishable with up to 2 years imprisonment or a fine.
- (2) If the perpetrator, in order to more easily commit the crime, takes advantage of night, the fact that the dwelling is located in a secluded area, or that the act is being committed by 3 or more persons, or uses a weapon, resorts to violence or threat of violence or uses scaling, breaking into or employs a lockpicking device, the same is punishable with up to 3 years imprisonment or a fine.
- (3) If there are people inside the dwelling when the perpetrator commits the crime, the limit to the penalty provided for in previous subarticle shall apply, increased by one third.
- (4) The attempt is punishable.

(5) Prosecution depends on the filing of a complaint.

Article 185 is a long statute, so we will examine each subarticle separately. Article 185, subarticle (1) describes the basic definition of Unlawful Entry: Any person who either (1) enters the dwelling of another person *without* their consent; *or* (2) remains there after being asked to leave.

The first way a person can commit Unlawful Entry contains a new term that needs to be defined; a **dwelling** is any building where a person lives, often someone's home. A workshop or store might not count as a dwelling unless the owner lives there as well. The perpetrator of this crime would also need to enter this dwelling without the owner's consent. A guest invited to a home by its owner cannot violate the law. However, if an owner asks the guest to leave and the guest refuses, the guest can be charged with violating Article 185, subarticle (1).

The punishment for this crime is up to 2 years imprisonment or a fine. We can imagine a couple scenarios in which someone might be charged with this crime.

## 2. Aggravated Unlawful Entry

Subarticles 2 and 3 are important as well, because they list a number of aggravating circumstances.

### Aggravating Circumstances in Property-Related Crimes

Many crimes defined by the Penal Code contain aggravating circumstances. As you may recall, aggravating circumstances, if present, increase the perpetrator's punishment. These circumstances may be included as part of a subarticle within an Article, such as subarticles 2 and 3 of Article 185. They may also be separate crimes that the defendant can be charged with. This is the case with Article 251, Larceny, and Article 252, Aggravated Larceny.

Note that when two separate crimes exist (aggravated and not aggravated) a defendant is likely to be *charged* with both crimes—the basic crime and the aggravated version. Nonetheless, the defendant can only be *convicted* of one crime under Article 42. A court will determine in its final judgment which crime the defendant is guilty of, and the corresponding penalties will apply.

Article 185, subarticle (2) lists a number of aggravating circumstances that increase the potential punishment if are present when a perpetrator commits Unlawful Entry. These circumstances include:

- If the crime is committed at night
- The dwelling is located in a secluded area<sup>75</sup>
- The act is committed by 3 or more persons
- The perpetrator uses a weapon, resorts to violence, or threatens violence
- Breaks into the building or uses a lockpicking device

If *any* of these circumstances are present, the potential punishment is increased from two years to three years. Article 185, subarticle (3) adds one more important aggravating circumstance, which further increases the punishment by one third:

- If there are people inside the building when the crime takes place

Note that these penalties can be cumulative. For example, if Manuel breaks into Josefa's house at night while she is sleeping, he has violated Article 185, subarticles (2) and (3). This means he faces a punishment of three years under Article 185, subarticle (2), *plus* another year (an additional one third) increase, for a total of four years of imprisonment if convicted.

Article 185, subarticle (4) indicates that the attempt to unlawfully enter is punishable (see Chapter 3). Article 185, subarticle (5) states Unlawful Entry is a semi-public crime. The victim must file a complaint before the government will prosecute the perpetrator.

### **3. Trespassing**

We have now reviewed what happens when an individual unlawfully enters someone's house. However, what if someone simply crosses onto the owner's land without entering a dwelling? In this case, Article 186 applies.

#### **Penal Code of the Democratic Republic of Timor-Leste**

##### **Article 186. Trespassing on sites restricted from public access**

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<sup>75</sup> Note that the law does not indicate what defines a "secluded" area. Depending on what the judge in any given case decides, this could be as remote as a single farm a mile from the closest neighbour, or simply a house on the outskirts of Dili.

- (1) Any person who practices any of the acts described in subarticles 1 and 2 of the previous article in connection with any other place closed to or restricted from public access or not freely open to public access, is punishable with, respectively, the penalties referred to in those subarticles, with their maximum limits reduced by one half.
- (2) Prosecution depends on the filing of a complaint.

Trespassing on Sites Restricted from Public Access is very similar to Unlawful Entry. Article 186 references the Unlawful Entry statute in order to define the crime. Article 186's elements are exactly the same as in Article 185, with one exception. An Article 186 violation does not require entry into a dwelling. Rather, the unlawful entry can be onto "any other place closed to or restricted from public access or not freely open to public access." If an individual indicates to everyone that her property is not open to the public, such as by placing a fence around it, then anyone who comes onto her land is Trespassing on Sites Restricted from Public Access under Article 186.

Note, however, that Article 186's maximum penalty is half that of Article 185. This probably reflects a decision by lawmakers that Trespassing is a less damaging crime to society than Unlawful Entry. It is important to keep in mind that penalties reflect decisions by lawmakers that certain acts are more harmful to society. Here, entering a person's dwelling is more harmful than simply walking onto her land. See Chapter 5 for additional discussion on penalties.

### Questions

1. Why do you think the Penal Code's drafters included the aggravating factors described in subarticles 2 and 3 of Article 185?
2. Suppose the court determines that Manuel is the owner of the land from the previous example. Manuel then builds his home on the land. He hosts a party to celebrate his new house, and Josefa is invited as a guest. At the end of the party, Josefa refuses to leave. Josefa tells Manuel that she has a machete and will strike him if he tries to kick her out. What might Josefa be charged with?
3. Suppose the court instead determine that Manuel is illegally occupying Josefa's land. What crime could you charge him with, assuming Josefa files a complaint? How long of a maximum sentence might Manuel face for that charge?

## Answers

1. It is probably good policy for these aggravating factors to exist because society wants to discourage people from taking actions that might result in injury, more severe crimes, or even death. Further, people who are willing to risk this additional harm may be greater threats to fundamental societal interests.

Subarticle 3 may exist because it is worse to break into a home where someone is inside. The potential for violence increases in that situation because the person inside might fight to defend their property. Similarly, society probably wants to discourage the property damage that would occur with breaking into a building, as described in subarticle 2. These aggravating factors increase the punishments for doing these things. Hopefully, they deter people from putting themselves and others in even more dangerous situations.

2. The government could charge Josefa with violating Article 185, since she entered with permission but then refused to leave. Because she also threatened Manuel with violence (whether or not she actually had a gun), she would likely face a more severe penalty under Article 185, subarticle (2) if convicted.
3. Manuel should be charged with Trespassing on Sites Restricted from Public Access under Article 186. Look first at Article 185 to ensure he satisfies the requisite elements. Depending on the exact facts, Manuel is a person who has either entered without permission, or refused to leave when asked to do so by Josefa. Unlike Article 185, there is no requirement that he enter or refuse to leave a dwelling. So long as he is on her land and it is not open to the public, he has committed a violation.

The maximum potential sentence depends on whether or not there were any aggravating circumstances. No threats were involved, nor did Manuel trespass onto Josefa's land at night. Under Article 186, subarticle (1) and 185, subarticle (1), Manuel's maximum sentence would be 1 year (2 years under Article 185.1, but then reduced by half because of Article 186.1). Note that it may matter if the property is in Dili versus a more secluded rural area, since that is an aggravating circumstance according to Article 185, subarticle (2).



### III. PROPERTY DAMAGE

#### SECTION OBJECTIVES

- To understand the crime of Property Damage and how it is committed in Timor-Leste.
- To discuss aggravating circumstances that might cause a prosecutor to charge a perpetrator with Aggravated property damage or Property Damage with Use of Violence instead of Property Damage.
- To discuss Arson and how it is different from the Property Damage crimes.

In this section, we will learn about land crimes that involve simply damaging another person's property. We will explore the basic crime of Property Damage, its aggravating circumstances, and the specific situation in which a perpetrator uses fire to damage property (called Arson).

#### 1. Property Damage

Property damage is unfortunately a common occurrence in all societies, and the Penal Code has a number of different statutes that address this crime. Article 258 describes the basic crime of Property Damage.

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 258. Property damage

- (1) Any person who wholly or partially destroys, causes damage to, defaces or renders unusable the property of another is punishable with up to 3 years imprisonment or a fine.
- (2) The attempt is punishable.
- (3) Prosecution depends on the filing of a complaint.

Recall from Chapter 2 that if a Penal Code article does not specify a mental state, the interpreter of the law should assume that the requisite mental state is intent. Even though Article 258 does not explicitly differentiate between accidental or intentional property damage, Property

Damages must be committed with intent. To summarize, a defendant can be charged with property damage if he intentionally (1) wholly or partially destroys, causes damage to, defaces, or renders unusable; (2) the property of another.

Let us define some of the important language in the first element. There are three ways a person can commit Property Damage. First, a person could “wholly or partially destroy” another person’s property. This means that the damage does not need to totally destroy the property. For example, damaging a house by breaking down a door counts as Property Damage, despite the fact the rest of the house is undamaged.

Second, a person could deface another person’s property. “Defaces” includes painting or scratching a surface. For example, painting graffiti on the side of a building would count as property damage despite the fact it does no structural damage.

Third, a person could render another person’s property unusable. “Renders unusable” means that the perpetrator makes a piece of property no longer work as intended or functional. This could include circumstances where the damage could be repaired relatively easily. For example, if the perpetrator steals a car wheel, the car will not work and becomes unusable. This is Property Damage, despite the fact neither the car nor the wheel have been defaced or broken in any way.

In all of these scenarios, the property must belong to another person. This makes sense. A person is free to damage or do whatever he wants with his own property.

A violation of Article 258 is punishable by up to three years imprisonment or a fine. Note that the attempt is also punishable, and that Property Damage is a semi-public crime.

## **2. Aggravated Property Damage**

Let us discuss the aggravating factors that can increase the severity of the punishments for this crime.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 259. Aggravated property damage**

Any person who wholly or partially destroys, damages, defaces or renders unusable the property of another:

- a) Destined for public use or utility;
- b) Possessing high scientific, artistic or historical value or is of great importance to technological or scientific development;
- c) Is a means of communication or transportation of great social importance;
- d) Causes losses over US\$ 1,000.00;

Pertains to another and is used for religious worship or venerating the memory of the deceased and is at a place of worship or in a cemetery, is punishable with 2 to 8 years imprisonment.

**Article 260. Property damage with use of violence**

If the acts described in articles 258 and 259 are committed with violence against a person or with threat of imminent danger to the life or physical integrity of said person, placing the same in a situation where he or she cannot resist, said conduct is punishable with 4 to 12 years imprisonment.

In Articles 259 and 260 we can see that some variations of the basic Property Damage crime have an even harsher punishment than the 3-year maximum available under Article 258. Not only that, but this is the first time in this chapter we see a minimum punishment for a conviction of Aggravated Property Damage. If convicted under Article 259, a defendant faces at least 2 years in prison.

Let us examine these aggravating factors in more detail and think about why damaging property in these circumstances carries a heavier penalty. First, Article 259, subarticle (a) makes damage of property “destined for public use or utility” an aggravating factor. This refers to property that the public as a whole might use, rather than an individual’s private property. A public building like a school or a police station is an example of property destined for public use. Someone’s house or store is an example of private property. Why might we want to punish damaging public property more severely than damaging private property? There are two possible reasons. More people may be affected by damage to public property because it is open to all people. Further, all people pay for public property by paying taxes. Therefore, society has to pay to repair damage to public property. The social harm, or the damage done to society as a whole, is greater than when the crime is perpetrated against an individual, so the crime’s penalties are more severe.

This same logic applies to Articles 259, subarticles (b), (c), and (e) which address damaging property of “high scientific, artistic, or historical value,” property that is for “communication or transportation of great social importance,” and places of worship or memorials, respectively. It is clear that the lawmakers wanted to punish damaging property that is especially important to the community more severely than damaging private property for personal use. However, Article 259, subarticles (d) shows that if the property damage is severe enough (over US\$ 1000), then that will also qualify as an aggravating factor. This probably represents the lawmakers’ judgments that, if the damage to an individual is bad enough, it is at least as bad as damaging the public property the other subarticles describe.

Similarly, Property Damage With the Use of Violence, Article 260, can also be thought of as an aggravating circumstance. Here the Penal Code is trying to discourage the use of violence in the act of damaging property. This is because violence can lead to worse crimes such as personal injury or even death. The more severe penalties here are an attempt to discourage violence. Additionally, people who risk harm to other person’s physical integrity as well as their property rights pose a greater threat to fundamental societal interest.

Note that violence does not need to actually occur for conviction to be possible under this Article 259. Merely the “threat of imminent danger” or placing someone “in a situation where he or she cannot resist” satisfies the major element of the crime. A situation where someone cannot resist might be if the perpetrator ties up the victim, or threatens him to stay out of the way while they destroy the property. This is especially applicable if the victim is smaller, weaker, or otherwise unable to stop the perpetrator. Note as well that the punishment is much more severe than even the Aggravated Property Damage penalty.

One example of an Article 260 charge might be if Joao damaged Jose’s shop with a club and threatens to kill Jose with his club when Jose tries to stop him. Joao would not need to hit Jose, only threaten him. The threat against Joao’s physical integrity would be enough for a prosecutor to charge Joao with Article 260.

### Questions

1. Why do you think the legislature decided that the acts described in Articles 259 and 260 merited additional punishment? Can you think of reasons why society might want to discourage the acts described in Article 259 more than the basic property damage that occurs if someone steals his neighbour’s wagon tire?

## Answers

1. Let us first examine Article 259. The aggravating factors listed there are largely about damage to public structures or buildings. Article 259, subarticles (a) specifically mentions property “destined for public use or utility,” while subarticles (b) and (c) reference damage to property that is considered to be of technical, artistic, or “great social importance.” For these subarticles it is likely the legislature recognized that damage to public property affects everyone to a much larger degree than a single private individual.

However, subarticle (d) does state that if a lot of damage is done to an individual’s property (US\$ 1,000 or more) they could still be convicted of Aggravated Property Damage. This likely reflects an understanding that beyond a certain point, extensive damage to an individual’s property is at least as bad as public damage. Subarticle (e) reflects an understanding of the importance of places of worship and cemeteries in society, and that this type of property damage should be protected through the application of criminal penalties.

Finally, Article 260 is a clear effort by the legislature to deter violence in society. Violence can occur even if the perpetrator only threatens violence. If a perpetrator threatens violence against a property owner, the property owner may respond with violence. The Penal Code deters this by more severely punishing property damage that is caused under the threat or an act of violence.

### 3. Arson

We have now addressed the basics of property damage, as well as aggravating circumstances in the context of property damage. There is one final law regarding property damage by fire that we will address in this chapter.

## Penal Code of the Democratic Republic of Timor-Leste

### Article 263. Arson

- (1) Any person who, intentionally sets fire to a house, building, establishment, means of transportation, forest, plantation or any other property, imperiling the life or physical integrity of any person or any property valued at over US\$ 5,000.00, is punishable with 2 to 8 years imprisonment.
- (2) If the acts described in the preceding subarticle relate to public property or in which public services are provided, the penalty is 2 to 10 years imprisonment.

- (3) The perpetrator is punishable with up to 3 years imprisonment or a fine if the acts are committed with negligence, whenever no heavier penalty is applicable by virtue of another legal provision.
- (4) If the danger referred to in subarticle 1 is caused by negligence, the penalty is 2 to 6 years imprisonment.
- (5) In cases provided for in subarticle 4, prosecution depends on the filing of a complaint.

Article 263, Arson, is a property crime distinct from the articles we previously have discussed. This crime involves using fire to cause damage. It is more complicated than the other property crime articles because there are different intent requirements and corresponding differences in the penalties imposed. We will begin our analysis with the elements of the basic crime of Arson, Article 263, subarticle (1).

Arson under subarticle 1 describes the crime in which a person (1) sets fire to a house, building, establishment, means of transportation, plantation, or any other property; and (2) imperils the life or physical integrity of any person, or property valued at over US\$ 5,000. Note the breadth of the first element. The first element of Arson can be satisfied by setting fire to “*any other property*” as well as the types of property listed. This is a very inclusive part of the statute. It means that if fire is used to destroy *any* property, the perpetrator will be found liable provided they meet the requirements of the rest of the elements of the crime. These other requirements are described in the second element, which requires that the perpetrator “imperil[] the life or physical integrity of any person” or “property valued at over US \$5,000.”

To “imperil” someone or something would be to put him or his property in a dangerous situation or increase the likelihood that he or his property will suffer harm. This statute requires that a person be put in danger or that the property be sufficiently valuable (US\$ 5,000). For example, if Manuel intentionally burns down Josepha’s house while she is away, but the home was only worth US \$4,000, he would not be charged with Arson under Article 263, subarticle (1). (He would, however, likely be liable for a charge of Property Damage under Article 258.) The punishment for a conviction of Arson is 2 to 8 years, a comparatively harsher penalty than Property Damage. This is probably due to the fact that fire is dangerous and unpredictable. Using

fire to destroy property might cause more damage than the perpetrator predicted because the perpetrator cannot easily exercise control fire (as opposed to a hammer or one's fists).

Article 263, subarticle (2) describes another aggravating factor, which was discussed once before in the context of Property Damage—damage of “public property or property in which public services are provided.” In the context of Arson, this factor carries a higher maximum penalty of 10 years. Again, this probably reflects the lawmakers' intent to more severely punish crimes that have a larger public impact.

Articles 263, subarticles (3) and (4) present a new situation not previously addressed in this chapter: when the act or the resulting property damage is committed with *negligence*. Generally, the Penal Code treats crimes that are committed negligently less harshly than crimes that are committed intentionally. This is because the perpetrator is thought to be less of a threat to fundamental societal interests and therefore less deserving of punishment than someone who intentionally broke the law. For a further discussion of the different mental states and how they are used in the Penal Code, see Chapter 2.

There are two different ways a perpetrator could be negligent as it relates to the crime of Arson. First, she could be negligent in *setting the fire*. The negligent *men rea* refers to the act of setting the fire, not the resulting damage. Article 263(3) addresses this situation. Suppose Manuel is smoking a cigarette and carelessly drops it next to Josefa's house without putting it out. Manuel's lit cigarette sets Josefa's house on fire and the house burns down. Manuel did not intend to set Josefa's house on fire. Nonetheless, a reasonable Timorese person may think Manuel acted carelessly by failing to put his cigarette out and dropping it by Josefa's house. Therefore, (assuming Josefa's house is worth more than US\$ 5,000) Manuel set fire to Josefa's property with negligence as described in Article 263, subarticle (3).

Compare Article 263 subarticle (3) with subarticle (4), which states that if the “*danger* referred to in subarticle 1 is caused by negligence,” then a different penalty will be applied. In this case, the “*danger*” referred to in Article 263, subarticle (1) is “imperiling the life or physical integrity of any person or any property valued at over US\$ 5,000.00.” Someone who commits this crime would have *intentionally* set the fire, but would have *negligently* caused damage to property in valued in excess of US \$5,000 or imperiled the life or physical integrity of another person. Suppose Manuel intentionally sets fire to Josefa's small workshop worth only US\$ 200. The fire then unexpectedly spreads and burns down Josefa's house as well, valued at US\$ 7,000.

In that case, Manuel would be guilty of Article 263, subarticle (4), because he intentionally started the fire, but did not intend to set Josefa's house on fire (and cause more than US\$ 5,000 in damage). Manuel only intended to burn down Josefa's workshop. However, Manuel acted carelessly in setting the fire in the first place. Therefore, Manuel committed Arson with negligence as described in Article 263, subarticle (4).

Note that these crimes have different penalties, once again reflecting a sense that certain crimes are more harmful to society than others. Also note that the victim must file a complaint in order for the government to bring charges for Article 263, subarticle (4).

### Questions

*Adapted From: Case of minor damage accompanied by threats, No. 96/C.Ord/2011/TDD<sup>76</sup>*

On 04 July 2011, the Dili District Court conducted a trial in a case on Property Damage accompanied by Threats. This case involved three defendants (J.D.S., M.D.S., and T.X.) who allegedly committed the crime against the victim A.M. in Metiaut Village, Cristo Rei, Dili in February 2011.

In this case the public prosecutor charged the defendants for committing the crime of Property Damage accompanied by Threats as described in Articles 258 and 157 of the Penal Code. A.M. built a house on government land without first securing an announcement or approval from the village chief or the locals to build a house. Therefore, the J.D.S., M.D.S., and T.X. knocked down the house, threatened A.M., and told him not to continue with the construction or else they would kill him.

J.D.S., M.D.S., and T.X. rejected the charges of the public prosecutor. In order to establish the facts and truth in this matter the court heard testimony from the victim and witness about what actually occurred.

The witness A.D.S. testified that he saw the defendants, J.D.S. and M.D.S., cutting (damaging) the timber supports of the house belonging to the victim. A.D.S. also saw J.D.S. and M.D.S. say that they would kill A.M. A.D.S. also testified to the court that he saw T.X. carrying a machete at the scene of the crime.

1. If you had been the prosecutor in this case, with what other crimes could you have charged J.D.S., M.D.S., and T.X.?
2. What if A.M. had been building a church instead of a house?

<sup>76</sup> Judicial System Monitoring Programme. *Summary of cases tried at the Dili District Court in July 2011*. 01 Aug. 2011. <<http://jsmp.tl/wp-content/uploads/2012/06/CS-Dili-July-2011-Vol-1.pdf>>



3. What if the J.D.S., M.D.S., and T.X. had set fire to the building instead of attacking it with machetes? Assume the building is valued at US\$ 6,000.
4. What if J.D.S., M.D.S., and T.X. had actually been cooking dinner on an open fire close to A.M.'s house, and had accidentally left the cooking fire burning when they left? Assume that the fire then spread and burned down A.M.'s house, which was worth US\$ 6,000, and no one was inside the house.

### Answers

1. The prosecutor could have also charged J.D.S., M.D.S., and T.X. with Article 260, Property Damage with Use of Violence. The defendants threatened to kill the victim and knocked down his building, which qualifies as “threat[s] of imminent danger to the life or physical integrity” as described in Article 260.
2. If the building had been a church, J.D.S., M.D.S., and T.X. could have been charged with Article 259, subarticle (e), Aggravated Property Damage. Subarticle e states Aggravated Property Damage occurs when the damaged property is “used for religious worship.”
3. If J.D.S., M.D.S., and T.X. had set fire to the building when the victim was still in it, they could have been charged with Article 263, subarticle (1), Arson, *and* Article 260, Property Damage with Use of Violence (because the fire would have put anyone inside the building in imminent danger, a violation of Article 260). Since these are separate charges, and have different elements, nothing would prevent the prosecutor from charging someone with both crimes, and nothing would prevent a court from upholding a conviction for both.
4. This is a complicated question. First, we need to determine if J.D.S., M.D.S., and T.X. meet the requirements of Article 263, subarticle (1). Was this fire set intentionally with the intent to imperil anyone or property valued at more than US\$ 5,000? The answer to that question is no. Every element of Arson under Article 263, subarticle (1) is met except that the fire was set negligently. Therefore, we turn to Articles 263, subarticles (3) and (4) to determine whether J.D.S., M.D.S., and T.X. committed a crime.

In this case, Article 263, subarticle (3) is the correct charge. J.D.S., M.D.S., and T.X. allowed the fire to spread to A.M.'s house and damage property valued at greater than US \$5,000. Article 263, subarticle (4) is incorrect because J.D.S., M.D.S., and T.X. did not intentionally set a fire with the goal of causing property damage.

## IV. CHAPTER REVIEW

### SECTION OBJECTIVES

- To review the crimes of Usurpation of Property and Alteration of Property Boundary Markings.
- To review the crimes of Unlawful Entry and Trespassing.
- To review the crimes of Property Damage and Arson.

We have come to the end of the chapter on crimes against immovable property, mainly land and buildings. We reviewed three different categories of crimes that address land and buildings: theft of land (Usurpation of property, Alteration of Property Boundary Markings), entering property without permission (Unlawful Entry and Trespassing), and property damage (Property Damage and Arson).

A substantial number of issues remain unresolved regarding conflicting claims to the same plot of land. Nonetheless, this is outside the scope of criminal law, and the Penal Code is relatively clear on land theft once the proper owner has been identified. For example, if one neighbour changes the boundaries between her property and her neighbour's, the law says that the first neighbour can be charged with Alteration of Property Boundary Markings under Article 262. Similarly, if someone walks onto someone else's land and builds a house, this is Usurpation of Property under Article 261.

Unlawful Entry and Trespassing on Sites Restricted from Public Access protect the home and private land from intrusion. We learned about aggravating circumstances in this section. From these aggravating circumstances, it is clear that the people of Timor-Leste have chosen to punish those who enter a home with violence more severely than those who do not.

Finally, property damage is covered by a number of laws, and aggravating circumstances play an important role. If you ever come across a case where a property damage charge is involved, *always look for aggravating circumstances*, as they can change the severity of the sentence. Moreover, check to see if an action qualifies as Arson under Article 263 whenever fire is involved, even if it was an accident.

## Questions

*Adapted From: Crime of destruction of property, Case No. 128/C.Ord/2011/TDD<sup>77</sup>*

On 18 January 2012, the Dili District Court conducted a hearing in a case of Property Damage. This crime was allegedly committed by two defendants (JdCB and JdJ) against the victim AdJ. This case allegedly occurred on 15 October 2010 in Bairopite Village, Dili. The trial was led by Judge Ana Paula Fonseca.

The public prosecutor's indictment said that on 15 October 2010, JdCB and JdJ and a large group damaged the workshop of the victim. JdCB and JdJ did this because they believed the land where AdJ built workshop belonged to them. JdCB and JdJ took down the workshop without an official document from the Ministry of Justice. AdJ filed a complaint and asked for compensation of US\$ 840.

At trial, JdCB and JdJ said that they had a document from the Ministry of Justice and Dili District Administration, which gave them permission to remove the workshop. However, when JdCB and JdJ showed the documents to the court, the date the document was issued and the date that the workshop was removed did not match. The defendant's document was marked 8 March 2011; however, the incident occurred on 15 October 2010. The court also did not trust the document shown by JdCB and JdJ to be an original because the document did not bear the signature of the Administrator.

1. First, assume that AdJ is not the legal owner of the land. Instead, JdCB and JdJ are the legal owners. What crime could AdJ be charged with?

For the remainder of these questions, assume that AdJ is the rightful owner of the land he built the workshop on.

2. What crimes would you charge the two defendants with? What potential sentences would they face?
3. What if the facts were otherwise the same as in Question 2, but AdJ claimed the workshop was worth US\$ 1,200?
4. What if the facts were otherwise the same as in Question 2, but the defendants had accidentally burned down the workshop while trying to disassemble it? What would you charge them with and what potential sentences might they face?
5. What if the facts were otherwise the same as in Question 2, but the defendants first scared away the victim, threatening to kill him?

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<sup>77</sup> Judicial System Monitoring Programme. *Summary of Cases Heard at the Dili District Court in January 2012*. 27 Feb. 2012. <<http://jsmp.tl/wp-content/uploads/2012/06/CS-Dili-January-2012.pdf>>

## Answers

1. AdJ could be charged with Article 261, Usurpation of Property, *if* he built his workshop after threatening or scaring away the legal owners. This is because Article 261 *requires* the invasion of another person's property with "violence or serious threat." If AdJ did not take JdCB and JdJ's property through the threat of violence, he cannot be charged with Usurpation of Property.

Most likely, AdJ would be charged with Article 186, Trespassing On Sites Restricted From Public Access. AdJ entered the victims' land without consent. He then refused to leave by building his workshop on the land.

2. Most likely JdCB and JdJ would be charged with Article 258, Property Damage. They broke down the AdJ's property (his workshop), and AdJ filed a complaint. This is punishable with up to 3 years imprisonment or a fine. Note that the potentially fake legal documents do not excuse JdCB and JdJ from being charged.
3. JdCB and JdJ could be charged with Article 259, Aggravated Property Damage. This is because Article 259, subarticle (d) lists the value of the destroyed property being more than US\$ 1,000 as an aggravating factor. In this case JdCB and JdJ will face 2 to 8 years imprisonment. Note that by causing more damage, JdCB and JdJ will be forced to spend at least 2 years imprisoned because of the 2 year minimum.
4. Article 263, subarticle (3), Negligent Arson, is the appropriate charge. JdCB and JdJ did not intentionally set fire to AdJ's workshop. This happened by accident while they were trying to tear it down. Setting a fire negligently that destroys property is a crime under Article 263, subarticle (3).
5. If JdCB and JdJ had threatened AdJ before disassembling the workshop, they could be charged with Article 260, Property Damage with Use of Violence. They would face 4 to 12 years of imprisonment. Note that Property Damage with Use of Violence carries a much harsher punishment because violence is involved.

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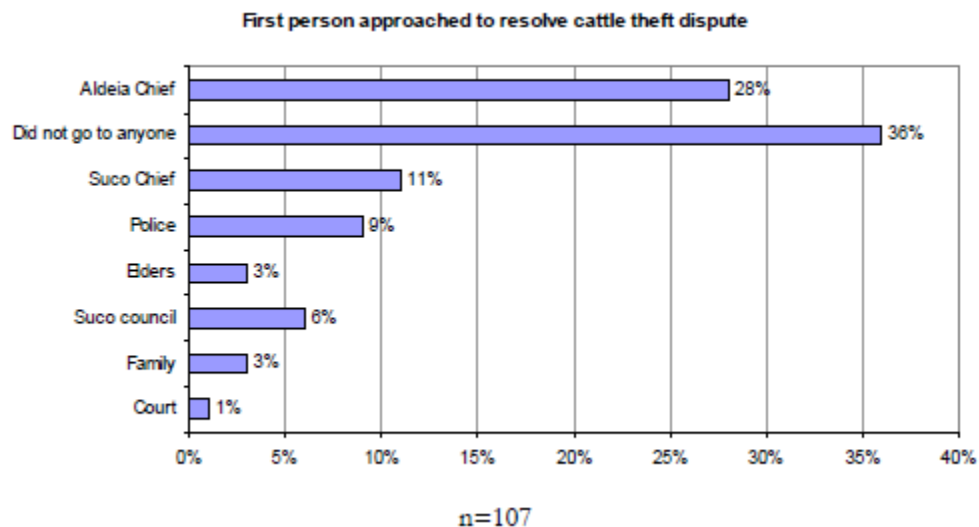


## CHAPTER 9: CRIMES AGAINST MOVEABLE PROPERTY

### CHAPTER OBJECTIVES

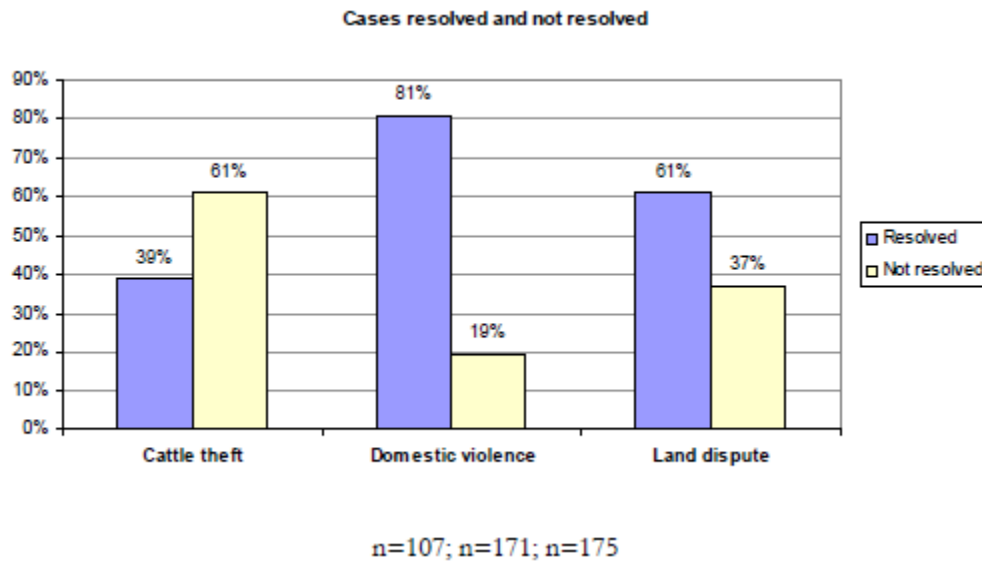
- To discuss the differences between Larceny, Appropriation Through Abuse of Trust, Fraud, Robbery, and other similar crimes involving the theft of moveable property.
- To understand what aggravating factors are and the impact they have on the penalties for these crimes.

This chapter will focus on crimes against moveable property. **Moveable property** encompasses all property that can be moved from one place to another. In most cases, this means everything except land or a building (which we called immovable property in the previous chapter). A car, a shovel, or a cow are examples of moveable property. Theft of moveable property is a common problem in Timor-Leste. One of the most common crimes is cattle theft. Theft occurs when a person takes the property of another without permission. A 2008 found that almost 10% of the population reported that they had been a victim of theft at some point in the previous two years. Moreover, the state-sponsored justice system was rarely used to resolve crimes involving immovable property.<sup>78</sup>



<sup>78</sup> Asia Foundation, *Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice*. 2008. <<http://asiafoundation.org/resources/pdfs/2008LawJusticeSurvey.pdf>>

Unfortunately, the victims of cattle theft reported that the most common outcome of their complaint was that the case was never resolved. Over 61% of those who reported that they had been a victim of theft also reported that their case was never resolved, as the chart below shows.<sup>79</sup>



The failed attempts at resolution includes attempts by the victim to get the property back through contacting police as well as the Suco Chief, Aldeia Chief, or elders of their community. We do not have data on what these victims did when the legal system did not resolve their problem.

Cattle theft is just one example of a crime against moveable property that a perpetrator might commit against a victim. In this chapter we will use other examples of property that can be stolen by a perpetrator and we will focus specifically on the crimes against moveable property of Larceny, Appropriation Through the Abuse of Trust, and Fraud.

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<sup>79</sup> Asia Foundation.



## I. LARCENY

### SECTION OBJECTIVES

- To understand the crime of Larceny and how it is committed in Timor-Leste.
- To discuss aggravating circumstances that might cause a prosecutor to charge a perpetrator with Aggravated Larceny instead of Larceny.
- To discuss Vehicle Theft and how it is related to the crime of Larceny.

As mentioned above, cattle theft is but one of a number of different crimes that are related to the crime of theft under the Timorese Penal Code. We will begin our analysis of the crimes against moveable property with Larceny.

#### 1. Larceny

Article 251, Larceny, focuses on the basic crime of theft of moveable property:

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 251. Larceny

- (1) Any person who, with unlawful intent to appropriate for him or herself or another party, takes a moveable object belonging to another, is punishable with up to 3 years imprisonment or a fine.
- (2) The attempt is punishable.
- (3) Prosecution depends on the filing of a complaint.

We will first focus on subarticle 1, and will break it into its most important component parts for easier analysis. The crime of larceny is committed when any person (1) with unlawful intent (2) to appropriate for himself or someone else (3) takes something belonging to another.

The first element is very important, because it says that the perpetrator of this crime must *intend* to commit the crime. Negligence or a mistake of circumstance is not sufficient to satisfy the requirements of the statute. For example, if Julio accidentally takes his neighbour's plow, thinking it is his own, he is not guilty of Larceny. Julio did not act with the required *mens rea* of intent because of his mistake of circumstance. Julio did not think he was taking his neighbour's

plow and therefore could not have intended his action. However, if Julio takes his neighbour's plow knowing it belongs to someone else, this satisfies the intent requirement. For more information on the different mental states required of perpetrators of crimes, see Chapter 2.

The second element contains an important definition. To **appropriate** something is to take something from an owner without the owner's permission. This definition also includes situations where the perpetrator takes something from an owner and then gives it to another person to use instead. It does not matter for this element whether you take something for your own use or give it to someone else. In the previous paragraph, Julio appropriated his neighbour's plow, even though he thought it was his own. Julio may not be guilty of Larceny (because he did not act with intent), but his actions still satisfy the definition of appropriation.

The third element states that the appropriation must be of property that belongs to another person. This seems to be an obvious element of the crime, as you cannot appropriate or steal something you already own. You also cannot steal something that nobody owns, such as a leaf that falls on a public walkway or a fish in the ocean (although Timor-Leste's government may have rules on how much and when you can catch certain fish). The requirement that appropriated property belong to another person is worth mentioning, however, because ownership rights are not always simple or clear. For example, suppose two families equally share a plow that is always kept in the same spot between their two homes. One afternoon, the father of the first family takes the plow, sells it, and keeps the money from the sale without telling the second family. Even though both families could use the plow, neither family owned *the entire* plow. They each owned half, and so when the father of the first family sold the plow and kept the money, he appropriated the half of a plow that belonged to the other family. Therefore, the father of the first family has satisfied this element of the crime.

Finally, though not an important element of the crime itself, the punishment for committing the crime of Larceny is up to 3 years imprisonment or a fine. Subarticles 2 and 3 state that the attempt of this crime is also punishable and that the victim of this crime must file a complaint—the state cannot otherwise prosecute this crime on its own.

### Questions

*Adapted From: Crime of minor theft, Case No.136/Pid.S/2012/TDB*<sup>80</sup>

On 18 March 2013 the Baucau District Court conducted a hearing and then proceeded to read out its decision in a case of Larceny allegedly committed by the defendants Paul and Felix against the State (Manatuto District Power Plant) in 2009.

The trial was conducted in Manatuto District via the mobile court. The public prosecutor alleged that there were two incidents—first in 2009 (the defendants could not recall the date) and second on 7 November 2009.

In his indictment, the public prosecutor stated that Paul and Felix took 30 litres of diesel from the Manatuto Power Plant and then sold it to residents of Manatuto. Defendant Paul took another 20 litres at a later time, which was when the police saw him and immediately arrested the Paul and Felix. The public prosecutor charged Paul and Felix under Article 251 of the Penal Code with the crime of Larceny.

1. Describe how Paul and Felix satisfied each element of the crime of Larceny, as defined in Article 251.

### Answers

1. The first element was satisfied by the fact that Paul and Felix intended to steal the gas when they appropriated it from the Power Plant. How can we know that they intended to steal the gas? They took the gas from a state power plant, so they knew it was not theirs. Then, they immediately sold it, which suggests that might have been their plan from the start. Additionally, Paul returned for a second time to attempt the same crime. Remember that for crimes that require intent, we do not need to be able to see inside the defendant's mind to charge him with a crime. If the facts we can observe show a clear intent to commit the crime, that is enough. The third and fourth elements were satisfied as well. The defendants took gas for themselves that was clearly not theirs.

## 2. Aggravating Circumstances

As discussed in previous chapters, many crimes have related articles or subarticles that contain lists of aggravating circumstances. These aggravating circumstances increase the penalty for the crime whenever present. A brief explanation of aggravating circumstances as it relates to property crimes follows below:

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<sup>80</sup> Judicial System Monitoring Programme. *Summary of the Trial Process at the Baucau District Court Period: March 2013*. <<http://jsmp.tl/wp-content/uploads/2013/01/Baucau-District-Court-2013.pdf>>

**Explanation:**  
**Aggravating Circumstances in Property-Related Crimes**

The presence of aggravating circumstances makes the perpetrator more harmful to society and increases her punishment. For example, one aggravating circumstance we will discuss below involves committing the crime of Larceny at night. At night, when it is dark, there is a greater risk that the victim of a theft will be hurt or become violent during the commission of the crime. The victim may be startled out of their sleep by the perpetrator or be more afraid because she cannot see what is going on around her. Because there is an increased risk of injury in these situations, the penalties for the crime are correspondingly more severe. Aggravating circumstances may be included as part of a subarticle within an article, such as the second and third subarticles in Article 185, Unlawful Entry, or as a separate crime that the defendant can be charged with. This is the case with Article 251, Larceny, and Article 252, Aggravated Larceny.

Note that when two separate crimes exist (aggravated and not aggravated) a defendant who commits Aggravated Larceny is likely to be charged with *both* crimes—the basic crime and the aggravated version. A court will determine which crime the defendant is guilty of, and then the corresponding penalties will apply. For example, suppose a perpetrator is charged with Aggravated Larceny and Larceny. If the judge determines that the crime was committed at dawn and not at night, the judge will dismiss the Aggravated Larceny charge and convict the perpetrator only of Larceny.

Article 252 lists a number of aggravating circumstances for the crime of Larceny. If any of these circumstances exist at the time a person commits a theft, he may be charged with Aggravated Larceny. The article provides the increased punishment he may receive, depending on the aggravating circumstance that existed when he committed the crime.

**Penal Code of the Democratic Republic of Timor-Leste**

**Article 252. Aggravated larceny**

- (1) Any person who commits the acts referred to in the preceding article is punishable with 2 to 8 years imprisonment if:
  - a) The moveable property belonging to the other party is of high scientific, artistic or historical value or is of importance to economic or technological development;
  - b) The moveable property belonging to the other party is a vehicle, is carried in a public transportation vehicle or by a passenger in a public transportation vehicle, or is at a pier or departure or arrival terminal;

- c) The moveable property belonging to the other party is used for religious worship or veneration of the memory of the deceased and is found at a place of worship or a cemetery;
  - d) The perpetrator commits the act at night to more easily commit the act of larceny;
  - e) The victim suffers considerable loss as a result of said appropriation;
  - f) The perpetrator enters a home, public facilities, commercial or industrial establishment with the intent to commit larceny;
  - g) The perpetrator employs lockpicking, scaling or breaking in to achieve said purpose;
  - h) The perpetrator takes advantage of a situation of special vulnerability of a victim of a disaster, accident or calamity;
  - i) The perpetrator takes advantage of the existence of a special relationship of trust with the victim or with the owner of the site where the property to be stolen is located;
  - j) The perpetrator commits larceny as a livelihood;
  - k) The crime is committed by 3 or more persons, including the perpetrator;
  - l) The value of the property stolen exceeds US\$ 1,000.00, but is less than US\$5,000.00.
2. If the value of the property taken exceeds US\$ 5,000.00, the penalty shall be 3 to 10 years imprisonment.
  3. Whenever more than one of the circumstances described in the previous sub-articles occur, only one shall be considered for effectively determining the applicable scope of the specific crime defined in law, and it shall be the one having the greatest effect, while the others shall be weighed as general circumstances in determining the penalty.
  4. If the value of the stolen object is less than US\$ 50.00, the circumstances referred to in subarticle 1 above shall only be considered as aggravating circumstances of a general nature.

This is a long list of different aggravating circumstances, so we will organize them clearly, according to: (1) circumstances that relate to the property; (2) circumstances that relate to the victim; and (3) circumstances that relate to the perpetrator or his commission of the crime.

First, we will focus on when an aggravating circumstance exists because of a characteristic the property has or where the property is located. Article 252, subarticles (1)(a), 1(b), 1(c), 1(l), and (2) relate to a characteristic possessed by the property. What do we mean by a characteristic possessed by a property? Property has specific features. For example, candy is almost always edible and sweet. Cars are made mostly of metal and possess an engine. In some cases, particular features make property very valuable in terms of actual monetary cost or how much the community (or society) appreciates the property. The loss of such items is therefore greater when they are stolen.

Article 252, subarticle (a), for example, tells us that someone who commits larceny of property that has “high scientific, artistic or historical value” would be guilty of commission of the crime of Aggravated Larceny. Property of “high scientific, artistic, or historical value” provides an important benefit to Timorese society. Therefore its theft is very serious. For example, someone who stole an ordinary sword would not likely be found guilty of Aggravated Larceny. If that sword was stolen from a museum, and had great historical or artistic importance, a judge might find the perpetrator had committed Aggravated Larceny.

### **Vehicle Theft: Comparing Article 255 and 252(b)**

Under the Penal Code Article 255, Vehicle Theft is treated as a separate crime in addition to being an aggravating circumstance for Aggravated Larceny under Article 252, subarticle (b). Note that both the broad definition of “vehicle” in Article 255 (it includes bicycles and boats as well as cars and trucks), and that the crime is satisfied if an individual merely “uses” a vehicle without the owner’s permission.

This small difference, that an individual who “uses” a vehicle without the owner’s permission may be found guilty, makes it much easier to perpetrate this crime, because the perpetrator does not have to intend to keep the vehicle after they are done using it (like with the crime of Larceny). For example, it is possible to be found guilty of this crime if an individual simply drives a neighbour’s car for a few hours without their permission, provided that the neighbour files a complaint (255.3). Finally, remember that a prosecutor could charge an individual with both Aggravated Larceny and Vehicle Theft if the perpetrator stole the car with the intent of keeping it by driving it away. In that case, the perpetrator has committed Larceny, but he has also “used” the vehicle by driving it, and so has also satisfied Vehicle Theft, Article 255. A judge would have to determine whether the perpetrator intended to appropriate the vehicle (and is therefore guilty of Aggravated Larceny) or only intended to use it (and is therefore guilty of Vehicle Theft).

The second type of aggravating circumstance focuses on the characteristics of the victim and involves subarticles (e), (h), and (i). Subarticle (e) provides that a victim suffering “considerable loss” as a result of the appropriation will satisfy the aggravation requirement. This means that even if a piece of property is valued at less than the US\$ 1,000 minimum of Article 252, subarticle (1)(l), it may still satisfy the requirement of Aggravated Larceny if it has significant importance to the victim for other reasons. For example, if Manuel stole a family’s chickens valued at US\$ 300 this may be enough to satisfy this element if the family’s only way to make money was selling the chickens’ eggs. Stealing the chickens under these circumstances did much more damage to the victim than the absolute value of the property would suggest. It took away their only form of making money to survive. Stealing pet chickens valued at US\$ 300 from a wealthy family that has no use for them would probably not satisfy the same requirement.

Subarticle (h) punishes individuals who perpetrate the crime of Larceny against individuals who are already vulnerable because of another accident or calamity. Stealing a tent from a family whose house just burned down, or stealing the food of someone who lost their crops because of drought would be two examples of circumstances that would satisfy this requirement.

Subarticle (i) provides for a charge of Aggravated Larceny in cases where the perpetrator abuses a position of trust that he has in relation to the victim. When a victim has put trust in another individual, that individual’s betrayal of the trust through the act of stealing is in many ways more culpable than it would be otherwise. Suppose Manuel’s neighbour asked Manuel to watch his property for a weekend while he visited relatives outside of town. If Manuel stole a valuable family heirloom while his neighbour was gone, that would be enough to satisfy the requirements of Article 252.

The third category of aggravating circumstances relate to the perpetrator and the manner of the commission of the crime itself. This includes the remaining subarticles of Article 252; (d), (f), (g), (j), and (k). Subarticles (d), (f), and (g) relate to the method the perpetrator uses to commit the crime. The purpose of creating this category of aggravating circumstances is to punish and possibly discourage future perpetrators from committing these crimes in a manner that has an increased likelihood of leading to violence or substantial property damage. Subarticle (d) addresses committing the crime at night, and f addresses Larceny committed in virtually any structure open to the public or a home. In both cases the lawmakers were likely trying to increase

penalties due to the increased risk of violence that might occur during theft committed at night or when entering a home or an establishment where people might be. Subarticle (g), by comparison, focuses on the use of “lockpicking, scaling, or breaking in” to steal. In this case, the perpetrator has committed an act that is either especially damaging (breaking in), likely to increase danger (scaling), or sneaky (lockpicking). All merit more strict punishment according to the law.

Subarticle (j) is somewhat different because it focuses on the perpetrator himself, and asks if the defendant makes a living from stealing. Imagine the police captured a professional thief who made his living stealing chickens and then selling them to other people. If the police can show that the perpetrator makes his living selling these stolen chickens, a prosecutor can charge him with Aggravated Larceny. Without the history of repeated theft, the perpetrator could only be charged with regular Larceny, since each chicken is probably worth less than US\$ 1000.

Subarticle (k) punishes more severely Larceny committed by groups of three or more people. Each individual may be charged with Aggravated Larceny in such a situation, assuming the court finds that all of the participants joined in committing the crime. The reason for this is probably because of the increased danger of multiple people committing a crime. Further, lawmakers were probably trying to cut down on the incidence of gang activity in Timor-Leste. Punishing more severely those crimes committed by groups is one way to encourage less criminal activity committed by gangs.

### Questions

1. Suppose Manuel steals a dog from Julio. The court decides the dog is worth only US\$ 150. The prosecutor charges him with Aggravated Larceny, arguing that the victim suffered “considerable loss” as a result of the theft under subarticle (e). What factors should the court consider in determining whether Larceny or Aggravated Larceny is the more appropriate charge? Would it matter if the dog was (1) the family’s only dog and also used for hunting, (2) Julio’s family owned a lot of dogs and did not take care of them very well, or 3) Julio is blind and he uses the dog to guide him around Dili?
2. Recall Paul and Felix from the first example. Paul and Felix took diesel from the Manatuto Power Plant and then sold it to residents of Manatuto. Assume the following additional facts:
  - Paul was an employee of the Manatuto Power Plant, and his boss had given him a key to the shed where the fuel was stored.
  - The fuel that was stolen was valued at US\$ 75.



- The gas was used to run the power plant generators, and without it the power plant had to shut down one of its three generators for a few hours the next day when it ran out of fuel
- You are the prosecutor for this case. What Aggravating Circumstances under Article 252 would you use to charge Paul and Manuel? Could you charge them both with the same crime?

### Answers

1. This is a hard question that depends on a number of factors the court will need to consider. First, what is the definition of “considerable loss”? Obviously, Julio could argue that he cares a lot about the dog, and that his family would be very upset if their dog was not returned to them. A court would have to consider whether Julio’s loss is the sort of “considerable loss” that qualifies for a charge of Aggravated Larceny. Generally, courts will want to see other facts suggesting this dog is irreplaceable in a way that causes above-ordinary harm to the family. If the stolen dog is Julio’s only pet and a hunting dog that contributes to their livelihood by helping Julio hunt dinner then the court is much more likely to believe that a charge of Aggravated Larceny is appropriate. If the family has other dogs though, and it has no other use besides as a companion, then the court will probably decide the opposite way (assuming no other aggravating circumstances are present), and sentence Manuel under regular Larceny instead. Finally, if it’s a service dog that Julio uses to help guide him through Dili because he is blind, that would almost certainly be a “considerable loss” to Manuel, and a court would be more likely to find that a charge of Aggravated Larceny was appropriate.
2. Paul can likely be charged with Aggravated Larceny because he has satisfied the requirements for Article 252, subarticle (i). This is because Paul is in a position of trust with his employer, who provided him with a key he then used to commit the theft. Whether Manuel (who is not an employee) can also be charged with Aggravated Larceny depends on whether his and Paul’s actions satisfy Articles 252, subarticles (e) or (f). Subarticle (e) requires that the victim suffer a “considerable loss.” Losing power for a few hours the next day suggests that the diesel fuel was much more important than its low (\$75) value suggests. That being said, it seems unlikely the court would find such a small loss, even if it did cause the loss of one generator the next day to be substantial enough. Perhaps if the plant had only one generator, and the whole village lost power, the loss might be large enough. Subarticle (f), however, might be satisfied if the shed they entered is considered a “commercial or industrial establishment.” Given these new facts, such a finding seems likely and both could probably be charged with Aggravated Larceny.

## II. APPROPRIATION THROUGH ABUSE OF TRUST

### SECTION OBJECTIVES

- To understand the crime of Appropriation Through Abuse of Trust and how it is committed in Timor-Leste.
- To discuss aggravating circumstances that might cause a prosecutor to charge a perpetrator with Aggravated Appropriation Through Abuse of Trust instead of Appropriation Through Abuse of Trust.

In the previous section we focused on Larceny, when a perpetrator appropriates the property of someone else with the intent of keeping it for his own use. Article 256, Appropriation Through Abuse of Trust, focuses on a very similar crime to Larceny, with an important difference.

### 1. Appropriation Through Abuse of Trust

This basic difference between Larceny and Appropriation Through Abuse of Trust is that the perpetrator of Article 256 receives custody of the property without receiving ownership, also called title, before he commits the crime. This is different than the crime of Larceny where the perpetrator takes both title and custody at the same time. Since this difference is important, both of these two terms will be explained in greater detail below.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 256. Appropriation through abuse of trust

- (1) Any person who unlawfully appropriates moveable property placed in his or her custody yet without transfer of title to said property, is punishable with up to 3 years imprisonment or a fine.
- (2) The attempt is punishable.
- (3) Prosecution depends on the filing of a complaint.

Once again, let's break down the statute into its most important component parts in order to understand it better. Appropriation through abuse of trust is when a person (1) unlawfully

appropriates moveable property (2) placed in his or her custody (3) *without* transfer of title to said property.

As discussed above, appropriation means to take something from someone else, generally without his permission.

Custody and title are the two most important concepts one must understand to understand the crime of Appropriation Through Abuse of Trust. To have **custody** over an item is to have physical possession or use of it. This generally occurs when the rightful owner has consented to the perpetrator's temporary use or possession of the property without the intention of transferring title to the perpetrator. To have **title** to something is to have the legal right to ownership over the property.

It is easier to understand the difference between custody and title with an example: if you borrow your neighbour's plow for the afternoon, you have "custody" of it while you are using it in the field. It is there, physically in your hands as you use it. However, you do not have title to your neighbour's plow even though you are using it. Your neighbour still legally owns the plow. She can rent it out, loan it to you, destroy it, or give it away. She has title, and therefore the ability to exercise all those rights exclusively. As the custodian (the person who has custody), on the other hand, you are only the property's caretaker, and may only have the rights that she has given you, like the right to use the plow on your field.

This distinction is important because it makes the crime noticeably different from Larceny, where the perpetrator has not been granted custody before he or she appropriates the property. Here, the perpetrator takes advantage of the fact that the property has been placed in his custody in order to appropriate it. The owner has trusted him to return the property; it is an abuse of trust when he instead appropriates it. At a one level, we all know the difference between the two. Stealing Josefa's plow while she is visiting family in Díli is different from borrowing her plow for one day and then not giving it back, even if both are crimes.

Note that an attempt to commit Appropriation Through Abuse of Trust is punishable (as it is with Larceny), and that a complaint must be filed in order for a prosecutor to bring charges.

## Questions

1. For each of the situations below, indicate whether a charge of Larceny or Appropriation Through Abuse of Trust would be appropriate. Assume in all cases that it is clear that the victim did not intend to abandon the property permanently:
  - Manuel borrows Josefa's plow and never returns it, even though she asks for it back a few months later.
  - Julio leaves his football with Manuel when Julio goes to work in Dili, and asks him to bring it to him later. When Manuel visits Julio in Dili three weeks later, he tells Julio he left it at home and that it's his now because Julio has moved so far away.
  - Josefa takes Julio's plow to replace the one Manuel never returned. She tells everyone in the village she's only "borrowing it" even though she has no plans to ever return it.
2. What are some of the main differences between Aggravated Larceny under Article 252, subarticle (1)(i) and Appropriation Through Abuse of Trust?
3. Why do you think the minimum penalty (up to two years) for Appropriation Through Abuse of Trust is less than the minimum penalty for Larceny (two to eight years)?

## Answers

1. In order:
  - Appropriation Through Abuse of Trust. Assuming Josefa gave Manuel permission to borrow the plow, he was given custody but not title. When he did not return it, he committed Appropriation Through Abuse of Trust.
  - Appropriation Through Abuse of Trust. It does not matter how far away the victim has moved from his property, if he never gave title to the perpetrator then he is still the rightful owner. In this example Julio did not give the football to Manuel as a gift, but rather asked him to keep it temporarily and bring it to him later. Therefore, Julio's appropriation of the property is a violation of the statute. Note that since the statute requires the filing of a complaint, and these two are likely friends, it is unlikely any charges would be brought.
  - Larceny. It does not matter what Josefa tells the village if she took the property with the intent of keeping it and it was never in her custody.
2. Though Article 252, subarticle (1)(i) and Article 256 seem similar because they both involve the perpetrator taking advantage of a relationship of trust with the victim, the circumstances are actually quite different. In Article 252, subarticle (1)(i) there is no discussion of any item being put into custody of the perpetrator. Rather, it is the existence of a relationship of trust that triggers the aggravating circumstance, not the giving of the custody of an individual item. To summarize, if Julio is your employee, and he steals a tool from your shop without my permission, he has violated Article 252, subarticle (1)(i). If instead you loan him the tool, and he appropriates it later, he has not committed a crime under 252, subarticle (1)(i) because

he never took the property with the intent to appropriate it. Rather, he was given custody and appropriated it later, a violation of 256 instead. Note that this may be considered Aggravated Appropriation Through Abuse of Trust as discussed below.

3. Generally, when a crime has a lower penalty than another crime, it represents a judgment by the lawmakers that the crime with the lower penalty is less harmful to society than the other crime. In this case, the biggest difference between these two laws is that in the Appropriation Through Abuse of Trust the only bad act is the appropriation (taking of title)—the lawful owner willingly gave the perpetrator custody of the property. In Larceny, both the illegal taking of custody and title take place. There is the risk that violence may occur when the perpetrator tries to take custody away from the lawful owner.

## 2. Aggravated Appropriation Through Abuse of Trust

Much like Aggravated Larceny, there is also an Article that addresses Aggravated Appropriation Through Abuse of Trust, Article 257.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 257. Aggravated appropriation through abuse of trust

- (1) Whenever the moveable property is valued at more than US \$1,000.00, the perpetrator is punishable with 2 to 8 years imprisonment.
- (2) The minimum and maximum limits to the penalties provided for in the previous subarticle and in article 256 are increased by one third if the perpetrator has received the property under trusteeship by order of law, due to occupation, employment or profession, or in any capacity as custodian, curator or trustee.

We have already reviewed the logic behind aggravated circumstances in the section on Larceny. In this subsection, we will just focus on the two most important aggravating circumstances Article 257 addresses.

First, it is an aggravating factor if the appropriated property is valued at more than US\$ 1,000. Appropriating property with a higher monetary value is considered more serious, and is punished as such.

Second, Article 257, subarticle (2) provides an aggravating circumstance similar to Article 252, subarticle (1)(i). If the perpetrator received the property through a special relationship, the penalty for the crime is increased. This primarily includes situations where the

law has dictated that someone receive custody (but not title) of property, or where granting custody of property is a practical necessity of business. An example where this might occur is if a child has been given custody of his parent's property because his parents are no longer able to take care of themselves. The child would have custody of all of their valuables but his job would be to use them for the benefit of his parents, not for himself. It would be an Aggravated Appropriation Through Abuse of Trust if he were to take exclusive possession of the property for himself.

Similarly, if an employee borrows a tool from his boss to perform his job and never returns it, he is likely also in violation of this statute, because they share a special relationship as employer and employee that requires trust. When the employee violates this trust, he is more culpable than if he did not have a pre-existing relationship with the employer.

### III. FRAUD

#### SECTION OBJECTIVES

- To understand the crime of Fraud and how it is committed in Timor-Leste.
- To discuss aggravating circumstances that might cause a prosecutor to charge a perpetrator with Aggravated Fraud instead of Fraud.

In this chapter, we have addressed Larceny and Appropriation Through Abuse of Trust. What do we call it when the perpetrator tricks the victim into giving her property to the perpetrator? The Penal Code describes tricks such as these as Fraud, which is the next topic we will analyse below.

#### 1. Fraud

The Penal Code describes the crime of Fraud in Article 266.

#### Penal Code of the Democratic Republic of Timor-Leste

##### Article 266. Fraud

- (1) Any person who, with intent to obtain unlawful gain for him or herself or a third party, by means of error or deceit over acts he or she has cunningly committed, and thus leads another person to act in such a manner that causes property loss to said person or any third party, is punishable with up to 3 years imprisonment or a fine.
- (2) The attempt is punishable.
- (3) Provisions in article 264 are correspondingly applicable.
- (4) Prosecution depends on the filing of a complaint.

We will examine each of Fraud's elements individually to ensure that we understand the crime in its entirety. Fraud is when a person (1) with intent to obtain unlawful gain (2) by means of error or deceit over acts he or she has cunningly committed (3) leads another person to act in a way that causes property loss.

Like Larceny, the first element contains the *mens rea* element of intent. The perpetrator of this crime must intend to commit Fraud. The perpetrator must intend to benefit illegally from the harm he causes to the victim. For example, it would *not* be Fraud if Manuel offers to buy a boat for Julio, and collects money from him only to discover when he gets down to the docks that the boat is no longer for sale. If Manuel returns the money, he has not committed Fraud, even though Julio might be worse off because he now no longer can get the boat he wanted. Manuel never intended to gain anything from helping Julio. If, on the other hand, Manuel lied about a boat being available for sale, and then left town with Julio's money, that would be considered Fraud.

The second element requires the perpetrator to use "means of error or deceit over acts he or she has cunningly committed." To be "cunning" is to be deceitful. In simpler terms, this element means that the perpetrator tricked the victim to voluntarily hand over the property the perpetrator wanted to appropriate. In the second example above, Manuel's lie about the boat would be an example of "deceit." Manuel tricks Julio into giving him money to buy a boat that does not exist.

The final element requires the act of giving over the property to cause a "loss." Trickery that occurs without a loss of property is not Fraud. For example, practical jokes, white lies, even "cunning" deceit that embarrasses or shames a person does not qualify as Fraud. If Manuel tricks Julio into falling into a puddle of mud by covering it with palm leaves, Julio has not suffered any loss of property just because his feet are now muddy and Manuel is laughing at him.

Like many other property crimes, Articles 266, subarticles (2) and (4) state the attempt of this crime is punishable, and a complaint must be filed in order for the government to prosecute the perpetrator. Simply committing the crime is not enough for the perpetrator to be charged.

Article 266, subarticle (3) is new and references Article 264. Article 264 concerns Active Repentance. This happens when the perpetrator "repents," or changes his mind about committing the crime, and tries to make amends. A perpetrator can also repent for the crimes of Larceny, Aggravated Larceny, Appropriation of Trust, Usurpation of Property, and certain types of Arson. For more information on repentance generally, see Chapter 3 (where it is discussed as Remorse).



### Questions

*Adapted From: Crime of fraud and falsification of documents, Case No. 576/C.Ord/2011/TDD<sup>81</sup>*

On 13 January 2011, the Dili District Court conducted a hearing in a case of Fraud and falsification of documents. This crime was allegedly committed by the defendants FdCR, DCDC, and HGCS. At that time, the defendant FdCR was the Director of a Senior High School in Dili. The other two defendants (DCdC and HGCS) were treasurers at Senior High School. FdCR, DCDC, and HGCS were charged with committing a crime against the State of Timor-Leste, carried out between 2008 and 2009.

The public prosecutor's indictment stated that on 12 December 2008, FdCR, DCDC, and HGCS went to collect money from the Ministry of Education Office, Dili District, totalling US\$ 7,610. On 15 December 2008, FdCR, DCDC, and HGCS went to collect another US\$ 7,600.

The stolen money was for repairing the school and paying for sports equipment.

On 22 January 2009, FdCR, DCDC, and HGCS submitted a financial report regarding the first phase of repairs. In this report they stated that the money had been entirely spent. However, only US\$ 500 appeared to have actually been spent. All of the remaining money was found in the bank account of FdCR.

In addition, it was found that several receipts included in the report were false. An investigation carried out of the Regional Office of the Ministry revealed that the condition of the school had not changed, and the only sports equipment available was four footballs. The report the FdCR, DCDC, and HGCS submitted, however, claimed that US\$ 4,000 had been used to purchase sporting equipment.

1. Given the facts above, have FdCR, DCDC, and HGCS committed Fraud, as defined in Article 266?
2. Would it have been possible to charge the defendants with Fraud if they had not submitted the false financial report?

### Answers

1. FdCR, DCDC, and HGCS have probably satisfied the requirements of Article 266. The key question in determining whether or not they have satisfied all the elements of Fraud hinges, in this case, on whether or not FdCR, DCDC, and HGCS intended to keep the money. Recall from Chapter 2 that when determining intent, we do not need to be able to read the perpetrator's mind to determine whether they intended to keep the money, or even whether

<sup>81</sup> Judicial System Monitoring Programme. *Summary of the Trial Process at the Baucau District Court Period: March 2013*. <<http://jsmp.tl/wp-content/uploads/2013/01/Baucau-District-Court-2013.pdf>>>

they intended to deceive the State of Timor-Leste. We can examine the facts and infer whether or not they have intentionally committed Fraud. Here, the facts suggest that they have. Most of the money has not been spent on repairing the school and sports equipment a month after it was received. Instead, most of the money (all but US\$ 500) is in one of the defendant's bank account. Importantly, FdCR, DCDC, and HGCS submitted a false report on how they spent the money, suggesting they were attempting to deceive the government as to the usage of the funds, for their own benefit. Even if they could not be successfully convicted of Fraud, they are at the least likely guilty of attempted fraud, as Article 266, subarticle (2) allows for punishment of the attempt as well as the act itself.

2. This question reveals why the specific facts of the case are always important to determining the guilt of the accused. If the false report had not been filed, it would be harder to prove that FdCR, DCDC, and HGCS were actually trying to commit Fraud because it would be harder to prove the intent element. They could claim that there had simply been a delay in buying the equipment, and that they still intended to use the money for what it was given. The false report, on the other hand, makes it clear that they were trying to deceive, rather than just slow in spending the money for its required use.

## 2. Aggravated Fraud

Just like Larceny and Appropriation Through Abuse of Trust, Article 266 has a similar statute, Article 267, for Aggravated Fraud:

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 267. Aggravated fraud

- (1) Any person who, as a result of conduct described in the preceding article:
  - a) Causes loss in excess of US\$ 2,000.00;
  - b) Makes his or her living from practicing fraud;
  - c) Places the aggrieved party in a situation of economic difficulty;Shall be punishable by 3 to 10 years imprisonment
- (2) Provisions in article 264 are correspondingly applicable.

Note the similarities between the Aggravated Fraud statute and Aggravated Larceny. One of the aggravating circumstances focuses on the property itself, one on the perpetrator, and one on the victim.

Article 267, subarticle (1)(a) examines the monetary value of the property taken. If it is worth more than US\$ 2,000, the law considers the crime to be Aggravated Fraud. Article 267, subarticle (1)(b) examines the perpetrator, and determines that if he makes his living from practicing fraud, that person should be punished more severely with the crime of Aggravated Fraud. Article 267, subarticle (1)(c) examines the victim, and says that if the perpetrator puts the victim into “economic difficulty” when he commits his crime, the fraud is also considered to be aggravated. An example where Article 267, subarticle (1)(c) might be charged would be if the perpetrator causes someone to give away their whole life’s savings on an investment that does not exist. Even if the amount of money is not substantial, perhaps only US\$ 100, it would be enough to trigger Aggravated Fraud if it was all the money that the victim had.

Finally, note that 267, subarticle (2) mentions Article 264 again, indicating that repentance may be possible, if the perpetrator is able to

### **Questions**

1. Look back at the previous exercise, where FdCR, DCDC, and HGCS took US\$ 4,500 from a school and filed a false report to prevent the government from finding out. The perpetrator wants to charge the defendants with Aggravated Fraud. Would that be the correct charge, given these facts?

### **Answers**

1. Yes. According to the facts of this case, FdCR, DCDC, and HGCS have committed Fraud that caused a loss over US\$ 2,000. They easily meet the minimum of Aggravated Fraud, Article 267, subarticle (1)(a).

## IV. THEFT AND VIOLENCE

### SECTION OBJECTIVES

- To understand the crimes of Robbery and Violence During Commission of Larceny and how they are committed in Timor-Leste.
- To discuss the difference between the crimes of Robbery and Violence During Commission of Larceny.

The use of violence in the commission of any property crime carries a more severe penalty than the non-violent versions. As discussed in earlier chapters, the Penal Code seeks to punish more severely crimes that could lead to personal injury, or death. Crimes of theft against moveable property have similarly harsh penalties for perpetrators who might attempt those crimes in a violent manner.

We will look first at Article 253, Robbery, which provides a separate statute for the theft of property using violence. Then we will examine Article 254, Violence During Commission of Larceny, which can be considered another aggravating circumstance for the crime of Larceny.

The easiest way to think about these two crimes is as additional aggravating circumstances modifying the crimes of Larceny, Appropriation Through Abuse of Trust, and Fraud. They both focus on the specific aggravating circumstance of violence.

### Penal Code of the Democratic Republic of Timor-Leste

#### Article 253. Robbery

- (1) Any person who, with unlawful intent to appropriate for him or herself or any other person, takes someone else's moveable property or compels said person to deliver the same, by means of violence against said person or threat of imminent danger to said person's life or physical integrity, or makes it so that said person is unable to resist, shall be punishable with a penalty of 3 to 10 years imprisonment.
- (2) If any of the circumstances described in subarticle 1 of the previous article are present, during conduct of said perpetrator, the penalty shall be from 4 to 12 years imprisonment.
- (3) If the conduct of the perpetrator endangers the life of the victim or causes serious harm to the victim's physical integrity, the perpetrator is punishable with 5 to 15 years imprisonment.

- (4) If the act results in death of the victim, the perpetrator is punishable with 5 to 20 years imprisonment.

Article 253, subarticle (1) focuses on perpetrators who use “violence against [the victim] or the threat of imminent danger to [the victim]’s life or physical integrity.” This Article is also more inclusive than the other crimes in this chapter, as it requires only that the perpetrator “takes someone else’s moveable property or compels said person to deliver the same.” An example of compelling someone to deliver property would be if Julio threatened to attack Manuel with a knife unless he gave him his wallet. This is considered Robbery even if Julio does not physically force the wallet out of Manuel’s hand. Manuel gives Julio his wallet only because he is afraid of being hurt. Robbery is a broad because it covers all violent situations that might occur when a perpetrator commits Larceny, Appropriation Through Abuse of Trust, or Fraud. It requires only that the perpetrator “take” the property. In all three of the articles discussed in this chapter, the property is taken from the victim by the perpetrator, or given to him before he appropriates it, so any facts that would satisfy these three crimes, if accompanied by violence or the threat of violence, also satisfies Robbery.

However, not all situations where property is taken violently from someone is Robbery. For example, suppose a judge orders property returned to a victim. If the police visit the perpetrator’s home to reclaim it, but are forced to use the threat of violence to get the property back from the perpetrator, it would seem that the police have violated Article 253. However, they did not use “unlawful intent” because the judge ordered them to return the property to its rightful owner. Always remember to make sure that every element of a crime has been satisfied.

### **Penal Code of the Democratic Republic of Timor-Leste**

#### **Article 254. Violence during commission of larceny**

Any person who, if caught in the act of larceny, reacts by any of the means described in the preceding article for the purpose of retaining the appropriated object or hindering restitution thereof, is punishable with the penalties respectively corresponding to the crime of robbery.

Article 254, Violence During Commission of Larceny is only subtly different than Robbery. For Violence During Commission of Larceny, the perpetrator does not have to *intend* to use the violence described. Article 254 simply says that *if* the perpetrator uses violence (as described in Article 253) while caught in the act of Larceny, then he is guilty of Violence During Commission of Larceny. The same penalties will be applied as those that would have been applied had he intended to use violence from the start.

The differences between these two laws are subtle, so let us review two examples. Julio could be charged with Robbery if he threatens Manuel with a knife and forces Manuel to give him his watch. Compare this with the situation in which Julio breaks into Manuel's home to steal Manuel's watch while Manuel was sleeping, hoping he could take Manuel's watch without Manuel noticing. However, Manuel wakes up and arches him. If Julio then threatens Manuel with the knife so he can escape, that would be Violence During Commission of Larceny. This is not Robbery because Julio did not originally intend to use violence to commit the crime. Nonetheless in either situation, a judge could sentence Manuel with the same range of penalties.

Article 253 includes other important elements. Article 253, subarticle (2) references Article 252, Aggravated Larceny, and adds a more severe penalty for the use of violence to commit Aggravated Larceny. This makes sense. The aggravating circumstances mentioned in Article 252 are already worse than basic Larceny. If the perpetrator also commits a violent act in the process of committing Aggravated Larceny, the minimum and maximum penalties should be higher. The perpetrator has done not one, not two, but three culpable things in committing his crime (basic Larceny, with an aggravating circumstance, with violence).

Note that Article 253 also focuses on the result of the violence. If the violence "causes serious harm" (Article 253.3), or "results in death" (Article 253.4), the penalties are even more severe. Again, this makes logical sense in a society where the lawmakers have decided that crimes presenting a threat to the welfare and safety of citizens should be punished more severely.

Importantly, the crime of Robbery does not require the filing of a complaint. Robbery is considered to be so serious that a prosecutor can bring a charge on his own, regardless of whether the victim wants to file a claim.

## V. CHAPTER REVIEW

### SECTION OBJECTIVES

- To review the crimes of Larceny, Appropriation Through Abuse of Trust, and Fraud.
- To review the crimes of Robbery and Violence During Commission of Larceny.

We've come to the end of the chapter on Property Crimes Against Personal Assets. We've covered a number of different crimes relating to theft of personal property, including the three main crimes: Larceny, Appropriation Through Abuse of Trust, and Fraud. We've also looked at how violence is considered to make the penalties for the crime much more severe.

Larceny is the most basic of the crimes against moveable property, and focuses on the theft of personal property, with or without the use of violence. There are a number of aggravating circumstances to be aware of that dramatically impact the severity of the punishment that might be given to the perpetrator.

Appropriation Through Abuse of Trust is very similar to Larceny, but focuses on the abuse of the trust of the property owner by the perpetrator. Crimes in this category involve the difference between title and custody. Generally these crimes will involve circumstances where custody was given to an individual who then tried to assert ownership over the property illegally.

Fraud is the use of trickery to get an individual to unknowingly give up or lose their property, generally to the individual perpetrating the Fraud. Crimes in this category often involve lying or deceit in order to convince an individual to give up their property.

Finally, we learned about crimes against immovable property involving the use of violence. We learned about the crimes of Robbery and Violence During Commission of Larceny. These two crimes differed based on whether the perpetrator intended to use violence as part of the theft. Nonetheless, they carry the same available range of penalties.

### Questions

On 30 June 2012, Julio, the administrator of a school, orders 50 chairs for a new classroom from Manuel, a local chair maker. Manuel calls Julio and tells him that he only has 25 chairs available. Nonetheless, Manuel tells Julio that if Julio sends him the money for 50 chairs in advance, he

will give him a discount on the total price. Julio pays for the 50 chairs in advance. Manuel delivers the first 25 chairs, but spends the rest of the money on a bike

Meanwhile, Josefa, Julio's sister, decides that she needs a new set of chairs for her bedroom. She asks Julio if she can borrow one of the chairs he just received from Manuel to see if she likes it before she buys her own. Julio gives her permission, but Josefa does not return the chair after a week.

Julio decides he is going to get the chair back from Josefa. He goes over to Josefa's house, finds the chair sitting outside the front door, and takes it back to the school. As he gets back to the classroom, he sees Manuel running out the back door, carrying a chair under his arm. Julio starts to run after him, but Manuel stops, pulls out a knife, and says "If you come any closer I will stab you." Julio backs away, Manuel leaves with the chair, and Julio calls the police

It's now 15 July 2012, and the prosecutor has just received two complaints, one from Julio that accuses Manuel of Fraud and Larceny, and one from Josefa that accuses Julio of Larceny.

1. Given the facts above, what should the prosecutor charge Julio with, if anything?
2. Given the facts above, what should the prosecutor charge Manuel with, if anything?
3. Given the facts above, what should the prosecutor charge Josefa with, if anything?

### Answers

1. The prosecutor probably should not charge Julio with anything. First, Julio did not attempt Fraud with the school funds. There is no evidence he attempted to use the money "to obtain unlawful gain" for himself. Perhaps you could make a case that he should not have been allowed to loan the chair to Josefa, since he did not technically own it, but as no one has filed a complaint against him for Appropriation Through Abuse of Trust (under the theory that the school gave him custody of the chair, but not permission for him to behave like he owned it by loaning it out), he is unlikely to be found guilty of that charge. Most importantly, Julio cannot be guilty of taking back property he is already the custodian of.
2. Manuel is likely guilty of Fraud, Aggravated Larceny, and Violence During Commission of Larceny (but not Robbery). He is guilty of Fraud because he tricked Julio into giving him money for chairs he never delivered, and he used Julio's money for his own personal benefit (to buy a bike). Assuming the chair is worth more than US\$ 50, he is guilty of Aggravated Larceny because he entered a "public facility" (see Article 252.1(f)) to commit the crime of Larceny. Moreover, he is guilty of using Violence During Commission of Larceny, because he threatened Julio with violence when Julio caught him stealing a chair from the school. Note that Robbery would not be the appropriate charge here, because he did not intend to use violence against Manuel initially, and only used it after he was caught.



3. Josefa, prior to Julio's taking back of the chair, could have been charged with Appropriation Through Abuse of Trust, since she was given custody of the chair, but then appropriate it for her own benefit. However, prosecution for that crime would have required the filing of a complaint, with Julio neglected to do here. Perhaps he just could not bring himself to charge his sister with the crime.

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## GLOSSARY

**Abandonment:** The crime of intentionally endangering the life of another person by leaving the person defenseless by reason of age, physical impairment or illness, when the perpetrator is responsible for protecting, caring for or assisting the abandoned person.

**Abortion:** The premature termination of a pregnancy causing the loss of the foetus.

**Abstract Penalty:** The range of penalties available is for any given crime.

**Accessory Penalty:** A penalty that is given in addition to the primary penalty for a particular crime.

**Accomplice:** A person who intends to materially or morally aid another person in committing a crime. An accomplice does not actually commit the *actus reus* of the crime but plays more of a supporting role and has less influence in the planning and execution of a crime. An accomplice primarily does what the principal (or coprincipals) of a crime tells her to do.

**Accused:** A person who has been charged with a crime, but has yet to be convicted.

**Action:** The bringing about a change in circumstances through force or a positive act of choice.

**Actus Reus:** The voluntary action or omission that constitutes a crime.

**Admonishment:** A penalty in which the judge publicly reprimands a convicted person in court.

**Adolescents:** Children ages 14, 15, or 16 years old.

**Aggravating Circumstance:** A circumstance attending the commission of a crime which increases its guilt or seriousness or adds to its injurious consequences, but which is above and beyond the essential elements of the crime itself. These circumstances will increase the perpetrator's penalty or punishment.

**Aggravated Homicide:** The crime of causing another person's death intentionally under specific circumstances. These circumstances involve characteristics of the victim, the method of killing, the killer's motivation, and the amount of premeditation.

**Alibi:** A Latin word that means "elsewhere." An alibi is a claim used by a defendant who asserts to have been at a place other than where the crime allegedly occurred.

**Appropriate:** To take something from an owner without the owner's permission.

**Arrest:** To take a suspect out of society and to keep them under supervision. This requires a judge to issue a warrant for their arrest.

**Arrest Warrant:** A document that a judge gives the prosecutors or police that makes it lawful to violate certain individual rights, such as taking away the suspect's freedom by putting the suspect into custody.

**Appeal:** To seek reversal of a decision of the lower court.

**Armed Conflict:** A legal term from international humanitarian law. Typically a war or battle between two states' armies or navies, or a conflict between a foreign non-state group and a state.

**Attendant Circumstance:** Any material element of a crime that is an essential part of the definition of the crime and must be proven for the defendant to be liable, but that is not a result or a form of conduct. Attendant circumstances often relate to characteristics of the victim or particular circumstances surrounding the criminal act or omission.

**Attempt:** A crime that is initiated but not successful is called an attempt. A person attempts a crime when he decides to commit that crime, then initiates some or all of the actions objectively required to commit the crime, but fails to execute the crime due to actions beyond his control.

**Battery:** The intentional application of force to the body of another person in a harmful manner.

**But-for Causation:** The simplest causation test that asks whether the harm would not have occurred but for the perpetrator's actions.

**Civilian/Civilian Population:** A person or group of people not actively participating in an armed conflict and given special protection under international humanitarian law. Also called "noncombatants."

**Cohabiting:** Two people are cohabiting if they live together in a manner similar to how family members or spouses live together. A couple can be cohabiting whether they are legally married or not.

**Coitus:** Another word for sexual intercourse.

**Combatant:** An active participant in an armed conflict as defined by international humanitarian law.

**Commission for Reception, Truth and Reconciliation (CAVR):** An independent truth commission established in Timor-Leste under UNTAET to investigate human rights violations during Indonesian occupation.

**Community Service:** A penalty that requires the perpetrator to work, without pay, in a social service agency for a specified number of hours.

**Complete Defense:** A factual circumstance or argument that eliminates all of the defendant's culpability.

**Concurrent Causation:** When two or more people's actions are alone enough to cause a criminal harm.

**Conduct-Based Offence:** Crimes that punish a specific type of conduct, regardless of the consequences.

**Concurrent Sentence:** A situation in which two or more sentences are to be served at the same time.

**Consecutive Sentence:** Situation in which one of two or more sentences is to be served after completion of the first sentence.

**Consent:** To give another person permission for something to happen or for something to be done.

**Coprincipal:** A person who enters a common criminal plan with another person and exercises control over the form that a crime takes.

**Crimes Against Humanity:** Violent crimes committed during widespread or systematic attacks against civilians.

**Criminal Law:** The laws and regulations that define actions and omissions that may be punishable by law.

**Criminal Procedure:** Laws that regulate the modes of apprehending, charging, and trying suspected perpetrators; the imposition of penalties on convicted perpetrators; and the methods of challenging the legality of conviction after judgment is entered.

**Culpable:** To be deserving of blame. In criminal law, it is specifically to be deserving of blame for a crime.

**Custody:** To have physical possession or use of an item; related to Title.

**Death Penalty:** A legal process in which a person is put to death by the state as punishment for a crime.

**Defendant:** Every person against whom an indictment is presented in a criminal proceeding.

**Defense:** A situation or set of circumstances that show that a criminal defendant is not guilty of wrongdoing or that mitigate the defendant's guilt.

**Delirium:** A serious disturbance in a person's mental abilities that results in a decreased awareness of one's environment and confused thinking. People in a state of delirium may commit criminal acts without understanding that they are doing something wrong.

**Determinate Sentence:** Type of sentence that establishes a specific time that the perpetrator will serve in prison.

**Deterrence:** A theory of punishment based on the idea that criminal punishment will discourage people from violating the law because the punishment they receive will outweigh the value of any benefit they would get from committing the crime.

**Diminished Capacity:** A defence based on the same structure as the insanity defense, with the only difference being that the defendant is not totally incapable of comprehending his actions. Instead, his ability to comprehend his actions is severely impaired.

**Direct Causation:** When the perpetrator's conduct is the only factor in bringing about a criminal harm.

**Diversion:** Theory of punishment that diverts perpetrators from more severe forms of punishment if they agree to attend counselling or educational programs, and they do not commit the same or similar offences within a specified period of time.

**Domestic Violence:** Any harmful act or series of acts committed by a family member against another family member, whether living together or not; or, the same type of conduct committed against a person with whom the perpetrator has an intimate relationship or has previously had an intimate relationship.

**Duty of Care:** A legal obligation one person has to protect another person from an unreasonable risk of harm.

**Duty:** Something a person must do because it is morally right or because the law requires it.

**Dwelling:** Any building where a person lives, often someone's home.

**Easement:** A technical term that means a limited right given by the owner of the property to another individual.

**Elements of a Crime:** The basic components that make up every specific crime defined in the Penal Code.

**Enquiry:** The investigative phase intended to collect proof and take actions required to demonstrate that a crime has been committed.

**Exculpate:** To show that a person is not guilty of a crime.

**Excuse:** A criminal defendant uses an excuse when he admits that he committed the act charged by the prosecution but claims that under the circumstances his conduct should not result in punishment.

**Exposure:** The crime of intentionally endangering the life of another person by exposing that

person to a situation where he or she is unable to protect him or herself single-handedly.

**Extraordinarily Mitigating Circumstance:** A mitigating circumstance that reduces *to a large extent* the unlawfulness of the perpetrator's conduct, guilt or need for penalty.

**Foreseeable:** To be reasonably likely to occur.

**Forfeiture:** Process whereby a criminal's assets become the property of the government.

**Formal Justice System:** Refer to State-Sponsored Justice System.

**Formal Title:** The recording of ownership in the state-sponsored legal system and documentation or written proof of ownership.

**Fundamental Societal Interests:** Interests so fundamental to life in Timorese society that they warrant special protection by penalizing people who threaten these interests. These interests include life, personal liberty, physical integrity, and property.

**Genocide:** The crime of committing other serious crimes with the intent to destroy, in whole or in part, a specific national, ethnic, racial, or religious group of people.

**Government:** A sovereign body responsible for creating and executing the general policy of Timor-Leste. The government can also draft and pass laws defining crimes and criminal sentences if given permission to do so by the National Parliament.

**Gross Negligence:** The *mens rea* in which a person acts with extreme carelessness, but is unaware of the risk of criminal harm to others.

**Habitual Criminality:** When a person commits a crime of intent with a prison sentence exceeding one year, and has previously committed three or more crimes of intent, punished by imprisonment, with no more than three years elapsing between each of the crimes.

**Homicide:** the crime of causing another's death intentionally; the perpetrator was aware of the risk of death created by his acts but chose to act anyways.

**Impossibility:** When a person could not actually commit a crime given the circumstances at the time that person acts.

**Incapacitation:** A theory of punishment based on the idea of removing the perpetrator from society to prevent them from harming others.

**Incest:** Sexual intercourse between close relatives, such as between a parent and child, or between siblings.

**Indeterminate Sentence:** Process that sets a minimum and maximum prison term that the defendant may serve. It is called “indeterminate” because the perpetrator’s actual time in prison is not known or determined at the time of sentencing.

**Insanity:** A person is legally insane if, as a result of mental illness, she is incapable of understanding the unlawfulness of her actions. Legal Insanity can be used as an excuse.

**Instigator:** Someone who directly and maliciously causes another person to commit a crime.

**Instrument:** Someone who is trick or forced to commit a crime by another person.

**Intent:** The *mens rea* in which a person consciously chooses to risk criminal harm to others, either because her goal is the criminal harm or the person is aware of the risk of the criminal harm occurring and ignores this risk.

**Internment:** The detainment, or removal from society, of an individual to a place other than prison. For instance, a defendant with a mental disability may be confined in a mental hospital, rather than a prison.

**International Law:** the law that all nations accept as governing how nations and their citizens interact with each other. This law can be found in treaties as well as customary law, which may not be formally written.

**International Criminal Law:** the area of international law that addresses serious crimes violating fundamental human rights, such as Genocide, Terrorism, Crimes Against Humanity, and War Crimes, as well as transnational crimes such as drug or human trafficking.

**Intervening Cause:** An event that occurs after the perpetrator’s conduct but before the criminal result that contributes to the criminal result.

**Intimate Partner:** A person with whom one shares a close emotional and physical relationship, such as a spouse, a girlfriend, or a boyfriend.

**Joint liability:** The legal theory that allows the *actus reus* of one coprincipal to be attributed to all other coprincipals.

**Judge:** The person who issues a judgment in a court of law.

**Justification:** A claim made by a criminal defendant that emphasizes the rightness or appropriateness of an act that is unlawful and would otherwise have subjected the author of the act to criminal sanctions under normal circumstances.

**Kidnapping:** Illegally and forcibly stealing or carrying another person away.

**Leges Artis:** A Latin phrase meaning “according to the law of the art” or “according to the established methods of the discipline.”



**Legal Interest:** A comprehensive term that describes any right, claim, or privilege that an individual has over real property or personal property.

**Legitimate Authority:** a person in a government position who has the power to give orders to that other people are required to obey.

**Legitimate Defense:** An act committed as the necessary means to repel an imminent or present unlawful attack on legally protected interests of the perpetrator or of a third party.

**Manslaughter:** the crime of causing another's death through one's negligence; the perpetrator was not aware of the risk of death created by his acts, but these acts were a gross deviation from the standard of care expected of a reasonable person.

**Mens Rea:** The perpetrator's mental state. This is what the perpetrator is thinking while committing a criminal act.

**Minors:** In the context of Crimes Against Physical Integrity, this term refers to children under the age of 17. In the context of Crimes Against Personal Liberty, this term refers to children under the age of 14.

**Mitigating Circumstance:** A circumstance of the commission of a crime that does not justify or excuse an offence, but may reduce the severity of a charge.

**Moveable Property:** Moveable property encompasses all property that can be moved from one place to another.

**National Parliament:** The governmental body in Timor-Leste with authority to make laws and pass legislation.

**Negligence:** The *mens rea* in which a person unreasonably risks criminal harm to others, but is unaware of this risk.

**Non-Liberty Denying Penalties:** Penalties that do not require the convicted person to go to prison or be interned as a security measure.

**Non-State-Sponsored Justice System:** The non-state sponsored justice system, also referred to as the informal justice system and the local justice system, encompasses the mechanisms that communities have established to resolve disputes.

**Objective Standard:** A standard that compares a person's actions against what a reasonable person would have done in a similar situation.

**Omission:** A failure to act to prevent a certain result

**Origin groups:** people who have lived on the land for many years and have the authority to allocate land to each other using their own customs and processes.

**Ownership:** The bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others.

**Partial Defense:** A type of defense that mitigates, but does not erase, the amount of culpability assigned to a defendant.

**Perpetrator:** A person who participates in a crime.

**Personal Liberty:** A human right the right to live without unlawful restrictions to one's movement, and to be free from the violation of one's body.

**Physical Integrity:** A human right; the right to be free from unwanted bodily contact, including actions that inflict physical or mental injury.

**Premeditation:** Thinking about and planning a crime before committing it.

**Preparatory Acts:** Mere planning activities that are not punishable.

**Presumed Consent:** A situation in which an evaluation of all circumstances leads to the conclusion that the alleged victim consented to an otherwise criminal act.

**Principal:** Someone who plays a direct role in the commission of a crime, either by committing its *actus reus* or having an instrument commit it.

**Principal Authorship:** The level of participation in a crime in which a person commits the *actus reus* of a crime or uses a third party as an instrument to commit the *actus reus*.

**Principle of Culpability:** The legal principle which states that "there can be no penalty without guilt." This principle means the state can only apply criminal penalties to people guilty of committing crimes.

**Principle of Humanity:** No individual may be punished by death or by any penalty or security measure of a perpetual nature or of an unlimited or indefinite duration.

**Principle of Legality:** The legal principle which states that an "act or omission may only be considered a crime and punished as such, when and if provided for in law." This principle means that a person can only be punished if her conduct is a crime defined in the Penal Code.

**Prison:** A penal institution administered by the government.

**Probation:** Probation is the release of a convicted defendant back into society with the understanding that if the defendant commits certain acts, he will have to serve a sentence of imprisonment. Probation may be supervised or unsupervised.

**Proportionality:** Requirement that a sentence must impose punishment proportionate to the offence.

**Public Crimes:** Crimes that are automatically prosecuted by the state.

**Public Defender:** The lawyer employed by the Public Defender's Office that defends the accused who do not have means for a private lawyer.

**Public Prosecutor:** The lawyer employed by the Office of the Prosecutor General that brings cases against people suspected of violating the law.

**Public Servant:** A government official or employee.

**Rape:** Threatening violence or actually using violence to practice anal, oral, or vaginal intercourse with another person without the person's consent. This crime also includes penetrating the anus or vagina with an object without the person's consent.

**Recidivism:** A tendency to relapse into a previous condition or mode of behaviour; especially relapse into criminal behaviour.

**Recurrence:** When a person commits a crime of intent that is punishable with a prison sentence longer than 6 months, and who has previously committed a crime of intent, punished by imprisonment of at least 6 months, within the last four years. It must be determined that the previous sentence or sentences have failed to serve as a sufficient warning against crime.

**Rehabilitation:** A theory of punishment that focuses on changing the perpetrator into a law-abiding person by teaching him that his actions were wrong.

**Reintegration Services:** services provided by the court with the goal of helping former prisoners with their transition back into society.

**Remorse:** When a perpetrator undoes all of the criminal harm caused after a crime has been committed.

**Result-Based Offences:** Crimes that punish a particular result, and any act that causes this result.

**Restitution:** Court-ordered reimbursement of victims of crimes by the perpetrator.

**Retribution:** A theory of punishment based on the idea that someone who harms another person by violating the law deserves to be punished by having an equal amount of harm done to her.

**Retroactivity:** The extension of an effect into the past.

**Self-Defense:** An act that involves defending oneself, one's property, or the well-being of another from harm.

**Security Measure:** A means of protection for society from criminal defendants who are exempt from criminal liability by reason of mental disorder whenever danger to self or others warrants protection.

**Semi-Public Crimes:** Crimes whose prosecution depends on the filing of a complaint by the victim.

**Sentence:** The Process by which a judge imposes punishment on a person convicted of a crime or crimes.

**Sexual Violence:** Committing a sexual act against someone's will.

**State-Sponsored Justice System:** The state sponsored justice system, also referred to as the formal justice system, encompasses the crimes, punishments, actors, and institutions established by law in Timor-Leste.

**Subjective Standard:** A standard that looks at what a person actually thought when acting.

**Subordinate:** A person under the authority or control of another person.

**Suspect:** Every person in regard to whom there are indications that he or she has committed, has taken part in, or is preparing to take part in, a criminal offence.

**Suspended Sentence:** Occurs when the judge delays the defendant's serving of a sentence after they have been found guilty, in order for the defendant to serve a period of probation. If the defendant does not violate the law during that period, and fulfils the conditions of the probation, the judge usually dismisses the sentence.

**Terrorism:** The crime of participating in serious other crimes as part of a terrorist group.

**Terrorist Group:** A group of two or more persons who, in order to pursue political, ideological, philosophical or denominational goals, act in a coordinated manner with a view to undermining national integrity or independence, subverting the operation of national or international institutions, intimidating public authorities, international organizations or other persons to act or abstain from acting by means of the commission of serious crimes.

**The Penal Code:** The main source of criminal law in Timor-Leste.

**Title:** To have the legal right to ownership over immovable or moveable property.

**Traditional Justice:** Refer to Non-State-Sponsored Justice System.

**Transnational Act:** An act that occurs across two or more nations' borders, such as drug trafficking (moving drugs from one country to another country).

**Trial:** The examination of evidence before a judge to decide the guilt of the suspect.

**Treaty:** Any legal agreement between two or more states (countries). Treaties are one important source of international law.

**United Nations Transitional Authority of Timor-Leste (UNTAET):** The international body responsible with administering Timor-Leste between the vote for independence and independence.

**Victim:** A person who is harmed or injured by another. Injuries and harms can be physical, monetary or emotional.

**Voluntary Desistance:** When a person voluntarily chooses to not move forward with committing a crime, even if he has already crossed the line into attempt.

**War Crime:** violent crimes committed against combatants or civilians during armed conflict.

**Writ of Indictment:** A written statement charging a party with the commission of a crime or other offence, drawn up by the Public Prosecutor.