Introduction to the Laws of Timor-Leste

Criminal Law

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Preface to the Series: *Introduction to the Laws of Timor-Leste*

Timor-Leste has enjoyed 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 centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Timor-Leste* series of papers produced by the Timor-Leste Legal Education Project (TLLEP). This series seeks to critically engage the reader in thinking about the 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. USAID provided funding for this series through its Timor-Leste Access to Justice Program.

The authors of the legal working papers 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 these texts accessible to the largest possible audience. The texts are 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. They cover topics ranging from constitutional law to inheritance law to the Petroleum Fund Law.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for this series were Peter Broderick, Daniel Cassman, Margaret Hagan, Brian Hoffman, Lexi Shechtel, and Anne Johnson Veldhuis, all Class of 2013, Jessica Fox, Hamida Owusu, and Samuel Saunders (all Class of 2014) edited the series under the guidance of Stanford Rule of Law Fellow Megan Karsh ('09). The students benefitted from the substantial and extensive guidance provided by Brazilian lawyer Dennys Antonialli (LLM '11) and Geoffrey Swenson ('09), TLLEP's former in-country director and legal advisor to the Asia Foundation's Dili office.

The program has also received extensive support from Kerry Brogan, previous Country Representative Silas Everett, current Country Representative Susan Marx, Juliao de Deus Fatima, and a host of other Asia Foundation staff. USAID Timor-Leste provided vital financial and programmatic support to the program. We especially thank USAID Director Rick Scott and USAID staff Ana Guterres and Peter Cloutier. The US Embassy in Dili, especially Ambassador Hans Klemm and Ambassador Judith Fergin, have been incredibly supportive. I would be remiss if I did not thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their unwavering support of this project.

Finally, this series of papers 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. Prosecutor General Ana Pessoa, Public Defender General Sergio de Jesus Hornai, and President of Court of Appeals Cláudio Ximenes were extremely gracious in clarifying issues related to their respective organizations and offering constructive suggestions. The textbooks received vital input from National University of Timor-Leste (UNTL) faculty and staff throughout the drafting and review process including comments from Rector Aurelio Guterres, Law Deans Tome Xavier Geronimo and Maria Angela Carrascalão, Professor Benjamin Corte Real, and Vasco da Cruz of the Portuguese Corporation. Feedback from UNTL students themselves on draft text was immensely helpful for the final text. The Judicial Training Center (CFJ) has also been a source of wisdom throughout the drafting process, particularly CFJ Director Marcelina Tilman, Erika Macedo, and Bernardo Fernandes. The text benefited as well from the contributions of Charlie Scheiner and La'o Hamutuk, the staff of the Ministry of Justice Legislation Unit, AALT Executive Director Maria Veronika, Judge Maria Netercia, Judge Jacinta Coreia, JSMP Executive Director, Luis de Oliveira, JSMP Legal Research Unit Coordinator, Roberto da Costa, ECM director Lino Lopes, and Sahe Da Siliva. We are also grateful to Gualdinho da Silva, President of the National Petroleum Authority, for two wonderfully engaging meetings.

In addition to this series and the already-published texts on professional responsibility, constitutional rights, and contracts, TLLEP has plans to complete the first edition of a new textbook in 2013 entitled *An Introduction to Criminal Law in Timor-Leste*. All texts are updated as the legal landscape changes. The most recent versions of all published texts are always available for download online free of charge on TLLEP's website: www.tllep.law.stanford.edu.

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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Criminal Law

CHAPTER OBJECTIVES

- To explore the general concepts that underlie the Penal Code.
- To understand the notions of the act and intent requirements for crimes.
- To examine how penalties are set for persons convicted of crimes.
- To discuss some of the crimes defined in the Penal Code.

Chapter Overview

- The Timorese criminal justice system is based on the ideas of legality, culpability, and humanity.
- Every crime has both a mental state requirement and an act requirement.
- Crimes defined in the Penal Code generally require criminal intent, unless the Code specifies that only negligence is required.
- The act requirement may be either a commission or an omission.
- The goal of a criminal sanction is to protect society and re-socialize the offender.
- Crimes are punishable by a variety of penalties, including fine, imprisonment, community service, and admonishment.
- The Penal Code provides for several forms of crimes, including preparatory acts, voluntary desistence, attempt, and remorse. Each is punished differently.
- The Penal Code provides for various types of perpetrators, including principals, instigators, and accomplices. Each is punished differently.
- The Penal Code creates several circumstances that exclude unlawfulness, including legitimate defense and state justifying need.

I. CONCEPTS OF CRIMINAL LAW

SECTION OBJECTIVES

- To understand the general concepts behind the Penal Code.
- To recognize the difference between crimes of omission and crimes of commission.
- To explore the act and intent elements of crimes.

1. Introduction and Layout of the Chapter

The Penal Code of the Democratic Republic of Timor-Leste governs crime and punishment in Timor-Leste. It defines which actions are illegal and punishable by the state. It lists which punishments may be imposed and determines how harsh those penalties should be. It also describes many of the important concepts that underlie criminal law in Timor-Leste. The Penal Code is, therefore, the primary resource document for this chapter, and we encourage you read the Code in its entirety.

This chapter begins by exploring many of the fundamental concepts of the Penal Code, including ideas such as commission versus omission and intent. The chapter then examines the types of crimes and criminal liability as defined by the Penal Code. It proceeds to outline the types and levels of penalties allowed in Timor-Leste and analyzes how penalties are determined. Finally, it discusses a few of the more common crimes defined in the Penal Code.

2. General Concepts and Goals of the Penal Code

Put simply, criminal law is the body of law dealing with crimes. Criminal law deals with actions that the law has prohibited. It differs from other types of law because criminal cases are filed, investigated, and prosecuted by the *state*. Perhaps the closest analogy in civil law is tort law, which also deals with actions that the law says are wrong. But torts are civil, rather than criminal, wrongs. The government does not prosecute a tort; instead a victim of a tort must file a lawsuit in court and prove the charges him or herself (possibly with the help of a lawyer like you!). The types of remedies available are also different; torts are generally resolved with the perpetrator paying money to the victim. While some criminal punishments do include monetary

restitution to the victim, crimes most often result in imprisonment or a fine paid to the state, rather than the victim.

All of the crimes and their punishments are defined in the Penal Code of the Democratic Republic of Timor-Leste. A commission of Timorese and international legal experts wrote the initial draft of the Penal Code. The Code was then presented to the National Parliament, which made some changes after parliamentary debate and a broad public discussion. Finally, the Code was approved by the Parliament and the Council of Ministers. It entered into force in 2009.

General Concepts of the Penal Code

The Penal Code is based on a few important concepts that will help you understand how criminal laws are made and applied. Most broadly, the Penal Code is premised on the idea that the government should interfere with people's freedoms as little as possible:

Penal Code of the Democratic Republic of Timor Leste

Annex

As this code is based on the Democratic Rule of Law, the General Part enshrines the principle of human dignity, respect for individual freedoms of each citizen and the responsibility of the State to intervene only when unsupportable harm to legal interests fundamental to life in society are observed. In such events, the State assumes the right to mete punishment and the social duty to reintegrate the offender into society.

The law says that the state will only punish someone for "unsupportable harm to legal interests fundamental to life in society." That is quite an extraordinary statement, and it is one that reflects the Penal Code's dedication to democracy and the rule of law.

This general limitation on the government's power to prosecute and punish crimes is reflected by the three principles that guide criminal law in Timor-Leste. The three principles are **legality**, **culpability**, and **humanity**. We describe these ideas briefly here, but they are discussed in more detail in the Annex to the Penal Code.

Three Principles of the Rule of Law in the Penal Code

Legality

The principle of legality states that an act or omission may only be considered a crime (and punished as a crime) when provided by law. This means that the government may not punish anyone arbitrarily. Only if his or her behavior is outlawed by a provision of the Penal Code may someone be punished for a crime.

Humanity
The principle of humanity emphasizes the value of each human life. This principle is outlined in Sections 29 and 32 of the Constitution. As applied to criminal law, it means that the criminal justice process will focus on rehabilitating offenders and helping them become productive members of society, rather than simply punishing them in perpetuity. To that end, Timor-Leste does not allow anyone to be punished by death or life in prison.

Culpability
Culpability is the idea that there can be no penalty without guilt. This means that the harshness of a penalty can never exceed the measure of guilt. It also means that some people in certain situations—for example someone with a psychological disorder that prevents him from determining right from wrong—may have reduced criminal liability because their actions lack culpability.

These principles will appear consistently throughout our discussion of criminal law. Again, the most obvious example of the principle of humanity is that Timor-Leste does not allow people to be executed for crimes, or even sentenced to life in prison. Both the principles of culpability and humanity are clearly reflected in the law's general preference for penalties that do not deprive people of their liberty through imprisonment (we will discuss this in more detail in the section on penalties below).

The Constitution and Criminal Law

Section 31 of the Constitution provides several protections for convicted criminals and for persons accused of crimes. These restrictions include limitations on the government's power to try people for crimes. For example, the State cannot accuse a person of a crime for an act that was not a criminal offence at the time it was committed. Penalties may not be imposed unless they are provided for in existing law (an example of the principal of legality, discussed above). A person may not be tried and convicted for the same crime more than once. And persons unjustly convicted and later exonerated are entitled to fair compensation.

Section 24 of the Constitution also provides for a number of protections during criminal proceedings. A person charged with a crime is presumed innocent until convicted. Accused persons have the right to a lawyer at all stages of the criminal proceedings against them.

Everyone has the right to a hearing and the right to present a defense. Evidence obtained by torture, coercion, or wrongful interference with private life may not be presented against the accused.

Provisions protecting people who have been convicted of crimes can also be found in the sections 30 to 32 of the Constitution. Convicted criminals retain their fundamental rights, except for those necessarily limited by enforcement of the penalty imposed upon them. And sentences of death or life in prison are expressly forbidden by the Constitution, as is any form of cruel, inhuman, or degrading treatment. A more involved discussion of these constitutional provisions is beyond the scope of this chapter, but it is crucial to mention these protections as they form the foundation of the criminal justice system in Timor-Leste.

Public and Semi-Public Crimes

The Penal Code defines two different types of crimes: public crimes and semi-public crimes. The difference between public and semi-public crimes depends on whether a complaint must be filed in order for the government to prosecute the crime. A complaint is a legal document, often filed by the victim of a crime, which claims that a criminal wrong has been committed. If a crime is a semi-public crime, its description in the Penal Code will state that prosecution depends upon the filing of a complaint. Comparatively, public crimes do not require a complaint in order for the State to prosecute. This is because public crimes are more severe than semi-public crimes. Several examples of public and semi-public crimes are listed below.

Examples of public crimes
- Treason (Article 196)
- Manslaughter (Article 140)
- Homicide (Article 138)
- Serious offences against physical integrity (Article 146)
- Serious coercion (Article 159)

Examples of semi-public crimes
- Simple offences against physical integrity (Article 145)
- Threats (Article 157)
- Coercion (Article 158)
- Sexual exhibitionism (Article 181)

3. Elements of a Crime

Determining when someone is guilty of a crime is a primary goal of criminal law. Unfortunately, the determination of guilt is sometimes extremely difficult. Even deciding *which* actions should be criminalized, and which people involved in a crime should be punished, can be complicated. There is a general requirement that most crimes include both an objective element (**actus reus**) and a mental element (**mens rea**). That is, for something to be considered a crime, it must include both an *act* that has criminal consequences and a *mental state* on the part of the criminal that makes him liable for that crime. A mere accident, without any intention or due to carelessness, does not constitute a crime. Nor does just thinking about committing a crime, constitute criminal conduct without any action.

Omission versus Commission

One of the key distinctions of actus reus is the difference between omission and commission. *Commission* refers to the doing of an act, like firing a gun or breaking into a house. *Omission* is the opposite; it means refraining from doing something. This might seem to conflict with the requirement that every crime include an objective act. Indeed, most crimes are crimes of commission. For example, killing someone with a gun or a knife is homicide, often a crime of commission. But what if a father were to abandon his child, letting the child starve to death? The father has not killed the child in the same way that a shooter has killed his victim, but most people would probably say that he is still responsible for the child's death. Indeed, the Penal Code creates two different crimes for these situations: abandonment (Article 143) describes the father who lets his child starve, while homicide (Article 138) describes the man who shoots and kills another person. Reflecting the differences in the directness of each criminal's level of responsibility for the victim's death, abandonment is punished less severely than homicide. Below are several examples of crimes of omission and crimes of commission from the Penal Code:

Crimes of Commission and Crimes of Omission

Crimes of Commission
- Homicide (Article 138)
- Threats (Article 157)
- Kidnapping (Article 160)

- Larceny (Article 251)

Crimes of Omissions
- Abandonment (Article 143)
- Negligent mismanagement (Article 275)
- Failure to report (Article 286)
- Refusal to cooperate (Article 300)

Reviewing this list of crimes of commission and crimes of omission suggests a principle we might use to distinguish them: crimes of commission involve doing something that the law says is wrong, while crimes of omission involve failing to fulfill a duty that the law has created. When we are responsible for the life of another, such as a parent for a child, or someone who cares for someone who is seriously ill, we owe a duty to that person. If the parent or caretaker fails to fulfill that duty and the result is serious harm to the person who needs his care, he commits a crime. Indeed it is this failure to fulfill one's duty that constitutes the objective element of crimes of omission.

Intent Requirement

The requirement that every crime have a mental element is laid out explicitly in the Penal Code. In fact, the Penal Code requires that in order for criminal liability to attach, the accused must act with intent or negligence:

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.

The Code also provides definitions for intent and negligence:

Penal Code of the Democratic Republic of Timor-Leste

Article 15: Definitions of Intent

1. Any person who commits an act with the 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 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; or

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 circumstances reveal that the perpetrator acted with levity or temerity and failed to observe elementary duties of prudence required in such a case.

The implications of these definitions are quite important for our discussion of criminal law. Article 14 establishes that, by default, any crime requires *intent*. For someone to be criminally liable, he must *intend* to do the crime for which he is accused. Thus, if someone dies in an accident, no homicide has occurred because there was no intent to kill anyone. However, if the definition of a crime specifies that only negligence is required, then something less than intent is required. So if someone involved in the accident caused the accident by failing to proceed with caution, that person might be guilty of manslaughter. For example, if someone is driving down Avenida de Portugal at 100 kilometers per hour and hits a pedestrian, the driver's action could be described as criminal negligence (more accurately, this might be considered recklessness, *see below*). If the victim dies, the driver could be convicted of manslaughter. This is because while homicide (Article 138) requires intent, manslaughter (Article 140) requires only negligence. Note also the definition of gross negligence from Article 16. Gross negligence is especially severe negligence; driving only 15 kilometers over the speed limit may be negligent,

but it would likely not be considered gross negligence. Consider the definitions of homicide and manslaughter from the Penal Code:

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 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.

Understanding intent elements is crucial to comprehending criminal law. The Penal Code usually requires intent, and less frequently requires negligence, for any crime to be committed. But in addition to these general requirements, the Code makes specific exceptions for certain people who may not be able to form the requisite intent element in the same manner as a competent adult. For example, under Article 20 of the Penal Code minors under 16 are exempt from all criminal liability, and persons between 16 and 21 years old may face reduced liability. Similarly, Article 21 of the Penal Code states that people who are insane and cannot understand the criminality of their actions may also be exempt from criminal liability.

It is worth noting that that there are other levels of mental culpability in addition to intent and negligence. However, our discussion of these other mental states will be brief because none are explicitly recognized by the Penal Code. The first of these other types of mental states is **recklessness**. In terms of the level of culpability, recklessness falls somewhere between gross negligence and intent. One way to think of negligence is carelessness. Someone is negligent when he acts, but is unaware (even though he should be aware) or does not fully appreciate that some result might occur. Recklessness, by contrast, involves *knowing* and fully appreciating that

some result might occur and proceeding anyway.[1] And finally, intent involves proceeding either with the determination that the result will occur or knowing that it is virtually certain to occur as a result of one's actions.

Another mental element is *knowledge*. Knowledge is easier to define and to understand that some of the other mental states. Certain actions only constitute crimes if the perpetrator is aware (i.e. has knowledge) of certain information. For example, campaign against peace efforts (Article 199) is the crime of distributing information intended to disrupt peace efforts at a time of war or preparation for war. But distributing such information is only criminal if the distributor *knows* that the information is false.

Purpose is another level of mental culpability. It is sometimes difficult to disentangle purpose from intent. One way purpose might be differentiated involves looking at whether the intended or desired consequences actually occur. For someone to commit a crime with intent, the intended consequences *must* actually occur. As an example, consider homicide, which involves causing the death of a person with the *intent* to kill. If someone is to be guilty of homicide, she must intend to kill someone and actually kill that person. If she acts intending to kill someone but fails, she has not committed homicide (she might instead have committed another offense, or an attempted homicide, as we will discuss in a subsequent section).

However, if a crime requires *purpose*, a person is guilty so long as a person desires a certain outcome, regardless of whether the outcome actually occurs. Consider the crime of serious offences against physical integrity (Article 146), which is defined as causing harm to the body or health of another with the purpose of depriving someone of an organ or limb or seriously disfiguring the victim (or a few other possibilities—review the Article for a complete definition). If someone intentionally causes harm to another with the *purpose* of depriving that person of a limb, the perpetrator is guilty of this offense, even if he ultimately fails to deprive the victim of a limb. For example, if someone were to try to cut off another person's arm but only managed to deeply cut the victim's skin, that person would be guilty of a serious offense against physical integrity. The intent element of this crime applies only to causing bodily harm, which the perpetrator did by cutting his victim's skin. As long as he does so with the *purpose* of depriving

[1] Recklessness is only mentioned once in the Penal Code, in Article 277, Negligent bankruptcy or insolvency. It is not defined in the Penal Code.

his victim of a limb, he is guilty of a serious offence against physical integrity, even if he ultimately fails in that purpose.

Penal Code of the Democratic Republic of Timor-Leste

Article 146: Serious offences against physical integrity

1. Any person who causes harm to the body or health of another person with the *purpose* (emphasis added) of:

a) Depriving such person of an important organ or limb…

…is punishable by 2 to 8 years.

Questions

1. The Penal Code prohibits retroactive application of criminal laws. That means that if someone does something that is not a crime when they do it, but the government outlaws the action afterwards, that person may not be punished for a crime. Why is this prohibition important? Which of the main principles of Timorese criminal law does this prohibition reflect?

2. For each of the following crimes, identify the act and mental state requirement:
   a) Assisting a criminal (Article 290)
   b) Simple offences against physical integrity (Article 145)
   c) Negligent bankruptcy or insolvency (Article 277)

3. Miguel borrows a knife from his friend, agreeing to return it after one month. But after one month, Miguel decides that he really likes the knife decides to keep it. When his friend asks for the knife back, Miguel refuses. The prosecutor charges Miguel with larceny under Article 251 of the Penal Code. Is Miguel guilty of larceny? If not, is he guilty of any other offense?

Answers

1. The prohibition on retroactive application of criminal law is important because it prevents the government from abusing the penal system to punish people arbitrarily and unfairly. A corrupt government might invent crimes to punish its political opponents or take advantage of people who cannot afford a strong defense. But if the government cannot punish people retroactively, it is more difficult to conduct and justify such actions. This prohibition reflects the principle of legality.

2. The act and mental state requirements are:
   a) **Act:** hindering investigative or preventative action by competent authorities. **Mental state:** knowledge or intent.
   b) **Act:** causing harm to the body or health of another person. **Mental state**: intent. Note that no mental state is specified in the definition of this crime, so intent is required in accordance with Article 14.
   c) **Act:** causing bankruptcy or insolvency. **Mental state:** serious recklessness or gross negligence.

3. Miguel is not guilty of larceny. The crime of larceny (Article 251) requires that someone take a movable object "with unlawful intent to appropriate" it. When he took the knife, Miguel did so with permission, and he did not intend to keep it. Only a month later, once he already taken possession of the knife lawfully, did Miguel decide to keep it. Instead of larceny, the prosecutor should have charged Miguel with appropriation through abuse of trust (Article 256). Review the intent requirements of these two crimes to understand why.

3. Summary

The Timorese criminal justice system is based on the concepts of legality, humanity, and culpability. These principles are designed to foster a system that protects the rights, lives, and dignity of all people who avail themselves of the justice system. The Constitution provides for a number of important protections that ensure these fundamental concerns, including a presumption of innocence and several important limits on the government's power to prosecute and punish criminals. Legality limits the government's ability to prosecute only if the perpetrator's actions are prohibited under the Penal Code. Humanity directs the government to use the justice system as a means to not only protect every citizens from criminals, but to also use the system to rehabilitate criminals. Culpability mandates that criminal punishment be given only to those with a guilty mind.

The Timorese Penal Code describes the crimes that the state may punish as well as the penalties that may be imposed upon convicted criminals. It recognizes two types of crimes: public crimes, which the government may always investigate and prosecute, and semi-public crimes, which the government may only prosecute once the victim files a complaint. Semi-public crimes are identified in the Penal Code by provisions requiring the filing of a complaint.

Every crime has both an act element and a mental element. Only if someone commits the act described in the Penal Code with the mental state that the law requires is that person guilty of

a crime. The act element of a crime may be either a commission (an affirmative act) or an omission (failure to act when one has a duty to do so). The mental state requirement may take many forms, but crimes defined in the Penal Code are presumed to require intent on the part of the perpetrator. In some instances, the law may require only negligence. Knowledge, purpose, or recklessness are other mental states that may be required in some instances.

II. PENALTIES AND LIABILITY

SECTION OBJECTIVES

- To understand which penalties may be imposed upon criminals, and how courts decide which penalties to impose.
- To examine forms of crimes and factors that may exclude unlawfulness or guilt.
- To consider the different types of perpetrators recognized in the Penal Code.

This section examines how convicted criminals are punished in the Timorese justice system. It also explores situations in which those penalties may be reduced or eliminated altogether. What if someone tries to commit a crime but fails, or succeeds only partially? What if multiple people work together to plan a crime, but only some of them actually carry it out? What if someone kills another person in defense of his own life? How do judges know which penalties to apply and how to apply them? This section answers these questions.

1. Penalties

Each crime described in the Penal Code contains a range of penalties that may be imposed upon the perpetrator. The punishment is usually a range of fines or years of imprisonment or some combination of the two. But how should a judge decide which penalty within that range to impose? We should begin to answer this question by recalling the principle of humanity, which emphasizes the value of each human life and human freedom. The goal of a penalty is not to punish or serve as vengeance, but to teach and re-socialize the offender. As a result of this principle, Article 62 of the Penal Code states a general preference for penalties that do not deprive persons of their liberty whenever possible. For example, fines or community service should be imposed, if legal and appropriate, in lieu of a prison sentence. Prison sentences should only be imposed when other penalties have proven ineffective in preventing the crime. Suspended sentences are another available option for terms of imprisonment of three years or less. Article 51 explains generally the principles behind determining the proper penalty:

Penal Code of the Democratic Republic of Timor-Leste

Article 51: Determination of the measure of penalty

1. Measure of penalty is determined according to the perpetrator's guilt and prevention requirements, within limits defined by law.

2. In determining a specific penalty, the court shall consider all circumstances that are not part of the defined crime but that either aggravate or mitigate the perpetrator's acts.

3. The court ruling shall explicitly mention the grounds for the measure of penalty adopted.

In determining what penalty to apply, the court has a number of options. Fines and prison sentences are the penalties usually provided for by the penal code. But fines and imprisonment are not the only penalties. In fact, the Penal Code provides for many alternative penalties that may be imposed under certain circumstances. In addition to fines and prison terms, courts may require community service (Articles 78 through 81), admonish criminals (Articles 82 and 83), suspend or revoke the criminal's privilege to hold public office (Articles 85 and 86), deport the criminal (Article 87), or prohibit the criminal from driving an automobile or carrying a weapon (Articles 88 and 89).

In determining a penalty, the Penal Code directs the court to consider all of the circumstances that reveal a higher or lower degree of unlawfulness of the act. Factors that influence our conception of the degree of unlawfulness of the act are known as **aggravating** or **mitigating factors**. Aggravating factors are aspects of the crime that make it seem worse or more serious. Mitigating factors are circumstances that make the crime seem less serious. Article 52 provides a list of some general aggravating factors, and Article 55 provides a list of some general mitigating circumstances. These general circumstances may result in a harsher or more lenient punishment at the discretion of the judge. But there is another form of mitigating circumstances. Namely, extraordinarily mitigating circumstances, which are identified in Article 56. If any of these are present, the maximum time of imprisonment is reduced by one third and the minimum time of imprisonment is reduced by one fifth. The maximum fine is reduced by one third and the minimum fine is reduced to the legal minimum. And if the maximum length of imprisonment is three years or less, the penalty of imprisonment may be replaced by a fine. Some aggravating and mitigating factors are summarized below, but remember that the court

must consider all circumstances of the crime that might aggravate or mitigate, regardless of whether they appear on this list.

General aggravating factors (Article 52)

- Crime is committed with disloyalty, such as betrayal, ambush, waiting, or disguise
- Crime is committed in a way designed to prevent defense of the victim
- Crime is committed by fraud, deceit, or abuse of power or authority
- Crime is committed for payment
- Crime is motivated by racism or other discriminatory sentiments
- Perpetrator has a special duty not to commit the crime or to hinder its commission
- Perpetrator has committed one or more similar crimes recently
- Crime is committed at the same time as another crime in order to facilitate the execution of one or more other crimes
- Commission of the crime was facilitated by perpetrator's entrance into the victim's residence, or by using poison, flooding, fire, explosion, or a weapon, or by sinking a vessel
- Crime was committed through the cooperation of two or more persons
- Perpetrator intentionally increased the victim's suffering or committed additional unnecessary acts of theft, cruelty, or destruction
- Victim was a spouse, parent, descendent, sibling, adoptee, or adopter of the perpetrator
- Victim is particularly vulnerable because of age, illness, or physical or mental disability.

General mitigating factors (Article 55)

- There is an incomplete case for a cause of exclusion (see next section)
- Perpetrator acts as a result of incidents that cause violent emotion or passion, or reacts to provocation by means of an immediate act
- Perpetrator appears before the authorities voluntarily before knowing of the existence of a criminal proceeding against him or her
- Perpetrator spontaneously confesses to having committed the crime
- Perpetrator demonstrates sincere repentance
- Low intensity of intent or negligence
- Reconciliation between victim and perpetrator

Extraordinarily mitigating circumstances (Article 56)

- Perpetrator was influenced by a serious threat or orders from another person upon whom perpetrator is dependent or to whom obedience is due
- Perpetrator's conduct was prompted by an honorable reason, by a strong solicitation or temptation from the victim himself, or by unjust provocation
- Perpetrator makes reparation of damage caused before the first trial hearing
- Perpetrator has maintained good conduct long after the crime has occurred

- Perpetrator has a noticeably diminished criminal liability

Again, remember that the general factors are only examples, and these lists are hardly exhaustive. It is also important to note that these circumstances need not necessarily occur during the commission of the crime. Circumstances that precede or follow commission of the crime may be considered as well.

In addition to factors that aggravated the actual commission of the crime, the Penal Code provides for consideration of the perpetrator's criminal history with Articles 53 and 54. Article 53 provides that a person who commits two crimes of intent punishable by more than six months in prison within four years shall have the minimum penalty for the second crime increased by one-third. Article 54 provides for the punishment of habitual criminals. A habitual criminal is a person who has (1) committed three or more crimes of intent punished by effective imprisonment, (2) with less than three years having elapsed between each of the crimes, and (3) whose actions and personality reveal a "strong or dangerous tendency towards crime." If a habitual criminal commits a crime of intent, the minimum *and* maximum penalties are increased by one-third.

When deciding upon a penalty, the court should consider first the issues of recurrence and habitual criminality and extraordinarily mitigating circumstances. Once those circumstances have been taken into account, the court should consider other aggravating or mitigating circumstances. Taking all of these circumstances into account, the court should 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." This process is outline in Articles 90 through 92.

Questions

1. Nina has been convicted of larceny three times in the last five years, and each time she was sentenced to short terms of imprisonment. She is convicted of another crime punishable by three to six years in prison, with no aggravating or mitigating circumstances. How should she be punished?

2. Agusto's wife is dying of illness. She needs very expensive medicine to survive, but Agusto cannot afford it. Agusto goes to the pharmacy and asks for the medicine and offers all the money he has, but the owner of the pharmacy refuses to sell it to him. In desperation, later that day Agusto breaks into the pharmacy and steals the medicine he needs. Out of his rage at

the pharmacist, Agusto also knocks over several shelves of goods at the pharmacy, destroying the products on them. He returns to his wife and gives her the medicine, and she recovers. A few days later, before he is identified as a suspect in the crime, Agusto goes to the police station voluntarily and gives a full confession. How should Agusto be punished?

Answers

1. Nina has committed three crimes of intent punished by effective imprisonment in the last five years. As a result, if the judge decides that her actions and personality reveal a strong or dangerous tendency towards crime, the penalty range will be increased to four to eight years. Because there are no aggravating or mitigating factors, it is likely that the judge will sentence Nina to somewhere in the middle of this range.

2. The answer to this question depends heavily on the judge. This demonstrates that sentencing is far from being an exact science. Agusto has a case that he should not be held liable at all, because his situation qualifies as a state justifying need (see "Exclusion of Unlawfulness or Guilt" in the next section). Assuming, however, that the court decides his situation does not qualify for that exclusion, several mitigating and aggravating factors are present. Most people would agree that Agusto's actions were committed for an honorable reason, an extraordinarily mitigating factor. Agusto also appeared voluntarily before the authorities and confessed for his crime. However, he did commit additional unnecessary acts of damage in the store, an aggravating factor. Ultimately, because there are many mitigating factors (including an extraordinarily mitigating circumstance) and only one aggravating factor, Agusto is likely to receive a lenient sentence.

2. Liability

Even if the act and intent requirements of a crime are well-defined and understood, deciding when people are guilty of that crime can be difficult. Criminal culpability can take a variety of forms. Sometimes criminals start planning crimes, but never actually put their plans into action. Sometimes criminals plan their crimes and carry out their plans, but fail to achieve their intended goals. Sometimes a group of people plan a crime together, but only a few of them actually carry out those plans (either with or without the knowledge of the rest of the group). This section explores whether and how crimes are punished in these instances.

Forms of Crimes

The forms of crimes punishable in Timor-Leste are laid out in Chapter II of Book I of the Penal Code. The Code recognizes at least five stages of planning and committing crimes. These stages are laid out in Articles 22 through 28.

Forms of Crimes in the Penal Code

Preparatory Acts (Article 22)
Preparatory acts are actions to plan and/or prepare for a crime.

Voluntary Desistance (Article 26)
Voluntary desistance occurs if the perpetrator willingly decides not to proceed in committing a crime he has started to plan, prevents the crime's consummation, prevents obtaining its result, or puts forth serious efforts to hinder the crime's consummation or result.

Attempt (Article 23)
A crime is attempted when a person has decided to commit that crime and initiates its execution by undertaking, wholly or in part, the acts objectively required to cause the result, but that result fails to take place *only* for reasons beyond the perpetrator's control.

Commission
Actual commission of the crime.

Remorse (Article 28)
Remorse as defined by the Penal Code might more accurately be described as voluntary restitution. If a crime does not involve violence or serious threats against persons and the damage has been remedied or a stolen object returned before the crime is reported, the perpetrator may face a reduced penalty or no penalty at all.

The harshness of the punishment for each form of a crime differs. As one might expect, the closer the criminal gets to commission of the crime, the harsher the penalty. Mere preparatory acts are not punishable in Timor-Leste (Article 22). However, attempts of certain crimes are punishable. If a person initiates a crime by doing all or some of the actions objectively required to cause the result, but fails to achieve that result for reasons beyond his control, that person has *attempted* a crime.

Attempts are only punishable in certain circumstances, as defined by Articles 24 and 25. An attempt is punishable if the crime attempted is a crime of intent that carries a maximum sentence of more than three years, or as expressly determined by law. If someone is convicted of

an attempted crime, the penalty will be "extraordinarily mitigated" in comparison to the penalty for the completed crime. Additionally, the attempt must be somewhat realistic. If the methods the criminal uses are obviously inappropriate to commit the crime or an essential element necessary to consummate the crime is lacking, the attempt is not punishable at all. For example, imagine that someone intends to commit murder with a firearm, but instead simply shoots their 'victim' with a water gun. Clearly this person has not actually attempted murder or any serious crime. Also, an attempt is not punishable at all if the perpetrator voluntarily desists from his attempt before the crime is committed, or prevents the consummation of the attempt. If multiple people work together to commit a crime, and one of them voluntarily desists from proceeding with its commission (or hinders its result), the person who desisted may not be punished for an attempt, even if the other participations proceed with the crime (see Article 26).

Even if a criminal succeeds in committing a crime, he might not be punished. If the criminal completes the crime but demonstrates remorse by making the victim whole, he may face a reduced penalty or no penalty at all. For example, imagine that someone steals a pair of shoes from a market, but only a few moments later regrets the action, and immediately thereafter returns the shoes. This person may not be punished for stealing. The table below summarizes the forms of crimes recognized by the Penal Code and their various penalties:

Form of Crime	**Description**	**Punishable**
Preparatory acts	Planning and/or preparing a crime	No
Attempt	Trying but failing to commit a crime	Extraordinarily mitigated penalty if the crime is a crime of intent punishable by more than 3 years in prison
Voluntary desistance	Deciding not to proceed with a crime	No
Completed crime	Actually committing a crime	Penalty described in code
Remorse	Making the victim whole	Extraordinarily mitigated penalty or no penalty at all

Perpetrators

When multiple people are involved in a crime, determining their various levels of culpability can be a challenge. Chapter III of Book I of the Penal Code describes the various types of perpetrators of a crime and establishes how each should be punished. We begin with a discussion of the different types of perpetrators, as laid out in Article 29 through 34.

Types of Perpetrators in the Penal Code

Principal (Article 30)
The person who commits the criminal act directly or through a third party who serves as an instrument of the principal.

Coprincipals (Article 30)
Any persons who agree to take direct part in commission of a crime or who join forces in commission of the crime.

Instigator (Article 31)
A person who directly and maliciously instigates another person to commit the crime, if the crime is actually committed or initiated.

Accomplice (Article 32)
A person who, with intent, materially or morally aids another person to commit a crime.

Article 33 provides that each participant in a crime is punishable "according to his or her guilt, regardless of the penalty or degree of guilt of the others." This means that each person involved in a single crime might face a different penalty depending on his or her level of responsibility and involvement. In general, however, principals and instigators may be punished by any penalty described in the Code. But accomplices face an extraordinarily mitigated penalty. The table below summarizes the levels of penalties for each type of perpetrator:

Perpetrator	Punishable
Principal/Coprincipal	Full extent of penalty
Instigator	Full extent of penalty, but only if the crime is actually committed or initiated

Accomplice	Extraordinarily mitigated penalty

Exclusion of Unlawfulness or Guilt

Sometimes, people commit crimes for reasons that society is prepared to accept. For example, legal systems generally agree that killing or injuring another person in self-defense, or in the defense of another person, is not a punishable act. The Penal Code describes several situations in which culpability is reduced or eliminated entirely. These circumstances are discussed in Chapter V of Book I of the Penal Code (Articles 43 through 50).

The first, and probably most well-known, of the circumstances that excuse unlawfulness or guilt is legitimate defense. Legitimate defense is defined in Article 44 of the Penal Code:

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.

This law might seem simple on its face: it says that it is not unlawful to do something that would normally be a crime if one is protecting oneself or someone else. However, there are a few important nuances in the definition. First, the unlawful act must be "committed as the necessary means" to repel an attack. If the means are not necessary or if the means are excessive, the defensive action might still be unlawful. For example, imagine that someone is about to throw a small pebble at a stranger. In an effort to stop this action an onlooker shoots the to-be pebble thrower with a firearm. True, the shooter was trying to protect the stranger, but resorting to shooting the thrower is clearly excessive. Article 48 helps to clarify this nuance:

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.

Article 48 makes it clear that responding to an attack with excessive means will result in a penalty, albeit a reduced one. However, if the use of the excessive means is attributable to justifiable fear or surprise, a penalty may not be levied.

Second, legitimate defense may only be employed to repel an "imminent or present" attack. Surely it would be lawful to respond with force if someone fired a gun at you, or threw a punch. But what if someone was advancing purposefully towards you, and began reaching inside his jacket? Is that enough to constitute an "imminent" attack? The answer will depend on the the circumstances, including the relationship between the two people. Legitimate defense is an important example of an exclusion of unlawfulness, but one that is also extremely complex and highly dependent on the circumstances.

The other causes for exclusion of unlawfulness and exclusion of guilt are summarized below.

Causes for Exclusion of Unlawfulness

State of justifying need (Article 45)
An act is not unlawful when committed as (1) an appropriate means to avert a present danger that threatens a legally protected interest of the perpetrator or of a third party, (2) if the interest safeguarded is significantly superior to the interest sacrificed, and (3) it is reasonable to impose the sacrifice of the victim's interest given the nature of the interest endangered.

Conflict of duties (Article 46)
It is not unlawful to disregard a legal duty or a legitimate order from an authority when complying with a duty or following an order of equal or greater value.

Consent (Article 47)
Consent of the victim may exclude unlawfulness if freely given and if the consent does not offend social mores. Consent may be freely withdrawn at any time, and may only be given by a competent person over 16 years of age. If the perpetrator is unaware of the consent, he or she may be punished with the penalty applicable to attempt.

Causes for Exclusion of Guilt

Exculpatory state of need (Article 49)
Guilt is excused when someone commits an unlawful act required to avert a real danger to the life, physical integrity, honor, or freedom of the perpetrator or a third party.

Exculpatory undue obedience (Article 50)
A public servant who obeys an order not knowing that it leads to commission of a crime acts without guilt so long as the unlawfulness of the act is not evident from the circumstances.

These causes for exclusion of unlawfulness or guilt act as excuses or justification that may negate or reduce criminal liability. They are important to know and understand in your study of criminal law as well, but a complete and in-depth discussion of each is beyond the scope of this introductory chapter.

However, let's discuss of a few quick examples for some of these exclusions and justifications. Think of state of justifying need as a lesser evil committed against the victim in order to avoid a greater evil to the perpetrator or a third party. For instance, imagine a driver, Carla, sees a child run into the street in front of her car. In order to avoid the child, Carla intentionally steers her car into a stranger's parked car. Intentionally hitting another's automobile could be property damage. But here, saving a life clearly outweighs any damage to the stranger's car. Carla's actions are both excluded from unlawfulness and guilt. Another example could involve a stranger named Jose standing in Rua Jacinto Candido. Jose does not notice that a bus is moments away from hitting him. Maria, standing next to Jose, notices the bus and quickly shoves Jose out of the way and onto the ground. Jose breaks his arm as a result of the fall. Normally, breaking a strangers arm could result in the crime of simple offence against physical integrity. But here, Maria's actions do not constitute a crime. These are pretty obvious examples. But you can imagine more difficult cases. For example, imagine a troubled man that is moments away from striking a stranger's young child. Is it justified for the child's parent, standing nearby and armed with a gun, to stop the attack by shooting him the stranger and depriving him of his life?

Exclusion of unlawfulness due to consent is straightforward. If Monrique asks Juliao to punch him in the stomach (maybe Monrique is training for a boxing match), Monrique cannot later file a complaint against Juliao. However, consent cannot be given for actions that offend social norms of decency; for example, it someone could not consent to being violently tortured.

Can you think of other examples of these exclusions?

Questions

1. a) Pedro decides he wants to kill Ana. He buys a gun and learns where Ana will be at a certain beach on Thursday, and he plans to shoot her at that beach on that day. Pedro takes his gun to the beach on Thursday. What crime, if any, has Pedro committed at this point? Can he be punished for any crime?
   b) Pedro sees Ana at the beach. He draws his gun and begins walking toward her. At the last minute, he trips and falls, firing the gun harmlessly into the sand. The police arrive and arrest him before he can fire another shot. What crime, if any, has Pedro committed at this point? Can he be punished for any crime?

2. João pays Maria and Juan to rob a bank. Maria tells Victor, an employee at the bank, that she intends to rob the bank and will give him some of the money they steal if he helps them. Victor gives Maria his key to the bank and the combination to open the vault. One night, Maria and Juan enter the bank using Victor's key and rob the vault. Which type of perpetrator is each person, and how can each be punished: a) João, b) Maria, c) Juan, and d) Victor?

Answers

1. a) Pedro has committed no crime at this point. He has engaged in preparatory acts for homicide, but those acts are not punishable.

   b) Pedro has committed attempted homicide. He can be punished for an attempt of this crime because homicide is a crime of intent punishable by up to twenty years in prison. Pedro initiated actions required to commit homicide, but failed to kill Ana due to circumstances beyond his control. Pedro's punishment will be extraordinarily mitigated compared to the punishment available for murder.

2. a) João is an instigator. He can be punished with the full penalty because the crime was actually committed.

   b) Maria is a principal. She can be punished with the full penalty.

   c) Juan is a principal. He can be punished with the full penalty.

   d) Victor is an accomplice because he intended to materially aid Maria and Juan in committing the crime. His penalty will be extraordinarily mitigated.

3. Summary

The Penal Code typically provides for punishment by payment of a fine or by a prison sentence or both. However, several other types of penalties are available to judges. These include community service, admonishment, suspension or revocation of the privilege to hold public office, deportation, and prohibition from driving or carrying a weapon. The goal of a penalty is to protect society and re-socialize the offender. As a result, non-liberty-depriving crimes are always preferable to prison sentences, if appropriate given the circumstances.

When deciding the severity of a sentence, a court must consider any circumstances that reflect either favorably (mitigating circumstances) or badly (aggravating circumstances) on the criminal or crime. The court must also consider the offender's criminal history. Taking these factors into account, the court should decide on the penalty necessary to protect society's interests and to reintegrate the perpetrator into society.

Liability for criminal actions can be quite complicated. The Penal Code recognizes several forms of crimes: preparatory acts, voluntary desistence, attempt, and remorse. Preparatory acts are not punishable. If a criminal prepares to commit a crime but voluntarily changes mind before carrying it out, he may not be punished. A criminal attempts a crime if he initiates its execution but fails to succeed due to events beyond his control. Attempts may be punishable by an extraordinarily mitigated penalty if the crime is a crime of intent punishable by more than three years.

When multiple people are involved in the same crime, they may each have different levels of culpability. Principals are person who commit the criminal act directly or through a third party that acts as their instrument. An instigator is a person who directly and maliciously instigates another person to commit the crime, and may be punished if the crime is actually committed or initiated. An accomplice is someone who intentionally helps another person commit a crime, and may be punished with an extraordinarily mitigated penalty.

Some circumstances may preclude the law form holding someone criminally liable for actions that would otherwise constitute a crime. A primary example is legitimate defense: when a crime is committed because it is necessary to repel an attack against the perpetrator or a third party. Other examples include state justifying need, conflict of duties, and consent.

As you can see, determining whether someone is guilty of a crime, and to what degree they should be punished, involves a variety of circumstances and factors. This process is far from

an exact science, as it involves so many human factors; it requires much thoughtfulness on behalf of judges and lawyers.

III. SPECIFIC CRIMES

SECTION OBJECTIVES

- To discuss the major categories of crimes in Timor-Leste.
- To identify and explain some of the most common and egregious specific crimes.
- To discuss some of the aggravating factors of the specific crimes.

Now that we have covered the fundamental concepts of Book I of the Penal Code, we turn to Book II, which covers specific crimes in Timor-Leste. However, before we move on, it is important to remember that the principles discussed from Book I (for example, the necessary components of a criminal action, exclusions, and punishment) are applicable to each of the specific crimes discussed in Book II. It is because of the general applicability of Book I to each specific crime that we discussed it first. The student and practitioner of criminal law must first understand these common principles before attempting to gain an understanding of the specific crimes. An understanding of the common principles is necessary to accurately apply the specific crimes discussed in Book II of the Penal Code to real life facts.

The Penal Code divides the specific crimes into eight different categories known as Titles. Each title is framed as "Crimes against [X]," for example, "Crimes against life" or "Crimes against assets." Since we cannot possibly cover all the specific crimes of Book II in this introductory book, we'll briefly introduce each title, but discuss only those specific crimes that you are either most likely to encounter in practice, are particularly egregious, or those that present interesting issues of statutory construction.

1. Title I: Crimes Against Peace and Humanity

Given the circumstances of Timor-Leste's long struggle for independence, it is without much surprise that the Penal Code's Book on specific crimes begins with "Crimes Against Peace and Humanity." The crimes detailed in this Title represent some of the most egregious in all of the Penal Code. Therefore, nearly all are punished with some of the highest terms of imprisonment in the Timorese Penal Code.

Of these heinous crimes, arguably the worst are genocide and crimes against humanity (Article 123 and 124). Genocide is the systematic destruction or abuse of a group of people based on a common association of those people; for example, race or religion. The most obvious form of genocide is widespread killing of the targeted group. However, the use of "destroy" in the Code (see below) is not limited to death. It also includes widespread imprisonment, depravation of property, and other serious crimes such as forced sterilization. In short, it is the widespread targeting of a group that defines genocide, not necessarily any particular action towards those people. Crimes against humanity are similar to genocide in that they are widespread, but they are not necessarily directed at a group. Rather, crimes against humanity are directed at the civilian population in general. Both genocide and crimes against humanity are punishable with the high prison sentences of 15-30 years.

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…[the Code goes on to list 10 different actions that would constitute genocidal activity].

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…[the Code goes on to list 10 different actions that would constitute a crime against humanity].

The other crimes in Title I include "War Crimes" and "Crimes against peace and freedom." War crimes are a broad and detailed area of international law, and are capable of being the subject of an entire class. For our purposes, think of war crimes as severe criminal activity committed during the course of war that offend international norms of human dignity. Crimes against peace and freedom are more accurately defined as terrorist activity or actions supporting terrorist activity.

2. Title II - IV: Crimes Against Persons

Whereas Title I discussed widespread crimes, Title I addresses those actions that constitute physical or psychological crimes against an individual person. If you choose to be a judge or a criminal prosecutor or defender, you will unfortunately be confronted with the crimes discussed in this title. Conceptually, this Title can be separated into the broad crimes of killing, non-sexual crimes against a person's physical integrity (known in many countries as battery), crimes against liberty, and sex crimes.

Killing

Homicide is the taking of another person's life and is punishable with 8 to 20 years imprisonment (Article 138). Remember, to commit homicide, one needs to both actually go through and succeed in the act of killing another, and have intended to do so. Homicide becomes aggravated homicide if the criminal commits the act under circumstances that are particularly reprehensible, or blameworthy. These circumstances include the following:

Circumstances	Examples
Means used to kill	Poisoning, torture, using explosives, causing extreme suffering, premeditation of the act
The type victim	A family member of the criminal, a public servant, a witness in an ongoing criminal investigation
The motivation of the criminal	Motivated by racial, religious or political hatred; by greed; by pleasure in killing; by a desire to cover up another crime

If any one of these circumstances is found, the judge is more likely to give a more severe punishment than if someone simply killed another out of rage and using means that were not extreme.

Manslaughter is the taking of another's life under the circumstances of negligence (Article 140). Whereas homicide requires intent to kill, manslaughter does not. Instead, a person is guilty of manslaughter if the individual chose actions so irresponsible that they created a deadly situation. For example, imagine that the captain of the Nakroma Ferry became so intoxicated while piloting the ship that he fell asleep and the boat crashed into shore. If the crash

resulted in death, the pilot could be considered guilty of manslaughter. However, since manslaughter is a less culpable form or killing it has a much lower term of imprisonment.

Penal Code of the Democratic Republic of Timor-Leste

Article 140: Manslaughter

1. Any person who, by negligence, kills another person in 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.

The other forms of killing discussed in the Penal Code include abortion, infanticide, abandonment or exposure (placing and leaving someone in a situation where they are likely to be seriously injured or die), and inciting or aiding suicide.

Crimes Against Physical Integrity

Far more common than acts that kill are acts that cause physical damage to another person's body or mind but do not result in death. These can range from the severe (for example, depriving someone of an important organ or limb (Article 146a)) to a minor offence, such as slapping another person (Article 145) or participating in a fight or group altercation (Article 151 and Article 152).

One of the more common crimes under this Title is Article 145, Simple offences against physical integrity. This is a kind of catch all article that covers most minor crimes against another's body or mind. Imagine someone punches another person, throws and strikes another person with an object, or gives another person a minor cut with a sharp object. All of these would arguably fall under Article 145:

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.

This Title also covers what are commonly referred to as crimes of domestic abuse and child abuse. Article 154, "Mistreatment of a spouse" makes it a crime to mistreat one's spouse or a girlfriend/boyfriend that is cohabiting with the perpetrator. This prohibition includes both acts of physical aggression and acts that cause mental or cruel mistreatment. Article 155, "Mistreatment of a minor" includes similar provision for people under the age of 17, as well as additional provisions that prohibit subjecting minors to hazardous working conditions, to any form of slavery, or distributing pornography or narcotics to a minor. Each of the offences described in Article 155 are aggravated if the minor is the perpetrator's relative.

Crimes Against Liberty

Crimes against liberty are those that deprive the victim of his or her human and constitutional right to live freely within the confines of the law. These crimes can, but do not need to, include acts that physically harm the victim. Instead, it is sufficient for the perpetrator to use threats of violence or other harm against the victim. Let's look at a short list of crimes against liberty to better understand this type of crime.

Crime	Description
Threats (Article 157)	Any threat of a crime that causes fear or unrest or otherwise limits a person's freedom of decision-making.
Coercions (Article 158)	Any use or threat of violence used in order to compel another to commit an act or activity.
Human trafficking (Article 163)	Any action that supports the transfer, enslavement, or forced servitude of others through use of threat, force or other forms of coercion. This crime is especially aggravated if the victim is a minor.
Enslavement (Article 162)	Any action that places a fellow human being in a situation of enslavement.
Freedom of assembly	Any actions that interferes with a lawfully authorized gathering or

(Article 170)	demonstration.

Most of these crimes have corresponding articles on specific, aggravating circumstances. Remember, it is important to consult these provisions, especially during sentencing.

Sex Crimes

The final area we cover here is that of sex crimes (Articles 171 – 182). These crimes are divided into three types: direct sexual coercion, sexual exploitation, and sexual abuse. Direct sexual coercion is the act of forcing another person, against their will, to engage in a sexual act. These acts could range from inappropriate sexual touching (Article 171) to rape (Article 172). It is important to note that act of rape includes not only anal or vaginal penetration, but also acts of oral coitus.

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 place the same in a condition where resistance is impossible, is punishable with 2 to 8 years imprisonment.

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.

Sexual exploitation covers prostitution and child pornography, both of which are expressly prohibited in Timor-Leste. Sexual abuse is concerned primarily with sex crimes against minors (Article 177), adolescents (Article 178), or persons incapable of resistance (for example, those with mental handicaps)*Article 179). Each of the punishments associated with sex crimes is increased by one third if victim is less than 12 years old, the perpetrator transmits aids to the victim, the victim later attempts or commits suicide, or the victim is related to perpetrator or otherwise dependent on the perpetrator.

3. Title III: Crimes Against Democratic Practice

Very broadly, crimes against democratic practice are those that interfere with or cause undue dangers to the normal peace and function of a democratic society. They include the prohibition of acts that interfere with elections (Articles 229 – 242); actions that harm the environment (Articles 215 – 221); and organized criminal activity (Articles 188 – 195).

However, the crimes described in this Title are quite varied. In short, Title III might more accurately be described as a collection of crimes that did not fit neatly into any other Title. For example, Title III includes crimes as different as high treason (Article 196) and driving under the influence of alcohol (Article 208). Therefore, it may be more useful to quickly identify the various chapters of this Title, as each chapter does have a narrower theme than the Title itself.

Chapter	Description
Chapter I: Crimes against public peace	Articles 188 – 189 prohibit those actions that represent organized crime or actions that otherwise threaten to cause disruptions to the general peace. Some of the actions they prohibit include participating in a riot, hindering political rights, and the usurpation of public office.
Chapter II: Crimes against State security	Articles 196 – 206 prohibit those actions that pose a threat to the internal and external security of Timor-Leste. Some of the actions they prohibit include high treason, inciting civil war, diplomatic disloyalty, breach of State secrets, and assassination of public servants.
Chapter III: Crimes against social life	Articles 207 – 228 prohibit those actions that create a general danger to citizens. Some of the actions they prohibit include driving under the influence, owning illegal weapons, polluting or otherwise illegally disturbing the environment, and interfering with worship.
Chapter IV: Electoral Crimes	Articles 229 – 242 prohibit those actions that interfere with the electoral process. Some of the actions they prohibit include registration and voter fraud, obstructing a candidacy, and disrupting an election or the freedom of choice in voting.
Chapter V: Crimes against public authority	Articles 243 – 250 prohibit those actions that obstruct the duties of public authorities or disobey legal orders. Some of the actions they prohibit include general disobedience of a lawful order, the escape of prison or

	aiding in escape, prison riots, and damaging State-owned assets.

Given the limited scope of this introductory chapter, it is not possible for us to delve further into the specifics of the varied crimes of Title III. However, the Title, and the entirety of the Penal Code, is less than 100 pages, and incredibly useful in understanding the scope and content of criminal law in Timor-Leste. We encourage you to read it in its entirety.

4. Title IV: Crimes Against Assets

Arguably some of the most common crimes in Timor-Leste fall under Title IV. Any time a criminal steals, damages, or otherwise deprives another of their rightful assets, that individual is likely to be prosecuted under Title IV, "Crimes against assets."

The Title begins with the crime of larceny:

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.

The larceny article represents a broad crime applicable any time one unlawfully takes the moveable property of another with the intent to keep it or give it to another. It does not matter if the property is food, a bicycle, or a cow. Each is eligible for prosecution under Article 251. However, recall that the perpetrator must have the intent to steal, and the owner of the property must file a complaint. That said, a complaint is not necessary for aggravated larceny, which occurs when one of the circumstances identified in Article 252.1 is present (for example, if the perpetrator breaks into the victim's home to commit the larceny).

If, during the act of larceny, the perpetrator appropriates the property of another through the use or threat of violence, he or she can prosecuted for robbery (Article 253). Similarly, if the perpetrator is caught during the act and resorts to violence, he or she can be prosecuted for "Violence during commission of larceny" (Article 254). The Code also includes special

provisions for the theft of an automobile, the use of arson, and damaging the property of another. Again, remember, several of these provisions may be mitigated if the perpetrator demonstrates acts of repentance and returns the property.

Less obvious forms of crimes against assets include fraud and mismanagement. Whereas larceny can be proven, in part, by catching the perpetrator in the act or with the stolen property, fraud and mismanagement require exposing acts of the mind. Fraud occurs when the perpetrator intends to unlawfully gain through the use of deceit. For example, imagine a wealthy builder is building a shopping center in Baucao. The builder leases shopping space to a variety of merchants, promising certain building standards, such as structural integrity. However, only a few months after the center's grand opening a storm hits Baucao destroying much of the building. The storm reveals that the builder intentionally used lower quality building materials than he promised. He could be prosecuted for fraud.

Mismanagement of assets can occur intentionally or negligently. In either case, the perpetrator has been entrusted to manage the assets of another and takes action that results in serious loss or damage to the assets.

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.

Article 274: Intentional mismanagement

1. Any person who is in charge of disposing of or managing interests, service or assets of another party, even though partner of the company or corporate entity that owns said assets, interests or services, and does intentionally violate rules of control and management or act in serious breach of the duties inherent to his or her office.

5. Titles V-VIII

The final titles cover Obstruction of Justice, Crimes Committed in the Performance of Public Functions, Forgery, and Crimes Against the Economy. Given the limited scope of this chapter, we will review these titles briefly and together.

Obstruction of justice is the act of interfering with the administration of the justice system. This crime can occur during any part of a criminal investigation, trial, judgment, or execution of a judgment. Examples include: perjury, or lying while under oath (Article 278); bearing false witness, or providing false information in one's capacity as a witness (Article 279); and bribery (Article 281. This Title also includes one of the rare examples of a crime of omission: failure to report a public crime (Article 286).

Crimes committed in the performance of public functions concern those actions taken by government officials or their agents that abuse the official's power. An example might include a national legislator taking an illegal cash payment to act or not act in a certain way. Another example may be an official stealing money from the government; this is known as embezzlement (Article 295). The Code prohibits both the general abuse of power (Article 297), and specific abuses of power, such as unlawful involvement in business (Article 299) or the unnecessary or excessive use of public force (Article 298). These prohibitions are intended to protect citizens from any improper use of the official's position of privilege and power. The title defines official as follows:

Penal Code of the Democratic Republic of Timor-Leste

Article 302: Concept of official

1.For the purpose of the criminal law, an official shall be considered as any of the following:

a) Civil servant;

b) Administrative officer;

c) Member of the armed and law enforcement forces;

d) [Anyone]…called to perform…an activity within civil administrative or court service or …agency of public utility.

e) A foreign public servant…in a foreign country…

f) Employee of a public international organization to whom said organization has authorized to act on its behalf.

This Article, especially subsection D, makes Title VI applicable to nearly all public servants in Timor-Leste, even if the public servant is employed "provisionally or temporarily, with or without remuneration, [or] voluntarily or compulsory." (Article 302d). For example, imagine the National Government is hosting a national parade and festival on Easter Sunday. The National Government creates a temporary committee to organize and administer the festival. The day of the event, one of the volunteers begins demanding entrance fees to the festival, even though he knows the festival is free. Even here, where the 'official' is an unpaid, temporary volunteer, he is still using his official power to gain an unlawful payment, and could be violating Article 297, Abuse of power.

Titles VII and VIII address illegal forgery and counterfeit respectively. Forgery is simply the illegal use of documents or technical reports with the "intent to cause loss to another person or the State, or to seek unlawful benefit for him or herself or another person." (Article 303). An example might include falsely signing a document as another person. Counterfeit usually concerns the illegal and unauthorized reproduction of public currency. However, it can also include the illegal and unauthorized reproduction of official seals, stamps, marks or watermarks (Article 310).

The final title of the Penal Code addresses crimes against the economy, and is concerned primarily with money laundering, tax fraud, and the illegal entry or exit of goods to or from Timor-Leste. Money laundering is the act of converting assets or products (most typically, cash) produced from illegal activity into other assets or products to disguise the illegal origin of the original assets or products. (Article 313). Tax fraud is any action intended to evade lawfully owed taxes. (Article 314). And the illegal movement of goods in or out of Timor-Leste occurs whenever goods or merchandise are not appropriately passed through customs.

Questions

1. Genocide and crimes against humanity are both detailed in the Penal Code's Title I of Book II. They represent two of the most heinous crimes in the Penal Code. What is the principle similarity between these two crimes, and what is the important distinction between them?

2. Suppose Antonio intends to steal jewelry from Odete, his elderly aunt. But, given Odete's age, she rarely leaves her home. Therefore, one evening while visiting Odete, Antonio places poison in her milk, but only enough to make her unconscious for several hours. Antonio returns late the same night, and with Odete clearly unconscious, successfully steals her most

valuable jewelry. The next day, Antonio discovers that the poison killed Odete. Out of guilt and remorse, Antonio returns the jewelry to the home, but does not turn himself into the police. Eventually, the police trace the poison back to Antonio and arrest him. Once on trial, Antonio lies about ever stealing the jewelry, but eventually all facts come forward. Look at the Penal Code and review this chapter; what crimes might Antonio be prosecuted for?

3. Imagine a group of 5 young men intentionally corner a young woman in an isolated and small alley late at night. One of the young men, with the four other standing immediately behind him, says nothing, but grabs the young woman and proceeds to have sex with her. During the course of this tragic event, the young woman does not physically resist, but does say, "Please don't do this!" What crimes have the young men committed?

4. Think back to the attempted assassination of then President José Ramos-Horta on the 11th of February 2008. List the crimes the rebels might be convicted of under the current Penal Code.

Answers

1. Genocide and crimes against humanity are similar in that they both involve widespread or systematic efforts to harm a group of people. The important distinction between the two is that genocide targets a group based on the groups common association as a national, ethnic, racial or religious group; whereas, crimes against humanity require only that the harm be targeted at a civilian population, regardless of any other association.

2. Clearly Antonio has committed a number of crimes, but exactly which is not immediately clear. The first question is whether or not Antonio is guilty of homicide, aggravated homicide, or manslaughter. This depends on whether or not Antonio acted with intent to kill. He did not try to kill Odete, he only wanted make her unconscious. However, Article 15, Definition of intent, states that intent is still present if the perpetrator's actions can possibly lead to the crime (here, homicide), and the perpetrator appreciates this possibility. Therefore, the State could argue that giving any amount of poison to an elderly person could possibly kill them, and Antonio had to know this. If the State establishes intent, they could probably establish aggravated homicide because 1) Antonio used poison; 2) the killing resulted from greed (Antonio wanted her jewelry); 3) Antonio committed the act with forethought (he visited her earlier to place the poison in her milk); and 4) Odete is a second-degree relative (his aunt). If the state cannot establish intent, they can arguably at least establish gross negligence, making Antonio guilty of Manslaughter. But Antonio's troubles don't end there. He has also likely committed aggravated robbery. Remember, robbery is similar to larceny, but in robbery the property is obtained through violence. Poisoning someone is an act of violence. The act is aggravated because Antonio committed the act 1) late at night to more easily conceal his actions; 2) by entering someone's home; and the jewelry, if expensive, could exceed $1,000 USD. That said, since Antonio returned the jewelry the very next day, his sentence is likely to be extremely mitigated. Finally, Antonio lied during the trial, therefore committing perjury.

3. The young man who committed the egregious act is likely to be convicted of rape. Rape does not require that the woman physically resist, or that the perpetrator make verbal demands or additional threats of violence. It is enough for a perpetrator to be guilty of rape if her or she places the victim "in a condition where resistance is impossible." Here, the young woman finds herself against 5 men, and could reasonably infer that resistance is impossible and might cause more harm.

4. To begin, this is rather long list, and each requires the proving of all elements of a crime discussed in Book I of the Penal Code. That said, possible crimes include: attempted aggravated homicide, incitement to war, criminal association, high treason, providing services to or collaboration with hostile armed forces, attempt against the highest representative of an organ of national sovereignty, and more.

6. Summary

Whereas Book I of the Penal Code lays out the various concepts that define criminal law in Timor-Leste, Book II sets forth the actual and specific crimes. Each crime is defined, and a range of penalties is provided. In addition, some crimes identify specific aggravating circumstances, and state whether the crime qualifies as a semi-public offence. Regardless the crime, those concepts identified in the first part of this chapter, from issues of intent and exclusion to punishment, apply to each and every specific crime.

Book II is divided into eight different titles based on the similarities of the crimes discussed in a given title. Title I discusses some of the Timor's most heinous crimes, such as genocide and crimes against humanity. These crimes are defined by large, widespread, and systematic harm to a group of people. Title II describes crimes against persons. This title details actions that result in death, serious physical injury, the loss of liberty, or invasions of a person's right to be free from sexual assault. Together, these two titles can be described as crimes that cause physical and mental damage to the health of people.

Title III addresses a large collection of somewhat disparate, or dissimilar crimes. However, these crimes are unified by a common desire to prohibit actions that damage the expectation of a free, democratic people to live in peace and free from undue harm. Think of Title IV, Crimes against assets, are all those actions that cause harm to things. Obstruction of justice, or interference in the lawful operation of the criminal justice system, is discussed in Title V. Prohibitions against public officials from abuse their power can be found in Title VI. And the

final two titles discuss prohibitions against forgery, counterfeiting, money laundering, tax fraud, and illegal import/export.

IV. REVIEW

SECTION OBJECTIVES

- To review the general concepts and principles of criminal law.
- To review the elements of a crime and important punishment considerations.
- To review the forms of crimes and exclusion.
- To review the types of perpetrators.
- To review the layout of specific crimes in the Penal Code.

Criminal law in Timor-Leste is founded on the principles of legality, culpability and humanity. Legality protects citizens from arbitrary and unfair punishment by requiring that the government prosecute people only if their actions offend a current law. Retroactive punishment is forbidden. Culpability demands that where there is no guilt there cannot be punishment. And humanity directs the government to use the justice system to ultimately rehabilitate the offender, and not to use the system for retribution and revenge.

All crimes require both and an objective element and a mental element. The objective requirement states that a crime cannot occur without an action. Therefore, merely thinking about committing a crime is not sufficient. But remember, "action" for some crimes can include the act of omission and attempt. The mental requirement demands that the perpetrator actually intend to commit the crime. Accidents are not crimes, unless, in some cases, they result from criminal negligence.

Once criminal activity is proven, punishment is determined. To do this, one must consider all circumstances of the crime. Mitigating factors are those circumstances that reduce the perpetrators culpability; whereas aggravating factors are those circumstances that increase the perpetrators culpability. After considering all circumstances, a sentence is determined within the range provided for in the Penal Code.

Crimes take several forms in Timor-Leste. The most obvious is commission, or actually committing the crime. Such action is always punishable, unless the circumstances present an exclusion. The most obvious exclusion is that of self-defense. But other exclusions include state

of justifying need, conflict of duties, and consent. Attempt, in certain crimes, is also punishable. However, preparatory acts and voluntary desistance are not punishable.

Punishment also depends, in part, on the perpetrator's degree of participation in the criminal activity. Principals and coprincipals, or those that actually commit the crime, are punishable to the full extent of the law. Similarly, instigators, or those that directly and maliciously cause another person to commit a crime, are punishable to the full extent of the law. It is only accomplices, or those that materially or morally aid in the commission, that can receive a mitigated punishment.

The specific crimes in Timor-Leste are laid out in Book II of the Penal Code. All of the concepts and principals discussed in Book I of the Penal Code are applicable to the crimes identified in Book II. For each specific crime, a definition and range of penalties are provided. Conceptually, these crimes are divided into crimes against people, crimes against a free society, crimes against things, crimes against justice, official abuses, and economic crimes.

Again, we encourage you to read the Penal Code in its entirety. It is not a long document, but can provide a lawyer or law student a greater understanding and appreciation of criminal law in Timor-Leste.

GLOSSARY OF SELECTED TERMS

Accomplice: A person who, with intent, materially or morally aids another person to commit a crime.

Attempt: A person attempts a crime when he decides to commit that crime and initiates of some or all of the actions objectively required to achieve his result, but fails to cause the result due to actions beyond his control.

Culpability: The idea that there can be no penalty without guilt.

Instigator: A person who directly and maliciously instigates another person to commit a crime.

Intent: A mental state defined in Article 15 of the Penal Code. A person acts with intent if his actions are deliberate and calculated to achieve the result that they do in fact achieve. The Penal Code also considers someone to act with intent if he does an action knowing that the result is a necessary consequence of that action.

Knowledge: Awareness. A mental state requirement of some crimes defined in the Penal Code. These crimes can only be committed if the perpetrator is aware of certain information.

Legality: The idea that the government may only punish as crimes those acts or omissions described in the Penal Code.

Negligence: A mental state defined in Article 16 of the Penal Code. A person acts with negligence if he fails to proceed with caution that is required under the circumstances.

Public crime: A crime whose prosecution is not dependent on the filing of a complaint.

Preparatory Acts: Actions taken to plan or prepare for the commission of a crime.

Principal: A person who commits a crime, either directly or through a third party.

Purpose: A mental state required by some crimes in the Penal Code. Purpose involves acting with the desire for a certain outcome to occur, even if that outcome ultimate does not transpire.

Recklessness: A mental state not defined in the penal code, recklessness refers to an action taken despite the actor's awareness that certain consequences might occur.

Semi-public crime: A crime whose prosecution is dependent on the filing of a complaint.