



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN BA SISTEMA JUDICIAL

JSMP REPORT
DRAFT LAW 29/I/ 3A
FREEDOM OF ASSEMBLY AND DEMONSTRATION

Dili, Timor Leste
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The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, East Timor. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in East Timor. For further information see www.jsmp.minihub.org

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*Judicial System Monitoring Programme
Rua Setubal, Kolmera, Dili – East Timor
Postal address: PO Box 275, Dili, East Timor
Tel/Fax: (670) 390 3323 883
Mobile: +670 7233725
Email: info@jsmp.minihub.org*

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1. Executive Summary

JSMP believes that if parliament wishes to pass a law regulating freedom of assembly and demonstrations, draft law 29/I/3A “Bill on Freedom of Assembly and Administration” should not be passed without significant amendments. In JSMP’s opinion this draft law is very restrictive, to the point that it will be very difficult to hold demonstrations in East Timor in an effective manner if this law is passed. JSMP believes that such restrictions are at the very least against the spirit of the Constitution which protects the right to freedom of assembly and demonstration.

The right to assemble and demonstrate is a right governed in the Constitution of East Timor. Article 42 gives every person the freedom to assemble peacefully and unarmed, without the need for prior authorization and in accordance with the law. The Constitution of East Timor restricts other guarantees provided in the Constitution in Article 24 by governing that rights can be restricted if they violate other constitutionally protected rights.

Generally speaking the majority of human rights are not considered to be absolute rights. The relationship between these rights and their interdependency often gives rise to conflict when guarantees are implemented for separate human rights. In such circumstances, there needs to be a balance amongst the interrelated rights to identify the scope of any restrictions.

However, JSMP believes that this draft law contains articles that may possibly violate the right to assemble and demonstrate which is not in accordance with the Constitution of Timor Leste. Article 5 in this law places restrictions on assemblies and demonstration in terms of distance from other locations, in practice the circumstances imposed may result in demonstrations not being able to be held in most parts of Dili. This same article also contains restrictions on the location and purpose of demonstrations which may prevent people from conducting effective demonstrations.

This draft law does not contain adequate guarantees on police activities in regards to performing their duties properly and only using force in a proportional manner. According to this draft law, even if a demonstration is peaceful, but it is conducted outside of working hours then the police are permitted to interrupt it. There is no definition of interruption that can occur and it may result in the situation that the police can engage in acts that violate the human rights of the demonstrators. For instance, if the demonstrators do not follow the restrictions set out in Article 5 or 6, and proceed to conduct a demonstration within a distance of 500 meters from the airport, although engaging in a peaceful demonstration; the police may use force to stop that demonstration. JSMP believes that an inclusion must be made to regulate the actions of police in accordance with the international standards for law enforcement officers - “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials”.¹ These principles are referred to in greater detail in the discussion contained in Section 7. In general these principles require the police to limit their force to the minimum extent necessary– for example to avoid the use of firearms in all circumstances unless their life or the life of another person is threatened.²

¹ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

² Refer to Principles 9, 13 and 14, “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials”.

According to Article 15 of this draft law a crime is committed if any person interferes in a demonstration or joins in a demonstration in violation of the rules set out in this law, and the perpetrators will be punished pursuant to articles in the Indonesian Penal Code. However these articles in the Penal Code refers to different acts than those in this draft law. JSMP believes that Articles 15.1 and 15.2 could be used to oppress the community and therefore should be removed.

JSMP notes that this draft law is significantly more restrictive than the equivalent Portuguese law, decree law 406/74 of 29 August 1974, on which it is based. The East Timorese law is far more restrictive than the Portuguese decree law in relation to the times demonstrations can be held, the purposes for which they can be held, where they can be held and what distances they have to be from certain places (for example the Portuguese law only places a restriction of 100 meters - as opposed to 500 meters in the draft East Timor law - on the distance between the demonstration and specified places).

JSMP has prepared this report in a very short period of time for the benefit of the parliament who will consider the aforementioned draft law. JSMP has only provided analysis on those articles which most need amending. JSMP feels that this law is not necessary for Timor Leste because other laws can be used to regulate issues relating to demonstrations. However, if the government wishes to pass this law, JSMP believes it would be advisable for the government to consider amending the articles discussed below.

2. Recommendations

JSMP recommends the following:

Recommendation 1 - On Article 5

Articles 5.1 and 5.2

JSMP believes that the prohibition on holding assemblies and demonstrations in public places that are situated less than 500 meters away from specific locations is too severe. JSMP realizes that it is very difficult to determine a proportional limit on distance, but **demonstrations conducted outside the perimeters of government institutions and other determined places** could be considered to be at a distance which is proportional to guaranteeing the balance between order, peace and quiet and the right to assembly and expression.

JSMP notes that if this article is not changed it will effectively mean that demonstrations will not be permitted in most areas in Dili as described on the diagram included in the report on page 9.

Article 5.3

JSMP believes that this article should be amended to only prohibit acts committed during demonstrations that infringe upon the privacy of government officials or other public bodies.

Recommendation 2 - On Article 6

JSMP proposes that this article should incorporate the following sub-article;

Sub-article 6.1

“Demonstrations may be permitted outside of the prescribed times in the event that there are particular circumstances which require activities outside the usual hours, conditional on the provision of a verbal notification at police headquarters”.

Recommendation 3 - On Article 7

JSMP proposes that this article should incorporate the following subsection:

Sub-article 7.2

“Police must avoid the use of force unless this is absolutely necessary, and when there are no other practicable means of dispersal and to the minimum extent necessary. This is so even if the demonstration is in violation of the law. If the assembly becomes violent police shall avoid the use of firearms if less dangerous means of dispersal are available, and unless the use of such arms is in accordance with the requirements provided for in Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: that is, police shall only consider the use of firearms in self-defence or defence of others against threats to life or serious injury. The actions of the police in both determining *whether* to disperse a demonstration, and in the *manner* of that actual dispersal, must be proportional to the extent of illegality in the demonstrators actions.”

Recommendation 4 – On Article 15

These penalties are too severe because they can undermine the right of an individual to participate in a legitimate demonstration due to fear of punishment. In addition, the activities considered to be in violation of this law are extremely broad in nature. JSMP is concerned that this law may be used to oppress the community of Timor Leste. Therefore JSMP recommends that subsections 15.1 and 15.2 be removed.

3. Article 5: Restrictions

Article 5, Subsection (1)

It is prohibited to hold assemblies and demonstrations in public places that are situated less than 500 meters away from state organs, official residences of holders of posts in state organs, military buildings, prisons, diplomatic representations and headquarters of political parties.

There are two important matters that need to be discussed in relation to Article 5, Subsection (1), firstly the restriction of distance for holding assemblies and demonstrations, and secondly the locations which may constitute the targets of demonstrations.

JSMP believes that the distance specified in Article 5, Subsection (1) restricts too severely the right to assemble or demonstrate. The restriction on distance between the many specified locations and the demonstrators is not reasonable or proportional. This distance will not enable the community to express their aspirations to the public institutions which may be considered as targets/recipients of the public message, notwithstanding accurate calculations, this law is intended to prohibit demonstrations. To illustrate the impact of Article 5, Subsection 1, the diagram on the page 9 describes how such a restriction on distance for demonstrations within the city of Dili could be applied.

Demonstrations are the realization of the freedom of assembly (and expression) as guaranteed in the Constitution of Timor Leste³ and international human rights instruments⁴. The Constitution only restricts the use of weapons in demonstrations or similar activities, without the need for authorization to conduct a demonstration. This law should reflect the constitution⁵, however JSMP believes that Article 5 of the (draft) law does not convey the spirit of the constitution, which in principle guarantees and respects the right of assembly and expression. JSMP does not understand the reason why a restriction on distance has been set out in this law. However, if such a restriction has been established due to considerations on the security and order of public places, then JSMP believes that the restriction on distance should not be intended to restrict the right to assemble or demonstrate as guaranteed in the Constitution. JSMP also understands that the right to assemble should not interfere with the freedom (right) of others to work etc, and therefore the proposed distance should be proportional, without any intention of restricting the right to assemble. JSMP realizes that it is very difficult to establish a proportional limit, but **demonstrations conducted outside the perimeter of government institutions** could be considered to be at a proportional distance that guarantees the balance between the consideration of order, peace and quiet and the right of assembly and expression.

³ Article 42 of the Constitution of Timor Leste, Subsection 1 states that “everyone is guaranteed the freedom to assemble peacefully and unarmed, without a need for prior authorisation” and subsection (2) states that “everyone is recognised the right to demonstrate in accordance with the law”.

⁴ For example, Article 19 of the ICCPR protects the right to freedom of expression whilst Article 21 protects the right of peaceful assembly.

⁵ Article 42, Subsection 2 of the Constitution “everyone is recognised the right to demonstrate in accordance with the law”.

Article 5, Subsection (2)

It is also prohibited to hold assemblies less than 500 meters away from ports, airports, telecommunication's buildings, power stations, water depots, fuel and other inflammable materials.

JSMP believes that perhaps the restriction on distance from specific locations set out in Article 5, Subsection (2) was intended to prevent the risk of fuel depots and other inflammable materials catching alight, which is perhaps an important consideration intended to avoid potential risks. Nevertheless, fuel depots and other inflammable materials appear to be abstract in nature and could give rise to multiple interpretations. A large number of fuel depots and stalls selling inflammable materials are spread though out Timor Leste. For example, this article could be applied to prohibit demonstrations in front of the Australian embassy because a large number of fuel stalls are located on the opposite side of the road.

On the other hand, several other locations may not pose the same level of risks that exists for fuel depots, and therefore the restriction on distance should be adjusted accordingly with the level of risk. JSMP believes that if the level/size of the risk/danger had been considered, then the same restriction on distance would not apply for all of the aforementioned locations. The size of the risk, together with other considerations and the determination of the restriction on distance should be categorized for each of the institutions/bodies. It is important that the restriction on distance in this article is determined proportionally and not merely intended to restrict the rights of individuals or the community wishing to assemble or express themselves in the institutions or locations that likewise should not be restricted from accepting the community's aspirations. For instance, the airport is a public place and demonstrations held there should not be prohibited. JSMP feels that the distance of 500 meters is not of correct proportion to allow the community to express their aspirations effectively.

Map of Dili- the circles indicate some of the areas in which demonstrations would be prohibited due to their distance of less than 500 meters from places designated in the draft law.

Article 5, Subsection 3

It is prohibited to hold a demonstration with the aim of challenging constitutional order, putting at risk democratically elected organs and institutions.

JSMP believes that this article contradicts democratic values which guarantee the right to freedom of assembly and expression as part of the means to challenge and control the performance of the government or other public institutions. The essence of this article is such as to include a prohibition on protesting for and requesting the dismissal of the cabinet who may have committed a great wrong (for instance corruption). This makes it very difficult for the community to control public bodies who are supposed to be accountable to the people, and for this reason JSMP believes that this article should be amended and the only acts committed during demonstrations that should be prohibited are those that infringe upon the privacy of government officials or other public bodies.

Article 5, Subsection (4)

Without prejudice of the right to criticize, it is prohibited to hold assemblies and demonstrations that intend to offend the honour and reputation of the Head of State and of those that hold positions in state organs.

Generally speaking JSMP is in support of this article as it in essence prohibits a person from personally attacking or defaming the good character of the Head of State, government officials or other government bodies. Nevertheless, the wording ‘offending the honor and reputation of the state and the head of state’ appears to be very vague and may give rise to multiple interpretations that may encourage interference from government agencies in demonstrations. For example, should a person who is demonstrating about suspected corruption in the presidential body be categorized as attacking the honor of the president because that particular body is headed by the president? JSMP believes that although it may be possible to demonstrate against actions taken by government agencies, it is also of concern that, at the very least, this law grants authority to law enforcement officers to intervene in such demonstrations based on an interpretation that these police or other agencies have been granted this authority pursuant to this law.

4. Article 6: Time Restrictions

Demonstrations may only be held between 8.00 and 18.30.

JSMP believes that the times specified which aim to restrict demonstrations to working hours are understandable because the authorities are trying to take into consideration the overall safety and security of the community. The aforementioned time restrictions are generally in accordance with normal circumstances. However, the 18.30 time restriction does not provide for circumstances where there may be a need for a demonstration outside these hours. This article has not made provision for specific issues and conditions that arise of an important or urgent nature and are encountered outside of the aforementioned times. This article therefore restricts the right of demonstration and the corresponding expression of opinion as an act that can only be performed at certain times. For example, if a person was arriving from overseas or a national parliament

session on policy formation was to be held at the unusual time of 7.30 pm, in these instances the demonstrators would not be able to express their aspirations and opinions at these events due to the aforementioned time restrictions.

According to this draft law, acts such as those committed recently by a number of people who were demonstrating past 6:30 pm at the Australian embassy about the Australian Governments' policy on the management of the JPDA, would be categorized as criminal, and the perpetrators would be facing a maximum of 6 years imprisonment.

In summary, JSMP is of the opinion that the right of freedom to demonstrate and through this the right to freedom of expression has been restricted greatly by the restriction on time. A restriction on time should not be so strict as to outlaw the act of demonstration which should be able to react to particular circumstances. It is also important that there is the ability for a demonstration to continue for the duration of the events that are being demonstrated against. For example, an important session of parliament may commence at 4pm and conclude at 8pm, and a demonstration in response to it should not have to stop at 6.30pm, but rather should be able to continue up until such time that the meeting of parliament is finished.

JSMP believes that this article should take into account other circumstances which are discussed above. In JSMP's opinion this article should appropriately include an exception in the time demonstrations can be held in the future. This article should not be limited strictly by the condition of time but rather state that demonstrations may be permitted outside of the prescribed times in the event that there are particular circumstances which require activities outside the usual hours, with the condition that a verbal notification is provided at police headquarters.

5. Article 7: Interruptions

Demonstrations or assemblies organized in public places, or that are open to the public, can be interrupted by decision of the police authority who should immediately communicate this to the competent civil authority, if the demonstrations/assemblies are diverted from their original objective through the practice of unlawful acts or if they violate the restrictions provided in Article 5 of this draft law.

In JSMP's opinion, this article allows the Police to stop demonstrations in certain circumstances. Based on JSMP's interpretation, the authority to split-up a demonstration under Article 7 is only granted when:

- That demonstration diverts from its original objective as manifested though unlawful acts;
or
- Violations of the restrictions provided in Article 5 occur.

As discussed previously, the right to assemble and freely express an opinion is protected by the Constitution and international law. Even so, restrictions on the right to assemble are permissible

under Article 24⁶ of the Constitution and the International Covenant on Civil and Political Rights (ICCPR). Consequently, restrictions on the right to assemble in the draft law must adhere to specific provisions which are set out in Article 24 of the Constitution and international instruments.

Basically, in order to analyze the application of international standards in the draft law, two main issues must be considered: firstly, are there grounds to justify interference by police in Article 7 (the demonstration diverts from its original objective, or violation of the restrictions provided by Article 5) which are reasonable and in accordance with international law; secondly, if the interference is acceptable under international law, then the interference must be reasonable, proportional and in accordance with standards of international law.

Grounds for Restricting the Right to Assemble under International Law

Pursuant to Article 21 ICCPR, “The right of peaceful assembly shall be recognized”. Nevertheless, this right can be restricted, but may be restricted only insofar that any such restrictions are imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others”.

Restrictions concerning Violations of the Law

The first restriction provided in Article 7 establishes that interference by Police is permissible if the demonstration diverts from its original objective, as stated by the wording *unlawful acts*. On the face of it, intervention in unlawful demonstrations is appropriate, reasonable and consistent with the restriction provided in Article 21. Ultimately however, whether or not that restriction is reasonable and in accordance with Article 21 depends on whether the law that the police claim has been violated by the demonstrators is also in accordance with international law. That is, this section would seem to authorize the dispersal of a demonstration for violation of a law even if that law is in violation of international standards. In that regard it is important to bear in mind section 9.3 of the Constitution which states that “All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.” Furthermore, even if the law of which the demonstration is in violation is consistent with international law it is important that any intervention by the police on the grounds of illegality is proportional. That is, for example, that a demonstration of great public significance not be dispersed for violation of a minor regulation.

Restrictions concerning Violations of Conditions

Whether the second ground for intervening in a demonstration is appropriate depends on the provisions of Article 5 – because the violation of conditions under Article 5 constitutes grounds

⁶ (1) “Restriction of rights, freedoms and guarantees can only be imposed by law in order to safeguard other constitutionally protected rights or interests and in cases clearly provided for by the Constitution.

(2) Laws restricting rights, freedoms and guarantees have necessarily a general and abstract nature and may not reduce the extent and scope of the essential contents of constitutional provisions and shall not have a retroactive effect.”

for intervention by the police. As discussed previously, there are many serious issues relating to the restrictions placed on demonstrations which are provided in Article 5. For the reasons outlined in the section related to Article 5 (pages 7-10), those restrictions are outside the scope of the restrictions permitted in the ICCPR and in practice constitute a violation of the right to assemble and to freely express an opinion. Consequently, if the proposal for Article 5 is adopted, then violations of the restrictions provided for by the aforementioned article will justify the dispersal of the demonstration by way of the police in violation of Article 21 ICCPR.

The manner of restricting the right to assembly under international law

Even if the *grounds* for intervening in an assembly are reasonable, the *manner* used must be reasonable and in accordance with standards of international law. Namely, that police actions must be restricted – their authority is not absolute. There are international standards on the use of arms by police during demonstrations – namely the Basic Principles of the Use of Force and Firearms by Law Enforcement Officials. Article 13 prohibits the use of force by law enforcement officials in the dispersal of assemblies that are unlawful but non-violent. Force can only be used if absolutely necessary, in which case they can only use force to the *minimum extent* necessary.⁷ According to Article 14 law enforcement officials may use firearms in the dispersal of violent assemblies, however such use is only permissible when less dangerous means are not practicable and only to the *minimum extent* necessary⁸. If the use of firearms is appropriate, that use may only be in accordance with the conditions provided for under Article 9.⁹

6. Article 15: Other Crimes

Articles 15.1 and 15.2

1. *Whoever interferes in an assembly or demonstration preventing or trying to prevent it from taking place, commits a crime of disobedience (article 160 of the Penal Code).*
2. *Everyone who assembles or demonstrates in violation with the provisions of the present law, also commit a crime of disobedience (article 160 of the Penal Code).*

JSMP believes that this article is not legitimate from a legal perspective and is of detriment to the community as it can be used to oppress them.

⁷ Principle 13, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials “In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

⁸ Principle 14, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, “In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases except under the conditions stipulated in principle 9”

⁹ Principle 9, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

In this law it is specified that whoever prevents (or attempts to prevent) a demonstration from taking place commits a crime of disobedience pursuant to Article 160 of the Indonesian Penal Code;¹⁰ and whoever assembles or demonstrates in violation of this present law also commits a crime of disobedience pursuant to Article 160 of the Indonesian Penal Code.¹¹

Article 160 of the Indonesian Penal Code states that: “any person who orally or in writing incites (namely encourages or urges) in public others to commit a punishable act, a violent action against the public authority or any other disobedience, either to a statutory provision or to an official order issued under a statutory provision, shall be punished by a maximum imprisonment of six years or a fine of 4.500 Rupiah.”

In JSMP’s opinion, it is important to understand that Article 160 relates to ‘inciting’ illegal activity and not avoiding, or preventing, or participating in a demonstration or assembly. JSMP believes that the intention of Article 160 of the Indonesian Penal Code is to punish a person for ordering or inciting others to participate in a demonstration, and the aim of the demonstration protest violently or protest against existing laws. In practice, the activities which constitute the above crime under the Indonesian Penal Code are related to limited activities and limited people involved in those activities.

In comparison with Article 160 of the Indonesian Penal Code, pursuant to Article 15.1 and 15.2 of the draft law, a person can be punished for a broad range of activities; such as participating in demonstrations that have a legitimate objective or participating in peaceful demonstrations which are in violation of this law.

In JSMP’s opinion Articles 15.1 and 15.2 are not legitimate as they are not in accordance with the aforementioned Indonesian Penal Code, for the reasons mentioned above. JSMP is aware that this law, as a law of Timor Leste, has more authority than the Indonesian Penal Code, however this article incorporates the Indonesian Penal Code and for that reason this article is legally questionable.

JSMP believes that Article 15 is unjust. For example, a person participating in a peaceful demonstration who does not have knowledge of the restrictions applying to the right to demonstrate, in the event that the said demonstration violates any of those restrictions, can be given a punishment of 6 years imprisonment.

In JSMP’s opinion, a maximum punishment of 6 years imprisonment for a person who participates in or prevents a demonstration, as mentioned in Articles 15.1 and 15.2, is too severe. This punishment is too harsh and it can undermine the right of a person to participate in a legitimate demonstration due to fear of being punished. Also the kinds of activities that can be considered in violation of this law are extremely broad. JSMP is concerned that this law can be used to oppress the community of Timor Leste. For this reason JSMP recommends that these two articles should be removed.

¹⁰ JSMP assumes that Article 15 refers to the Indonesian Penal Code, because that is the code currently applicable in Timor Leste.

¹¹ Article 15.2

Article 15.3

Authorities that prevent or try to prevent, outside the legal framework, the exercise of the right to assemble or demonstrate commit a crime of misuse of power (article 421 Penal Code) and can be subject to disciplinary sanctions.

Article 15.3 states that an authority, such as a state official, who prevents or tries to prevent a demonstration or assembly, outside the legal framework, can be punished under Article 421 of the Indonesian Penal Code, which carries a maximum sentence of 2 years and 8 months imprisonment.

In JSMP's opinion, these two articles are almost compatible, as Article 421 relates to an official preventing a demonstration or other activity.