



**JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAM PEMANTAUAN SISTEM YUDISIAL**

Report on the Amnesty and Pardon Law

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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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A) INTRODUCTION

JSMP is aware that the draft Amnesty and Pardon Law¹ is currently being debated in Parliament. JSMP believes that the implementation of this law will have a detrimental effect on the justice system in East Timor.

Based on the analysis in this report, JSMP is of the opinion that this law will not reach its aim of assisting the process of reconciliation. Substantial amendments to the law would be required for it to have a positive impact on the reconciliation process.

The draft Amnesty and Pardon Law has many technical problems, including articles which violate the Constitution, and ill-defined key terms².

Moreover, the draft Amnesty and pardon law will be result in many problems in its practical implementation, especially the requirement for applications and decisions to be made by the Prosecutor and Courts within 72 hours. Another negative practical impact of this law is that those with money will benefit from this law as compensation must be paid to receive Amnesty. JSMP believes that the draft Amnesty and Pardon Law will impact society discriminately.

The draft Amnesty and Pardon Law provides the opportunity for people who have committed crimes such as fraud and bribery to obtain Amnesty. Also the draft Amnesty and Pardon Law does not appear have any impact on reconciliation as there is no reference to amnesty for crimes which occurred during the period of Resistance in East Timor. The only impact on crimes which were committed during this period will be through the pardon provision which will allow for the reduction in sentence and possible release of those already convicted and sentenced by the Special Panel for Serious Crimes for committed serious crimes in 1999.

This report from JSMP intends to provide analysis of the law in relation to its Constitutionality and evaluation of the practical impacts and procedural aspects of this law. The report also aims to evaluate the draft Amnesty and Pardon Law with reference to the two stated aims of the law; of assisting the process of reconciliation and providing assistance to those who have committed crimes due to the vicissitudes of life. This analysis will examine the relationship between the above mentioned ideals which are stated in the preamble against the practical effect of the substantive articles contained in the law.

This analysis by JSMP on the draft Amnesty law is a general analysis which is limited only to the articles which JSMP has deemed important. The limited analysis is also due to the very short time period in which JSMP had to produce this report. This report only comments on the draft law and does not analyse the relationship between amnesties and reconciliation or comment on whether the act of granting amnesty in general terms is beneficial for this process or not.

JSMP understands that in May 2002 there was another draft Amnesty and Pardon law but because of time limitations the draft law from that time did not receive approval from Parliament. The draft Amnesty and Pardon law from 2002 is very different from the 2004 draft law which is

¹ The full title of the proposed law is 24/I/2 Law on Amnesty and Other Clemency Measures (authoritative text is Portuguese).

² See the example of words which are not clear as discussed in Part B of this report which contains the commentary about Article 1.

currently before the Parliament. This current draft law has the potential to impact greatly on ordinary criminal cases, and it does not contain any references to specific groups or in generality to people who committed criminal acts in 1999. The only impact for crimes in 1999 are for those who have already been sentenced for Serious Crimes.

JSMP is of the opinion that it is essential that the community be given an opportunity to be involved in discussions relating to granting Amnesty. Informed community participation is necessary to assist assessing the need for the amnesty and pardon and success in the practical implementation of any future Amnesty law.

Article 1
Amnesty for offences

Insofar as they have been committed on 31 March 2004 or before, there shall be amnesty for the following offences:

- a) criminal offences carrying an imprisonment penalty up to 5 years insofar as they have not been committed in an organised manner, or with violence or under threat against people;*
- b) minor violations of the highway code, offences related to tax and customs, or other offences only carrying a fine penalty;*
- c) any other violations punishable with a fine penalty, even where such offences may alternatively carry an imprisonment sentence.*

B) COMMENTARY ON ARTICLE 1

Analysis of Article 1 (a): definition of crimes which can receive Amnesty.

In JSMP's opinion, the intention to exclude from the grant of amnesty crimes which were violent is a necessary limit to the grant of Amnesty. Such a limit is necessary in order to guarantee that serious crimes, moreover crimes which violate human rights, cannot receive amnesty, for example the crime of torture.

Even though the intention of the law could be one of assisting the courts in East Timor it should be noted that the work of the courts, prosecutor and the police may not be diminished. According to the draft Amnesty and Pardon Law the judge is the authority who is responsible for deciding to grant amnesty. Consequently the judge must analyse the criteria for the grant of amnesty, that is, if the violation was not violent, did not use threats or was not organised. The judge can not decide whether the person is guilty, but must only decide if amnesty can be granted. It is very important to guarantee that the law provides clear criteria that the judge can apply³.

The criteria 'organized' is not a clear criteria. When attempting to identify what is intended to be included by the word 'organized' many interpretations can result, for example does organized mean systematic? Or does it refer to involvement of many people belonging to the one association? Or that preparation occurred? It is important to clarify the important term 'organised' to prevent the law being applied in a non- uniform manner.

If the criteria 'organised' includes participation in an association or systematic conduct, the draft Amnesty and Pardon Law will exclude most members of the militia and the resistance. This interpretation is contrary to the work of the Commission for Truth, Reconciliation and Reception (CAVR) as the work of CAVR includes many militia who have not committed serious crimes.⁴ According to Regulation UNTAET 2001/11, people who go through the CAVR process can receive immunity from prosecution in a criminal process⁵. If the intention of the legislators of the current draft Amnesty and Pardon Law is to exclude cases which have proceeded through the CAVR process, or to substantially change the process of CAVR, this needs to be stated explicitly.

³ See Commentary of Article 6.

⁴ For the definition of crimes which constitute serious crimes refer to Regulation UNTAET 2001/11.

⁵ See Article 32 and 33 Regulation UNTAET 2001/11 and also Schedule 1 UNTAET 2000/11.

It is very important that the draft Amnesty and Pardon law specifically clarifies the relationship of the law with the CAVR process.

JSMP recommends that the draft Amnesty Law defines its relationship with CAVR (and also Regulation UNTAET 2001/11).

In order to identify the crimes which will receive amnesty, in accordance with Article 1(a), the provisions of the Indonesian Penal Code (KUHP) must be examined as the KUHP is the applicable law in East Timor as of 31 March 2004.

With reference to article 1(a), it is useful to illustrate the crimes which would be eligible to receive amnesty and those which would not.

Crimes which are eligible to receive Amnesty		Crimes which are not eligible to receive amnesty	
Crime	Sentence (maximum)	Crime	Sentence (maximum)
Theft (article 305 KHUP)	4 years	Public Incite for violence (artigu 160)	6 years
Embezzlement (Article 372 no 374 KHUP)	4 years	Official Embezzlement with money in custody (artigu 415)	7 years
Fraud (Article 378, 379 no 380)	4 years	Bribery by Judge (artigu 210 no 420)	9 years
Authorities receiving Bribes ⁶ (artigu 418 no 419)	5 years	Extortion (artigu 425)	7 years
Receiving a Bribe (artigu 209)	2 years		
Illegal Search (artigu 429)	2 years		
Violation of privacy by Official Authorities (artigu 430 no 431)	2 years		
Official Authority participates in tender (artigu 435)	1 years		
Adults makes an indecent conduct against children (artigu 292)	5 years		

In addition to considering economic crimes (see above table), according to article 1(a) amnesty can be given to crimes by government authorities and also to members of the police (for example: illegal search, accepting a bribe, violation of privacy). Such a situation is problematic because it is very important to guarantee the responsibility of criminal acts by the police.

JSMP recommends that if the aim of Parliament is to give amnesty to people who only commit minor crimes, it is very important that article one includes a provision that members of the police cannot receive amnesty if the violation is an abuse of their power.

⁶ KUHP does not limit the amount of money which can be received by the authorities. According to the article all of these crimes are the same, there is no reference to the maximum value of the bribe.

Amnesty for Economic Crimes as well as Tax and Customs violations will not assist Reconciliation

The definition of ‘violation’ contained in article 1 states that amnesty can include economic crimes and violations of other regulations, expressly tax, customs and traffic regulations.

Currently in East Timor there is no Tax Court⁷. As a result of the lack of this institution it is difficult to monitor compliance with tax regulations. JSMP is aware that when the Tax Court becomes operational it will have the competency in relation to cases of violation of tax regulations. According to the Amnesty Law, article 1(b), all people who violate the tax law before 31 March 2004 will have immunity. Consequently, amnesty could prejudice the process of tribunal in the future.

JSMP cannot understand the rationale for including violations of tax and customs regulations in the grant of amnesty. As the inclusion of these violations may assist business people in East Timor JSMP is of the opinion that a condition should be imposed which stipulates a relationship between the value of the tax that has not been paid and compensation which is required to be paid for the granting of amnesty. Otherwise, JSMP can foresee the practical consequence that the provision of amnesty will benefit wealthy people to a greater extent. When discussing the Amnesty law, the government should also consider the economic consequence to the State; by giving amnesty to tax and customs violations the government is losing a revenue source through the payment of fines to the government.

In relation to concepts of justice, and morally and ethically, JSMP does not understand how the aim to achieve reconciliation has any relationship with taxation. JSMP believes that the only purpose for the amnesty for tax violations is to provide a benefit for people with money.

Amnesty for Economic Crimes: Injustice can result

As illustrated in the above table, the definition of crimes to receive amnesty includes serious economic crimes by government authorities, for example fraud and nepotism.

JSMP is not aware of other countries which have granted amnesty for economic violations⁸. Usually the giving of amnesty is based on an intention to assist in the process of reconciliation after a historic event has impacted on the normal relationship within communities. JSMP believes that the granting of amnesty for economic crimes is not in accordance with the principal of amnesty because it does not assist the process of reconciliation in East Timor. Although article 2(1) states that people who receive amnesty must pay economic compensation to the victim, the reality is that in terms of this law people are not to be criminally responsible.

⁷ According to the Constitution of East Timor, article 129, East Timor must establish an Administrative, Tax and Audit court. UNTAET Regulation 2000/12 imposes tax in East Timor. Currently, this court does not exist and therefore it is very difficult to guarantee the implementation of the UNTAET regulation.

⁸ For example in South Africa (Article 20(3)(f) Promotion of National Unity and Reconciliation Act, No. 34 (1995) excludes personal gain), Chile (Article 3 of the Amnesty law No. 2.191), Bosnia and Croatia, amnesty is limited to cases which are related to violence that had impacted on the society as well as to political cases. Refer to Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation, William W. Burke-White (2001), Harvard International Law Journal.

In reality the application of amnesty for violation of tax and custom regulations and economic crimes provides protection for one group; those with economic power in East Timor. The protection of this group will result in a feeling of injustice in East Timor.

JSMP recommends that amnesty should not extend to tax violations or traffic infringements because of the disadvantages identified above, including that it does not accord with justice and that there is no relationship with reconciliation for East Timor.

The Definition of Crimes which can receive Amnesty violates the Constitution.

In a democracy, official authorities have to be held accountable for any conduct which may violate the law. This principal is very important to prevent the abuse of power by authorities. However, a limit to the accountability of all usual criminal acts is important in order to guarantee that the authorities can do their work without undue interference. For example, it is usual that limited immunity is granted to politicians when it relates to their work. Article 94 of the Constitution of East Timor accords with this principal, by giving amnesty to members of parliament, in relation to their opinions and their votes. Article 113 and 114 of the Constitution of East Timor also gives limited immunity to members of the government.⁹.

When comparing the immunity for authorities provided by the Constitution can be seen that the draft Amnesty and Pardon Law is of greater scope than that provided for in the Constitution. Article 1(a) of the draft Amnesty and Pardon Law provides amnesty for crimes with a prison sentence of no more than five years, in violation of articles 113 and 114 of the Constitution.¹⁰ Article 1(a) does not provide any relationship between the crimes and whether the recipient of the Amnesty has an official position such as a member of parliament. Consequently, the application of the amnesty law for members of parliament who commit crimes before 31 March 2004 may violate the Constitution because these people will receive immunity for crimes for which there is no relationship with their work.

Although people must provide financial compensation to receive amnesty, in JSMP's opinion, granting amnesty to government officials does not assist in deterring corruption. Public officials could have a criminal record for acts that have received amnesty and still continue to have the ability to stand for official positions in the government.¹¹

JSMP is of the opinion that if the draft Amnesty and Pardon Law has the intention to change the process outlined in Constitution regarding immunity for officials, the correct process as stated in Article 154 of the Constitution of East Timor must be followed.¹² The process by which to

⁹ **Section 113 (Criminal liability of the members of Government)**

1. Where a member of the Government is charged with a criminal offence punishable with a sentence of imprisonment for more than two years, he or she shall be suspended from his or her functions so that the proceedings can be pursued.
2. Where a member of the Government is charged with a criminal offence punishable with a sentence of imprisonment for a maximum of two years, the National Parliament shall decide whether or not that member of the Government shall be suspended so that the proceedings can be pursued.

Section 114 (Immunities for members of the Government)

No member of the Government may be detained or imprisoned without the permission of the National Parliament, except for a felonious crime punishable with a maximum sentence of imprisonment for more than two years and in *flagrante delicto*.

¹⁰ For example: if members of government is accused of bribery, (article 418 KHUP), then according to the Constitution- article 113- government members must be suspended if the crime accused has a possible sentence of more than 2 years. If the Amnesty law is applicable, members of the government can receive amnesty in relation to crimes in which the maximum sentence is 5 years. A consequence of the Amnesty law Article (6) is that the criminal process must cease. So it could occur that the members of government could have their cases of bribery stopped as the crime would effectively have not occurred as amnesty would apply.

¹¹ See article 79(6) of the Constitution of East Timor.

¹² **Article 154 (Initiative and Time for Revision)**

1. It is incumbent upon Members of Parliament and the Parliamentary Groups to initiate constitutional revision.
2. The National Parliament may revise the Constitution after six years have elapsed since the last date on which a law revising the Constitution was published.

promulgate the draft Amnesty and Pardon law and the process by which to change the Constitution are very different.

In JSMP's opinion, to guarantee that the amnesty law does not violate the Constitution the draft Amnesty and Pardon law must be changed. The definition of crimes contained in Article 1 must state that members of parliament and government cannot receive amnesty because the grant of amnesty to them is regulated by the Constitution of East Timor.

The period applicable to the amnesty is too arbitrary

Similar to amnesty laws of other countries, amnesty is normally applicable for very limited periods.

This Amnesty law does not establish a commencement date for the period from when the acts can have occurred. Consequently this law applied to crimes which occurred during 1999 and also during the period of Indonesian occupation of East Timor. The final date for when the acts can have occurred which are entitled to receive amnesty is 31 March 2004. JSMP cannot identify a reason for this period as there does not appear to be any historical or social basis for establishing this period.¹³ Consequently, JSMP believes that the amnesty law will result in injustice and not assist in reconciliation because amnesty will be given to people who have committed a crimes before the 31 March 2004 but not to those who committed the same crime, just after that date. Without an underlying rationale, the law will create an unfair system; a system which brings uncertainty and also can have a negative impact of the confidence of the community in the justice system of East Timor¹⁴.

JSMP recommends that, like other countries, the period for the grant of amnesty must be one which can assist reconciliation.

3. The period of six years for the first constitutional review shall commence on the day the present Constitution enters into force.

4. The National Parliament, regardless of any timeframe, may take on powers to revise the Constitution by a majority of four-fifths of the Members of Parliament in full exercise of their functions.

5. Proposals for revision should be submitted to the National Parliament one hundred and twenty days prior to the date of commencement of debate.

6. After submission of a proposal for constitutional revision under the terms of item 5 above, any other proposal shall be submitted within 30 days.

¹³ Examples of countries in which the time frame for the acts which could receive Amnesty was limited to the duration of the conflict are Sierra Leone, Mozambique, and Bosnia and Herzegovina.

¹⁴ See the Conclusion of this report.

Article 2
Condition precedent

1. *Amnesty enacted following the previous article of this law is to be granted on the condition that the aggrieved party has been compensated and, where the aggrieved party is the State, that payment of appropriate fiscal and customs taxes has been made.*
2. *Whenever the aggrieved party is unknown or cannot be found, the judge may consider that the condition referred to under item 1 above has been met for the purposes of this law.*
3. *If at the time of granting amnesty, the exact amount of compensation has not yet been established, the judge, following inquiries as s/he has deemed necessary, shall establish such amount equitably through an unappealable award.*
4. *Failure to meet the condition referred to under item 1 above within the 90 days immediately following notification that may be served to the accused for such purposes shall render amnesty inapplicable.*

C) COMMENTARY ON ARTICLE 2

JSMP recognizes that the provision of compensation to victims may contribute to alleviating the feeling that injustice results from crimes being given amnesty. If no compensation were required to be paid to victims', perceptions may exist that the perpetrator is not responsible or accountable for those legal actions. JSMP believes that this guarantee has the potential to prevent the situation which occurred in South Africa¹⁵.

JSMP wishes to highlight that Regulation 2000/10, which relates to CAVR, establishes the regime whereby people who receive immunity for acts committed in relation to the political conflict have no civil responsibility for compensation to the victim¹⁶. It is important to clarify the relationship between the Amnesty law and CAVR in relation to civil responsibility.

JSMP recommends that the Amnesty law must clarify if this law changes UNTAET regulations in order to try to guarantee that there is no serious conflict and also that people do not have a sense of injustice.

Difficulties in Identifying the Victim

When analysing the article it appears to have a simple meaning, but in practice the judge may have many difficulties implementing this decision. JSMP foresees that there will be many cases (such as cases of fraud, corruption and cases which involve large amounts of embezzlement) in which identifying the victim will be difficult. It may occur that the judge, on the basis of Article 2(2), could decide that there is no victim relevant to the grant of amnesty. If the judge decides that there are no victims who have been wronged the grant amnesty can be performed without an order for compensation. This situation may occur especially if there are complicated cases and limited judicial resources to dedicate to the case. In addition, according to Article 7(3) the judge

¹⁵ See article 20(7) Promotion of National Unity and Reconciliation Act, No. 34 (1995)

¹⁶ See article 32(2) of UNTAET Regulation UNTAET 2000/10.

must make a decision about the application for amnesty within 72 hours if the beneficiary is imprisoned. In trying to comply with this time limit it may occur that it is practically easier to apply article 2(2) when no victim can be identified. The consequence of article 2 is that in practice it can result in abuse because of the difficulties in its application.

JSMP recommends that the law clarifies the situation when a judge can apply article 2 (2) and also provides a longer time period for the judge to identify the victim in complex cases.

The Requirement for the Judge to decide compensation has negative consequences.

According to article 2(3), when amnesty is to be granted, and the amount of compensation is not known, the judge must then do any necessary investigations to decide the value of the compensation.

JSMP believes that the application of article 2 (3) can complicate the work of the judge because the law does not provide sufficient information about how the judge determines the value of the compensation and how a case should proceed if it is not known whether the accused is guilty. In cases in which the accused confesses that he or she is guilty then it should be straightforward for the judge to apply this law and decide compensation, however if there has not been a decision about whether the person is guilty the process will be complicated¹⁷.

Article 2(3) provides that the decision cannot be appealed. In JSMP's opinion the application of Article 2(3) will have a negative impact for many people in the justice process. Article 2(3) can result in two situations:

- 1) Violation of the right of people to appeal a decision, which is a right guaranteed in International law¹⁸; and
- 2) Injustice and the potential or opportunity for corruption in general in the judicial system in East Timor because of the lack of protection usually provided by the oversight of the Court of Appeal.

JSMP recommends that like all judicial decisions, the Amnesty law provides that decisions relating to compensation to the victim can be appealed.

The Condition that the money must be paid in 90 days creates injustice

According to article 2(4) if people cannot fulfil their obligation to pay the compensation with 90 days after notification of amnesty, then they cannot receive amnesty.

JSMP believes that this article can create discrimination between financially well-off and not well-off people. For example: a microlet driver, with a small income, may have difficulties in paying compensate the victim and it could occur that they would be unable to receive amnesty. However on the other hand, a person who committed the same violation but has money to pay compensation, could receive amnesty.

¹⁷ See above section G) Commentary of Article 6.

¹⁸ Article 14(5) of the Convention on Civil and Political Rights.

The idea of this law had the objective to assist people who had committed crimes because of social problems¹⁹. The identified consequence by JSMP is that the application of this law will result in benefiting the well off to the detriment of the non-well off persons.

JSMP suggests that the Amnesty law should be amended to reflect that the economic circumstances of the person required to pay the compensation should be taken into consideration when determining the value of the compensation to be paid to the victim.

¹⁹ See the Preamble of the proposed law number 24/I/2^o law on Amnesty and other Clemency Measures.

Article 3
Pardon

1. With regard to any type of criminal offence, minor offence or contravention committed on 31 March 2004 or before, pardon shall be granted for the following:

- a) fine penalties even where such penalties replace another form of penalty payment;
- b) prison sentences enforced as actual punishment not exceeding one year;
- c) half of the penalty or 18 months whenever the imprisonment sentence has been enforced as actual punishment not exceeding 10 years, whichever is more favourable to the convict;
- d) one-third of the sentence whenever imprisonment has been enforced as actual punishment exceeding 10 years.

2. Pardon referred to under item 1 above shall apply to penalties established by decisions to be orally given or which have already been orally given and is made in relation to shall centre on the single sentence in case of cumulative punishment.

D) COMMENTARY ON ARTICLE 3

The Regulations on Pardon violate the Constitution

According to Article 85(i) of the Constitution of East Timor, the President of the Republic has the exclusive competency to grant pardons and commute sentences after consultation with the Government.

The Amnesty law, if promulgated, will be a law passed by the Parliament. Article 3 of the draft Amnesty law refers to the pardoning of people. Consequently article 3 clearly violates the Constitution of East Timor.

JSMP recommends that the Amnesty law cannot regulate the granting of pardons because the granting of pardons is the exclusive competence of the President. JSMP is of the opinion that the President can continue to consider the granting of pardons but not together with the Parliament.

Pardon according to article 3 does not support reconciliation

Although JSMP recommends that the Amnesty law cannot include regulations about pardon, JSMP provides the following commentary for the consideration of the President if he implements his power according to 85(i) of the East Timorese Constitution.

JSMP is of the opinion that the draft law in its application will not support the reconciliation process. Reconciliation in East Timor, as embodied by the work of the CAVR, has involved painstaking community reconciliation agreements that will be ratified by the court. The reduction of sentences undermines this process as the punishments agreed on by the community may be changed. In this context, it is unclear whether the CAVR agreements come under the amnesty provisions. It appears they do as the provisions cover ‘any type of criminal offence, minor offence or contravention’. Nevertheless, the impact of this provision on CAVR agreements is unclear.

JSMP recommends that the Amnesty law should not grant pardon for crimes which come under CAVR jurisdiction as this undermines the community reconciliation process. The draft law should be amended to specifically exclude such crimes.

Impact on the Serious Crimes Process

According to article 3, this draft law pardon is applicable to all crimes. Consequently people who committed serious crimes can receive a pardon. This can result in extremely lenient sentences for the gravest crimes under international law. For example, someone who was sentenced to 9 years imprisonment, and was arrested in 2002, could be eligible for conditional release inside 12 months. The appearance of those convicted of crimes against humanity in such a short space of time will most likely lead to tension in communities and perceptions that the serious crimes process has failed.

Further, according to international law, people who commit serious crimes (for example Crimes against Humanity and war crimes) must be detained and the detention must be proportional to the serious crime. If people who commit serious crimes are released through pardon it may result in a situation in which the period of detention is similar for ordinary crimes.

JSMP is of the opinion that the decision to pardon those who have committed serious crimes is a political decision. According to commentary given above, JSMP recommends that if the president wishes to grant pardons the President should undertake consultation with the community to try to analyse whether the granting of pardons will assist reconciliation.

All crimes are granted pardon

Under article 3 people who committed any crimes and violations can receive pardons (including pardoning of any fines which are to be paid). JSMP believes that article 3 is not sufficiently defined and should either specifically include, or exclude, certain crimes. In particular crimes which come under the jurisdiction of the CAVR and Special Panels should be excluded. The lack of specificity in regard to which crimes receive pardons means that the crimes where pardon would be most beneficial are not targeted. Accordingly, crimes where pardon is inappropriate still come under the law. JSMP cannot identify any benefit in this for the community.

In any future law on pardons by the President, JSMP believes that it would be advisable to only include certain categories of crimes.

Article 4
Condition subsequent

Pardon provided for in this law shall be granted on the condition that the beneficiary is not to commit another malicious crime in the succeeding 3 years from the date of entry into force of this law or, in case where the beneficiary is imprisoned beyond the three years, in the year immediately following his or her release.

Article 5
Pardon on suspended sentence

In case of conviction that results in suspended sentence, pardon provided for in this law shall only apply where suspension is to be revoked.

E) COMMENTARY ON ARTICLES 4 AND 5

JSMP has no specific important comments on articles 4 and 5 of the Draft Amnesty and Pardon Law.

Article 6
Effects

1. *A declaration of amnesty under the terms of Article 1 of this law, besides overriding any criminal procedure, shall imply an automatic cancellation of any criminal records related to the offence for which amnesty has been granted.*
2. *Amnesty or pardon granted under this law shall not invalidate civil liability arising from the offence committed.*
3. *The deadline to initiate legal action for civil liability shall begin to count again from the date of entry into force of this law.*
4. *Where a date for trial hearing has already been established in a case related to an offence for which amnesty has been granted, the trial hearing shall be held for the sole purpose of determining and enacting the value of the civil liability.*

F) COMMENTARY ON ARTICLE 6

Article 6(1) is poorly drafted and unclear

Article 6(1) has two functions. Firstly, it states that a declaration of amnesty made under Article 1 will cancel any criminal proceedings relating to the act for which amnesty is granted. Secondly, any criminal records relating to the offence for which amnesty is granted will be erased. The first effect is not problematic, however, the second effect appears to confuse the distinction between an amnesty and a pardon. Amnesties are granted where the alleged offender has not yet been convicted of the offence with which he is charged. Pardons, on the other hand, are granted where the applicant has already been convicted and the conviction noted on their criminal record. That is, a person cannot have an offence on their criminal record unless they have already been convicted of that offence. Consequently an amnesty applicant will not have a criminal record in respect of the offence for which they are seeking an amnesty and so Article 6(1) is, in that regard, meaningless. It may be that the drafter intended the Article to erase criminal records for applicants who are seeking a pardon, however, this has not been expressed in the provision. If that were the intention it would be a very significant step to erase the criminal records of all those who are pardoned, because these people will include persons convicted of serious crimes relating to events which took place in 1999.

Requesting Compensation

Article 6(2) protects the right of a person injured as a result of the criminal act of a beneficiary to seek compensation. According to Article 6(3) the time limits imposed on victims seeking compensation for harm suffered as a result of the criminal acts of the beneficiary will commence from the date on which the Amnesty Law becomes enacted as law in East Timor.

This process can result in a situation in which the courts may have a large number of applications for compensation relating to persons who have been detained in prison (people who wish to receive pardon). This situation can result in many cases being brought to court and also uncertainty in the application of the law. Illustrating the consequences of Article 6(3) is the example of a person who 3 years ago received a sentence of 4 years imprisonment and at the time

of determination of guilt the victim did not receive compensation. Now according to the law 3 years later the victims can make an application for compensation.

JSMP recommends that the parliament analyse all the consequences of the application of article 6(3) to guarantee that there is no uncertainty in relation to the application of the law and also there is not a large influx of cases for the Court.

Changes to the criminal process and also civil procedures: Article 6(4)) can create problems

Article 6(4) states that when the Court has already scheduled a hearing for the trial in relation to a case which is to receive amnesty, the hearing must continue even though the purpose of the hearing has changed. This has the objective of determining the civil responsibility of people who receive amnesty, rather than trying to establish if the crime was committed or not. In short, the section has the effect of transforming a criminal proceeding into a civil proceeding. On one level, the section simply makes convenient use of a hearing which has already been scheduled. However, the problem is substantive and shows that the drafter may not appreciate or understand the distinction between civil and criminal proceedings.

Civil cases and criminal cases follow different rules of evidence and importantly the evaluation which is to be performed by the judge in these two types of cases is very different. JSMP is of the opinion that article 6(4) has been included to try and take advantage of the fact that a hearing has already been scheduled however this will not necessarily be of any practical assistance for the process.

According to the process established in East Timor, the courts firstly establish if the accused is guilty or not. If the court considers that the accused is guilty, usually the court determines if compensation to the victim is appropriate. This order of proceedings assists in guaranteeing the right of the accused to the presumption of innocence which is enshrined in Article 31(1) of the Constitution of East Timor and also article 14(2) of the Convention of Civil and Political Rights²⁰.

If the process contained in the draft Amnesty and Pardon law is followed problems may result for judges in adjudicating the amount of compensation to be paid by a person wishing to receive amnesty as it assumes that the person automatically has civil responsibility and must pay compensation to the victim. The procedure, according to article 6(3), can lead to a situation in which the rights of the accused to the presumption of innocence are violated.

It is therefore important that the amnesty law examines the consequences which are outlined above to guarantee that the rights of the accused are not violated.

On the basis of the above analysis, JSMP identified a possible means of guaranteeing the rights of the accused to the presumption of innocence and to avoid any confusion for the court actors involved in the process. The option suggested by JSMP is that two different procedures can be followed depending on whether the accused admits guilt or not.

²⁰ Convention of Civil and Political Rights, United Nations, 1976. In July 2003, East Timor accepted to abide by the obligations imposed by this international instrument.

- 1) Firstly the court must ask if the accused admits guilt or not²¹, if the accused admits guilt, then the Tribunal can establish the beneficiaries and determine the amount of compensation to be paid²²;
- 2) If the person does not admit guilt, then the tribunal must firstly determine the civil culpability of the person in order to determine the value of the compensation.

The two options above illustrate the necessary differences between civil and criminal standards.

JSMP wishes to highlight that if the Parliament adopts the above procedures – to request admission of the crime as a pre-condition to receive amnesty - it is important for the law to clearly state that the accused has the right to remain silent and that court actors cannot pressure the accused to admit guilt.

JSMP understands that the decision of Parliament to impose a condition that in order to receive amnesty the person must admit guilt is largely political decision and as such JSMP does not provide further comment but recommends that the parliament consider the advantages and disadvantages for reconciliation and ensures that clear wording is used.

²¹ This process occurred in many countries where an amnesty was applied. For example South Africa.

²² To ensure this occurs the court must carefully listen to the testimony and analyse the evidence.

Article 7
Competencies

1. *On its own initiative, the Public Prosecution Service shall promote the application of this law at the court which is in charge of the case and the competent judge for any such case shall decide on the application.*
2. *Where a case is outstanding at the Court of Appeal, such case shall be referred back to the first-instance court for the purpose of applying this law.*
3. *Where the beneficiary of amnesty or pardon is under custody, the application from the Public Prosecution Service and the decision by the judge has to be made within 72 hours, respectively.*
4. *Whenever the lawful deadlines to comply with the provisions of this law are not met, the public defender or the attorney may request its application or, where the beneficiary is under custody, file a petition for habeas corpus.*

H) COMMENTARY ON ARTICLE 7

The Practical Implementation of the Amnesty law can create problems for the Prosecutor

The prosecution therefore has complete discretion as to whether or not to file an application for amnesty or pardon. JSMP believes that the law should provide an ability for defence council to also make applications for amnesty and pardon.

JSMP recommends that people who want to receive amnesty and pardon (or their representatives) have the competence to make an application.

The time to make an application is too limited

According to article 7(3), if an application is in relation to a person in prison the prosecutor has only 72 hours to make the application and the judge 72 hours to decide the application.

In practice it will be very difficult for the court actors to guarantee that the lawful application of this article will occur, because the time period is so limited. Article 7(3) also provides that if a decision is not made within 72 hours an action for habeas corpus can be brought.

When considering the practical application of the pardon for persons in prisons it must be noted that for those who have been sentenced to more than one year the granting of a pardon may not result in their immediate release. If an action for *habeas corpus* is brought for people who will not be eligible for immediate release, their application would necessarily be rejected. JSMP believes that this situation will result in waste of court time and resources.

Parliament must also consider that if the court approves an application for *habeas corpus*, the government will be liable for compensation.²³

JSMP recommends that the Amnesty law should not regulate habeas corpus as this action is already adequately regulated - by Regulation UNTAET 2001/25²⁴ – and the action for habeas

²³ See article 52.2 of UNTAET Regulation 2001/25.

corpus has little practical impact in relation to this law.

Appeals against decisions relating to applications for Amnesty and Pardon

Article 7(5) provides that people can appeal to the court on decisions relating to amnesty and pardon.

Article 7(5) does not clearly state the process which must be followed in appealing these decisions. JSMP believes that the poor drafting of this section could result in many interpretations of the section.

As previously stated, it is very important that people who are refused amnesty and pardon have the right to an appeal because the right of appeal is an important right in the East Timorese justice system. JSMP believes that appeals must always be decided on the merits even if one of the parties does not attend or present arguments related to the appeal. JSMP also believes that the process of appealing which is currently applicable in East Timor should be the same for cases of amnesty and pardon.

JSMP recommends that Article 7(5) clearly defines the right to appeal. JSMP also recommends that the Amnesty law regulate that the process of appeal should follow the established procedures in Regulation UNTAET 2001/25.

Article 8 *Entry into force*

This law shall enter into force on the day following its publication date.

F) COMMENTARY ON ARTICLE 8

JSMP does not have a commentary on Article 8

²⁴ Article 47.

G) CONCLUSION

The current draft Amnesty and Pardon Law should not be promulgated as the objectives of the law as set out in the preamble are not achieved by the substance of the law itself. In JSMP's opinion, the law will result in disadvantage for Timorese society and the judicial system and JSMP cannot understand any overall benefit which would result from the law.

The ability to practically assist in the process of reconciliation cannot be found in the application the Draft Amnesty and Pardon Law. Significantly the law does not provide any motivation for people to come forward to request amnesty for crimes which are not currently being pursued through criminal procedures. Further the law does not establish a limitation on the period in which people can make applications for amnesty.

It is very important that the law clearly defines the term 'organised'. Currently the law could be interpreted as excluding all people who committed minor and serious offences in 1999 because those acts would be classified as organised. The draft law must be amended to include other articles which explain clearly how reconciliation will be assisted and for which crimes and to whom amnesty can apply. The law must also clearly define which law should relate to the immunities which are guaranteed under UNTAET regulations which govern the CAVR process and the relationship between the CAVR and this law.

Contrary to the objectives of the law contained in the preamble, the people who will benefit greatly from this law are the perpetrators of ordinary crimes and economic crimes (for example fraud, bribery), and those who have the money to pay for the requested compensation. Parliament must analyse the law in detail and provide further clarity to ensure that those who are intended to benefit from the law will actually benefit in reality otherwise this law will leave many opportunities for abuse and injustice.

JSMP wishes to emphasize that according to the Constitution, Parliament does not have the power to grant pardons. Pardoning is the exclusive competence of the President. The President of East Timor should have regard to the consequences of the application of pardon in the terms provided by the draft Amnesty and Pardon Law, for example the extremely limited period for deciding some applications - 72 hours - and also how the different discounting of sentences for those in prison affects each other.²⁵ If the President wants to pardon people who have committed serious crimes, JSMP suggests that wide community consultation regarding this issue should occur.

²⁵ See article 15 (1) of the Indonesian Penal Code.