



Justice Update

11 December 2017

Challenges in preventing and combatting Corruption as well as Good Governance and the importance of the Law Against Corruption

Some thoughts on the commemoration of International Anti-Corruption Day on 9 December¹ each year

We know that corruption cases are complex because they involve systems and individuals in a range of capacities. These include individuals with capacity as the result of their political power, or because of their intelligence as well as the capacity of others to influence the processes in place.

Recognising the complex nature of corruption requires specific approaches and investigation strategies, because this crime is not the same as other ordinary crimes. Therefore efforts to address complex crimes like this require comprehensive responses, methods and strategies that also need to be specific in nature.

Legal framework

At the conceptual level we have the Constitution² which has ratified the United Nations Convention against Corruption; and the Law on the Anti-Corruption Commission (ACC). However, we don't yet have an Anti-Corruption Law to specifically define crimes of corruption and other specific mechanisms to combat corruption through both preventative and repressive acts.

Therefore proceedings in corruption cases have only referred to applicable articles and provisions in the Penal Code set out under Title VI on 'Crimes committed in the performance of public functions'.

The provisions are set out in Articles 292 - 299 with a combination/conjugation of articles on aggravation and concept of public servants (articles 301 and 302).

¹ This information was presented on 22 February 2016 commemorating the Sixth Anniversary of the AntiCorruption Commission at the CNE Meeting Room in Dili, but was updated to reflect the current situation.

² Article 1 of the Timor-Leste Constitution talks about the principle of the Rule of Law, and Article 6 (e) of the Constitution mentions to promote the building of a society based on social justice, by establishing material and spiritual welfare of the citizens;

Based on JSMP monitoring, a lot of cases have come before the court involving crimes under the following categories:

1. Economic involvement in business
2. Intentional mismanagement
3. Abuse of power
4. Embezzlement
5. Abuse of trust, and
6. Passive corruption for an unlawful act & active corruption.³

For these crimes the perpetrators can be individuals or groups.

Total number of cases identified through JSMP monitoring (during the last three years)

Between 2014-2017 JSMP monitored 59 cases of corruption. Meanwhile, according to a financial report from the Prosecutor General for the 2013 - 2016 period⁴, the Public Prosecution Service processed 286 cases, and 165 of these resulted in formal charges before the courts.

These cases involved high level authorities such as former ministers, a former vice-minister, a former secretary of state, directors and public officials.

These cases show progress in the judicial sphere. Even though there are a range of challenges and limitations, including pressure or occasional intervention, the courts have maintained their institutional responsibility to ensure justice for all. JSMP believes that in post-conflict states like Timor-Leste it's not easy to prosecute ministers or former ministers to court. However, on the contrary we can do this in Timor-Leste.

Challenges relating to the commitment to combat corruption

1. There is no specific Law Against Corruption

Even though there have various initiatives from relevant institutions such as the Public Prosecution Service and the Anti Corruption Commission (ACC) to present a draft ACC Law to the National Parliament, until now the National Parliament has not given a positive response to these initiatives.

As discussed above, crimes of corruption have their own nature and complexity including a “modus operandi” that changes from time to time. Therefore, it is important to have a specific law for the ACC to provide it with enough power and capacity to carry out its work effectively based on the nature and complexity of the crime.

³ JSMP Annual Report: ‘Overview of the Justice Sector, 2015 & 2016, available on the JSMP website JSMP: www.jsmp.tl

⁴ Office of the Prosecutor General, Financial Report 2013-2017

2. Issues on human resources in the courts

There are limited human resources in the justice sector (to date there are no judges or prosecutors who specialise in corruption), even though several years ago the Public Prosecution Service started assigning some of their prosecutors to this area. However, there aren't any efforts or mechanisms to strengthen their specific technical ability in this area including developing specific strategies on how to address crimes such as corruption);

We believe that to ensure a sound and effective process to combat corruption it is necessary to have prosecutors and judges specifically assigned to combat corruption in addition to other initiatives.

3. Issues relating to the implementation of the Law on Witness Protection

Even though this law came into force in 2009 – approximately 8 years ago), it has still not yet been implemented properly.

Witness protection is necessary to guarantee the rights and freedoms of witnesses and therefore preserve all evidence directly related to such crimes until a final decision is handed down in proceedings.

Witness protection has two essential elements:

- 1) The person appearing as a victim needs to be given protection and treatment from the relevant institutions in accordance with their responsibilities and the specific requirements of each case. This protection is to ensure that victims in any instance are given protection and security to preserve evidence that is relevant and associated with such crimes;
- 2) Witness protection is also crucial to help discover facts relating to the case. Witnesses need to feel safe so they can give proper testimony without feeling fear as the result of threats or intimidation. Witness testimony can also protect the credible evidence that will help the court to hand down a fair decision.

Based on JSMP's observations, this law has not yet been properly implemented because the State has not guaranteed the conditions necessary to implement this law. Implementation of the law on witness protection requires specific equipment and instruments/facilities, for example, to protect the identity of witnesses during trial proceedings, so that witnesses are given protection so they can testify freely.

JSMP has noted that often witnesses provide testimony in court and they feel afraid and insecure. If a witness does not feel safe then it will not be possible to reveal the facts relating to an incident.

4. Unconstitutional resolutions-interventions towards the justice sector;

Perhaps all of us still remember the two or three consecutive resolutions issued in October 2014.⁵ Even though these resolutions were issued three/four years ago, the justice sector is still traumatised at an institutional level. In addition these resolutions have had an effect until now because important resources in the justice sector have been lost. For JSMP, this is a form of direct political intervention towards the justice sector.

Even though the State at that time (National Parliament and the Government) provided justification for these actions by saying the objective was to protect and safeguard “national interests” and due to “major forces”, however there has been no evidence to justify these actions.

These resolutions have had serious implications. In addition to violating principles in the Constitution relating to the separation of powers and judicial independence, these resolutions have undermined the justice sector and in practice have had implications on cases that were being processed, as they have been delayed for lengthy periods of time and retried to protect the integrity and value of evidence.

5. Confusion on the interpretation of the issue of immunity

In practice there is often major confusion about the interpretation of the issue of immunity and this has negatively affected cases that should have been brought to trial.

Article 113.1 of the Timor-Leste Constitution states that members of the Government must be suspended when charged with a criminal offence punishable with a sentence of imprisonment for more than two years.

In a case punishable with a sentence of imprisonment for more than 2 years, the immunity of a member of Government should be automatically suspended and the court does not need to wait for the National Parliament to remove the person's immunity. However this is different for members of the National Parliament (approximately 5 years or more). However in practice there is major confusion, and for the past few years some members of government have even refused⁶ to be held responsible because of their immunity.

Recommendations

Based on the aforementioned points we recommend:

⁵ JSMP Thematic Report: Dismissal of international officers and advisors from the judicial sector of Timor-Leste: Analysis on the constitutionality, legality and impact of Parliamentary Resolution No. 11/2014 and Government Resolutions No. 29/2014 and 32/2014

⁶ JSMP Press Release: Issue of immunity impeding trial of the defendant Secretary of State for Arts and Culture, Isabel Ximenes (<http://jsmp.tl/wp-content/uploads/2015/01/imunidade-wcju1.pdf>)

1. For the National Parliament to reschedule, debate and approve the draft Law Against Corruption
2. Identify the need for specialised training for judges and public prosecutors in the area of combatting corruption
3. Effectively implement the Law on Witness Protection
4. Request for the National Parliament to develop guidelines on how to remove immunity to clarify the confusion that has existed.
6. Need to develop joint training between ACC investigators and relevant institutions such as Customs, the Public Prosecution Service and if possible judges.

JSMP: Working to ensure justice for all!