

Justice Update

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The Civil Code and Legislative Dynamics in the National Parliament

Introduction

The 13th September 2011 marked a new phase in the sphere of the judicial system of Timor-Leste, as the National Parliament had previously approved Draft Law No. 56/II on the Civil Code on the 23rd August 2011, which was then forwarded to the President to be published in the State Gazette. As of the 13th September 2011 Timor-Leste has had its own material civil law (Civil Code) and its own formal civil law (Civil Procedure Code) which were approved and promulgated on the 3rd February 2006.

JSMP welcomes and values the efforts and commitment of the State to strengthen the civil law system in Timor-Leste, however JSMP believes that the ratification of the Civil Code also raises some substantial issues that need to be debated, interpreted and thoroughly examined so that this law can be adjusted in line with the reality and the context of Timor-Leste in the future.

In relation to the legislative process in the national parliament, starting with the debate, plenary session and the approval and promulgation of the Civil Code in the State Gazette, JSMP issued a Press Release¹ regarding the presence of the Civil Code. The aforementioned Press Release is aimed at expressing JSMP's stance and concerns about the legislative process in the National Parliament up until when the Civil Code was ratified.

Regarding the concerns of JSMP towards the legislative process and practices taking place in the National Parliament and the process of promulgation carried out by the President, JSMP is

¹ For more information about JSMP's stance, please refer to JSMP Press Release on 19 September 2011, available at the JSMP website: www.jsmp.minihub.org:

reissuing this “*justice update*” to examine and disseminate the facts observed by JSMP in the National Parliament up until when the Law was promulgated on 13 September 2011.

This Justice Update is not intended to take issue with the constitutional competence and authority of the National Parliament and the President, but is only intended to invite real discussion in a public forum and demand that the sovereign organs of the State take responsibility and deal with the matter seriously, and in this case specifically to urge the National Parliament and the President to use their authority properly, to give due consideration and proper assessment of the capacity of the people of Timor-Leste, in accordance with the current context and reality.

1. Regarding Civil Law

The material civil law is a very important law in a democratic society, because this law regulates and determines the limits of legal relationships between one individual and another, between individuals and groups, as well as between groups, in the context of legal-social relations that uphold the interests of each person.

As an independent State, Timor-Leste clearly needs its own Civil Code, which is the responsibility of the National Parliament as the legislative body as set forth in the Constitution of the Democratic Republic of Timor-Leste.

According to Article 92 of the Timor-Leste Constitution, the National Parliament has three fundamental powers: (1) legislative power, (2) supervisory power, (3) political decision making powers. In relation to its legislative power, Article 96.1 of the Constitution on ‘legislative authorization’ states that the National Parliament can authorize the Government to make laws on such matters such as the definition of crimes, sentences, security measures as well as the definitions on the civil and criminal procedure.² Generally speaking Governments are better equipped than National Parliaments in terms of human and financial resources, and thus the practice of granting legislative authorization is normal in many countries.

Moreover, Article 97.1 of the Constitution on ‘legislative initiative’ states that the power to initiate laws lies with members of parliament, members of parliamentary groups and also the

² Refer to Article 96 of the Constitution for more information about the competencies of the President.

Government. This means that legislative authority is not just the exclusive authority of members of parliament or parliamentary groups, because it can also be passed on to the Government as the executive organ.

Therefore the decision of the National Parliament to submit a number of laws or pieces of legislation to be drafted by the Government, as was the case with the Draft Civil Code, reflects the spirit of Article 96 of the Constitution on ‘legislative authorization’, particularly 96.1 (b)³.

2. Transition Period - UNTAET

After Timor-Leste freed itself from the Republic of Indonesia there was a period of transition between 1999 and May 2002 under UNTAET administration, and until the Draft Civil Code was ratified and promulgated by the President of Timor-Leste, the Indonesian Civil Code was applicable in Timor-Leste. Regarding this policy, please refer to Article 3.1 of the UNTAET Regulation UNTAET//1999/1.⁴

UNTAET Regulation No. 1/99 states that the laws applied in Timor-Leste (including the Indonesian Civil Code) will continue to apply until Timor-Leste establishes its own legal system through the sovereign organs of the State.

When the President promulgated Law No.56/II on the Civil Code, the Indonesian Civil Code was automatically superseded and thus Timor-Leste will start to apply the Civil Code of Timor-Leste in accordance with the time frame established in the new Civil Code.

3. Draft Civil Code and Special Commission

The Draft Civil Code was submitted by the Minister of Justice in 2009 to the National Parliament as Draft Law No. 30/II which was then passed onto Committee A of the National Parliament that deals with legislative issues, authority and local governance according to Articles 9, 10 and 13 of the Rules of Procedure of National Parliament. The drafting of the Civil Code, which ended up comprising 2195 articles, was initiated by the government through the granting of legislative authorization to the National Parliament.

³ Refer to Article 96 Constitutions RDTL

⁴ Refer to UNTAET/REG/1999/1

The draft was submitted by the Government to the National Parliament and comprised five (V) books, namely Book I on General Provisions, Book II on obligations (encompassing agreements/contracts in general, responsibilities, guarantees, fulfillment of contracts, legal sanctions for those who violate agreements, mandates etc.), Book III on “property and land” (encompassing ownership rights, rental arrangements etc.); Book IV on ‘family’ which encompasses matters regarding marriage, divorce, adoption etc.) and Book V on ‘inheritance’ (which encompasses the right to inheritance, how the government decides on the value of inheritance etc.).

Based on JSMP’s observations, Committee A started a discussion on the Draft Civil Code in a general plenary session through public consultation with community leaders, civil society and also the Bishops of Dili and Baucau. However this process was not an in-depth one because the public consultation only consisted of introducing the importance of the civil law.

Committee A completed public consultations by approving the Draft Civil Code in a general plenary session in 2010. Discussion on the draft civil code during a special plenary session recommenced in 2011, where more than 200 articles were completed (Article 1 - 214). However, the President of Committee A lodged a request with the President of the National Parliament to announce the continuation of discussions on the draft civil code through a special committee.

In the final phase the President of the National Parliament agreed to a request to announce the formation of a Special Committee, made up of members from each of the political party benches in the National Parliament. However, the Fretilín Bench, who had three representatives, chose to “Walk Out” because it was not really important to establish a special commission as set out in Article 36 of the Rules of Procedure of National Parliament and requested for discussion to continue in a special plenary session on the Draft Civil Code before Committee A.

However the Chair of the National Parliament did not agree and maintained the stance to establish this Special Committee in 2011 considering the complexity of the aforementioned draft

law. This committee started its first round of discussions in Maubisi between 16-26 May 2011 and the second round of discussions took place in Com, Lospalos between 2-7 June 2011, and the third Round of Discussions continued in Maubisi between 28 June - 1 July 2011 to approve the draft law comprising more than 2000 articles. This Special Committee comprised 8 members of Parliament but had no representatives from the Fretilín bench.

During the drafting and discussion of the Draft Civil Code the Special Committee only received technical assistance from one international legal advisor to help the members of the council or the relevant Committee to understand the contents of the draft law.

Although there were some who supported and others who opposed this process, in the end the Draft Civil Law was approved at the last full plenary session of National Parliament on 23 August 2011 with 27 voting in favor, 1 against and 14 abstaining.

After being approved in National Parliament the draft law was submitted to the President to be promulgated in accordance with the competence of the President as set out in Article 85 (a) and (c) of the Constitution.⁵ Also Article 88 of the Timor-Leste Constitution on the rights of the President regarding ‘promulgation and veto’ also grant authority to the President to exercise his right to politically or judicially veto any law submitted by the National Parliament before its ratification. However, unfortunately the President did not use his constitutional authority to consult with the advisors to the President before promulgating this draft law.

Without taking issue with the constitutional authority of the President regarding the promulgation of this law, JSMP however remains concerned that the President accepted the Draft or Parliamentary Decree on 12 September and promulgated it on 13 September 2011. This means that the President only spent one day studying the law and seeking consultation and then ratified the law on the following day. JSMP believes that this is not how State affairs are normally conducted and no rational justification can be accepted for this process.

⁵ Please refer to Article 85 (a) and (c) of the Timor-Leste Constitution.

Therefore, JSMP is convinced that the President did not read the Civil Code or consult or seek opinions on it to an adequate level before it was promulgated. JSMP perceives this process to be one of '*closing my eyes, opening my eyes and then promulgating the law...!*' This should not have occurred because the Civil Code is a legal document that is extremely complex and also because it sets out the legal relationships that exist between individuals and those in society in general in relation to their daily lives. Also, the Civil Code is very different with other legislation because the Civil Code is a complicated technical law.

Recalling the complexity of this law Filipe Alfaiate, an international consultant attached to JSMP to oversee the drafting of this Civil Code, stated that in his home country Portugal it took more than 10-20 years to draft their Civil Code. This process involved experts in this field who had years of academic experience who were appointed to examine their Civil Code before it was approved and ratified.

Also, for example in Indonesia, they still use the Civil Code which was a Dutch product that has a number of adaptations or changes, recalling what a complex task it is to start examining and replacing this law with a new Civil Code reflecting the current circumstances of Indonesia.

JSMP is extremely concerned with and regrets the actions of the President for ratifying this law without detailed consideration and analysis regarding the substance of the draft law, both its advantages and disadvantages and impact on members of the community who directly apply this law. JSMP believes that the President should have fully utilized the maximum time set out in Article 85 (c) of the Constitution, which prescribed a time limit of 30 days for the President to fully study and consult on all of the legislation which is sent to the President before being promulgated.

JSMP believes that practices of State administration such as this should be preserved to fully strengthen our constitutional norms and at the same time ensure that all legislation that is ratified in this State must reflect the context and reality of Timor-Leste, especially in relation to this Civil Code.

4. Dynamics in National Parliament

JSMP noted that the discussion process before the Special Committee regarding the Civil Code in special plenary hearings were not effective because there was a lack of public consultation because certain components of civil society, religious leaders and customary leaders were not fully involved, which is necessary to ensure that this Civil Code truly reflects the lives and culture of the community in Timor-Leste. The Rules of Procedure of National Parliament⁶ make it possible to accommodate the views of the people to produce a law that reflects the interests of the majority of people to realize and fulfill the functions and aims of legislation.

Moreover, in addition to the lack of participation of representatives from the opposition party, the composition of the Special Committee was not fully representative, because only 8 members of parliament were involved. This situation become more complex considering that there were 1295 articles in the draft civil code, and therefore JSMP doubts that it was possible for the members of parliament to read the summarized findings and analysis from the Special Committee in such a short time.

Although JSMP admits that Article 13.1 of the Constitution and Article 94.1 of the Rules of Procedure of National Parliament provide for the use of Portuguese language, JSMP is still concerned because that during discussions regarding the draft civil code, the majority of those involved did not make a significant contribution because the members of parliament did not have a strong understanding of the substance of the draft civil code because it was only provided in Portuguese.

Another example from the process that took place in the National Parliament was the fact that 14 members of parliament, including 5 members of the AMP block, chose to abstain from the vote on the draft civil code because they felt that it did not reflect the real circumstances in the community. Several articles that were raised by members of parliament in the last plenary session included Article 1475 on civil marriages, marriages in accordance with Catholic rules/teachings, traditional marriages (monogamous/cohabitation) and Article 1305 regarding clean water.

⁶ Refer to Article 79 (d) of the Rules of Procedure of the National Parliament

In addition, another fundamental and essential fact that concerns JSMP is that this draft civil code only establishes provisions for civil marriages between members of the community who are Catholic as well as traditional marriages (monogamous/cohabitation), however it does not provide for marriages between non-Catholic members of society such as protestants, as well as Muslims, who are citizens of Timor-Leste with their own religious identity and practices.

Another matter that surprised JSMP is that Articles 12 and 45 of the Constitution prescribe that the State provides guarantees for those that follow different religious beliefs and teachings⁷ and stipulate that no one shall be persecuted or discriminated against on the basis of his or her religious convictions.⁸

In relation to this situation JSMP has no doubt in saying that the legislative policy of the National Parliament regarding this civil code does not reflect Timor-Leste's obligations in accordance with international provisions of international law that have been ratified by the State of Timor-Leste.⁹

Although JSMP understands that there might be different interpretations of these matters, JSMP believes that practices like this have the potential to give rise to discrimination due to political negligence or lack of detail on the behalf of members of the National Parliament. *As a consequence, JSMP believes that in addition to being unrealistic and out of context, the Civil Code is actually unconstitutional because it does not adhere to the provisions and spirit of the Constitution and provisions of international law which have been ratified by the government of Timor-Leste.*

The President should have used his judicial veto in regards to the aforementioned draft, and requested an abstract review of its constitutionality to the Court of Appeal which is also carrying out the function of the Supreme Court of Justice, before the President promulgated the law.

5. Recommendations

⁷ Refer to Articles 12.1 and 12.2 of the Constitution

⁸ Refer to Article 45 of the Constitution

⁹ Refer to Articles 2, 7, 16.1 of the Universal Declaration of Human Rights and Articles 18.1 and 18.2 of the Convention against Civil and Political Rights

Based on the facts and concerns set out above, JSMP hereby makes a number of recommendations for consideration and follow-up:

1. JSMP urges members of the legislature to consider the formal and material aspects of a piece of legislation in the future to ensure that philosophical, historical, sociological principles as well as the customary practices of the people are accommodated in a legal product that reflects the true reality in society.
2. JSMP appeals to members of parliament to draft a proper plan to engage in open consultation in the future, and encourages them to deal with the issues raised above, and in particular ample space should be provided for a legal product to reflect the reality that exists in Timor-Leste;
3. JSMP also hopes that in the future the legislative process will include comprehensive awareness raising and public consultation with all relevant components of society to ensure that the process reflects the common interest and the desire of the majority when the law is applied;
4. JSMP urges National Parliament to seriously and responsibly defend the interests of the people in the National Parliament and ensure that the legislative process is carried out in an appropriate and first-rate manner;
5. In addition, JSMP encourages the National Parliament not only to prioritize the quantity or amount of laws/pieces of legislation that are produced during each legislative period, but rather to focus on the importance of producing first-rate legislation, because each legal product issued by the National Parliament will have a direct impact on the fate of the people;
6. JSMP urges and encourages the President to use his powers effectively in accordance with the provisions set out in the Constitution, to consult with relevant parties or at least to make use of the legal advisors/experts on presidential matters, in relation to the ratification of each piece of legislation forwarded by the National Parliament.
7. JSMP urges the President to value the constitutional powers granted to him by the people pursuant to the provisions set out in the Timor-Leste Constitution.

For further information please contact:

Luis de Oliveira Sampaio

Executive Director of JSMP

E-mail : luis@jsmp.minihub.org

Land line : 3323883/7295795