



JUDICIAL SYSTEM MONITORING PROGRAMME PROGRAMA MONITORIZASAUN BA SISTEMA JUDISIÁRIU

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Commitment to combat Corruption, the Powers of the Anti-Corruption Commission and existing challenges

Introduction

The promise and commitment to combat corruption and promote good and clean governance still has a long way to go and there are a number of challenges. These challenges include the lack of political will on the part of politicians, attempts to halt the investigative process and intervention in cases of corruption, and in particular the lack of a specific legal framework to combat corruption. In addition coercive measures relating to cases of corruption have not yet been applied effectively by the courts, which allows defendants to abscond while the appeal process is ongoing.

Even though the Anti-Corruption Commission (ACC), Public Prosecution Service and relevant institutions have carried out a range of efforts, these efforts have not been effective because they don't have enough power in the law to support these efforts.

To date, JSMP (Judicial System Monitoring Program) has dedicated itself and has been fully committed to monitoring the functioning of the formal justice system to promote a justice sector that functions independently, with credibility and one that is acceptable to all.

In addition, JSMP has also monitored and kept abreast of the legislative process in the National Parliament. Monitoring of the legislative process has been aimed at ensuring that the National Parliament is able to function with good quality, transparency, accountability and can promote public participation in the entire legislative process. In this area, JSMP has also given a lot of attention to draft laws that are closely linked to the justice sector, including the draft Law Against Corruption.

JSMP has regularly made recommendations through its annual reports¹, submissions and approaches in the form of consultations with the National Parliament and the Ministry of Justice to give priority to the Draft Law Against Corruption, because this law is crucial and necessary to strengthen the work of the ACC. Unfortunately, these efforts have not had a positive response from the Government and the National Parliament during the last few legislative periods, even though civil society, university students, academics, religious leaders and the general community have reiterated the importance of the Law Against Corruption in Timor-Leste.

JSMP Monitoring

Based on JSMP monitoring between 2014-2017 there were 56 (fifty six) cases involving the crime of corruption that have been registered. Most of these cases involved crimes of corruption set out in the Penal Code which were categorised as exercising public functions. These crimes included embezzlement, misappropriation of public assets, abuse of power, economic involvement in business, aggravated abuse

¹ Recommendation No. 28 Overview of the Justice Sector 2017" available at: http://jsmp.tl/wp-content/uploads/2012/05/OJS-2016-Final_Tetun-Version_26-April-2017.pdf; and Recommendation No. 4 Parliamentary Watch Annual Report" 2017 available at: http://jsmp.tl/wp-content/uploads/2012/05/Relatoriu-PWP_TETUM.pdf.

of trust, forgery of documents or technical reports and money laundering². Most of these cases involved members of public institutions such as former and current members of government ranging from directors, technical officers, secretaries of state, vice ministers and ministers. Some cases also involved current members of parliament, but it is difficult to bring them before the court because immunity is interpreted in an *ambiguous and manipulative* manner.

The ACC, Public Prosecution Service and the courts have worked hard and demonstrated a strong commitment to deal with cases of corruption. Cases have involved current members of the government and former members of the government and some members of parliament and have been technically complex and timely to investigate and bring to court. In particular, corruption involves systems, networks of criminal organizations and involves individuals in a variety of capacities. These include capacity due to political power, or because of their intelligence and because of the capacity of others to influence the processes taking place.

Powers of the Anti-Corruption Commission

The ACC was established under Law No. 8/2009 and has been given the status of an independent, specialised criminal police body with specific responsibility to investigate crimes characterized as corruption (Article 3.2). Even though it has been given a mandate as a specialised criminal police body, the ACC has limited powers, which limits where it can intervene and take action in both terms of prevention and criminal investigations.

There is the possibility that the practice of corruption can also occur in the private sector involving those who benefit from public sector projects. However, the ACC and other relevant institutions may not intervene in this sector due to the scope and competence of the ACC which is limited to cases provided for in the Penal Code.

During an interview with the Deputy Commissioner of the ACC, Manuel Countinho C. B. Corterial, on 2 February 2018, he stated that pursuant to Article 5 of Law No. 8/2009 on the Anti-Corruption Commission (ACC), the Commission has two important missions: namely prevention and criminal investigations.

Pursuant to Article 5 of Law No. 8/2009 the ACC has designed its strategic plan to implement these two important missions, and particular has given priority to the role of prevention and criminal investigations.

However, due to the limited powers set out in its Statute, the work of this organisation is limited to crimes occurring in the public domain, as set out in the Penal Code. These are the crimes provided for in Articles 292-299 of the Penal Code regarding crimes committed in the performance of public functions and other relevant crimes set out in the Penal Code, such as the crime of Intentional Mismanagement (Article 274 of the Penal Code) and the crime of Money Laundering (Article 313 of the Penal Code).

The Deputy Commissioner said that indications suggest that crimes of corruption occur frequently in a range of sectors within public institutions in Timor-Leste. It is likely that corruption occurs in the directorates of procurement, finance, state assets, and sometimes during activities related to local travel.

² Refer to Annual Reports: Overview of the Justice Sector 2014, 2015 and 2016, available at: http://jsmp.tl/wp-content/uploads/2012/05/OJS_2015_TETUM.pdf no http://jsmp.tl/wp-content/uploads/2012/05/OJS-2016-Final_Tetun-Version_26-April-2017.pdf

Also, these crimes don't just occur in the public sector but also in the private sector through the practices of bribes and nepotism. However, as mentioned previously, the ACC cannot intervene and investigate crimes occurring in the private sector, because there is no law that gives power to the ACC and the Public Prosecution Service to intervene in the private sector. Therefore it is difficult to promote intervention in cases of corruption that do not fall within the competence of the ACC.

Challenges faced by the Commission

1. Draft Law Against Corruption

The Draft Law Against Corruption was first discussed in National Parliament in 2011. This draft law has been around since the first legislature right through to the fourth legislature. However, this draft law is still pending and has passed its date of expiry at the National Parliament. This is despite the fact that many people are concerned about this important draft law that will give powers to the Anti-Corruption Commission to carry out its work efficiently and effectively to combat crimes of corruption.

The ACC has engaged in a range of efforts to process crimes of corruption; however the ACC continues to encounter a range of challenges including those caused by the lack of a Law Against Corruption. Everyone is hoping that in the next legislature the parliament will include this draft law in its agenda because it is not just important to the ACC but it is also absolutely necessary to allow the ACC to do its work efficiently. It is strange to establish the ACC but not empower it with its own law to give it wide ranging powers so it can execute its role.

2. Lack of collaboration between the State institutions

During an interview with the Deputy Commissioner of the ACC, there was also a discussion about the challenges he has encountered in doing his job. The Deputy Commissioner has stated that during the investigative process the ACC has also encountered other problems regarding access to documents. Normally after information is received the Public Prosecution Service will conduct interviews and then the Public Prosecution Service will send a dispatch to the ACC. However the investigative process has often encountered a range of challenges because many people are not very cooperative in providing data or important documents relating to crimes of corruption that are being investigated.

JSMP believes that actually the ACC can force any state entity to cooperate and is able to process them in the interests of justice. Article 300 of the Penal Code on refusal to cooperate states that "*An official who, having been lawfully requested by competent authorities to provide due cooperation to enforce justice or provide any other public service, refuses to do so or fails to do so without justification, is punishable with up to 3 years imprisonment or a fine*".

This provision acts as a strong legal instrument that obliges entities to cooperate with the ACC in relation to any notification directed towards them in the interests of justice. Also, Article 286 of the Penal Code on failure to report is an alternative legal option that can oblige an entity or individual to participate in the investigative process or relevant processes in the interest of justice.

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

Even though this law entered into force in 2009 (7 or 8 years ago) JSMP has observed that this law has not yet been implemented effectively.

In all judicial case and processes, especially cases of corruption that are technically complex and involve actors in a range of capacities, including the capacity to influence political power, witnesses play a crucial

role. Therefore, the relevant provisions regarding witness protection are necessary to protect witnesses so that they preserve all evidence directly related to a crime to help the court discover the truth and justice.

Unfortunately, the Law on Witness Protection has not yet been implemented properly because the State has not guaranteed the conditions necessary to implement this law. JSMP has made recommendations on many occasions and JSMP has observed that witnesses who provide testimony in court do not feel secure because they are afraid. If a witness does not feel secure he cannot provide all of the facts or accurate evidence based on his knowledge.

Ideally, witnesses need to feel protected, safe and should not be subjected to threats, either personally or against their family members, so that they can feel free to collaborate and provide evidence to the court. JSMP presumes that entities and individuals that according to ACC have refused to collaborate with notifications have likely done so because they don't feel safe or don't understand that the Law on Witness Protection can protect their identity and security, as well as that of their family members.

4. Ambiguous interpretation of the issue of immunity of current members of government and members of parliament

In cases involving state authorities, especially members of government and members of parliament, there are major challenges because the trend is for members of government and members of parliament to refuse to collaborate. This trend occurs because of an ambiguous interpretation of the right to immunity which is guaranteed in the Constitution and the Parliamentary Rules of Procedure.

Article 94 of the Constitution guarantees immunity for Members of Parliament. Pursuant to Article 94.1 of the Constitution, the Members of National Parliament shall not be held liable for civil, criminal or disciplinary proceedings in regard to votes and opinions expressed by them while performing their functions. However, Article 94.2 states that Parliamentary immunities may be withdrawn in accordance with the Rules of Procedures of the National Parliament. Article 8.2 of the Parliamentary Rules of Procedure states that the immunity of members of parliament can be removed if they commit a crime carrying a prison sentence of more than five years, by way of authorisation given by the National Parliament. Article 8.3 of the Parliamentary Rules of Procedure also states that members of parliament can lose their immunity when there are criminal proceedings initiated by the court, but the National Parliament shall decide to suspend the immunity or not. If an MP is facing a criminal proceeding initiated by the court, the suspension of immunity shall be requested by a competent judge, as set out in Article 8.4.

In addition, Article 113 of the Constitution also guarantees the immunity of Members of Government, however with strict limitations on the scope of this immunity. Members of government who are charged with a criminal offence punishable with a sentence of imprisonment for more than 2 years must be automatically suspended. Meanwhile, 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 or not.

JSMP has observed that in some cases defendants have stated that they have immunity against criminal proceedings because they are a member of parliament or a member of the government. In these cases the National Parliament has refused to cooperate with the request of the court to suspend the members from performing their functions, and there is confusion amongst members of parliament about how and when members of parliament can use their immunity.

JSMP believes that if there is a serious allegation against a member of government or Member of Parliament, immunity cannot be used a justifiable cause to impede the trial of a Member of Parliament or

member of government. These individuals need to immediately respond to any criminal accusations against them. This is to demonstrate that “everyone is the same” under the law, and to improve the public perception that the law only applies to common people, whilst important people get to hide behind these privileges.

Recommendations

In light of the challenges described above, JSMP makes the following recommendations:

1. JSMP recommends for the Draft "Law Against Corruption" to be given top priority for discussion in the next legislature to help the work of the Anti-Corruption Commission (ACC) to combat corruption and promote good governance;
2. All entities are asked to collaborate with the work of the Anti-Corruption Commission so that it can have the ability to combat the crime of corruption in Timor-Leste;
3. JSMP also recommends for the ACC and the Public Prosecution Service to use the applicable legal procedures to oblige all entities to collaborate with the ACC. This can be done via a request for court authorisation to oblige all people to comply with notifications and to collaborate with the ACC, including the application of Article 286 of the Penal Code and Article 300 of the Penal Code, if necessary;
4. The National Parliament is asked to introduce guidelines on how to apply immunity for members of the government and members of parliament to avoid confusion in practice when there are any allegations against current members of the government and members of parliament;
5. The court is requested to impose penalties in cases of corruption against defendants that truly reflect the gravity of the crimes committed, to prevent other authorities from committing further corruption in the future;
6. The court is requested to assess and apply appropriate coercive measures such as pre-trial detention in cases of corruption to prevent defendants from absconding from the territory of Timor-Leste whilst appeals are ongoing at the Court of Appeal. To prevent such situations in the future, the courts should give careful consideration to coercive measures and apply them based on the nature of each case.