



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

JUSTICE UPDATE

Period: June 2007

Issue: 13/2007

THE AMNESTY LAW PROTECTS PERPETRATORS OF CRIMES COMMITTED DURING THE 2006-2007 CRISIS

Introduction

The national parliament is the highest organ of RDTL sovereignty and has the highest authority to create laws and issue political decisions in accordance with Article 92 and Article 95 of the RDTL Constitution. In its capacity as the highest authorized organ of sovereignty, on 04 June 2007, the National Parliament approved a law on truth and clemency for certain crimes/misdemeanors (*Lei Sobre a Verdade e Medidas de Clemencia para Diversas Infraccoes*). Article 95 (3).g of the RDTL Constitution states that the National Parliament is authorized to create legislation and grant amnesty to the perpetrators of crimes/misdemeanors, but not to grant pardons, which are the prerogative of the President (Art 85(i)) .

Although the National Parliament has approved the aforementioned law, it still must be promulgated by the President of the Republic within 30 days from the date of its receipt, in accordance with the President's power of veto set out in Article 85 (c) of the RDTL Constitution.

JSMP believes that the aforementioned law contains a number of conflicting articles. The law itself is not compatible with other legislation and is unconstitutional. This is despite the fact that all new laws are supposed to correspond with the Constitution which is the highest law in the country. It is fair to say that this law is unconstitutional as it applies the principle of retroactivity, relies on competencies that do not belong to the National Parliament and contravenes international human rights law. It also includes articles that are vague and ambiguous.

The aforementioned law contains many typographical and sequencing errors due to a lack of attention and JSMP believes that these mistakes will have a large impact on its application in procedural matters.

Controversy surrounding the Amnesty Law

The Courts have already processed a number of cases originating from the 2006 crisis. Some of these cases are still in progress, whilst others have reached a final decision carrying the full force of the law. However, Article 14 (6) of the Amnesty Law states that if a person is identifiable and eligible under Article 1 of the Amnesty Law, the judgment issued by the court against that

individual may be annulled and its sentence cancelled. The issue here relates to the authority of the court's decision, with reference to Article 118 of the RDTL Constitution, which states that Court decisions shall prevail over the decision of any other authority.

The Amnesty Law seems to state that, on one hand, for cases concluded through the judicial process with a decision carrying the full force of the law only clemency is available, and amnesty on the other hand, is available for individuals or cases that are still pending and where a decision carrying full force of the law is yet to be issued. Therefore, the law contravenes international human rights law¹ in making a potential difference between two individuals suspected/convicted of a same crime and discriminating against those who have already been convicted.

Before we continue with our analysis, we need to understand the true meanings of amnesty and clemency. **Amnesty** can be interpreted as a measure to "excuse" a crime and consider that the crime never took place and therefore exclude culpability and social responsibility. A person granted amnesty will not be prosecuted for a crime listed in Article 1 of the Amnesty Law. Whereas, **clemency** is to pardon someone who has been convicted and sentenced by a court (a partial or entire reduction of sentence). This means that clemency can only be granted after trial and sentencing is complete (*Carolyn Bull : 2001*).

Article 8.2 (b) states that military personnel, police, security forces, officials and prison guards, who in the execution of their duties and functions, commit an act constituting *genocide, crimes against humanity or homicide with direct malice* cannot be granted amnesty. This article upholds human rights principles; however during the crisis of 2006 there was not a single case that fulfils the elements of the two first crimes in the aforementioned article.

According to Article 1(k) of the Amnesty Law, amnesty is granted for all crimes with *dolo eventual* (where the suspect was not directly involved in the commission of the crime/ *moral actors*) that are not expressly specified in Art 1, whereas those guilty of crimes with *dolo directo* (individuals directly involved in the commission of the crime/*material actors*) may only be granted amnesty for one of the crimes enumerated in Art 1. This provision will result in discrimination between *moral actors* and *material actors*, recalling that during the military crisis that took place in 2006 – 2007, the moral actors played a more prominent role and are more responsible than the material actors.

JSMP also believes that some of the articles contained in the Amnesty Law are extremely controversial as they provide a loophole for perpetrators who commit crimes within the community, in particular Article 8.3 (b), which states that those "*currently serving a prison sentence for the commission of a sexual act against a victim below the age of 14 years*" may not be pardoned. This seems to suggest that the appropriate body can grant amnesty or clemency for the rape of a woman above the age of 14.

¹ Equality before the law, e.g. Art 14 International Covenant on Civil and Political Rights

JSMP believes that this law will not positively support the rule of law or justice or help the state perform its duties in accordance with the law.

Weaknesses & Impact

The preamble in paragraph 2 states that a new need has arisen to uphold justice and truth with the purpose of educating the people of Timor Leste to value the Constitution and other laws. However, the Amnesty Law contains many elements that conflict with other laws, including the Constitution. For example, Article 9 contravenes the provision *not to apply the principle of retroactivity in accordance with Article 24 (2) of the RDTL Constitution*. How can the people value the Constitution and other legislation if a law has been created and approved that is both unconstitutional and discriminative?

The Amnesty Law is more political than judicial in nature and appears to have been created and approved with the intention of protecting certain individuals and groups who wish to evade prosecution. Important pieces of legislation such as the Amnesty Law are intended to provide justice to all and not just a select group of people.

This law prescribes the crimes and misdemeanors that are eligible for amnesty and the conditions for the granting of amnesty but it does not mention which institutions are responsible for applying this law and the type of hearings/investigations that must be conducted to identify perpetrators who are eligible for amnesty and clemency.

Article 6 of the Amnesty Law states that victims or aggrieved individuals can lodge a civil claim to the court for compensation. However, compensation is prerequisite only for individuals being granted amnesty under Art 1(a) and 1(c). Where compensation cannot be provided, an alternative punishment is imprisonment, which shows the inconsistency contained in the Amnesty Law itself. The law overlooks the high cost of a civil proceeding and that it can take up to 4 or 5 years for civil cases to be processed. The Amnesty Law does not clearly state if this aforementioned civil process shall adhere to the civil procedure code or not.

Since this law grants a much broader amnesty to individuals in the category of moral actors (*dolo eventual*) than direct actors, it includes an inherent discrimination between the “big fish” and the small fry. Amnesty can be granted to commanders of an armed force who order or direct others to commit a murder, or even a massacre, while their subordinates remain ineligible. This gives the impression that the law is protecting the leaders of certain units from the applicable law.

Indeed, Art 1.a of the law refers to Article 55 of the Indonesian Penal Code which states that those who perpetrate, **cause others to perpetrate**, or take

a direct part in the execution of the act or misuse their authority can be granted amnesty.

Before enacting the Amnesty Law, the RDTL government should reconsider the recommendations made to the International Commission of Inquiry who conducted investigations in 2006.

JSMP is aware that most post conflict countries have an amnesty law, like El-Salvador Chile, Mozambique, South Africa etc, however their laws tend to be judicial in nature, meaning that they don't arbitrarily draft an Amnesty Law that is discriminative, political and intended to protect certain groups or individuals, as is the case with the Amnesty Law in Timor-Leste

JSMP believes that if this controversial Amnesty Law is promulgated in the Official Gazette by the President of the Republic without first undergoing significant changes to its substance, then it is quite possible that both horizontal and vertical conflicts may arise between victims and perpetrators, as well as between victims and the government, or conflict may also take place between the moral actors and the material actors.

Recommendations

- JSMP recommends for the President of the Republic to use the authority granted in Article 85.c, Article 85.e and Article 88 (1) of the RDTL Constitution to veto any laws or pieces of legislation that do not support the public interest or are in conflict with the Constitution as the highest law of the country.
- JSMP also requests for the President of the Republic to proceed cautiously when making a decision relating to the enactment of a Law which will impact negatively on the public interest.
- JSMP also requests for the President of the Republic to submit the Amnesty Law to the Court of Appeal pursuant to Article 85.e of the RDTL Constitution to undergo a judicial review on its constitutionality and to ensure its application does not conflict with existing laws deemed to be superior pieces of legislation.

For further information please contact:

Roberto Pacheco

Coordinator of Legal Researchers, JSMP

Email : bebeto@jsmp.minihub.org

Or contact:

Dr. Timotio de Deus, JSMP Director

Email : timotio@jsmp.minihub.org

Landline: 3323 883