



JUSTICE UPDATE

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Practical Legal Problems with the Implementation of the New Criminal Procedure Code and Criminal Penal Code

1. Introduction

On 16 September 2005 parliamentary legislation came into force authorising the government to draft and approve the Criminal Procedure Code and the Penal Code as decree laws within 120 days. These Codes are to replace the Indonesian Penal Code and the UNTAET Criminal Procedure regulations to create a new regime of criminal laws for Timor-Leste. Both Codes have now been drafted and approved by the Government, but JSMP has noted three legal and practical issues in the way that the Criminal Procedure Code and the Penal Code have been introduced and implemented. This justice update is intended to highlight some of the complex issues around the introduction of the laws and identify areas the government and the courts need to address.

2. Have the Codes been prepared in accordance to law?

First, the introduction of the Codes has not complied with the timing set out in the Authorising laws. In particular, they have not come into force on the same date as required by the Authorising Laws and the Penal Code has not come into force within the stipulated 120 days.

The 120 day period for approving the laws ended on 14 January 2006. It is clear that the Criminal Procedure Code falls within this period but the approval of the Penal Code is uncertain. As at 25 January 2006, the Penal Code is yet to be promulgated by the President. Does the authorisation allow just for the decree-law's approval by the government, or must the promulgation also be completed? The affect of non-compliance, if it is in fact non-compliance, is ambiguous. If the authorisation law requires promulgation by the President within 120 days, the most severe result is that the Penal Code is invalid because it was not drafted according to law.

As a result of the delay in promulgation of the Penal Code, the two new Codes have not come into force on the same date as required by the Authorising Laws. In the Legislative Authorisation on Criminal Procedure Matters, Article 5 states that the Criminal Procedure Code and the Penal Code "should be finalised and approved so that both laws enter into force on the same date". The corresponding Article 4 of the Legislative Authorisation on Criminal Matters states that the two Codes must "both enter into force on the same date". The fact that this has not taken place means that neither of the Legislative Authorisations have been adhered to. This has not been publicly addressed by the government, nor has the effect of this non-compliance. One consequence could be that the new Criminal Procedure Code must await the Penal Code before it takes effect. A more severe consequence would be that due to non-

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compliance with the Authorisation Laws, the Codes are held to be invalid. It is of importance that these issues are addressed, as the functionality of both of the new laws could potentially be questioned.

3. What procedure code currently applies?

Practical issues have also arisen as a result of the entry into force of the Criminal Procedure Code but not the Penal Code. JSMP has observed some differences in the Courts about what legal framework to apply. In the Dili District Court on 11 January 2006, JSMP monitored a case in which the Court heard the Dos Santos case the old regime of the Indonesian Penal Code with the UNTAET Criminal Procedure Regulations. But subsequently on 12, 16 and 17 January 2006, JSMP monitored cases in which the courts relied on a mixed regime of the Indonesian Criminal Code together with the new Criminal Procedure Code. It seems apparent that Parliament did foresee this uncertainty and attempted to quell any possibility of confusion, through the aforementioned articles.

The choice of criminal procedure framework lies within the discretion of the courts for cases begun under the earlier framework. The Legislative Authorisation on Criminal Procedure Matters in Article 4 states that the criminal procedure process that was in force when the proceedings began, shall continue, except if the new law benefits the suspect, defendant or convict. Correspondingly, Article 4 of the Criminal Procedure Code states that the law: "shall be immediately applicable, without prejudice to actions taken during the time the previous law was in force." For cases begun under the earlier UNTAET Regulation 25/2001, the new law says that it shall not apply if it would cause considerable and avoidable deterioration of the situation of the defendant, namely a limitation in the defendant's right of defence, or would bring disharmony or disunity to the proceedings.

4. What happens if there are practical issues in implementation?

The third issue is that there is a practical difficulty in abiding by Article 14 of the Criminal Procedure Code. This article states that a panel of three judges must preside over cases in relation to crimes with penalties exceeding five years imprisonment. JSMP has observed, in the first few weeks of the application of the Criminal Procedure Code, that there have been some scheduling difficulties in attempting to comply with Article 14. JSMP notes that a similar provision exists in the UNTAET Criminal Procedure Regulations in Article 12; however the panel is composed only by the request of the prosecutor or the defense counsel. JSMP has not monitored any case in which a panel has been requested.

For example, in Dili District Court, on 12 January 2006, the court scheduled a case where the defendant was accused of a crime which carried a sentence of over five years; however the trial did not take place as there were only two judges available. Similarly, on 16 January 2006, in another case where the defendants Graciano and others were accused of murder, which carries a penalty of over five years, the trial did not take place for the same reasons. Finally, on 17 January 2006, another case, where the crime's maximum penalty carries more than a five year sentence, went to trial with a panel of three presiding judges, following the direction of Timor-Leste's new Code of Criminal Procedure.

JSMP recognises the reasons behind such a section, though hopes that from now on there will be a clear directive to schedule specific dates for these trials. JSMP does recognise the difficulty for the judges, as they already have many commitments and obligations. Further, JSMP recognises the courts have made some inroads into expediently dealing with cases and is concerned that this may cause another setback, unless a clear directive is issued nominating particular dates for such hearings.