

East Timor's legal system thrown into doubt

On the 15 July 2003, East Timor's Court of Appeal ruled that Indonesian law had never been validly in force in the country and that Portuguese law should be applied.

According to the Judicial System Monitoring Programme (JSMP) "the decision has generated an enormous amount of uncertainty, confusion and division within the Courts, East Timorese legal fraternity and community at large regarding the fundamental basis, or source of East Timorese laws."

The Court of Appeal decision was based on the case of Armando dos Santos who had been convicted of murder and sentenced to 20 years imprisonment by the Special Panel for Serious Crimes in September 2002. In a split decision (2:1) the Court of Appeal ruled that Dos Santos was guilty of genocide under the Portuguese Criminal Code (a crime he had not been charged with) and increased his sentence to 22 years.

The ruling is based on the United Nations Transitional Authority in East Timor (UNTAET) Regulation 1999/1; Section 3.1 which states:

"Until replaced by UNTAET regulations or subsequent legislation of [the] democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall [continue to] apply..."

The Court has ruled that as Indonesia's occupation of East Timor from 1975 until 1999 was unlawful under international law, Indonesian law was never validly in force in the country.

The majority of the court comprised Judge Claudio Ximenes (presiding) and Judge Jose Maria Antunes affirmed their position that the appropriate subsidiary law in East Timor is Portuguese. The third panel member, Judge Jacinta Corria da Costa expressed a dissenting opinion, stating that she found no ambiguity regarding the clear intention of UNTAET that Indonesian law apply as the subsidiary law in East Timor.

"Subsequent to its decision on 15 July, the Court of Appeal has applied Portuguese law in several subsequent appeal cases. However... the Dili District Court, including the Special Panels for Serious Crimes, appear to have decided they are not obliged to

follow the Court of Appeal's decision, and are continuing to apply Indonesian law in their decisions," JSMP reported.

"In its broader application, the Court of Appeal decision has the potential to render invalid many transactions conducted in East Timor during the last 28 years because they have been determined under Indonesian, and not Portuguese law. These would include commercial contracts, registration of births, deaths and marriages, bank loads, bankruptcy proceedings and other matters, such as criminal prosecutions undertaken between December 1974 and 25 October 1999. Taken to its full extent, the Court of Appeal decision has the potential to cause massive disruption to life in East Timor, to business centres, and the East Timorese economy."

Since the decision there have been several further developments in East Timor:

- * the Prosecutor-General filed an appeal to the Court of Appeal (sitting as the Supreme Court) seeking a declaration that Indonesian law is the applicable subsidiary law in East Timor;
- * the Special Panel for Serious Crimes issued a decision in the case of *Public Prosecutor v Joao Sarmiento and Dongos Mendonca*, declaring that they did not consider themselves bound by the decision of the Court of Appeal, and that they considered the proper source of subsidiary laws to be the Laws of Indonesia; and
- * nine Members of Parliament have tabled a draft bill in the national Parliament which proposes that Indonesian, and not Portuguese law be confirmed as the applicable law

in East Timor.

"The future of commercial investment in East Timor is likely to hinge on whether East Timor can deliver a mature, developed and properly-functioning legal system able to provide commercial certainty for investors," said the JSMP.

"Given the present uncertainty regarding this fundamental issue of law. JSMP considers that it is incumbent upon the national Parliament to intervene.

NTU Law School update cont...

legal profession and civil and administrative law and procedure. The Law School looks forward to welcoming Prof. Bullier, as he offers a rare opportunity to study European law in Darwin. Those interested in enrolling in either this unit or that offered by Dr. Schloenhardt should enrol as soon as possible.

Finally, the text of the 4th Prof. Ahmad Ibrahim Memorial Lecture entitled *Sacrificing Personal Freedom in the Name of National Security* delivered by Prof. Jesse Wu at the International Islamic University in Kuala Lumpur on 12 July 2003 (mentioned in last month's column) can now be found at <http://www.ntu.edu.au/lba/law/staff/wu/wu1.htm>. It's well worth a read.

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